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

In the Matter of	)	
	)	
Promoting Diversification of Ownership In the Broadcasting Service	)	MB Docket No. 07-294
	)	
2006 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. 06-121
	)	
2002 Biennial 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. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	
Ways to Further Section 257 Mandate and To Build On Earlier Studies	)	MB Docket No. 04-228

To: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

EXECUTIVE SUMMARY

In these comments, NAB again reiterates its broad support for proposals that will aid underserved groups seeking access to the broadcast industry. The struggle to help aspiring broadcast owners with the financial support and management skills required to operate a successful station is a struggle shared by everyone, including established media entities. Efforts to date by private industry and the government have had only limited success. The primary obstacle for underserved groups hoping to gain a foothold in the media industry remains limited access to capital. NAB applauds Commission efforts to help underserved groups overcome this obstacle, and strongly encourages the Commission to adopt incentive-based rule changes that will stimulate investment in new entrant broadcast properties. For example, NAB supports properly designed proposals that encourage investment in incubator programs that could provide a substantial boost to new entrants, including women and minorities.

NAB questions some of the rule changes suggested in the *Notice*, however, particularly the reallocation of TV channels 5 and 6 so close to the digital television transition. The Commission should also refrain from adopting proposals that would disrupt the financing and sale of broadcast properties, such as a blanket refusal to grant temporary waivers of the multiple ownership limits even to facilitate multi-station transactions. NAB further urges the Commission to be cautious about implementing constitutionally unsustainable proposals, or those that may have unintended consequences adverse the broadcast industry generally or the interests of new entrants specifically.

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To: The Commission

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB") again reiterates its broad support for proposals that will help foster a more diverse and robust broadcasting

industry.[1] These comments, in response to the Commission's *Third Further Notice of Proposed Rulemaking* in this proceeding,[2] echo comments NAB submitted last year that endorse a framework of voluntary initiatives that will bring more minorities, women and other underserved communities into the broadcasting industry.[3] NAB again cautions against reaching too far with these proposals and creating a constitutionally unsustainable set of rules that could undermine Commission efforts to encourage minority and female participation in broadcasting. NAB believes that an appropriate balance between government mandates and voluntary industry efforts can be achieved that will produce real world results and survive possible judicial scrutiny.

As noted in previous comments, NAB has long been a strong proponent of endeavors to bring underserved groups into the media industry. Through partnerships with the National Association of Broadcasters Education Foundation ("NABEF") and the Broadcast Education Association ("BEA"), NAB has helped to develop a very successful educational system that not only provides students with access to employment in the broadcasting industry, but gives them the tools that they need to excel in broadcast management and ownership.[4] Earlier in this proceeding, NAB encouraged the

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[1] NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission, the Courts, and other federal agencies.

[2] *Second Further Notice of Proposed Rule Making* in MB Docket Nos. 07-294, 06-121, 02-277 and 04-228, and MM Docket Nos. 01-235, 01-317, and 00-244 (rel. March 5, 2008) ("*Notice*").

[3] *See* NAB Comments in MB Docket No. 06-121 (filed Oct. 15, 2007).

[4] NABEF sponsors Media Sales Institutes at three universities, including Howard University, Florida A&M, and at the Spanish Language Media Center of the University of North Texas. These intensive ten-day training programs prepare talented students with diverse backgrounds for sales careers in the broadcast industry. To date, these programs have trained 221 students for media sales careers. Close to 90% have been

Commission to adopt rules that will help fund efforts similar to those undertaken by NABEF and BEA, as well as create rules that will incent more organizations and companies in the media industry to develop similar programs. As noted by numerous commenters and the Commission itself, access to capital remains the primary obstruction for underserved groups trying to break into the broadcast industry. NAB applauds efforts by the Commission, noted in the *Report and Order*, to help remedy this problem through better communication and coordination with financial institutions.[5]

I. Definition of Socially and Economically Disadvantaged Business

As noted in previous comments, NAB does not take a specific position on how the Commission should define a socially and economically disadvantaged business ("SDB"), except to caution the Commission against use of a definition that cannot survive judicial scrutiny. NAB does not object to the use of a "full file review" as suggested by the Diversity and Competition Supporters ("DCS"). *Notice* at ¶ 84. If done properly, such a process could strike an appropriate balance between the need for more diversity in broadcasting and the Constitutional restrictions against race and gender-based classifications. However, the concept of a "full file review" poses several potential hazards and questions that must be dealt with and answered before the Commission can move forward with such an audacious plan.

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hired. Its Broadcast Leadership Training program provides MBA-style executive training for station managers and others who aspire to own stations. To date, more than 15 percent of the BLT graduates have gone on to own stations, and many others are in various stages of station acquisition.

[5] *See Report and Order* in MB Docket Nos. 07-294, 06-121, 02-277 and 04-228, and MM Docket Nos. 01-235, 01-317, and 00-244 at ¶ 54 – 55 (rel. March 5, 2008) ("*Report and Order*").

First, “full file review” must be structured in a way that does not serve preference to any race and does not clearly advantage one group over another. Any process that is too race-conscious is likely doomed to failure. Second, the process should be forward-looking, and should be designed to produce a healthy and diverse broadcast industry. Candidates should be evaluated not only on their ability to overcome significant social and economic disadvantages but also on their potential to develop, fund and operate a broadcast station. Unlike the university student that must merely attend class and study hard, potential broadcast owners face a much higher hurdle of not only obtaining a radio or television station but operating one successfully.

Third, and perhaps most importantly, the “full file review” must have clear and established criteria and a transparent selection process that ensures long-term systemic integrity. Any selection process that relies on vague criteria and the subjective decision making of a panel – no matter how independent or politically insulated – will almost certainly be administratively burdensome and subject to heavy criticism that could undermine the Commission’s diversity efforts. Further, the Commission should be careful to avoid criteria that require the candidate to promise or ensure a particular type of programming if and when the candidate becomes a broadcast owner. Such criteria could unduly hamper the new owner and diminish their ability to obtain financing necessary to succeed. Moreover, such a requirement could run afoul of First Amendment restrictions.

II. Structural Rule Waivers for Creating Incubator Programs

As noted in previous comments, NAB supports proposals that provide incentives for established players in the media marketplace to invest in new broadcast properties

and companies. Incubator proposals, long considered by the Commission, could, if enacted properly, provide a significant boost to new entrants.[6] However, if the benefits of a establishing an incubator program are too restricted and represent too much of a gamble for the incubating station or company, the proposal is unlikely to produce the results the Commission is hoping to achieve.

NAB does not oppose procedures that would ensure the integrity of the incubator programs. However, it is unclear why the benefits of creating such programs should extend only to radio stations in large markets. *Notice* at ¶ 97. By limiting the program in this way, the Commission would likewise be limiting the pool of potential incubators, and by turn, be limiting the potential number of new entrants that may receive the benefit of this rule change. Further, it is not clear what the penalty would be for an incubating party that the Commission determines has failed to provide enough support for the SDB-owned station. Would the incubating party be required to divest the station it acquired under this proposal? If so, it is likely that many potential incubating parties would deem this a risky endeavor and be unwilling to participate in a program that could cost them millions of dollars in unrecoverable costs.

NAB finds significant merit in the proposal that would allow an incumbent station to move its community of license to any community located in the same market even if the original community does not have another full-power AM or FM or LPFM station so long as the vacating station could underwrite the cost of licensing, construction and one full year of operation of an LPFM station. *Notice* at ¶ 98. This is a creative incentive that

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[6] *See Memorandum Opinion and Order and Further Notice of Proposed Rulemaking,* 7 FCC Rcd 6397, 6391-92 ¶¶22, 24-25 (1992); and *Notice of Proposed* Rulemaking, Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, (10 FCC Rcd 2788 n. 2 (1995).

would ensure service and promote the Commission's goals. That rule is of course contingent on there being a party willing and able to operate an LPFM station in that community. To the extent that such a party does not exist, the Commission should establish rules that will allow a station to move its community of license and agree to the underwriting commitments for a set period of time should a party be found that is willing to start a new LPFM station.

III. Reallocation of TV Channels 5 and 6 for FM Service

The idea of extending the FM band into channel 6 (and 5) had been suggested previously in the DTV channel allocation proceeding at the Commission.[7] In the *Memorandum Opinion and Order On Reconsideration of the Seventh Report and Order*,[8] the Commission declined to adopt that suggestion, specifically electing to "stand by our now well-established determination that the additional opportunities for increasing FM noncommercial coverage do not outweigh the costs of eliminating channel 6 from TV service."[9]

Given the critical juncture of the digital television transition, the Commission should decline to revisit this issue in the instant proceeding.[10] Although the Commission, in citing the supplemental comments of DCS, noted that reallocation

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[7] *See, e.g.,* Petitions for Reconsideration filed in MB Docket No. 87-268 by Mullaney Engineering, Inc. ("Mullaney"), EME Communications ("EME"), and Robert E. Lee (collectively, "Petitions").

[8] In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order and Eighth Report and Order*, MB Docket No. 87-268 (rel. Mar. 6, 2008) ("MO&O").

[9] *Id*. at ¶ 27.

[10] The Commission released its determination in the DTV MO&O one day (March 6) after it released the instant *Notice* (March 5).

"could yield tremendous opportunities for new entrants,"[11] its potential to cause significant disruption to digital television ("DTV") service does not warrant reallocation of radio and television services. As the Commission aptly recognized, construction of post-transition facilities, international coordination, protection of Class A, low power TV, and TV translators that use the low VHF channels would be severely affected by the proposed reallocation.[12] More than 20 full-power television stations already have post transition allotments on Channels 5 and 6. These allotments represent the conclusion of a long, complex process involving years of coordination by broadcasters, the FCC, and others (such as Mexico and Canada) to ensure that all television broadcasters have in-core allotments for their post-transition operations. It would not be fair to these stations' viewers to require them to accept interference from radio stations or to force the stations to find alternative post-transition allotments.[13] Moreover, in some crowded markets, there are no alternative allotments available.[14]

Nor would it be reasonable to remove two channels out of the available pool of channels for television broadcasting in light of the hundreds of low power television services using these channels and the requirement that the Commission create and protect 175 new DTV allotments pursuant to the Community Broadcasters Protection

[11] *Notice* at ¶ 100.

[12] *See MO&O* at fn.73.

[13] Also, it appears that two thirds of these stations are moving to the stations' current NTSC channels. This suggests that the stations have a reasonable expectation of conserving resources for their post-transition buildout (*e.g.*, through the use of the stations' existing NTSC antennas) – efficiencies that would be lost if the stations are forced to find new channels.

[14] *See* In the Matter of Advanced Television Systems and their Impact upon the Existing Television Broadcast Service, *Opposition to Petitions for Reconsideration filed by the Walt Disney Company*, MB Docket No. 87-268 at 3-5 (May 20, 2008) (detailing the technical reasons that its station WPVI-DT must remain on channel 6).

Act of 1999.[15] Eliminating protection for – or the existence of – free, over-the-air television service on Channels 5 and 6 would harm the public interest because it would deprive viewers that rely on full power, low power, commercial and noncommercial television to provide critical news, emergency information and entertainment in many markets throughout the United States.

IV. Modifications to Form 323

The Commission seeks comment on a variety of possible modifications to its biennial ownership report (FCC Form 323). *Notice* at ¶¶ 93-96. NAB supports the Commission's goal of ensuring that its ownership reports generate data allowing accurate measurement of minority and female ownership and agrees that some of the proposed changes will assist the Commission in reaching that goal, as discussed further below.

The Commission seeks comment on whether to expand the biennial filing requirement to include licensees that are sole proprietorships and partnerships comprised of natural persons. NAB agrees that such information would contribute to a more accurate calculation of the participation of women and minority owners in the broadcast marketplace. NAB notes, however, that this additional filing requirement might be burdensome for a sole proprietor. Moreover, application of the biennial filing requirement to sole proprietors is not necessary to obtain information concerning the race or gender of broadcast licensees because a sole proprietor's race/gender does not change unless a license is assigned or transferred. In that case, an FCC Form 323

[15] *See* Pub. L. No. 106-113, § 1000(a) (9), 113 Stat. 1536 (1999); *see* 47 U.S.C. § 336(f) (6) (B). *See also MO&O* at fn.73 ("Providing for the full availability of these channels for new TV stations will help enable the Commission to provide for the 175 DTV allotments for new TV stations under the CPB Act.").

would have to be filed following consummation of the transaction,[16] and the race and gender of the new owner would be reported to the Commission. Thus, to avoid unduly burdening sole proprietorships, the Commission should simply rely upon information provided in the initial FCC Form 323 filed by a new owner following consummation of a license transfer/assignment or grant of a permit to construct and operate a new station.[17]

The Commission notes that current ownership report filing procedures require licensees that are directly or indirectly controlled by another entity to file a separate FCC Form 323 for every entity in its ownership "chain." *Notice* at ¶ 95. *See also* FCC Form 323 Instructions at 2. The Commission asks whether this makes ownership data more or less reliable. *Notice* at ¶ 95. It is not clear to NAB whether the current system contributes to or detracts from the reliability of minority and female ownership data. However, we note that if the Commission were to revise the reporting requirement so that a single form could be filed for all of the entities ultimately controlled by the same parent company, or a single form for each licensee, it might be easier for Commission staff and parties interested in ownership issues to identify minority and female owners. Interested parties would then be able to review a single report, rather than reviewing each licensee filing as well as the multiple cross-referenced reports that one would have to review under current filing procedures. Revised filing procedures also could reduce the burdens on Commission licensees who currently are required to file multiple reports.

[16] *See* 47 C.F.R. § 73.3615 (c) (an ownership report must be filed within 30 days of consummating an assignment or transfer of control of a permit or license).

[17] *See* 47 C.F.R. § 73.3615 (b)-(c) (ownership reports must be filed within 30 days of consummating an assignment or transfer and 30 days of grant of a construction permit).

The Commission also asks whether it should adopt a new form to collect information on race, gender, and ethnicity and delete these questions from FCC Form 323. *Notice* at ¶ 96. NAB believes that requiring a separate report will not contribute to the Commission's data-gathering efforts. To prepare for ownership report filings, licensees and the parties that directly or indirectly control them engage in substantial efforts to gather and verify ownership-related data from all the entities and individuals who are attributable interest holders in the licensee's ownership chain. Gathering and disclosing race and gender information can be most efficiently and reliably done as part of the overall ownership report filing. Thus, NAB believes that retaining the connection between overall ownership reporting and race and gender reporting is the best approach for obtaining the most accurate data. In addition to ensuring accuracy, retaining the existing approach will avoid imposing an additional and unnecessary filing burden on Commission licensees.[18]

The Commission also seeks comment on whether a system of audits and penalties is necessary to ensure that licensees are accurately reporting ownership information. *Notice* at ¶ 96. The accuracy of statements before the Commission is a matter taken very seriously by broadcast licensees. Honest representations before the Commission go directly to a licensee's character qualifications, and false statements have the potential to subject the licensee to investigations, forfeitures, criminal fines,

[18] The Commission also asked whether it should establish a uniform ownership report filing date and eliminate the current practice of allowing licensees to file reports on the anniversary of their renewal date. *Notice* at ¶ 95. NAB does not have a position at this time on whether a uniform date or the renewal date is best. However, NAB would oppose any rule or policy change that would require additional ownership report filings and thereby increase burdens on licensees. NAB also urges the Commission to consider whether, if it adopts a uniform filing date, its electronic filing systems can accommodate the volume of reports.

imprisonment, and license revocation. Indeed, as with many Commission forms, the FCC Form 323 requires a specified representative of each licensee[19] to certify that he or she "ha[s] examined this Report and that to the best of [his or her] knowledge and belief, all statements in this Report are true, correct and complete."[20] Beneath the certification, the FCC Form 323 explicitly states that "[w]illful false statements on this form are punishable by fine and/or imprisonment" (citing 18 U.S.C. § 1001), "and/or revocation of any station license or construction permit" (citing 47 U.S.C. § 312(a)(1)), "and/or forfeiture" (citing 47 U.S.C. § 503).[21] In light of these potential consequences for filing inaccurate ownership reports, broadcasters already have a more-than-adequate incentive to file accurate reports, and the Commission already has multiple vehicles under existing statutes and rules for penalizing those that fail to file accurate reports. Moreover, there is no record evidence that inaccurate reports are being filed. Thus, no new or special mechanisms are needed for the Commission to ensure that accurate ownership reports are being filed.

V. NABOB and Rainbow/PUSH Proposals

The *Notice* also references several proposals first offered by the National Association of Black Owned Broadcasters, Inc. ("NABOB") and Rainbow/PUSH during the 2002 Biennial Review proceeding.[22] NAB does not oppose the proposal that would "allow minorities to own station combinations equal to the largest combination in a

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[19] *See* 47 C.F.R. § 73.3513 (who may sign broadcast applications).

[20] FCC Form 323, Section III (Certification).

[21] *Id.*

[22] Comments of The National Association of Black Owned Broadcasters, Inc. and the Rainbow/PUSH Coalition, Inc. in MB Docket No. 02-277 (filed Jan. 2, 2003) ("*NABOB and Rainbow/PUSH January 2003 Comments*").

market." *Notice* at ¶ 101. This rule change would be similar to the rule that permits the sale of grandfathered station combinations to "eligible entities" that was adopted by the Commission in the *2002 Biennial Review*.[23] NAB does have reservations, however, similar to those expressed above, that such an explicit race-based rule would be vulnerable if challenged in court. Instead, NAB suggests that this rule should mirror the rule that permits the sale of grandfathered station clusters in whole and use the "eligible entities" definition as a baseline until perhaps a more appropriate definition of socially and economically disadvantaged business is adopted.

NAB also has reservations about other NABOB and Rainbow/PUSH suggestions cited in the *Notice*. Specifically, NAB opposes a rule change that would prohibit the Commission from granting temporary waivers of the local ownership rules to parties that propose transactions that may temporarily create station combinations that exceed ownership caps. *Id*. at ¶ 101. To facilitate the functioning of the broadcast marketplace, the FCC has long granted temporary waivers to parties acquiring broadcast properties, especially in multi-station transactions. Neither NABOB, Rainbow/PUSH, nor DCS offer any evidence that these temporary waivers have caused harm to local broadcasting markets such that the Commission should be prevented from affording local stations involved in complex transactions some short-term flexibility. Such a rule would only serve to inhibit unduly the financing and sale of broadcast properties at a time when broadcasters are struggling to compete against other media outlets. NABOB and Rainbow/Push cite only one example where a company was able to line up buyers for stations exceeding the local ownership caps prior to the completion of a transaction that

[23] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13811, ¶ 489.

would have otherwise required temporary waivers.[24] This is hardly the case with every transaction and cannot be the basis for a significant policy change.

NAB also questions the necessity of a rule change that would count every local marketing agreement ("LMA") as an attributable ownership interest. *Notice* at ¶ 101. Already, in any LMA where one station brokers more than a very modest 15 percent of the other station's broadcast time, the LMA is considered an attributable interest that applies toward the multiple ownership limits.[25] There is no reason to believe that a broadcaster brokering less than 15 percent of another station's time exerts such control over the brokered station that the broadcaster should be deemed to "own" the brokered station for purposes of applying the local ownership limits. NABOB and Rainbow/PUSH offer no empirical evidence or compelling reason to alter this long established 15 percent threshold.

VI. Conclusion

NAB reiterates its broad support for initiatives designed to bring more underserved groups into the broadcast industry. Experience shows that a diverse broadcast industry is a healthy broadcast industry that benefits everyone including the listening public. As NAB and other have noted repeatedly, however, access to capital remains the primary obstacle for would-be broadcast owners. NAB is encouraged by

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[24] *See NABOB and Rainbow/PUSH January 2003 Comments* at 24-25.

[25] *See* Note 2 (j)(1) to 47 C.F.R. § 73.3555 ("Where two radio stations are both located in the same market, as defined for purposes of the local radio ownership rule contained in paragraph (a) of this section, and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a) and (c) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station."). The same rule applies for television stations.

Commission efforts to help underserved groups overcome this obstacle and suggests strongly that the Commission consider more incentive-based proposals that have proven most successful in the past. NAB cautions against rule changes that may reach too far, or may have unintended consequences that harm the broadcast industry generally or the interests of minority broadcasters specifically.

Respectfully submitted,

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