

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

In the Matter of)	
)	
2006 Quadrennial Regulatory Review – Review)	MB Docket No. 06-121
of the Commission’s Broadcast Ownership)	
Rules and Other Rules Adopted Pursuant to)	
Section 202 of the Telecommunications Act)	
of 1996)	
)	
2002 Biennial Regulatory Review – Review)	MB Docket No. 02-277
of the Commission’s Broadcast Ownership)	
Rules and Other Rules Adopted Pursuant to)	
Section 202 of the Telecommunications Act)	
of 1996)	
)	
Cross-Ownership of Broadcast Stations and)	MM Docket No. 01-235
Newspapers)	
)	
Rules and Policies Concerning Multiple)	MM Docket No. 01-317
Ownership of Radio Broadcast Stations in)	
Local Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244
)	
Ways to Further Section 257 Mandate and To Build)	MB Docket No. 04-228
On Earlier Studies)	

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)¹ submits these comments in response to the Commission’s *Second Further Notice of Proposed Rulemaking* in this proceeding.² In the *Notice*, the Commission seeks comment on a number of proposals offered by the Minority Media

¹ The National Association of Broadcasters is a 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 the Courts.

² *Second Further Notice of Proposed Rule Making* in MB Docket Nos. 06-121, 02-277 and 04-228, and MM Docket Nos. 01-235, 01-317, and 00-244, FCC 07-136 (rel. August 1, 2007) (“*Notice*”).

and Telecommunications Council (“MMTC”) designed to increase minority and female participation in the broadcast industry, as well as on the general issue of fostering minority and female ownership. In response to this *Notice*, NAB reiterates its general support for policies that create industry incentives to increase minority and female ownership and participation in the broadcast industry. Specifically, NAB encourages the Commission to adopt policies that emphasize public/private partnerships and rely on market-based stimulants to boost minority and female ownership.

I. Broadcasters Continue to Support Programs and Policies that Encourage Minority and Female Ownership in the Broadcast Industry

Broadcasters have regularly supported programs that promote minority and female participation in the media business. Through our partnerships with the National Association of Broadcasters Education Foundation (“NABEF”) and Broadcast Education Association (“BEA”), NAB has helped create a comprehensive educational structure that has brought hundreds of new participants, from all backgrounds, into the broadcast industry. NAB recognizes that programs designed to increase diversity of ownership are important and we will continue to develop those programs. In addition, NAB believes that it is equally important that we encourage educational development throughout the broadcast industry, particularly for groups that have traditionally been underrepresented in the broadcast industry. By focusing attention on every level of career development, the NABEF and BEA help create fertile soil from which new ownership opportunities are likely to sprout.

NABEF, for example, sponsors a number of programs and institutes that provide valuable educational experiences for women and people of color. NABEF seminars and programs nurture participants at every level of career development – from entry-level media sales institutes³ to

³ 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

Professional Fellowship programs at major universities for senior managers. Its Broadcast Leadership Training program (“BLT”) 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.

NABEF programs provide quality examples of ways that public/private partnerships can help promote more diversity in media ownership. Indeed, many of the programs offered by NABEF and its partners echo those offered in the *Notice*, particularly those found in Appendix A at #18, 19, 23 and 26. NAB strongly recommends that the FCC recognize and encourage such programs.

II. NAB Encourages the Commission to Ask Congress to Reinstate the Tax Incentive Program as the Most Effective Way to Promote Diversity in Broadcast Ownership

Even with successful private initiatives such as those described above, more can be done to address specific problems such as access to capital that often plague groups seeking to break into the broadcasting business. For that reason, NAB strongly supports the reinstatement of a tax incentive program that would provide companies tax credits or other benefits if they sell broadcast properties to minorities or women. We have previously endorsed legislation aimed at that goal.

The Federal Communications Commission’s previous tax certificate program was an effective policy in promoting minority ownership of broadcast stations. Congressional reinstatement of a similar program is, in the opinion of many including the FCC Advisory Committee on Diversity for Communications in the Digital Age, one of the most direct and effective methods of encouraging minority ownership in broadcasting. Congressman Charles Rangel of New York and Congressman Bobby Rush of Illinois have each introduced tax incentive legislation in this

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 hired.

Congress.⁴ We encourage the FCC to support this proven method and provide necessary information to Congress on how such a program can be crafted and administered to achieve its goals.

III. Defining a Workable Mechanism that Fosters Diversity in the Media Industry

Many of the proposals identified in the *Notice* rely on a clear and workable definition of Socially and Economically Disadvantaged Businesses (“SDB”).⁵ As the Commission notes, any definition for SDBs could run afoul of constitutional limitations that require that strict scrutiny apply in cases of racial classification.⁶ MMTC and other commenters have noted,⁷ however, that the Supreme Court’s ruling in *Grutter v. Bollinger*, 539 U.S. 306 (2003), suggests that the Commission might find a compelling governmental interest to create a racially and/or gender-based classification. This will better focus any program that the Commission proffers to encourage minority and female participation in the media industry.

Traditionally, government agencies that have used race-based classifications have relied on a definition set forth in Section 8(a) of the Small Business Act (codified at 15 U.S.C. §637(a))⁸

⁴ See H.R. 3003 and H.R. 600, 110th Cong. (2007).

⁵ See *Notice* at 12-15, 18, and 22.

⁶ See *Adarand v. Peña*, 515 U.S. 200 (1995).

⁷ See Reply Comments of The Office of Communication of The United Church of Christ, Inc. in MB Docket No. 04-228 (filed Nov. 8, 2004).

⁸ See 15 U.S.C. §637 (a)(6)(A), “Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. In determining the degree of diminished credit and capital opportunities the Administration shall consider, but not be limited to, the assets and net worth of such socially disadvantaged individual. In determining the economic disadvantage of an Indian tribe, the Administration shall consider, where available, information such as the following: the per capita income of members of the tribe excluding judgment awards, the percentage of the local Indian population below the poverty level, and the tribe’s access to capital markets.”

which presumes that certain racial and ethnic groups are “socially and economically” disadvantaged. In light of the decision in *Adarand*, several government agencies scaled back, but did not end, race-based classifications in federal procurement programs.⁹ In 1996, the Department of Justice issued a pronouncement suggesting several reforms to government affirmative action programs that effectively expanded the program beyond race-based classifications.¹⁰ For the most part, however, programs based on the traditional SDB definition remain in place because the government believes that such “programs are needed to remedy the effects of discrimination that have raised artificial barriers to the formation, development and utilization of businesses owned by minorities and other socially disadvantaged individuals.” *Id.*

While the SDB definition in the Small Business Act can provide a model for the FCC, it is important that the Commission consider the extent to which any proposals designed to foster diversity in media ownership differ from the direct procurement programs that the SDB definition traditionally supports. Any effort to define SDBs in the context of gender or race-based ownership programs would require specific findings, preferably by Congress, that such initiatives are necessary. NAB is concerned that any effort to define SDBs without a proper basis could lead to a court challenge and produce even more uncertainty that could further undermine efforts to establish meaningful programs.

⁹ See Defense Federal Acquisition Regulation Supplement, Small Disadvantaged Business Concerns, 60 Fed. Reg. 64, 135 (1995).

¹⁰ See Federal Procurement; Proposed Reforms to Affirmative Action; Notice, 61 FR 26042 (rel. May 23, 1996). The DOJ changed the standard for individuals or groups that were not presumptively “socially and economically disadvantaged.” Instead of requiring “clear and convincing evidence” to prove a disadvantage, individuals or groups seeking SDB status had to prove they were disadvantaged only by a “preponderance of the evidence,” a change that nearly doubled the accepted candidates for SDB status within two years. See Athena S. Cheng, *Affirmative Action for the Female Entrepreneur: Gender as a Presumed Socially Disadvantaged Group for 8(a) Program Purposes*, 10 Am. U. J. Gender Soc. Pol’y & L. 185, 207-209 (2001).

The Commission has clear statutory authority to enact programs that promote diversity in the media. The combined mandates of Section 1, Section 257 and Section 309(j) of the Communication Act deliver to the Commission a consistent message that diversity in media is an important goal.¹¹ The FCC has implemented this mandate using small businesses as a race and gender-neutral means of promoting opportunities for women and minorities. Given that a large number of small businesses are owned by women and minorities, we believe this provides a solid, albeit not perfect, method of promoting diversity in media. NAB notes that, in the broadcast auction context, the Commission has also utilized the concept of “new entrants” as a race and gender-neutral way of establishing special measures to promote diversity in broadcasting.

While we do not offer comment on any exact definition for SDB, we suggest that the Commission consider a conservative approach that will ensure any definition be clear and workable in light of any programs that rely on the definition. A proper definition of SDB would make it easier to target incentive programs, but a successful challenge to that definition would likely undermine the entire initiative.

IV. Several MMTTC Proposals Provide a Solid Framework That Could Increase Minority and Female Ownership of Broadcast Properties

NAB supports programs that provide incentives for businesses to sell stations to minorities and females to promote diversity of ownership in the broadcast industry. As noted above, a tax incentive program is a proven method for increasing diversity of ownership, and we strongly encourage the Commission to ask Congress to reinstate that successful program. Furthermore, the Commission should repeal or narrow the “equity/debt plus” attribution rule (“EDP Rule”), which limits existing broadcasters from providing an important source of capital for current and

¹¹ See 47 U.S.C. §151; 47 U.S.C. §257(b); and 47 U.S.C. §309(j)(3)(B), which directs the Commission to disseminate “licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.”

prospective minority broadcasters. Other entities working to promote minority ownership of broadcast properties have consistently expressed concern that the EDP Rule has the “unintended consequence” of discouraging broadcasters from providing investment in SDBs.¹²

The Commission should also adopt a general policy that emphasizes and encourages volunteer action by broadcast entities and market-based stimulants to promote diversity of ownership. In particular, we note as examples several proposals offered by MMTC and contained in the *Notice*.

First, the proposal to carve out an exception allowing grandfathered clusters of stations that otherwise exceed the numerical ownership caps to sell the cluster in whole to a qualified SDB,¹³ mirrors an existing exception that allows grandfathered clusters to be sold in whole to small business entities.¹⁴ Because the current exception has not proved successful, in part because small businesses lack access to capital necessary to make large broadcast purchases, MMTC recently asked the Commission to tweak the rule, allowing grandfathered clusters to be sold to any third party – not just small businesses – if that third party agreed to sell above cap stations within one year to a qualified small business.¹⁵ NAB supported that rule change, and suggested several ways to strengthen and improve the rule.¹⁶

¹² Comments of Diversity and Competition Supporters in MB Docket No. 02-277 at 110 (filed Jan. 2, 2003); Petition of Minority and Media Telecommunications Council for Partial Reconsideration and Clarification of *Attribution Order* at 2 (filed Oct. 18, 1999).

¹³ See *Notice* at 12.

¹⁴ See *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules*, 18 FCC Rcd. 13620, 13810-13812 (2003) (“*2002 Biennial Review*”).

¹⁵ See *Petition for Rulemaking of the Minority Media and Telecommunications Council; To Facilitate the Entry of Small Businesses into Local Radio Markets in RM-1388* (filed July 12, 2007).

¹⁶ See Comments of the National Association of Broadcasters in RM-11388 (filed Sept. 5, 2007).

Second, NAB recommends approval of the proposal found in the *Notice* at Appendix A (#5).¹⁷ As noted above, NAB has long been a supporter of incubator programs like those operated by the NABEF. This rule, which provides an economic incentive for broadcasters to create and nurture incubator programs, would expand exponentially the NABEF's work, and could provide thousands of disadvantaged businesses and individuals with the seed money and education to excel in the broadcast business.

Third, NAB also recommends approval of the proposal found in the *Notice* at Appendix A (#7), which makes equity/debt plus interests that enable SDBs to build out an unbuilt permit nonattributable in ownership calculations.¹⁸ Although we strongly recommend that the Commission repeal or narrow the EDP Rule generally, this proposal provides a sensible limitation on the rule, and one that would actively encourage capital investment in SDB-owned broadcast properties.

Fourth, we suggest the Commission look closely and creatively at incentive-based leasing provisions, like that identified in the *Notice* at Appendix A (#6). Short of full-station ownership, leasing proposals could provide a quick and easy route to promoting diversity.

Furthermore, the NAB generally supports proposals that will help overcome the largest roadblock to a more diverse broadcast industry – access to capital. The NAB supports recent proposals by the FCC Diversity Committee to hold a conference that will bring together industry stakeholders, minority interests, and private equity firms. Moreover, NAB supports efforts that will encourage banks and other financial institutions to provide debt financing to qualified small business entities.¹⁹ Furthermore, NAB agrees that, in addition to capital access, small businesses, minorities and women need access to information about broadcast sales. NABEF recently partnered

¹⁷ See *Notice* at 13.

¹⁸ See *Notice* at 14.

¹⁹ See *Notice*, Appendix A at #28 and 29.

with MMTC to hold a pair of forums with Clear Channel Communications and Citadel, each of whom is looking to sell broadcast properties, to connect them with minorities and women eager to enter the market. NABEF has offered to host similar conferences for media companies that have properties for sale.

NAB additionally reiterates concerns about the recent trend toward restricting designated entity status in spectrum auctions. As previously urged by the NAB,²⁰ the Commission must be cautious about adopting unnecessarily restrictive designated entity rules that would inhibit the ability of small businesses or SDBs to raise capital and attract investors (including larger communications entities) without stripping these small businesses of designated entity status and benefits (e.g., bidding credits). The adoption of overly restrictive designated entity rules would exacerbate the access to capital problems routinely experienced by small and minority/female-owned businesses, and would impair their ability to participate in spectrum auctions, including ones for broadcast licenses.

Finally, NAB encourages the Commission to avoid unwarranted and unproven assumptions that modernizing the local broadcast ownership rules will result in fewer opportunities for women and minorities. Instead, the FCC should implement policies that ensure a financially viable radio and television industry, particularly in light of growing competition from a number of new sources. Initiatives to promote diversity in broadcasting would be moot in an environment where radio and television stations are held back from effectively competing in an ever-expanding digital media marketplace.

V. Conclusion

NAB reiterates its general support for proposals that promote diversity of ownership in the broadcast industry. As noted above, we encourage the Commission to consider policies that provide

²⁰ See Comments of NAB in Docket No. 05-211 (filed Sept. 20, 2006).

strong incentives to current broadcast owners to sell to minority and female-owned entities, as these programs are proven to be the fastest and most effective solutions to a lingering problem.

Respectfully submitted,

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