

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Rules and Policies to Promote New Entry and)	MB Docket No. 17-289
Ownership Diversity in the Broadcasting Services)	
)	

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

The Red Brennan Group (“Petitioner”), through counsel, hereby submits its Reply to the Opposition to Petition for Reconsideration filed by the National Association of Broadcasters (“NAB”) on February 8, 2019 in the above-captioned proceeding. This Reply is timely submitted pursuant to Sections 1.429(g) and 1.4(h) of the Commission’s Rules.¹

In its Opposition, NAB accuses Petitioner of not having adequately read the record in the Commission’s proceeding implementing the incubator program. This accusation seemingly stems from the mere fact that Petitioner has adopted a perspective different from that of the Commission on the issue of an incubator program in the broadcast industry. Petitioner is, and was, fully aware of the study pointed out by NAB in its Opposition. That study, however, is less than convincing that the program proposed by the Commission will increase diversity in the broadcast industry. It also does not bring the Commission’s revenue-based standard out of the realm of arbitrary and capricious.

NAB refers to the Commission’s ownership rules as “outdated.” However, NAB’s ideas are not exactly novel themselves. As pointed out in the Petition, the Commission already enacted a series of proposals in 2008 to increase broadcast ownership by minorities and women by tying

¹ 47 C.F.R. §§ 1.429(g), 1.4(h).

benefits to a revenue-based eligible entity standard.² The Third Circuit correctly concluded that there was no logical link between a revenue-based standard and a program intended to benefit minorities and women, and therefore the Commission's 2008 Order was arbitrary and capricious.³ Despite the clarity of the Third Circuit's ruling, the Commission is proceeding in essentially the same fashion today, and NAB is along for the ride.

The Third Circuit found the Commission's 2008 Order to be arbitrary and capricious, in part, because the Commission did not have reliable and accurate data on broadcast ownership by minorities and women.⁴ NAB attempts to fill this data gap for the Commission by conducting a tally of female-owned and minority-owned businesses that were awarded construction permits after using new entrant bidding credits during a handful of select broadcast auctions. This is not the convincing data the Third Circuit had in mind in *Prometheus*, and the "study" proves little, especially in light of the fact that the study was conducted by an interested party to the proceeding.

First, the data tallied by NAB is inconsistent at best. For example, in Auction 93 most of the female-owned and minority-owned winning bidders proceeded without the use of bidding credits.⁵ In fact, in that auction, bidding credits succeeded in bringing just one female-owned business to the table out of the 93 construction permits awarded.⁶ Auction 79 was similar: more

² *Promoting Diversification of Ownership in the Broad. Servs.*, FCC 07-217, 23 F.C.C. Rcd. 5922 (2008).

³ *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 470 (3d Cir. 2011).

⁴ *Id.* at 470-71.

⁵ Letter from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289 et al., at 2 (filed Mar. 26, 2018).

⁶ *Id.*

than twice as many minority-owned successful bidders participated without bidding credits than with.⁷

It's also worth noting that the data produced by the Commission's Advisory Committee on Diversity and Digital Empowerment ("ACDDE") demonstrated a far more meager increase in auction participation by minority-owned and female-owned businesses. ACDDE found that new entrants in broadcast auctions were not even 4% more likely to be minority-owned and not even 3% more likely to be women-owned.⁸ Meanwhile, NAB concluded that winning bidders relying on new entrant bidding credits were 93% more likely to be women, and 40% more likely to be minorities, than winning bidders who did not use the credit.

The studies also do not provide the Commission with evidence regarding *causation*: did bidding credits truly cause those minority-owned and female-owned businesses to participate in those auctions? NAB certainly does not know the answer, as its study is just not thorough or sophisticated enough to provide the answers the Commission needs. Its tally is also based on a very limited sample size; 1,022 construction permits (and those are construction permits, not licensed stations) can hardly be said to provide a complete picture of the broadcast industry. NAB also did not bother to verify the accuracy of the Form 175 self-reporting it used for its tally. Reliance on such unverified self-reporting can hardly be said to allay the Third Circuit's concerns regarding the *accuracy* of the Commission's data on minority and female broadcast ownership.⁹

⁷ *Id.*

⁸ Comments of Federal Communications Commission's Advisory Committee on Diversity and Digital Empowerment, A Proposal for an Incubator Program, MB Docket No. 17-289 (filed Apr. 2, 2018).

⁹ *Prometheus*, 652 F.3d at 468.

This is the “strong record evidence” that NAB claims the Commission has. However, the immense disparity in conclusions between NAB and ACDDE suggests that neither group truly knows just how likely a revenue-based standard is to increase minority-owned and female-owned businesses in the broadcast industry. And without knowing, the Commission could not have adequately analyzed the merits of the incubator program.

Even putting this data aside, the revenue-based standard does not add up from a common-sense approach. Is the Commission seeking to increase broadcast ownership by low-revenue businesses, or by minority-owned and female-owned businesses? The two concepts are not one-and-the-same, and NAB’s tally does little to trick one into thinking otherwise. But it’s not lost on Petitioner why the Commission is proceeding, and NAB endorsing, a revenue-based standard. A standard based on race or gender would trigger heightened scrutiny by a court.¹⁰

But a revenue-based standard, while not subject to heightened scrutiny, must still pass the arbitrary and capricious test, and in this case it fails badly. Small businesses are not the same as minority-owned and female-owned businesses, and the huge disparities in data suggest that both NAB and the FCC have yet to figure out how likely the groups are to overlap.

Finally, NAB claims that the Commission “carefully” considered whether there was good cause to waive the multiple ownership rules. The Commission never explained why the harms consistently associated with media consolidation were of no concern. Petitioner highlighted some of these concerns in its Petition, and NAB responded as though the harms associated with media consolidation were some sort of made-up concept. In reality, the Commission itself has acknowledged that media consolidation leads to higher advertising costs.¹¹ The Commission

¹⁰ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

¹¹ *Prometheus*, 652 F.3d at 462 (“[The Commission] chose to credit another study in the record that reached the opposite conclusion (consolidation caused advertising prices to double).”).

could not have carefully weighed these harms against the benefits of an incubator program when it has not even an estimate of how many minority-owned and female-owned businesses will be added to the broadcast industry.

By: _____/s/_____
Donald J. Evans, Esq.
Mark C. DeSantis, Esq.
Fletcher, Heald & Hildreth, PLC
1300 North 17th Street, 11th Floor
Arlington, VA 22209
703-812-0400
evans@fhhlaw.com

Dated February 22, 2019

CERTIFICATE OF SERVICE

I, Michelle Brown Johnson, a secretary with the law firm of Fletcher, Heald & Hildreth, PLC, hereby state that a true copy of the REPLY TO PETITION FOR RECONSIDERATION was served by first class mail, postage prepaid, unless indicated otherwise, this 22nd day of February, 2019, to the following:

Rick Kaplan
Erin L. Dozier
Jerianne Timmerman
National Association of Broadcasters
1771 N Street, NW
Washington, DC 20036

_____/s/_____
Michelle Brown Johnson