

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
2010 Quadrennial Regulatory Review -)	MB Docket No. 09-182
Review of the Commission's Broadcast)	
Ownership Rules and Other Rules Adopted)	
Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
)	MB Docket No. 07-294
Promoting Diversification of)	
Ownership in the Broadcasting Services)	

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)¹ submits these reply comments regarding the Media Bureau’s recently released report on Federal Communications Commission (“FCC”) Form 323 data (the “Broadcast Ownership Report”).² Commenters addressing the Broadcast Ownership Report are in nearly universal agreement that additional steps must be taken to address broadcast ownership diversity. Several commenters announce or reiterate their support for specific incentive-based measures to enhance opportunities for diverse owners. NAB urges the Commission to give serious consideration to such proposals.

As NAB and several other commenters also observe, no interests will be served by further delay in the modest relaxation of some ownership rules that the Commission is

¹ The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² See *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182, Report on Ownership of Commercial Broadcast Stations, DA 12-1667 (MB, rel. Nov. 14, 2012) (“Broadcast Ownership Report”). See also *Commission Seeks Comment On Broadcast Ownership Report*, MB Docket Nos. 09-182, 07-294, DA No. 12-1946, Public Notice (rel. Dec. 3, 2012) (“Public Notice”).

currently contemplating. Accordingly, we urge the Commission to move forward with modifications to its broadcast ownership limits, take some immediate race-neutral steps to enhance broadcast ownership diversity, and continue research to lay the foundation for other measures if such neutral steps fail to produce results.

I. The Commission Should Take Immediate Steps to Implement Incentive-Based Solutions

A number of commenters agree that the adoption of incentive-oriented approaches that reduce barriers to entry will most effectively expand opportunities for minority and female owners. The Diversity and Competition Supporters (“DCS”) have offered 47 proposals for consideration in this proceeding, many of which are supported by the Newspaper Association of America (“NAA”), NAB, and the National Association of Media Brokers (“NAMB”). Like NAB, NAA, for example, supports proposals to establish an incubator program that provides broadcasters incentives to finance or incubate disadvantaged businesses; reinstatement and expansion of the tax certificate policy; relaxation of the main studio rule; FCC engineering tutorials; placement of diversity resources on the FCC’s website; and a legislative recommendation to create a small and minority communications loan guarantee program.³

Similarly, like NAB, NAMB believes that proposals such as reinstating a tax certificate program, establishment of incubator programs, and relaxation of foreign ownership restrictions, would “actually address the real issue at hand—whether minorities or any other new entrant can gain access to the capital necessary to purchase a

³ Comments of NAA in MB Docket Nos. 09-182 and 07-294 (Dec. 26, 2012) (“NAA Comments”) at 10 (citing Comments of DCS in MB Docket Nos. 09-182 and 07-294 (Mar. 5, 2012) at 22-24, 30, 34, 36).

broadcast station...”⁴ Both Media General, Inc. and Bahakel Communications, Ltd. also agree that the FCC’s previous tax certificate policy was very effective in promoting diversity and support the introduction and adoption of new tax deferral legislation designed to foster diverse ownership.⁵

NAB continues to support the proposals outlined in our initial comments.⁶ We have further reviewed several other DCS proposals and note that there are additional proposals that, like those previously supported by NAB, are aimed at addressing access to capital or reducing entry barriers. These include proposals such as structural rule waivers for financing construction of a qualifying entity’s unbuilt station⁷ and developing an online resource directory to enhance recruitment, advancement, and diversity efforts.⁸ NAB additionally urges the Commission to consider the proposals for legislative recommendations to establish targeted loan programs.⁹

In particular, NAB urges the Commission to move forward with consideration of the request for clarification regarding foreign ownership restrictions filed by members of DCS and others involved in the Coalition for Broadcast Investment (“CBI”).¹⁰ CBI requested the Commission to clarify that it will conduct a case-by-case analysis of proposed foreign ownership in excess of 25% of the parent company of a broadcast licensee. NAB agrees

⁴ Comments of NAMB in MB Docket Nos. 09-182 and 07-294 (Dec. 26, 2012) (“NAMB Comments”) at 7.

⁵ Comments of Media General, Inc. in MB Docket Nos. 09-182 and 07-294 (Dec. 26, 2012) at 2-3; Comments of Bahakel Communications, Ltd. in MB Docket Nos. 09-182 and 07-294 (Dec. 26, 2012) at 2.

⁶ NAB Comments in MB Docket Nos. 09-182 and 07-294 (Dec. 26, 2012) at 7-8.

⁷ See Supplemental Comments of DCS in MB Docket Nos. 09-182 and 07-294 (April 3, 2012) (“DCS April Supplemental Comments”) at 26.

⁸ See DCS April Supplemental Comments at 74.

⁹ See DCS April Supplemental Comments at 89, 90.

¹⁰ Letter to Marlene H. Dortch, Secretary, FCC, from Mace Rosenstein and Gerald Waldron of Covington & Burling LLP, Counsel for the Coalition for Broadcast Investment (Aug. 31, 2012).

that this modest procedural step would help place broadcasters on equal footing with other communications industry segments seeking capital investment, foster innovation in the broadcast industry, and provide new opportunities to promote greater diversity in broadcast ownership.¹¹ NAB urges the Commission to act expeditiously on CBI's request.

NAB has not previously taken a position on how the Commission should define what entities are eligible for the particular diversity measures the Commission may adopt. However, DCS has taken up the challenging issue of what standard the Commission should apply in implementing its diversity measures. DCS supports use of the overcoming disadvantages preference ("ODP"), a race- and gender- neutral definition that targets those who have overcome substantial disadvantages.¹² DCS urges the Commission to tentatively adopt and test this standard by applying it in the context of one of DCS's proposals, such as the incubator initiative.¹³ DCS observes that applying the ODP standard to a single program initially will allow the FCC to make the administrative adjustments needed for the program to meet its goals, minimize the possibility of abuse, and avoid subjectivity. DCS further submits that adoption of the ODP standard would be responsive to the court's remand in *Prometheus II*.¹⁴

¹¹ *Id.* at 2, Appendix, p. 6.

¹² Comments of DCS in MB Docket Nos. 09-182 and 07-294 (Dec. 26, 2012) ("DCS Data Comments") at 12-13. The use of an ODP standard was proposed by the FCC's Diversity Committee. The FCC later issued a public notice seeking comment on whether to conduct a rulemaking proceeding to evaluate use of an ODP standard. See *Media and Wireless Telecommunications Bureaus Seek Comment on Recommendation of the Advisory Committee on Diversity for Communications in the Digital Age for a New Auction Preference for Overcoming Disadvantage*, Public Notice, 25 FCC Rcd 16854 (2010).

¹³ DCS Data Comments at 13. See also *id.* at 7-8 (discussing incubator program). See also Comments of the National Association of Black Owned Broadcasters in MB Docket Nos. 09-182 and 07-294 (Dec. 26, 2012) at 5, n.13 (the incubator proposal could be an effective tool "if connected to a definition of eligible entity that could meaningfully promote minority ownership.").

¹⁴ DCS Data Comments at 13.

NAB agrees that the Commission should move forward with the use of the ODP standard in conjunction with the incubator program as proposed by DCS.¹⁵ Applying ODP to one incentive-based program will allow the Commission to assess and refine its implementation of the standard, determine whether use of this standard fosters new entry and diversity, and evaluate the standard for application in other contexts. Should the Commission proceed with the approach DCS has outlined, NAB looks forward to working with all interested parties to implement such a program.

II. Those Who Seek Further Delay Have Not Demonstrated that the Existing Broadcast Ownership Rules Promote or Even Preserve Ownership Diversity

Several commenters continue to press for the existing broadcast ownership rules to be retained or made even more restrictive, asserting that absent these rules, minority and/or female ownership automatically will be reduced.¹⁶ Others contend that the Commission should not proceed with modifications to the ownership rules without further study of the potential impact on minority ownership.¹⁷ The Commission cannot, consistent with its statutory obligation and established case law, rely on the unproven assertion of a causal connection between the structural rules governing broadcast ownership and the levels of minority and female ownership as a rationale for retaining the existing rules.¹⁸

¹⁵ As previously stated, NAB supports use of the incubator program not only for waivers of the radio rule, but also for waivers of other broadcast ownership rules. See Comments of NAB in MB Docket Nos. 06-121 and 07-294 (Jul. 30, 2008) at 4-5 (benefits of creating incubator programs should not be limited to radio).

¹⁶ See, e.g., Comments of Alliance for Women in Media, Inc. in MB Docket Nos. 09-182 and 07-294 (Dec. 26, 2012) at 2; Comments of Media Alliance in MB Docket Nos. 09-182 and 07-294 (Dec. 26, 2012) at 2; Comments of Free Press in MB Docket Nos. 09-182 and 07-294 (“Free Press Comments”) at 17-23.

¹⁷ See, e.g., Comments of the Leadership Conference for Civil Rights in MB Docket Nos. 09-182 and 07-294 (Dec. 26, 2012) at 1; Comments of the National Hispanic Media Coalition in MB Docket Nos. 09-182 and 07-294 (Dec. 26, 2012); Comments of the Office of Communication of the United Church of Christ, Inc., et al. in MB Docket Nos. 09-182 and 07-294 (Dec. 26, 2012) at 4-16; Free Press Comments at 11-12.

¹⁸ See, e.g., *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993)(court invalidated FCC criterion for licensing broadcast applicants because, after 28 “years of experience with the policy,” the FCC had “no evidence to

A. Retaining the Existing Rules Impedes Capital Investment in Broadcasting to the Detriment of Broadcasters, Viewers, and Minority and Female Owners

Several parties suggest that the FCC should retain the existing broadcast ownership rules as a cure for the low number of minority and female owners.¹⁹ One commenter discusses the financial plight of minority-owned television stations as grounds for declining to reform the rules.²⁰ But the overly restrictive and competitively asymmetric broadcast ownership rules currently in effect are only contributing further to the financial challenges faced by smaller, minority- and female-owned stations by artificially depressing the value of broadcast stations. For existing minority and female owners, ownership restrictions reduce the asset and net worth values of their stations, which in turn reduces their borrowing capabilities (and thus their ability to acquire additional broadcast properties, to upgrade programming, or to make other investments in their stations). Since access to capital is a key barrier to expansion or entry for minority and female broadcasters, ownership limits that reduce the capital of existing minority and female licensees will not increase their ability to acquire additional broadcast properties, but will in fact decrease their ability to do so.

With regard to potential minority and female entrants into the broadcast industry, there is no reason to believe that ownership limitations increase the ability of minorities and women to acquire stations vis-à-vis other competing purchasers. Indeed, there is

indicate that it achieve[d]” the “benefits that the Commission attribute[d] to it,” and the agency could no longer rely on “unverified predictions”); *Cincinnati Bell Telephone Company v. FCC*, 69 F.3d 752, 764 (6th Cir. 1995) (court found ownership limitations in the wireless industry to be arbitrary because they were based on “generalized conclusions” and “broadly stated fears,” rather than “documentary support”).

¹⁹ See, e.g., Comments of the National Hispanic Media Coalition in MB Docket Nos. 09-182 and 07-294 (Dec. 26, 2012) at 9 (existing limits should be preserved as “a race-neutral way to promote ownership opportunities for women and people of color”).

²⁰ See Free Press Comments at 18-23.

every reason to expect that, if competitively disparate regulation discourages investment in broadcasting, minorities and women will find it even more challenging than other potential purchasers to obtain scarce investment capital needed for acquiring and operating stations. Ownership restrictions that reduce the value of broadcast properties make stations less expensive for *all* potential investors (including those with greater access to capital).

B. The Record Shows that Modifying Existing Rules Will Not Harm Minority or Female Ownership

Other commenters agree that there is no basis for assuming that changes to the structural rules will harm minority or female ownership. As NAA notes, some parties contend that the newspaper/broadcast cross-ownership rule should not be modified because such a change will result in further declines in minority ownership.²¹ NAA observes that there is no evidence that relaxation of the rule will cause newspapers to purchase minority-owned stations. NAB agrees. The value of a newspaper/broadcast cross-ownership combination comes from the economies of scale of sharing newsgathering resources.²² Thus, a minority-owned station that does not have a local news operation broadcasting in English would be an unlikely target for acquisition by a newspaper.²³

²¹ NAA Comments at 2-3 (citing Letter to Marlene H. Dortch from Matthew F. Wood of Free Press, MB Docket Nos. 09-182 and 07-294 (Dec. 4, 2012); Letter to Marlene H. Dortch from Angela Campbell of Institute for Public Representation, MB Docket Nos. 09-182 and 07-294 (Nov. 23, 2012)).

²² NAA Comments at 3.

²³ *Id.* at 3-4 (“[a] broadcaster that lacks a newsroom is likely no more attractive to a newspaper than a clothing store, auto dealer, or restaurant.”). NAA observes that this view is shared by MMTC President David Honig, who stated that “minority broadcasters seldom seek to acquire the types of stations sought by newspapers.” *Id.* at 5 (citing David Honig, *The FCC Must Act Now to Rescue Minority Broadcast Ownership*, <http://broadbandandsocialjustice.org/2012/11/the-fcc-must-act-now-to-rescue-minority-broadcast-ownership/> (Nov. 12, 2012)).

NAA further points out that the vast majority of minority-owned television stations are located in markets outside the top 20 Nielsen DMAs, offer no local news, or broadcast only in a foreign language.²⁴ In fact, by NAA's count, only two of the 69 minority-owned full power television stations are non-top 4 stations in the top 20 markets that regularly broadcast local news in English. NAB agrees with NAA's conclusion that, with only two potential targets representing just 3% of minority-owned stations, the newspaper/television cross-ownership proposal being considered by the FCC poses no threat to minority ownership.²⁵ Accordingly, the Commission should reject the claims of parties opposing changes and proceed with its proposal to provide "much-needed" regulatory relief to local journalism.²⁶ NAB agrees with this analysis and also notes that there is no evidence in the record to indicate that minority-owned radio stations are likely targets for acquisition by newspapers.

NAMB similarly does not anticipate that the relaxation of the newspaper/broadcast or radio/television cross-ownership rules will have a significant impact on minority ownership opportunities. Based on its observations of the marketplace, NAMB expects that cross-ownership transactions will be "few and far between" because "companies are moving away from such cross-ownership."²⁷ NAMB additionally explains that there is significant inventory available for would-be purchasers, so there will continue to be "many stations available to any entrepreneur able to come up with an attractive business plan

²⁴ NAA Comments at 4.

²⁵ *Id.* at 5.

²⁶ *Id.* NAA also notes that none of the FCC-commissioned studies on media ownership have found a correlation between cross-ownership and diversity. *Id.*

²⁷ NAMB Comments at 5 (citing Media General's divestiture of its newspapers, while retaining its television stations, Clear Channel's divestiture of television stations, while retaining its radio stations, and Sinclair Broadcast Group, Inc.'s divestiture of radio properties, while retaining its television stations).

and the financing to make that plan a reality.”²⁸ In response to claims that reform of the cross-ownership rules will result in non-minority buyers acquiring stations that are presently minority owned, NAMB states that it knows of nothing to indicate that minority owners would be particularly susceptible to selling their stations, but observes that no minority owner should be denied the right to sell their properties at a time and price that makes business sense for that particular owner.²⁹ NAB agrees with NAMB’s observations. And because very often, “today’s seller is tomorrow’s buyer,” if minority owners choose to sell stations, many will return to the marketplace, “looking for stations ... and armed with the capital to make such an acquisition as provided by the purchase price they received for their station.”³⁰

C. The Commission Must Meet its Statutory Obligations Under Section 202(h)

The Commission should not heed calls for further delay in updating its broadcast ownership rules until additional research is completed regarding the disproportionately low levels of female and minority owners. First, the Commission has several potential practical solutions before it that can be implemented now to begin improving ownership diversity. Second, the Commission is statutorily required under Section 202(h) to eliminate or modify its rules in light of the dynamic changes to the media marketplace.³¹

²⁸ *Id.* at 6

²⁹ *Id.*

³⁰ NAMB Comments at 6.

³¹ Section 202(h) was “designed to ‘continue the process of deregulation.’” *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002), quoting *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002). See also *id.* at 164 (court rejected the “wait and see” approach taken by FCC in its ownership review, due to “unresolved questions” on certain issues, as inconsistent with Section 202(h)’s mandate); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 395 (3rd Cir. 2004)(Section 202(h) is “deregulatory” because it imposes an “obligation” on the FCC that “it would not otherwise have” to “periodically ... justify its existing regulations” and “vacate[] or modif[y]” those no longer in the public interest.).

As NAB and numerous other commenters have shown, there is no basis for retaining decades-old cross-ownership restrictions in today's competitive multi-platform market.

Finally, the proposed delays do not serve the interests of broadcasters, prospective broadcasters, or American viewers. Continuing to place the entire broadcast industry at a disadvantage vis-à-vis its non-broadcast competitors will not result in retaining existing minority or female owners today, or expanding their ranks tomorrow. In contrast, incentive-based approaches have a proven record of success and enjoy the support of many commenters. NAB urges the Commission to move forward with its proposals for cross-ownership reform, as none of the changes under consideration would harm broadcast ownership diversity. Indeed, the record supports broader reform of the broadcast ownership rules, including the local television and local radio rules, to allow broadcasters to achieve greater efficiencies and enhance their service to the public.

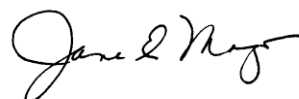
III. Conclusion

NAB urges the Commission to work toward practical solutions grounded in marketplace realities to foster opportunities for a more diverse broadcast industry.

Respectfully submitted,

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