

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

In the Matter of)	
)	
2014 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. 14-50
)	
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
)	
Promoting Diversification of Ownership in the Broadcasting Services)	MB Docket No. 07-294
)	
Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets)	MB Docket No. 04-256
)	
Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services)	MB Docket No. 17-289

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

I. INTRODUCTION

The National Association of Broadcasters (NAB)¹ hereby submits reply comments on the above-captioned Notice of Proposed Rulemaking, in which the Commission adopted an incubator program to help increase broadcast station ownership diversity and requested comment on how best to structure such a program.² In our initial comments, NAB focused

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 *2014 Quadrennial Regulatory Review*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, 9857-9864 ¶¶ 121-145 (2017) (Notice).

on providing practical recommendations for an incubator program that will effectively promote station ownership by minorities and women.³ On March 27, 2018, the Commission's Advisory Committee on Diversity and Digital Empowerment (ACDDE) adopted a recommendation to the Commission concerning the incubator program.⁴ In its recommendation, ACDDE proposes that qualifying incubation activities include joint ventures between established broadcasters and incubated entities,⁵ or station donations to certain qualifying entities.⁶ Broadcaster Skip Finley also offered a host of helpful suggestions drawn from his career in the radio industry.⁷

In contrast, certain organizations that claim to support diversity again failed to engage constructively on policies that will effectively increase broadcast ownership diversity.⁸ Instead of responding to the Commission's call for specific input on designing a workable incubator program, these groups continue to cling to archaic ownership policies

³ Comments of the National Association of Broadcasters, MB Docket Nos. 17-289, et al. (Mar. 9, 2018) (NAB Comments).

⁴ See Comments of the Federal Communications Commission's Advisory Committee on Diversity and Digital Empowerment: A Proposal For An Incubator Program, MB Docket No. 17-289 (April 1, 2018) (ACDDE Comments).

⁵ ACDDE Comments at 30-40.

⁶ *Id.* at 40-42.

⁷ Comments of Skip Finley, MB Docket Nos. 07-294, 17-289 (Mar. 9, 2018) (Finley Comments). Mr. Finley's input is significant given his experience navigating the challenges faced by minority broadcasters. *Id.* at 2-3. Mr. Finley agrees with NAB that access to capital is one of the biggest obstacles to minority and female station ownership, and supports key elements of our proposal, such as providing an ownership cap waiver as incentive for established broadcasters to participate, and the benefits of requiring a broadcaster to have a financial stake in the success of the incubated station. *Id.* at 3-4; NAB Comments at 6-8 & 12-13.

⁸ Letter from Dana J. Floberg and Jessica Gonzalez, Free Press, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 17-289, et al. (Mar. 9, 2018) (Free Press Letter); Comments of Office of Communication, Inc. of the United Church of Christ (UCC), et al., MB Docket Nos. 17-289 et al. (Mar. 9, 2018) (UCC Comments).

that have never been shown to improve ownership opportunities for minorities and women. Indeed, since the minority tax certificate program was eliminated in 1995, the FCC has had no effective program for increasing ownership diversity. Yet, for more than twenty years, these groups have done nothing more than stand by and salute the failed regulatory regime in place, never taking one proactive step to facilitate station ownership for minorities and women.

Free Press and UCC remain so wedded to outdated broadcast ownership limits, they would rather poke holes in the premise of the Notice than respond to specific questions in the Notice;⁹ indeed, UCC states that answering the questions in the Notice about how to design an incubator program is “pointless.”¹⁰ Their refusal to engage constructively on the Commission’s proposal contradicts their claims that they are “pleased to see the Commission acknowledge” barriers to entry for minority and female owners, or that they truly wish to “ameliorate these harms.”¹¹ While these groups cannot be expected to have the expertise of a Federal Advisory Committee or a minority broadcaster who personally overcame hurdles to success, that does not excuse their failure even to consider how the program can effectively address the challenges facing prospective minority and female station owners. Free Press and UCC yet again offer nothing but the forlorn hope that ownership limits will somehow pave the way for more minority and female station owners in the future, even though they have demonstrably failed to do so for many decades.

⁹ UCC questions the Commission decision to create an incubator program and repeats earlier complaints about the Commission’s move to relax certain ownership limits. UCC Comments at 2-9. None of these arguments are responsive to the Notice.

¹⁰ *Id.* at 3-4.

¹¹ Free Press Letter at 1.

There is no more time to waste relying on failed policies of the past. NAB supports the Commission's finding that, given the lack of station ownership diversity and broad support in the record for an incubator program, it is time to move forward on specific policies to correct the problem. Our initial comments set forth concrete proposals for an effective incubator program. Below, we reinforce the importance of providing tangible incentives to established broadcasters to enter an incubation arrangement and explain why the eligibility standard for an incubated entity must provide certainty to participants and be simple for the Commission to administer.

II. OWNERSHIP RULE WAIVERS WILL PROVIDE CRITICAL INCENTIVES FOR AN ESTABLISHED BROADCASTER TO PARTICIPATE IN AN INCUBATOR PROGRAM

A successful incubator program must be based on marketplace realities and provide meaningful incentives for both prospective and established broadcasters to participate.¹² For the latter, the most tangible economic benefit would be a waiver of an otherwise-applicable broadcast ownership limit. For example, both Mr. Finley and NAB proposed that an established radio broadcaster who partners with an incubated entity should be permitted

¹² Comments of the National Association of Broadcasters, MB Docket Nos. 17-289 et al., at 12 (Mar. 9, 2018) (NAB Comments). NAB consulted several member broadcasters in developing our comments, including DuJuan McCoy, President & CEO of Bayou City Broadcasting (BCB), licensee of five full-power television broadcast stations. Mr. McCoy launched BCB during his participation in the NAB Education Foundation's Broadcast Leadership Training Program. Mr. McCoy, an African-American broadcaster who strongly supports broadcast ownership diversity and the incubator program, emphasized the importance of incentives to attract the participation of established broadcasters to the program. Mr. McCoy also stressed the need for flexibility that would allow an incubated entity to either purchase the incubated station or sell its interest at the end of the incubation relationship. A critical part of Mr. McCoy's success was purchasing stations in smaller markets, improving upon them, and using the proceeds from the sale of those stations to grow his business. This strategy has allowed him to invest in more stations located in larger markets, and to hold a greater financial stake in the stations.

to exceed the local radio ownership cap,¹³ or the local or national TV cap, depending on the situation. Mr. Finley and NAB also agree that an incubating entity should be permitted to use an ownership waiver in a different market than where the incubated station is located.¹⁴ Multiple commenters support permitting the incubating broadcaster to have an equity interest in the incubated station, which would provide much-needed financial assistance to the incubated entity, align the interests of the incubating and incubated entities, and allow both the incubating and incubated broadcasters to share in the risks and the financial success of the station.¹⁵

ACDDE agrees that incentives for established broadcasters are important to a successful incubator program, and proposes that they be grounded in tax policy changes that must be made by Congress.¹⁶ While NAB has long supported reinstatement of an updated version of the tax certificate program, we cannot support further delay in implementation of an incubator program. Should Congress determine that a tax benefit will be made available to broadcasters who undertake certain activities, such as selling stations

¹³ *Id.* at 13-14; Finley Comments at 3.

¹⁴ Finley Comments at 4-5; NAB Comments at 13-14. In our initial comments, NAB stated that such a waiver should be used in a market that is similar in size or larger than the market where the incubated station is located. NAB Comments at 14. Upon further reflection and discussion with member stations, we recognize that, depending on the ownership structure of the particular radio or television markets at issue, there may be circumstances where it would be more appropriate to allow waivers to be used in markets smaller than the incubation market.

¹⁵ NAB Comments at 13 (the established broadcaster's financial stake in the incubated station is "important, because it allows the established broadcaster to share in the financial success of the incubated station's operations and the proceeds of any potential sale of the station"); ACDDE Comments at 32 ("both companies would be financially at risk and motivated to ensure the venture's success"); Finley Comments at 3-4.

¹⁶ ACDDE Proposal at 6, 43-45.

to qualifying entities, or as a benefit for participating in the Commission’s existing incubator program, this would be a welcome development. The Commission’s incubator program could then be modified to allow established broadcasters to choose from two different benefit options—a tax credit or an ownership rule waiver. However, the Commission should not delay implementation of its incubator proposal pending Congressional action on tax certificate legislation. The tax certificate has long been the subject of advocacy by a wide range of individuals, organizations and companies, and has attracted the attention of members of Congress from both parties, who have introduced several bills to reinstate the program. Still, after decades of efforts to revive the program, it has not been reinstated.¹⁷ We believe that the Commission’s incubator proposal holds great promise and will address many of the same issues as the previous tax certificate program. The Commission should not condition the launch of the incubator program on future actions that Congress may or may not take.

Free Press and UCC oppose the use of waivers as an incentive for established broadcasters to participate in incubation agreements. UCC states that an ownership waiver would be “meaningless in the absence of strict ownership limits.”¹⁸ The only ownership limits that are newly “absent,” however, are the newspaper-broadcast and radio-television

¹⁷ See, e.g., NAB, *NAB Statement on Introduction of Tax Certificate Legislation*, Press Release, available at: <http://www.nab.org/documents/newsroom/pressRelease.asp?id=4129> (Apr. 5, 2017)(supporting legislation introduced by Rep. Butterfield); Letter from David K. Rehr, President & CEO, NAB, to Rep. Charles Rangel, available at: https://www.nab.org/documents/newsRoom/pdfs/071307_Minority_Tax_Credit.pdf (July 13, 2007)(supporting legislation introduced by Rep. Rush); *NAB Supports Bringing Back Tax Certificate Program*, Radio World, available at: <https://www.radioworld.com/news-and-business/nab-supports-bringing-back-tax-certificate-program> (Oct. 11, 2004)(discussing NAB support of a bill introduced by Sen. McCain). Efforts to reinstate the tax certificate have been underway almost since it was eliminated 23 years ago.

¹⁸ UCC Comments at 6-8.

cross-ownership rules. Stations must still comply with the local radio limits, the national TV ownership cap, and the local TV rule, which continues to prohibit combinations involving more than one top-four-ranked TV station absent a waiver of the rule. Waivers of these limits could allow established broadcasters to achieve efficient combinations, creating an ideal incentive for entering into an incubation agreement. Significantly, while UCC stands ready to critique the Commission’s proposed incentive, they offer no alternative proposal.

Free Press essentially relitigates its view that any broadcast ownership combinations—apparently even those involving a waiver of the rules to allow ownership by an incubated entity—will harm minority and female ownership.¹⁹ First, for every ownership rule waiver that the incubator program allows, an incubated entity would be entering the broadcast marketplace, so it is not clear how the proposal can actually create any additional “consolidation.” Neither the Commission nor any other party supporting an incubator program has proposed that established broadcasters would *own* the incubated stations as part of an incubator arrangement. Rather, the FCC and proponents of the incubator program anticipate that the established broadcaster will hold an attributable, non-controlling interest in the incubated station, which would be independently owned and operated by the incubated entity.²⁰

¹⁹ Free Press Letter at 2-3.

²⁰ See Notice at ¶ 138 (proposing that the incubating broadcaster hold a “non-controlling, attributable interest in the incubated station”); NAB Comments at 4, 7, 11 (“The incubating broadcaster should provide a meaningful financial investment in the station, as well as the training and support needed to enable the incubated entity to successfully own and operate the incubated station or another broadcast property, while still ensuring that the incubated entity retains control of the incubated station.”); Finley Comments at 4; ACDDE Comments at 30-31. NAB agrees with ACDDE’s view that control should be reflected in the incubated entity’s ownership of a 51% or greater voting interest. *Id.* at 31. Some commenters propose capping an incubating broadcaster’s equity interest, limiting its options, and restricting use of sharing arrangements between the incubating and incubated entities. ACDDE Comments

Second, NAB continues to object to Free Press' unproven assertion of a causal connection between the modest changes the Commission has made to its ownership rules and low levels of minority and female ownership. As NAB and other parties have repeatedly explained, overly restrictive broadcast ownership limits only contribute further to the financial challenges faced by all broadcasters, including smaller, minority- and female-owned stations, by artificially depressing the value of broadcast stations.²¹ When ownership regulation discourages investment in broadcasting, minorities and women find it even more challenging than other potential purchasers to obtain scarce investment capital needed for acquiring and operating stations. Moreover, ownership restrictions that reduce the value of broadcast properties make stations less expensive for all potential investors (not just minorities and women). Claims that ownership combinations will reduce or impede minority or female ownership are simply incorrect. After all, levels of minority and female ownership were extremely low decades ago when the broadcast ownership rules were extremely restrictive.

at 31 (proposing an equity cap), 32 (proposing limits on options), and 36-37 (proposing limits on use of joint sales and shared services agreements); Finley Comments at 4 (proposing an equity cap); Comments of REC Networks in MB Docket Nos. 17-289 et al. at 3 (Mar. 9, 2018) (REC Networks Comments) (proposing a ban on use of local marketing, joint sales or sharing agreements). NAB believes that an incubator program will be better served by flexibility in these areas. As discussed in our comments, an incubated entity may ultimately determine that it is a better business decision to sell its interest in the incubated station and use the proceeds of that sale to invest in another station. NAB Comments at 9. See also Note 12, *supra* (discussing growth strategy of African-American-owned BCB). Under NAB's proposal, this would be an equally permissible outcome. Similarly, restricting the ability of the parties to use sharing agreements, some of which are not even deemed attributable interests under the FCC's rules, may unduly hinder incubation activities that could make incubated stations more successful.

²¹ See, e.g., NAB Reply Comments in MB Docket No. 09-182 at 5-7 (Jan. 4, 2013); Reply Comments of The Center for Regulatory Effectiveness, MB Docket Nos. 06-121, 02-277, 01-235, 01-317, 00-244 and 04-228, at 2-4 (Oct. 2007) (CRE Reply).

NAB agrees with the Commission that a well-designed incubator program must include a financial incentive for incubators to participate, and that an ownership rule waiver is the best available option within the scope of the Commission's authority at this time.²² As demonstrated by the success of minority tax certificate program in promoting minority ownership, a meaningful financial incentive for established broadcasters is critical to making properties available for qualifying new entrants.

III. THE INCUBATED ENTITY ELIGIBILITY STANDARD MUST PROVIDE CERTAINTY, AVOID CONSTITUTIONAL ISSUES AND BE SIMPLE TO ADMINISTER

UCC objects to the Commission's use of a revenue-based standard for determining eligibility to be an incubated entity, in favor of a race- or gender-specific standard such as the Small Business Administration's Socially and Economically Disadvantaged Businesses (SDB) standard.²³ They assert that the former would too broadly apply to any small businesses and new owners, and does not sufficiently target minorities and women.²⁴

NAB is not opposed to use of the SDB standard, but we are concerned that doing so may pose some legal challenges that could undercut the incubator program.²⁵ As detailed in our initial comments, a race-based standard would be subject to a higher level of legal scrutiny, and is generally prohibited absent a compelling governmental interest in remedying

²² Notice, 32 FCC Rcd at 9859 ¶ 127.

²³ UCC Comments at 5.

²⁴ *Id.* at 4-5, *citing* Notice, 32 FCC Rcd at 9859. Opponents also repeat earlier complaints about the Commission's collection of data on ownership diversity that could support a race- or gender-based standard. *Id.* at 5-6; Free Press Letter at 3. NAB submits that further data-gathering is not necessary for the Commission to proceed on an incubator program. The lack of station ownership diversity is well-documented, and further efforts to develop perfect data will not address the underlying problem. The Commission should certainly track participation in the incubator program and other measures to improve ownership diversity to gauge their effectiveness.

²⁵ NAB Comments at 20-21.

past discrimination;²⁶ however, the Commission has not found evidence of such discrimination in its prior policies.²⁷ These legal challenges could reduce the regulatory certainty of the incubator program, in turn reducing the interest of both established and prospective broadcasters who need to be confident in the program's long-term viability before investing the time and money to draw up business plans and develop an incubation arrangement.

With respect to the Overcoming Disadvantages Preference (ODP) standard – which has the support of the ACDDE²⁸ – NAB is concerned that it will require the Commission to make subjective decisions on the qualifications of incubatee candidates, which could be time-consuming, complex and subject to challenges.²⁹ We also expressed concerns that this approach would require the parties to an incubation agreement to conduct significant due diligence and negotiate the drafting of an incubation agreement, all before knowing whether the Commission will approve the incubatee candidate. In this regard, the ACDDE has proposed that the FCC could assess eligibility as proposals for specific incubation projects are presented, or could grant entities a “general ODP certification” which they could then

²⁶ *Id.* at 20, citing *Adarand Constructors, Inc. v. Peña*, 515 US 200 (1995).

²⁷ *Id.* at 20-21, citing *2014 Quadrennial Regulatory Review*, Second Report and Order, 31 FCC Rcd at 9864 ¶ 299 (2016) (2016 Quadrennial Review Order).

²⁸ ACDDE Comments at 13-26. ACDDE also proposed that Native Nations qualify as incubated entities, observing that the relationship between the U.S. government and federally recognized tribes is governed by a treaty, and that ownership policies affecting Native Nations would not be constrained by *Adarand*. ACDDE Comments at 28-29. NAB agrees with this analysis and would not object to including Native Nations as qualifying entities for incubation projects.

²⁹ NAB Comments at 20-22. We also noted that the Commission has questioned whether this standard might still be subjected to heightened Constitutional scrutiny. *Id.* at 21, citing 2016 Quadrennial Review Order at 9993 ¶ 306.

use to negotiate incubation relationships with established broadcasters.³⁰ If it adopts an ODP standard, the Commission should offer both options to maximize the ability of parties to negotiate incubation relationships and minimize uncertainty.

On balance, NAB believes that an eligibility standard based on the FCC's new entrant bidding credit is the best course because it will foster certainty.³¹ Both the Commission and prospective parties to an incubation arrangement can easily assess eligibility with this bright line test. Moreover, recent NAB research highlights the potential effectiveness of the new entrant standard as a means to foster station ownership opportunities for minorities and women.³² Our review of the use of new entrant bidding credits in FM broadcast auctions across several years revealed that winning bidders relying on new entrant bidding credits were 93% more likely to be women, and 40% more likely to be minorities than other winning bidders.³³ These data further support the use of a new entrant standard in the incubator context as a means of promoting minority and female station ownership while responding to potential constitutional concerns.

IV. CONCLUSION

NAB appreciates the opportunity to assist the Commission's establishment of an incubator program to increase broadcast station ownership diversity. As discussed above, and unlike so-called public interest groups that purportedly support ownership diversity, we have attempted to provide practical, market-based recommendations for a program that will

³⁰ ACDDE Comments at 23-24.

³¹ NAB Comments at 17-19.

³² Letter from Rick Kaplan, NAB, to Marlene H. Dortch, Esq., MB Docket Nos. 17-289, et al. (Mar. 26, 2018).

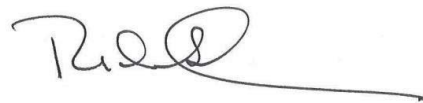
³³ *Id.*

successfully foster the ownership of radio and television stations by minorities, women and other new entrants.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal line extending to the right.

Rick Kaplan
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April 9, 2018