

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

In the Matter of)	
)	
Promoting Diversification of Ownership In the Broadcasting Services)	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
)	

**PETITION FOR RECONSIDERATION OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

Pursuant to Section 1.429 of the Federal Communications Commission’s rules, 47

C.F.R. § 1.429, the National Association of Broadcasters (“NAB”)¹ seeks reconsideration of

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 and other federal agencies, and the Courts.

limited aspects of the *Report and Order*² in the above-captioned proceeding. NAB strongly supports the FCC's goals of improving the quality and reliability of its data on minority and female owners in the broadcast industry. However, because certain new obligations will create burdens without furthering these goals, NAB urges the Commission to eliminate or modify those aspects of the *Report and Order* that expanded biennial ownership report filing obligations to include sole proprietors and holders of some non-attributable interests.

I. The FCC's Data Collection Effort is Not Advanced by Mandating Biennial Filings From Sole Proprietors

NAB urges the Commission to reconsider its adoption of a requirement that all sole proprietors file biennial ownership reports.³ This requirement will not further the FCC's goal of having a complete picture of the state of minority and female ownership, but it will unduly burden small licensees that are sole proprietorships.

As NAB and American Women in Radio and Television discussed in their comments,⁴ the race and gender of a sole proprietor is reported at the time (s)he obtains a license, whether it is through an assignment/transfer (*i.e.*, on the post-consummation ownership report)⁵ or through an auction (*i.e.*, on the "short form" application; on the ownership report required to be filed after a long form application for a construction permit

² See *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, FCC 09-33 (rel. May 5, 2009) ("*Report and Order*").

³ *Report and Order* at ¶¶ 1, 17.

⁴ See Comments of NAB in MB Docket No. 07-294 (Jul. 30, 2008) at 8-9; Comments of American Women in Radio and Television in MB Docket No. 07-294 (Jul. 30, 2008) at 4-6.

⁵ 47 C.F.R. 73.3615(c) ("Each permittee or licensee of a commercial AM, FM or TV Broadcast station shall file an Ownership Report on FCC Form 323 within 30 days of consummating authorized assignments or transfers of permits and licenses.").

is granted; and in connection with the license application once the station is constructed).⁶ Unlike the demographic data for entities with multiple investors, officers, and directors, a sole proprietor's race and gender does not change.

While the biennial filing of the same demographic information by sole proprietors would not add to the FCC's knowledge about minority and female broadcast owners, a new obligation to file ownership reports every two years places a significant burden on licensees that are least equipped to shoulder it. Unlike group owners, who may have employees focused on regulatory compliance issues and outside counsel sending reminders about filing deadlines, requirements, and changes, a sole proprietor may be the only person monitoring regulatory developments and handling compliance matters for its station(s). Filing the biennial report form creates a new burden for these licensees in terms of time, filing fees,⁷ and even the risk that a minor error on the form or one missed deadline could result in penalties difficult for a sole proprietor licensee to bear.

The *Report and Order* does not disagree with the idea that the demographic data for sole proprietors does not change over time. Rather, it states (at ¶ 16) that without biennial ownership filings by sole proprietors, there is no way to establish a "snapshot" of minority or female ownership as of a certain date. But the Commission does not explain why its system for tracking this data cannot link back to the most recent report filed by each sole proprietor who is a current licensee. The Commission has directed its staff to "revise the electronic interface so that the ownership data is incorporated into the

⁶ See FCC Form 175, Question 9; 47 C.F.R. 73.3615(a) (ownership reports must be filed by permittee within 30 days after the grant of a construction permit for a new commercial radio or television broadcast station. The permittee is also required to update its initial report or to certify the continuing accuracy and completeness of that report when the permittee applies for a station license for that new station).

⁷ 47 C.F.R. § 1.1104 (the filing fee for ownership reports is \$60.00).

database, is searchable, and can be aggregated and cross-referenced.”⁸ As part of this process, data from the most recently filed ownership report for each licensee should be made available for review and use by researchers, analysts, or any member of the public interested in diversity of broadcast ownership. Because the demographic data for sole proprietors does not change, the data will be current as of any snapshot date. Without at least carefully evaluating this option, the Commission will be imposing a burden on sole proprietor licensees without a corresponding public interest benefit. NAB thus urges the Commission to reconsider the new filing obligation placed on sole proprietors.

II. The FCC’s Goals Are Not Served by Imposing New Obligations on Non-Attributable Investors That Do Not Influence Station Operations

NAB urges the Commission to reconsider its new ownership reporting requirement for certain non-attributable interest holders. This requirement will not yield useful information 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. At the same time, the new reporting obligation will significantly burden licensees and their investors—many of whom may be deterred by the new requirements. Because these requirements will harm broadcasters’ ability to attract investors and create filing burdens while providing no corresponding public interest benefit, they should be eliminated or at least modified. For example, the Commission could minimize the burden by requiring *only* demographic data and not full reporting by non-attributable investors.

⁸ *Report and Order* at ¶¶ 12, 20.

A. The New Reporting Requirement is Burdensome and Will Deter Investors

In the *Report and Order*, the Commission held that it would, for the first time, 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, the Commission determined that “it is important to collect” information from holders of equity interests in a licensee that would be attributable but for the single majority shareholder exemption⁹ and from holders of interests that would be attributable but for the higher Equity/Debt Plus (“EDP”) thresholds adopted in the *Diversity Order & FNPRM*¹⁰ for purposes of determining attribution of certain interests in eligible entities.¹¹ Although its 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,”¹² the Commission concluded that its concern about impeding capital flow “does not apply” in the case of the new disclosure requirements.¹³ NAB believes, however, that the new disclosure requirements are very likely to deter investment in the broadcast industry at a time when investment is needed most.

⁹ *Report and Order* at ¶ 17. The single majority shareholder 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. See former 47 C.F.R. § 73.3555 Note 2(b). Under the revised data collection requirement, shareholders holding non-attributable voting stock interests of five percent or more in corporations with a single majority shareholder are required to be reported.

¹⁰ *Promoting Diversification of Ownership in the Broadcasting Services*, 23 FCC Rcd 5922 (2008) (“*Diversity Order & FNPRM*”).

¹¹ *Report and Order* at ¶ 17. 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, cable television system, daily newspaper or other media outlet subject to the FCC’s broadcast 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. The *Diversity Order & FNPRM* adopted a mechanism to allow an interest holder to exceed the 33 percent

It is important to note that the Commission did not solicit comment on disclosure of non-attributable interest holders. Citing only the reporting exemptions for sole proprietorships and partnerships, the *Diversity Order & FNPRM* (at ¶ 95) asked whether “expansion of the scope of parties required to file the biennial ownership report would enhance the race, gender, and ethnicity data collection.” This reference to “parties required to file,” coupled with the cited examples, suggested that the Commission was considering expanding the biennial reporting requirement to additional groups of licensees, not to additional types of investors. To the best of NAB’s knowledge, no commenter proposed that the Commission gather information on the race and gender of non-attributable interest holders. Thus, there was no clear notice that the agency was considering extending the reporting obligation to non-attributable investors. As a result, the record here is incomplete and contains no information on the potential harms or benefits of this new requirement.

Ownership reporting is a burdensome 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

threshold without triggering attribution if the investment would enable an eligible entity (i.e., a small business) 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 *Report and Order* applies the traditional EDP threshold of 33 percent for reporting purposes for all licensees, including eligible entities.

¹² *Report and Order* at ¶17 (citing *Diversity Order & FNPRM* ¶¶ 51-52).

¹³ *Report and Order* at ¶17 (“We can be more inclusive in collecting this information without causing an adverse effect on capital investment”).

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 7.5 hours to complete,¹⁴ the reality is that many more hours can be spent performing just the due diligence required to make the requisite certifications on the forms and to fully describe the ownership structure.¹⁵ 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, it is not uncommon for three or more ownership reports to be involved in a single station’s reporting obligation because of the number of entities that are not natural persons within the ownership chain. The advice of an attorney is almost always required because of the complexity of the required disclosures, even for an experienced filer. For a non-attributable entity or individual that is a new filer and is not as familiar with FCC certifications as an attributable interest holder, understanding the rules and required certifications will be particularly burdensome.¹⁶

Investors today 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

¹⁴ See FCC Form 323 Instructions at p. 5, available at: <http://www.fcc.gov/Forms/Form323/323.pdf> (citing OMB Control No. 3060-0010).

¹⁵ The organization of a licensee’s ownership structure is generally based on aspects of corporate and tax law in the applicable jurisdiction. The structure 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. But in no event is it designed to facilitate completion of an FCC ownership report.

¹⁶ The advice of a broadcast engineer may even be required if the non-attributable investor holds an interest in other broadcast stations and is expected to address the questions about multiple and cross-ownership, etc., because, as a non-attributable investor, ownership rule compliance would not have been relevant to that investor’s previous acquisitions.

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. Selecting an investment vehicle that does not involve extensive reporting obligations can be part of what attracts an investor to a particular vehicle. The Commission should reconsider the new reporting requirement in light of the burdens it will place on non-attributable investors and the deterrent to investment that may harm a wide range of licensees, especially in today's difficult economic climate.

In fact, the Commission has previously recognized that minority and female-owned entities face unique challenges in accessing investment capital.¹⁷ To the extent that the new reporting requirements deter 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 intends to promote. NAB further notes that the ability of the recently revised EDP policy (*see* n.11, *supra*) to promote investment in eligible small entities (including those controlled by minorities and women) will likely be hampered by the deterrent effect of making these non-attributable investments subject to new reporting burdens.

B. Reporting By Non-Attributable Investors Will Not Foster a Clearer Picture of Minority/Female Ownership

The new reporting rules will not only burden licensees and investors, but also will fail to gather information relevant to the FCC's concerns about minority and female ownership. 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

¹⁷ See, e.g., *Diversity Order & FNPRM* at ¶ 34 ("difficulty in accessing capital investment currently is inhibiting diversity of ownership of broadcast stations and new entry").

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 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, it is unclear how the compiling of detailed information about these non-attributable investors would further public interest goals.

C. If Not Eliminated, the Reporting Requirement Should Be Implemented So as to Minimize Burdens on Licensees and Deterrents for Investment

NAB is uncertain as to whether the Commission intends for the specified non-attributable interest holders to complete the entire form or only to provide demographic data. If the Commission determines that it must gather demographic information on certain non-attributable interests, it should do so in the least burdensome manner possible. For example, the Commission could allow licensees to disclose only general demographic data, such as a series of pull down boxes that would allow the licensee to identify the

¹⁸ *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). See also *Diversity Order & FNPRM* 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”).

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.

number and type of non-attributable investors that are minorities or women, together with their ownership share, without the granular information on their names, addresses, familial relationships, and other media interests. If this were the case, it would be clear that, for example, a licensee with a single majority shareholder also has an African-American male investor holding six percent of the company's shares. Such an approach would still burden licensees with additional data-gathering, but would be less likely to deter investment.

III. Conclusion

For the reasons explained above, the Commission should reconsider its expansion of ownership reporting requirements to sole proprietors and certain non-attributable investors. Rather than mandating additional filings for sole proprietors, Commission databases should instead be linked to the most recent filing by the sole proprietor, which will be current at any "snapshot" date because the demographic data does not change. Data gathering regarding non-attributable investors should be eliminated because it will burden licensees and deter investment, 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,

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