



March 26, 2018

Marlene H. Dortch, Esq.  
Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington DC 20554

Re: Written Ex Parte Communication, MB Docket Nos. 17-289, 14-50, 09-182, 07-294, 04-256

Dear Ms. Dortch:

In our comments supporting the Commission's plans to adopt an incubator program, the National Association of Broadcasters (NAB) identified two potential eligibility standards for prospective incubated entities: (i) a standard based on the new entrant bidding credit used in FCC broadcast auctions;<sup>1</sup> or (ii) the eligible entity standard used by the FCC for a variety of diversity initiatives.<sup>2</sup> NAB supported these standards because we believe that they will foster new entry into the broadcast industry, particularly by minorities, women and small businesses. Moreover, both standards would avoid the potential litigation risks associated with a standard that is race- or gender-based, given the heightened scrutiny applied to such standards.<sup>3</sup> NAB has continued research to support our proposed eligibility standards since our comments were filed, with a goal of developing evidence that the standards would promote a more diverse broadcast industry. We are filing the instant *ex parte* notice to share the results of our research.

One way to assess the efficacy of each standard is to review demographic data on entities that have benefited from use of the standards in the past and determine whether they are

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<sup>1</sup> Comments of NAB in MB Docket Nos. 17-289 et al. (Mar. 9, 2018) at 17-19 (NAB Incubator Comments), *citing* 47 C.F.R. §§73.5007-5008. NAB proposed that the Commission modify the existing standard by requiring incubated entities to have met the qualifications for a full year prior to its incubation application and fall within a revenue cap. *Id.*

<sup>2</sup> NAB Incubator Comments at 19, *citing 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, Second Report and Order, 31 FCC Rcd 9864, 9983 ¶ 286 (2016)*. NAB proposed that the Commission modify the existing standard by requiring entities to have met the qualifications for a full year prior to its incubation application. *Id.*

<sup>3</sup> NAB Incubator Comments at 22.

more likely to be minorities and women than entities that do not utilize the standards. NAB has been unable to identify a means of tracking entities that have benefited from the Commission's eligible entity standard. However, using publicly available FCC data, we were able to analyze use of the new entrant bidding credit in every FM broadcast auction held since the Commission's adoption of the credit.<sup>4</sup> We reviewed the data to determine whether bidders relying on a new entrant bidding credit were more likely to be minorities or women than bidders who did not use a credit.

As discussed below, our results demonstrate that the availability of new entrant bidding credits dramatically increases the number of female- and minority-owned businesses who successfully win broadcast auctions—resulting in *nearly 93% more winning bids by women owners and 40% more winning bids by minority owners* in FM auctions held since 2004. Collectively, winning bidders using new entrant bidding credits were *64% more likely to be minorities or women* than other winning bidders.<sup>5</sup> Based on this track record, we believe that the use of a standard based on the new entrant bidding credit for purposes of the FCC's incubator program would be an effective way to promote station ownership by minorities and women, as well as small businesses and other new entrants.

## **Methodology**

NAB's analysis relies entirely on publicly available data on the FCC's website, and can be replicated.

The Commission has held nine FM broadcast auctions since its adoption of the new entrant bidding credit.<sup>6</sup> The Commission posts data concerning every auction on its website, including lists of winning bidders, public notices associated with each auction, and other

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<sup>4</sup> We focused our analysis on open auctions for permits to construct full-power FM stations for a few reasons. First, the Commission has auctioned a substantial number of construction permits in this service over several years in multiple open auctions (as compared to only three open full-power TV auctions involving fewer than 20 construction permits). Second, we chose to look at full-power stations, which, among other things, have the ability to originate programming, as a measure of full participation in the broadcast industry. Finally, we also excluded "closed" auctions that are designed to resolve mutually exclusive applications, so that our analysis would be focused on applicants that planned for auction participation (rather than those that may have made applications in a filing window and later learned that they would need to participate in an auction to resolve mutual exclusivity).

<sup>5</sup> See Attachment A.

<sup>6</sup> The nine auctions are FM Broadcast Auctions 37, 62, 68, 70, 79, 91, 93, 94 and 98, held between 2004 and 2015. See FCC, Wireless Bureau Auction Homepage, available at: [http://wireless.fcc.gov/auctions/default.htm?job=auctions\\_home](http://wireless.fcc.gov/auctions/default.htm?job=auctions_home).

information.<sup>7</sup> The FCC also makes available FCC Form 175 data for every auction.<sup>8</sup> Form 175 asks each applicant to select a “status” from a menu of options, including “[m]inority-owned business” and “[w]oman-owned business.”<sup>9</sup>

NAB relied on FCC Form 175 demographic data because we concluded that this data—provided by all bidders within just weeks of each auction—offers the most complete and accurate demographic picture of who has successfully participated in broadcast auctions.<sup>10</sup> In fact, the FCC states that it requests demographic information on Form 175 so that the FCC can “monitor its performance in promoting economic opportunities for these designated entities”—the very purpose of the analysis we are conducting here.<sup>11</sup>

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<sup>7</sup> See FCC, Wireless Bureau Auction Homepage, available at: [http://wireless.fcc.gov/auctions/default.htm?job=auctions\\_home](http://wireless.fcc.gov/auctions/default.htm?job=auctions_home).

<sup>8</sup> See FCC, Auction Application Search, available at: <https://auctionfiling.fcc.gov/form175/search175/index.htm>.

<sup>9</sup> Other options are: “rural telephone company”; “noncommercial educational entity” and “none of the above.”

<sup>10</sup> While biennial ownership reports (FCC Form 323) gather data on minority and female owners, NAB believes that Form 175 data was the best available data for purposes of our analysis, primarily because of the possibility of change over time. FCC Form 175 has to be completed by all prospective bidders just prior to the start of an auction. In contrast, a bidder that successfully wins an auction in 2009 might build out its construction permit over a three-year period and thus not file a new station ownership report until 2012. Unlike a biennial ownership report, moreover, an ownership report filed for a new station does not gather data on a licensee’s race, ethnicity or gender. Biennial reports were not filed in 2012, so it possible that a winning bidder would not be required to file a Form 323 with demographic data until December 2013—over *four years* after participating in the auction. Intervening events during that lengthy period could meaningfully impact the accuracy of this analysis. For example, a construction permit could be the subject of an assignment, transfer of control, or lesser ownership change that results in minorities/women either acquiring or losing a controlling interest. The company name used during the bidding process could have changed, making it difficult (if not impossible) to find the relevant Form 323 data years later. Moreover, not every winning bidder advances to the stage of becoming a licensee—a bidder may face hurdles at the long form application stage, in making its final payment, or constructing the station—in which case no biennial Form 323 would ever be filed. Given these many variables, NAB concluded that the Form 175 demographic data provided by all bidders within just weeks of each auction offers the most complete and accurate demographic picture of who has successfully participated in broadcast auctions.

<sup>11</sup> See, e.g., *Auction Notice and Filing Requirements for FM Broadcast Construction Permits*, Public Notice, DA No. 01-119 (rel. Jan. 19, 2001) at Attachment D.

With the assistance of outside counsel, we downloaded FCC Form 175 data identifying female and minority bidders in all nine FM broadcast auctions. We also obtained from the FCC website lists of winning bidders in each auction and information on whether they used bidding credits. We compared that to the lists of minority and female bidders in each auction. From this data, we developed a spreadsheet listing (for each auction): the total number of permits won; the number of permits won with and without use of bidding credits; the total number of permits won by minority owners; the total number of permits won by women owners; the total number of permits won by entities controlled by women who are also minorities; and the total numbers of permits won by minorities and/or women with and without bidding credits. We then used simple formulas to calculate the percentages of winning bidders in various categories, totaled the data on each auction, and performed further calculations to evaluate the impact of new entrant bidding credits across all nine auctions. A spreadsheet reflecting our findings is attached.<sup>12</sup> If it would be useful to FCC staff, NAB is willing to share a copy of the spreadsheet in electronic form.

## Results

Our analysis of the auction data found that winning bidders relying on new entrant bidding credits were **93% more likely to be women** than winning bidders who did not use a credit, and **40% more likely to be minorities**. Collectively, winning bidders using new entrant bidding credits were **64% more likely to be minorities or women** than other winning bidders.<sup>13</sup>

Based on this information, NAB believes that the new entrant standard has been a successful means of promoting minority and female ownership in the context of broadcast auctions. While the standard certainly fosters broadcast ownership by a wide range of new entrants who are not minorities or women,<sup>14</sup> the standard has resulted in substantially greater numbers of women and minorities winning commercial FM construction permits. A mere 23 of the 1022 permits awarded at auction over the past fourteen years (2.3%) went to women owners who did not rely on the new entrant credit, and a paltry 47 permits went to minority owners (4.6%) who did not rely on the credit.<sup>15</sup> Because of the new entrant credit,

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<sup>12</sup> See Attachment A.

<sup>13</sup> Attachment A.

<sup>14</sup> A total of 547 construction permits were awarded to winning bidders who relied on new entrant bidding credits. Of these, 51 were women-owned (9%), and 76 were minority-owned (14%). Some of the winning bidders were both minorities and women. See Attachment A.

<sup>15</sup> See Attachment A. These are the numbers of construction permits won by women and minorities who did not use bidding credits.

however, 7.2% of the construction permits were won by women, and 12% of construction permits were won by minorities.<sup>16</sup>

### Conclusion

NAB urges the Commission to consider this data as it evaluates potential eligibility standards. While we do not object to use of other standards, we believe that this standard is likely to be responsive to constitutional concerns as well as questions raised about whether eligibility standards for various diversity measures ultimately promote minority and female ownership.<sup>17</sup>

NAB appreciates the FCC's ongoing efforts to develop the incubator program and welcomes the opportunity to provide more information about our analysis if desired.

Respectfully submitted,

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

Rick Kaplan  
General Counsel and Executive Vice President  
Legal and Regulatory Affairs  
National Association of Broadcasters

cc: Michelle Carey, Sarah Whitesell, Brendan Holland, Benjamin Arden

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<sup>16</sup> See Attachment A. These are the percentages of all permits won by women and minorities.

<sup>17</sup> See NAB Incubator Comments at 20, *citing Prometheus Radio Project v. FCC*, 652 F.3d 431, 470-471 (3d Cir. 2011) (*Prometheus II*).

**ATTACHMENT A**

**National Association of Broadcasters  
Impact of New Entrant Bidding Credits in FM Broadcast Auctions on Minority and Female Ownership  
FCC Incubator Proposal; MB Docket Nos. 17-289 et al.**

	Auction 98	Auction 94	Auction 93	Auction 91	Auction 79	Auction 70	Auction 68	Auction 62	Auction 37	Total	Key
<b>Total Permits</b>	102	93	93	108	85	111	9	163	258	1022	CPs won
<b>Total Permits w/ Bid Credits</b>	51	52	47	59	45	51	4	89	149	547	CPs won where entity received bidding credits
<b>Total Permits w/ no Bid Credits</b>	51	41	46	49	40	60	5	74	109	475	CPs won where entity did not receive bidding credits
<b>Total Permits - Minorities</b>	28	21	8	19	17	12	0	11	7	123	CPs won where entity reported minority ownership on Form 175 (sum of rows 10+11)
<b>Total Permits - Females</b>	8	5	2	20	3	13	1	12	10	74	CPs won where entity reported female ownership on Form 175 (sum of rows 12+13)
<b>Total Permits - Both</b>	6	3	1	12	3	10	0	5	1	41	CPs won where entity reported both minority and female ownership on Form 175
<b>Total Permits w/ BC &amp; Min or F</b>	19	18	4	27	5	4	1	11	13	102	CPs won where entity received bidding credits and was either minority or female-owned (or both)
<b>Total Permits w/ no BC &amp; Min or F</b>	11	5	5	0	12	11	0	7	3	54	CPs won where entity did not receive bidding credits and was either minority or female-owned (or both)
<b>Total Permits w/ BC &amp; Min</b>	17	18	3	19	5	1	0	8	5	76	CPs won where entity received bidding credits and was minority-owned*
<b>Total Permits w/ no BC &amp; Min</b>	11	3	5	0	12	11	0	3	2	47	CPs won where entity did not receive bidding credits and was minority-owned*
<b>Total Permits w/ BC &amp; F</b>	8	3	1	20	2	3	1	5	8	51	CPs won where entity received bidding credits and was female-owned**
<b>Total Permits w/ no BC &amp; F</b>	0	2	1	0	1	10	0	7	2	23	CPs won where entity did not receive bidding credits and was female-owned**
<b>% of BC Min or F</b>	37%	35%	9%	46%	11%	8%	25%	12%	9%	19%	Row 8 / Row 3. Percentage of CPs won by entities receiving bidding credits that were minority or female-owned (or both)
<b>% of no BC Min or F</b>	22%	12%	11%	0%	30%	18%	0%	9%	3%	11%	Row 9 / Row 4. Percentage of CPs won by entities not receiving bidding credits that were minority or female-owned (or both)
<b>% of BC Min</b>	33%	35%	6%	32%	11%	2%	0%	9%	3%	14%	Row 10 / Row 3. Percentage of CPs won by entities receiving bidding credits that were minority-owned
<b>% of no BC Min</b>	22%	7%	11%	0%	30%	18%	0%	4%	2%	10%	Row 11 / Row 4. Percentage of CPs won by entities not receiving bidding credits that were minority-owned
<b>% of BC F</b>	16%	6%	2%	34%	4%	6%	25%	6%	5%	9%	Row 12 / Row 3. Percentage of CPs won by entities receiving bidding credits that were female-owned
<b>% of no BC F</b>	0%	5%	2%	0%	3%	17%	0%	9%	2%	5%	Row 13 / Row 4. Percentage of CPs won by entities not receiving bidding credits that were female-owned
<b>Conclusion: Bidding Credits make it</b>	<b>64% more likely that an entity will have minority and/or female ownership</b>										
<b>Conclusion: Bidding Credits make it</b>	<b>40% more likely that an entity will have minority ownership</b>										
<b>Conclusion: Bidding Credits make it</b>	<b>93% more likely that an entity will have female ownership</b>										

\* NOTE: Certain entities in this row may have reported both minority and female ownership, but no entities in this total reported just female ownership.

\*\* NOTE: Certain entities in this row may have reported both minority and female ownership, but no entities in this total reported just minority ownership.