

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

In the Matter of)	
)	
Promoting Diversification of Ownership)	MB Docket No. 07-294
In the Broadcasting Services)	
)	

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)¹ supports the Commission’s goal of enhancing the quality of its data and information concerning broadcast ownership. Obtaining consistent data at specified intervals can allow interested parties to identify trends over time. Identifying such trends may assist the Commission and others interested in broadcast ownership diversity to identify new means of promoting broadcast ownership more reflective of our nation’s racial, ethnic, and gender makeup.² Below we submit comments on issues raised in the Fifth³ and Sixth⁴ Further Notices of Proposed Rulemaking in the above-referenced proceeding. We urge the Commission to continue to refine its Form 323 process while ensuring that any burdens on licensees are reasonable and do not place broadcasters at a competitive disadvantage in the investment marketplace.

¹ NAB 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, e.g., NAB Comments in MB Docket Nos. 09-182 and 07-294 (Dec. 26, 2012) (responding to FCC request for comment on its report on ownership of commercial broadcast stations based on Form 323 data).

³ See *Promoting Diversification of Ownership in the Broadcasting Services*, Memorandum Opinion & Order and Fifth Further Notice of Proposed Rulemaking, 24 FCC Rcd 13040 (2009)(“*Fifth FNPRM*”).

⁴ See *Promoting Diversification of Ownership in the Broadcasting Services*, Sixth Further Notice of Proposed Rulemaking, MB Docket No. 07-294, FCC No. 12-166 (rel. Jan. 3, 2013)(“*Sixth FNPRM*”).

I. The Commission Should Not Adopt Reporting Requirements For Holders of Non-Attributable Interests

The *Fifth FNPRM* in this proceeding seeks comment on requiring the reporting of information about the holders of certain non-attributable interests.⁵ NAB has previously expressed concerns about such expanded requirements, observing that such an obligation on non-attributable investors would fail to yield useful information about minority and female ownership, while at the same time imposing burdens on and deterring investment in broadcasting.⁶

NAB continues to believe that this obligation would not serve any useful purpose. By definition, this information cannot inform concerned parties about minorities or women with a meaningful role in broadcast station operations, because, as the Commission has previously determined, only the holders of *attributable* interests have such influence. The Commission should refrain from approving reporting requirements that would significantly burden licensees and their investors without providing public interest benefits.

A. Expanded Reporting Requirements Would Burden and Deter Investors

The *Fifth FNPRM* proposes to define the classes of interests that are reportable on FCC Form 323 in a manner different from the classes of interests that are attributable. Specifically, it seeks to collect information from holders of equity interests in a licensee that would be attributable but for the single majority shareholder exemption⁷ and from

⁵ *Fifth FNPRM* at ¶ 16.

⁶ In a previous order, the Commission adopted a requirement that these interests be disclosed. See *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Fourth Further Notice of Proposed Rulemaking, 24 FCC Rcd 5896 (2009) (“*323 Order*”). On reconsideration, the Commission eliminated the requirement, partially granting NAB’s Petition for Reconsideration of the *323 Order*. *Fifth FNPRM* at ¶ 2; NAB Petition for Reconsideration in MB Docket No. 07-294 (Jun. 26, 2009) (“NAB Petition”).

⁷ This exemption provides that a minority shareholder’s voting interests will not be attributed where a single shareholder owns more than 50 percent of the outstanding voting stock (and thus has clear voting control).

holders of interests that would be attributable but for the higher Equity/Debt Plus (“EDP”) thresholds adopted in the *Diversity Order*⁸ for purposes of determining attribution of certain interests in eligible entities.

Attribution rules are designed to identify entities with the ability to influence licensee operations without “unduly restricting the means by which capital investment may be made available to the broadcast industry.”⁹ As we explained previously,¹⁰ NAB believes that these proposed disclosure requirements are likely to deter investment in the broadcast industry and will clearly burden both broadcasters and their investors. Accordingly, we urge the Commission to give serious consideration to the potential impediments to the flow of capital into the broadcast industry before adopting expanded reporting requirements.

See former 47 C.F.R. § 73.3555 Note 2(b). Under the proposed data collection requirement, shareholders holding non-attributable voting stock interests of five percent or more in corporations with a single majority shareholder would need to be reported.

⁸ *Promoting Diversification of Ownership in the Broadcasting Services*, 23 FCC Rcd 5922 (2008) (“*Diversity Order*”). Under the EDP standard, an interest is attributable if, aggregating both equity and debt, the interest exceeds 33 percent of the total asset value of a broadcast station licensee (or other media outlet subject to the FCC’s ownership rules), and the interest holder also: (1) holds an attributable interest in another media outlet in the same market that is subject to the ownership rules; or (2) supplies over 15 percent of the total weekly broadcast programming hours of the station in which the interest is held. To encourage investment in diverse entities, the *Diversity Order* adopted a mechanism to allow an interest holder to exceed the 33 percent threshold without triggering attribution if the investment would enable an eligible entity to acquire a broadcast station provided that: (1) the combined equity and debt of the interest holder in the eligible entity is less than 50 percent; or (2) the total debt of the interest holder in the eligible entity does not exceed 80 percent of the asset value of the station being acquired by the eligible entity and the interest holder does not hold any equity interest, option, or promise to acquire an equity interest in the eligible entity or any related entity. The *Fifth FNPRM* proposes to apply the traditional EDP threshold of 33 percent for reporting purposes for all licensees, including eligible entities. Since the *Fifth FNPRM* was released, the Court of Appeals for the Third Circuit reversed and remanded this and other measures that relied upon the eligible entity definition. *Prometheus Radio Project v. FCC*, 652 F.3d 431, 469-72 (3d Cir. 2011). The Commission has requested comment on how to address the remand of the modified EDP standard. *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; Promoting Diversification of Ownership in the Broadcasting Services*, 26 FCC Rcd 17489, ¶¶168-69 (2011).

⁹ 323 Order at ¶17 (citing *Diversity Order* ¶¶ 51-52).

¹⁰ NAB Petition at 4-9.

Ownership reporting is a time consuming and frequently costly process, particularly for entities with multiple interest holders. To complete the report(s) properly, a licensee must survey all of the attributable interest holders on their ownership of other communications outlets, identify familial relationships among those with attributable interests, and confirm that any new media interests held by investors comply with relevant ownership rules. For each attributable interest holder, the positional interest, ownership share (i.e., class and percentage of assets, including equity and debt, voting rights or other rights to control), name, address, citizenship, ethnicity, race, and gender must be verified and updated. Although the Commission estimates that ownership reports take only 2.5 - 4.5 hours to complete,¹¹ it can in fact take many more hours just to perform the due diligence necessary to make the requisite certifications on the forms and to fully describe the ownership structure.¹² If all of the attributable interests in a licensee are not natural persons, then a separate additional ownership report must be completed for each entity in the “chain” of ownership. Indeed, numerous reports are often necessary to fulfill a single station’s reporting obligation because of the number of entities within the ownership chain.¹³ The advice of an attorney is almost always required because of the complexity of the disclosures, even for an experienced filer. For a non-attributable entity or individual that is a new filer that lacks familiarity with FCC certifications as an

¹¹ See FCC Form 323 Instructions at p. 10, available at: <http://www.fcc.gov/Forms/Form323/323.pdf> (citing OMB Control No. 3060-0010).

¹² The ownership structures of broadcast licensees are strongly influenced by corporate and tax law in the applicable jurisdiction. The structures may be designed to promote continued ability to attract investment, protect against challenges that could impair the stability of broadcast operations, and/or other factors.

¹³ It is NAB’s understanding that, for example: a station group owner that filed eight or nine ownership reports using the previous version of Form 323 has to file 61 reports in the revised system; one television station group was required to file 300 reports; the licensee of a single low power TV station had to file seven separate reports; and a low power TV group had to file approximately 130 reports. See NAB Reply Comments in MB Docket No. 10-103 (filed Sept. 13, 2010) at 8-9.

attributable interest holder, understanding the rules and required certifications would be particularly challenging.¹⁴

Investors have many options for where to direct funds, and a variety of considerations can guide their decisions. Profitability is obviously critical, but other factors, such as minimizing paperwork and administrative burdens, avoiding fees associated with experts needed for consultation or completion of regulatory filings, reducing legal liability or even protecting their own privacy would be logical considerations for many investors.¹⁵ Investors may well select investment vehicles that do not involve extensive reporting obligations over other vehicles with such additional obligations. The Commission should decline to adopt new reporting requirements in light of the burdens they would place on non-attributable investors and the competitive disadvantage they would impose on broadcast licensees vis-à-vis their competitors in the market for capital investment.

Importantly, the Commission has specifically recognized that minority and female-owned entities and other new entrants face unique challenges in accessing investment capital.¹⁶ To the extent that expanded reporting requirements deter broadcast investment, this deterrent may well have a disproportionate negative impact on existing and potential minority and female broadcast owners—the very types of licensees that the Commission

¹⁴ Consultation with a broadcast engineer may also be required if a non-attributable investor holds an interest in other media outlets and is expected to address questions about multiple and cross-ownership. As a non-attributable investor, ownership rule compliance would not have been relevant to that investor's previous acquisitions.

¹⁵ See, e.g., Reply to Opposition to Petition for Reconsideration of CBS Corporation in MB Docket No. 07-294 at 8 (Aug. 21, 2009) (“CBS Reply to Opposition”) (“Cautious and discerning investors...particularly passive, non-attributable funding sources—are far less likely to select an investment vehicle saddled with burdensome and intrusive reporting obligations, filing fees and potential legal costs associated with ... ownership reports than other investment opportunities without such disadvantages.”).

¹⁶ See, e.g., *Diversity Order* at ¶ 34 (“difficulty in accessing capital investment currently is inhibiting diversity of ownership of broadcast stations and new entry”).

wants to promote. NAB further notes that the effectiveness of the revised EDP policy—which was intended to promote investment in eligible entities (including those controlled by minorities and women) by making such investments non-attributable—would be undermined by making these non-attributable investments subject to new reporting burdens as if they were attributable.

B. Imposing Reporting Requirements on Non-Attributable Interest Holders Would Not Provide Useful Information for Diversity Analyses

As a rationale for including non-attributable interests, the Commission states that it wishes to “err on the side of comprehensiveness” because of “criticism of the current collection scheme.”¹⁷ Requiring reporting by non-attributable investors would achieve neither objective. Rather than create a more comprehensive database, such reporting would “muddy the waters” with irrelevant data and would be unresponsive to criticism because critics did not seek information on non-attributable investors.

Expanding Form 323 reporting as proposed in the *Fifth FNPRM* would fail to gather information relevant to examining or improving minority and female ownership levels. In establishing attribution rules, the Commission seeks to identify “those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions.”¹⁸ The FCC’s rules do not attribute minority interests in single majority shareholder licensees or those that meet the

¹⁷ *Fifth FNPRM* at ¶ 17 (citing *323 Order* at ¶ 18).

¹⁸ *Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Regulation and Policies Affecting Investment in the Broadcast Industry and Reexamination of the Commission’s Cross Interest Policy*, 14 FCC Rcd 12559, 12560 ¶ 1 (1999) (“1999 Attribution Order”). See also *Diversity Order* at ¶ 18; *Implementation of Section 11 of the Cable Television and Consumer Protection Act of 1992*, 23 FCC Rcd 2134, 2183 ¶ 109 (2008) (“2008 Attribution Further Notice”).

new EDP eligible entity thresholds because it has determined that these interests do not rise to the level of influence over licensee operations such that they should be attributed.¹⁹ If a minority or female investor cannot significantly influence a licensee's operations, compiling detailed information about these non-attributable investors would not serve any clear purpose or advance the goal of increasing ownership diversity.

While the *Fifth FNPRM* states that reporting by non-attributable investors is important to respond to "criticisms of the current collection scheme,"²⁰ it does not cite any past criticism of ownership data in which any party urged the Commission to gather information on non-attributable investors,²¹ and NAB knows of no such criticism. Additionally, as NAB has previously observed, it is unclear how tallying non-attributable relationships can be used to establish new rules or policies in support of greater minority and female *ownership*.²² NAB could envision supporting a data-gathering effort if it could be linked to a potential regulatory action that advances ownership diversity. However, neither the *323 Order* nor the *Fifth FNPRM* identifies any specific regulatory purpose for this information. If gathering information for the sake of "comprehensiveness" were an

¹⁹ In proposing to retain the single majority shareholder exemption, the FCC has explained that "the existence of a single majority shareholder sufficiently attenuates the voting power of minority shareholders such that it should not be a basis for attribution." *2008 Attribution Further Notice* at ¶ 110. The FCC correctly noted that "[a] single majority shareholder has the right to manage and control a corporation," that corporate management cannot be expected to be significantly influenced by a minority shareholder where there is a single majority shareholder, and that generally, a single majority shareholder would be able to outvote minority shareholders on any issue. *Id.* Earlier comments observed that, because a single majority shareholder controls the election of all members of the board of directors, minority shareholders have no ability to influence the directors or management of the corporation. *See, e.g.,* Viacom Comments in MM Docket Nos. 92-264 *et al.* (Jan. 14, 2002) at 8; AT&T Comments in MM Docket Nos. 92-264 *et al.* (Jan. 14, 2002) at 77-78. *See also* CBS Reply to Opposition at 4 (where there is a single majority shareholder, the "other shareholders, 'even acting collaboratively, would be unable to direct the affairs or activities of the licensee on the basis of their shareholdings") *quoting* *1999 Attribution Order* at 12560).

²⁰ *Fifth FNPRM* at ¶ 17 (citing *323 Order* at ¶ 18).

²¹ *See 323 Order* at ¶¶ 7-10 (discussing various critiques and suggestions, none of which involved gathering data on non-attributable interest holders).

²² NAB Reply to Opposition to Petition for Reconsideration in MB Docket No. 07-294 (Aug. 21, 2009) at 4.

acceptable rationale under applicable Administrative Procedure Act and Paperwork Reduction Act standards, such a rationale could be used to justify any reporting requirement at all.

II. The Commission Should Adopt Proposals in the Sixth FNPRM to Reduce Burdens and Streamline Filing Requirements

A. CORES/FRN Issues

The *Sixth FNPRM* proposes to discontinue use of Special Use FCC Registration Numbers (“FRNs”) generated by the Commission’s Registration System (“CORES”) because unique identification will assist the Commission in developing a more searchable and manipulable ownership database.²³ The *Sixth FNPRM* seeks comment on whether to continue allowing filers to obtain a Special Use FRN under certain limited circumstances. Specifically, filers would be permitted to obtain Special Use FRNs only “in instances where, after reasonable and good faith efforts, they are unable to obtain a CORES FRN from an individual with reportable interests.”²⁴ This proposal is designed to ensure that filers “will still be able to timely file a Form 323 and to report the recalcitrant attributable interest holder.”²⁵ NAB agrees with this proposal and urges the Commission to retain this alternative for filers who are unable to obtain FRNs from certain interest holders in spite of reasonable, good faith efforts to do so.

The *Sixth FNPRM* also requests comment on whether to require CORES FRNs for certain non-attributable interests, entities and individuals if rules are adopted requiring these interests to be disclosed on Form 323, as proposed in the *Fifth FNPRM*. As discussed at length in Section I above, the Commission should not require Form 323

²³ *Sixth FNPRM* at ¶¶ 12-13.

²⁴ *Sixth FNPRM* at ¶ 17.

²⁵ *Id.*

disclosures by any holders of non-attributable interests. For the same reasons, mandating FRNs for such interest holders would not be appropriate. Many of these interest holders likely regard themselves as passive investors who are not involved in the day-to-day or long-term operational decisions of licensees. As a result, NAB anticipates that they would be the very sort of “recalcitrant” interest holders the Commission described in connection with its proposal to retain Special Use FRNs for a narrow set of circumstances. If the Commission ultimately chooses to require Form 323 disclosure of these non-attributable interest holders, it should permit utilization of Special Use FRNs in order to minimize the burden and intrusiveness of such disclosure requirements on filers and interest holders.

B. Form 323 Modifications

Currently, biennial ownership reports are required to be filed by November 1 of odd-numbered years, and to be accurate as of October 1 of the year in which they are filed. The *Sixth FNPRM* proposes to move the due date from November 1 to December 1.²⁶ The October 1 “as of” date would be unchanged, thereby giving filers an additional 30 days to complete their filings. NAB agrees with this proposal because it provides additional flexibility to filers. As the Commission observes, it also will promote more accurate reporting, and will not significantly delay the collection of data.²⁷

The *Sixth FNPRM* also seeks comment on certain proposals submitted in the *Review of Media Bureau Data Practices Proceeding*,²⁸ including several NAB proposals. NAB continues to support the various modifications to Form 323 which we previously

²⁶ *Sixth FNPRM* at ¶ 22.

²⁷ *Id.*

²⁸ *Sixth FNPRM* at ¶ 23 (citing *Pleading Cycle Established for Comments on Review of Media Bureau Data Practices*, Public Notice, MB Docket No. 10-103, 25 FCC Rcd 8236 (2010)).

proposed.²⁹ These included modifying Form 323 to: (i) allow for cross-referencing to other reports; (ii) allow a filer with multiple subsidiaries to list all licensees/stations in Section I, Item 7; (iii) eliminate Section II-B, Item 3(c) as duplicative; and (iv) modify form instructions to eliminate certain inconsistencies.³⁰ We believe that these changes will significantly reduce burdens on Form 323 filers,³¹ reduce confusion for filers, and improve the quality and accuracy of FCC ownership data.

III. Conclusion

For the reasons explained above, the Commission should not expand ownership reporting requirements to non-attributable investors. Data gathering regarding non-attributable investors would burden licensees and disadvantage them in the marketplace, without clearly advancing FCC goals. At a minimum, this requirement should be implemented in a way that minimizes burdens and reduces the risk of deterring investors.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430



Jane E. Mago
Jerianne Timmerman
Erin L. Dozier

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²⁹ See NAB Reply Comments in MB Docket No. 10-103 (filed Sept. 13, 2010) at 6-8; *Sixth FNPRM* at ¶ 23.

³⁰ *Id.*

³¹ See also *Sixth FNPRM* at ¶ 23 (like NAB, the Commission believes that allowing an entity with several wholly-owned subsidiaries to list all of the licensees and their respective stations in Section I, Item 7 “will significantly reduce the filing burdens on some entities, without compromising the data collected.”).