

*Before the*  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

|   |   |                      |
|---|---|----------------------|
| In the Matter of                            | ) |                      |
|   | ) |                      |
| 2014 Quadrennial Regulatory Review –        | ) | MB Docket No. 14-50  |
| Review of the Commission’s Broadcast        | ) |                      |
| Ownership Rules and Other Rules Adopted     | ) |                      |
| Pursuant to Section 202 of the              | ) |                      |
| Telecommunications Act of 1996              | ) |                      |
|   | ) |                      |
| 2010 Quadrennial Regulatory Review –        | ) | MB Docket No. 09-182 |
| 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   | ) | MB Docket No. 07-294 |
| the Broadcasting Services                   | ) |                      |
|   | ) |                      |
| Rules and Policies to Promote New Entry     | ) | MB Docket No. 17-289 |
| and Ownership Diversity in the Broadcasting | ) |                      |
| Services                                    | ) |                      |

**COMMENTS OF**  
**OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST**  
**MEDIA ALLIANCE**  
**NATIONAL ORGANIZATION FOR WOMEN FOUNDATION**  
**COMMUNICATIONS WORKERS OF AMERICA**  
**COMMON CAUSE**  
**BENTON FOUNDATION**  
**MEDIA COUNCIL HAWAII**  
**PROMETHEUS RADIO PROJECT**  
**MEDIA MOBILIZING PROJECT**

Office of Communication, Inc. of the United Church of Christ, Media Alliance, National Organization for Women Foundation, Communications Workers of America, Common Cause, Benton Foundation, Media Council Hawai'i, Prometheus Radio Project, and Media Mobilizing

Project (“UCC *et al.*”)<sup>1</sup> respectfully submit these comments in response to the Federal Communication Commission’s (“FCC” or “Commission”) *2014 Quadrennial Regulatory Review, Order on Reconsideration and Notice of Proposed Rulemaking (“ReconOrder/NPRM”)*.<sup>2</sup> UCC *et al.* oppose the Commission’s proposal to adopt an incubator program as it will not fulfill the Commission’s obligation to promote gender and racial diversity of media ownership.

## **I. Background**

An incubator program is intended to allow broadcast licensees to exceed the Commission’s ownership limits if they implement a program designed to ease entry barriers and provide assistance to qualified entities seeking to enter the broadcast market. This concept was first introduced in the 1990s,<sup>3</sup> but it has never been accepted by FCC.<sup>4</sup> While the Commission has sought comments on adopting an incubator program in the past, comments in support of the concept have failed to offer persuasive arguments that eliminate the program’s inherent concerns. The Commission most recently elaborated these concerns in its *2014 Quadrennial Review*, starting with its *Further Notice of Proposed Rulemaking (“FNPRM”)* where it stated that an incubator program could create a “substantial loophole” that would permit consolidation

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<sup>1</sup> The standing of each organization is evident from the record.

<sup>2</sup> 32 FCCRcd 9802 (2017).

<sup>3</sup> See *Revision of Radio Rules and Policies*, 7 FCCRcd 6387, 6391-92 (1992).

<sup>4</sup> The Commission deferred consideration of an incubator proposal made by the Multicultural Media, Telecom and Internet Council (“MMTC”) in the *2002 Biennial Review*, 18 FCCRcd 13620, 13636 (2003). It then rejected incubator proposals made by MMTC in the *2006 Quadrennial Review, 2008 Diversity Order*, 23 FCCRcd 5922, 5946-47 (2008) and by both MMTC and National Association of Broadcasters (“NAB”) in the *2010 Quadrennial Review, Second Report and Order*, 31 FCCRcd 9864, 10001-02 (2016).

while posing “substantial legal, administrative, and practical challenges.”<sup>5</sup> When the Commission declined to adopt an incubator program in the *2014 Quadrennial Review, Second Report and Order* (“*2d R&O*”), it affirmed its concerns, pointing out administrative and definitional problems and approvingly citing comments from UCC and Common Cause stating that such a program “could create a substantial loophole in the Commission’s ownership rules without having any significant impact on minority and female ownership.”<sup>6</sup>

Despite repeatedly finding that an incubator program is infeasible, the Commission reversed its long-held position in the *ReconOrder/NPRM*. It is well-established that before adopting or modifying a rule, an agency needs to “examine the relevant data and articulate a satisfactory explanation for its action[,] including a ‘rational connection between the facts found and the choice made.’”<sup>7</sup> However, in the *ReconOrder/NPRM*, the Commission offers no explanation why its prior concerns are no longer valid, nor has it sought comment on this issue. Instead, it has ostensibly decided that it will adopt an incubator program, but does so without actually proposing a specific program. It merely asks a series of detailed questions regarding how to structure and implement such a program, such as the eligibility criteria for the incubated entity; appropriate incubating activities; benefits to the incubating entity; how such a program would be reviewed, monitored, and enforced; and the costs and benefits of such a program.<sup>8</sup> But because the Commission fails to resolve the underlying concerns of an incubator program and

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<sup>5</sup> *2014 Quadrennial Regulatory Review, Further Notice of Proposed Rulemaking and Report and Order*, 29 FCCRcd 4371, 4515 (rel. Apr. 15, 2014) (“*FNPRM*”).

<sup>6</sup> *2014 Quadrennial Review*, 31 FCCRcd at 10002 (quoting Joint Reply Comments of United Church of Christ, OC, Inc. and Common Cause, MB Dkt. 14-50, 25 (Sep. 8, 2014) (“Joint Reply”).

<sup>7</sup> *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 469 (3d Cir. 2011) (“*Prometheus II*”) (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>8</sup> *ReconOrder/NPRM*, 32 FCCRcd at 9859-64.

has not made promotion of minority and female ownership its primary goal, answering these questions is pointless.

## **II. An Incubator Program Will Not Lead to Diverse Ownership**

UCC *et al.* oppose the adoption of any incubator program because (1) the FCC is not attempting to promote minority and female ownership as the central goal of the incubator program; (2) any incubator program is futile without strict media ownership limits; and (3) the Commission’s chronic failure to collect sufficient ownership data makes it impossible to tailor a program that will improve ownership diversity or to assess the impact of such a program.

### **A. The FCC failed to identify promoting minority and female media ownership as the central focus of an incubator program**

In the *ReconOrder/NPRM*, the Commission continues to ignore its statutory mandate to advance ownership by minorities and women,<sup>9</sup> the Third Circuit’s clear direction that “the Commission . . . consider the effect of its rules on minority and female ownership,”<sup>10</sup> and its own repeated findings that racial and gender diversity in station ownership leads to greater viewpoint diversity.<sup>11</sup> The Commission does not mention even once, much less discuss, minority and female media ownership in the *ReconOrder/NPRM*. It only devotes one sentence to diversity, stating generally that the objective of an incubator program is “to support the entry of new and diverse voices in the broadcast industry.”<sup>12</sup> But the Commission makes clear that the term “new and diverse voices” means small businesses and new owners, not women and racial and ethnic minorities. It does so by stating that an incubator program can promote competition and new

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<sup>9</sup> 47 U.S.C. §309(j).

<sup>10</sup> *Prometheus II*, 652 F.3d at 471.

<sup>11</sup> *See, e.g., 2d R&O*, 31 FCCRcd at 9918 (citing *FNPRM*, 29 FCCRcd at 4423).

<sup>12</sup> *ReconOrder/NPRM*, 32 FCCRcd at 9859.

voices in the broadcast industry by creating ownership opportunities for small businesses”<sup>13</sup> and by asking questions about how to reduce costs and increase benefits for small businesses.<sup>14</sup> The *ReconOrder/NPRM* does not invite any comment on how to ensure the program will foster minority and female ownership.

The Commission’s misdirected focus is also evident by the fact that it again proposes the “revenue-based” definition for “eligible entities” as one of the several options for the new program.<sup>15</sup> Not only has the Third Circuit already found in *Prometheus II* that there is no evidence that this definition would promote ownership opportunities by minorities and women,<sup>16</sup> but the Commission itself has acknowledged this, concluding that this definition would merely promote ownership by small businesses and new entrants.<sup>17</sup>

While the Commission also seeks comment on race- and/or gender-specific eligibility standards, such as the Socially and Economically Disadvantaged Businesses (SDB) standard employed by the SBA and many other federal agencies,<sup>18</sup> it again insists that those supporting such standards must provide analysis on how they could withstand a constitutional challenge.<sup>19</sup> In doing so, the Commission once again wrongfully imposes its own burden on the public and ignores UCC and Common Cause’s prior advice on how the Commission could engage in the

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 9864.

<sup>15</sup> *Id.* at 9861.

<sup>16</sup> *Prometheus II*, 652 F.3d at 471-72.

<sup>17</sup> *2d R&O*, 31 FCCRcd at 9961.

<sup>18</sup> For example, the Department of Transportation (“DOT”) and Environmental Protection Agency (“EPA”) give preference to SDBs when awarding contracts and include women as a socially disadvantaged group. *See*, DOT at 49 C.F.R. §26.67; EPA at 42 U.S.C. §4370d. The current form of the DOT’s program was upheld by the Tenth Circuit on remand from the Supreme Court’s decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. dismissed*.

<sup>19</sup> *ReconOrder/NPRM*, 32 FCCRcd at 9862.

intellectual exercise necessary to create such a standard.<sup>20</sup> Aside from that, the Commission has already rejected substantial evidence submitted in previous proceedings on how an SDB standard could survive constitutional scrutiny<sup>21</sup> when it declined to promulgate such a standard, citing lack of sufficient evidence.<sup>22</sup> Without any guidance on exactly what additional evidence the Commission would find compelling enough to convince it to adopt a racial- and/or gender-conscious standard, the Commission effectively asks the impossible.

By focusing on small businesses, it is clear that the Commission is not seeking to design an incubator program that would actually advance ownership opportunities for women and minorities. Rather, this proposal delays the Commission's obligation to take real action on promoting minority and female ownership and attempts to distract from the extremely negative impact on ownership diversity caused by the consolidation the *ReconOrder/NPRM* authorizes.

**B. Any incubator program will not be effective without strict media ownership limits**

Even if the incubator program were intended to improve minority and female ownership, the Commission has removed nearly all incentives for in-market licensees to participate in the program. The *ReconOrder/NPRM* acknowledges that the primary incentives for participating in the program are waivers of the Commission's local broadcast ownership rules.<sup>23</sup> Thus, an incubator program would be meaningless in the absence of strict local ownership limits.<sup>24</sup>

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<sup>20</sup> See Joint Reply; see also Joint Reply at n.62 (citing to a National Cooperative Highway Research Program report included with its appendix, which provides guidelines on how an agency might conduct the type of study necessary to develop a constitutionally viable program, NCHRP, Report 644, Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program (2009)).

<sup>21</sup> See, e.g., Comments of UCC *et al.*, MB Dkt. 06-121 (Oct. 23, 2006).

<sup>22</sup> *2d R&O*, 31 FCCRcd at 9987.

<sup>23</sup> *ReconOrder/NPRM*, 32 FCCRcd at 9863.

<sup>24</sup> Joint Reply at 25.

Nonetheless, in the *ReconOrder/NPRM*, the Commission effectively repealed long-standing local television ownership rules by eliminating the Eight-Voices Test and Joint Sales Agreement (“JSA”) attribution rule, and by adding a new case-by-case review process for those seeking to circumvent the Top-Four Prohibition.<sup>25</sup> Now, in-market station owners—particularly the large media companies that have the resources to incubate “eligible entities”—can control more stations in the same market through acquisitions and content sharing without needing a waiver from the Commission.<sup>26</sup>

The proposed acquisition of Tribune Media Co. by Sinclair Broadcast Group provides an excellent example of how the Commission’s incubator proposal is effectively pointless without strict local ownership rules. Under the merger, Sinclair would own stations in at least ten markets that would run afoul of the old rules.<sup>27</sup> To come into compliance, Sinclair would have had two options. First, it could have divested those stations, potentially providing opportunities for minorities and women to enter the broadcast market. Second, it could have sought waivers of the rules from the Commission. As contemplated, the Commission could make those waivers contingent on participation in an incubator program. Now, it is more likely than not that Sinclair will be able to control those ten stations either because the Eight-Voices Test was repealed, the Commission grants a request by Sinclair to circumvent the Top-Four Prohibition, or Sinclair

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<sup>25</sup> *ReconOrder/NPRM*, 32 FCCRcd at 9832-38, 9848-54. With these changes, one company could control all the top-four stations in a single market without needing a waiver if the Commission decided not to enforce the Top-Four Prohibition against the company in that market and the company used JSAs to sell 100% of the advertising for the other two top-four stations.

<sup>26</sup> If the Commission also eliminates or raises the national television audience reach cap, which it is considering doing in a separate proceeding, it would open the door to so much consolidation in the broadcast market that any remaining incentive for in-market stations to participate in the incubator program would disappear.

<sup>27</sup> See *Amendment to June Comprehensive Exhibit*, Sinclair Broadcasting Group, Inc., MB Dkt. 17-179 (Feb. 18, 2018).

utilizes JSAs to effectively continue controlling the stations it divests. Indeed, Sinclair is counting on it.<sup>28</sup>

Thus, even the best designed incubator program will not be effective without any incentive for in-market licensees to participate.

**C. The Commission’s chronic failure to collect sufficient ownership data makes it impossible to assess an incubator program’s effect of on minority and female ownership**

The Third Circuit has directed the Commission multiple times to assess the impact of its ownership rules on minority and female ownership before changing those rules.<sup>29</sup> And it said that if the Commission needs more data to comply with this mandate, “it must get it.”<sup>30</sup> Despite these repeated reminders, the Commission has not collected the accurate data necessary to evaluate the impact of its ownership rule changes. UCC *et al.* have urged the Commission to remedy this problem for years.<sup>31</sup>

The accuracy and completeness of data are indispensable to crafting any program meant to improve ownership diversity, including determining whether an incubator program’s benefits to minority and female ownership offset its likely harms. One of the primary concerns with the incubator concept is that it is premised on permitting greater media consolidation as an incentive for in-market stations owners to participate in the program. But consolidation creates greater

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<sup>28</sup> See *id.* at 7-24.

<sup>29</sup> See, e.g., *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 384 (3d Cir. 2004) (finding that the Commission could not justify repealing the failed station solicitation rule (“FSSR”) without assessing the impact of that action upon minority and female ownership); *Prometheus II*, 652 F.3d at 438 (stating that the Court had remanded the Commission’s repeal of the FSSR because “the Commission had failed to consider the effect on minority ownership of the repeal despite the rule being the only existing regulation intended to promote minority television ownership.”).

<sup>30</sup> *Prometheus Radio Project v. F.C.C.*, 824 F.3d 33, 49 (3d Cir. 2016).

<sup>31</sup> See, e.g., Opposition to FCC Motion to Hold in Abeyance at 9-10, *Prometheus Radio Project v. F.C.C.*, No. 17-1107 (3d Cir. Feb. 27, 2017); Petition for Writ of Mandamus at 18-19, *In re Prometheus Radio Project and Media Mobilizing Project*, No. 18-1167 (3d Cir. Feb. 2, 2018).

barriers to entry for potential minority and female owners, so any benefits that might result from the program will be, at best, offset by this harm. While the Commission seeks comment on how to assess the effectiveness of an incubator program, it is impossible to evaluate the program's impact on ownership diversity due to the deficiencies in the collection of ownership data. For example, the Commission's 2015 Form 323 Ownership Data report does not include important indices such as market share, ratings, or owner information,<sup>32</sup> which are necessary for the Commission and stakeholders to make an accurate assessment on media ownership changes.<sup>33</sup>

In fact, rather than taking steps to improve its data collection, the Commission has taken steps to undermine the completeness and accuracy of its ownership data.<sup>34</sup> In April 2017, the Commission decided to allow noncommercial stations to file ownership reports by Special Registration Numbers instead of their FCC Registration Number.<sup>35</sup> This change makes it nearly impossible for the FCC and stakeholders to verify, aggregate, and cross-reference ownership data. As if that were not enough, the Commission is entertaining other proposals to reduce reporting requirements for broadcasters, thanks to its unqualified request for comments on its media rules in May 2017.<sup>36</sup>

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<sup>32</sup> See *Third Report on Ownership of Commercial Broadcast Stations*, FCC Form 323 Ownership Data as of October 1, 2015 (2017).

<sup>33</sup> Without data showing how many stations are owned by each owner, there is no way to identify whether any increase in the number of minority-owned stations was caused by new entrants in the market or by consolidation. Similarly, without rating and market share information, it is impossible to know how the market share of minority-owned stations correlates with any increase in the number of minority-owned stations. For example, a change from 10 minority-owned stations with 20% market share to 20 minority-owned stations with 10% market share is not an increase in diversity of ownership.

<sup>34</sup> Petition for Writ of Mandamus, No. 18-1167, at 21.

<sup>35</sup> *Promoting Diversification of Ownership in the Broadcasting Services*, Order on Reconsideration, 32 FCCRcd 3440 (2017).

<sup>36</sup> *Commission Launches Modernization of Media Regulation Initiative*, Public Notice, 32 FCCRcd 4406 (2017).

Without adequate data to ensure an accurate assessment of program's impact on diversity ownership, and no intention to remedy the data deficiency, the Commission should not adopt an incubator program.

### **Conclusion**

For the forgoing reasons, no incubator program, no matter how well intended and designed, will lead to diverse media ownership. UCC *et al.* request that the Commission abandon its proposal to adopt an incubator program.

Respectfully submitted,

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\* These comments were drafted primarily by Yuan Tian, a law student in the Institute for Public Representation Communication & Technology Clinic.