



April 25, 2018

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

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

Dear Ms. Dortch:

On Monday, April 23, 2018, representatives of the National Association of Broadcasters (NAB) met with the FCC's Media Bureau to discuss the Commission's adoption of an incubator program to facilitate new entry into the broadcast industry. A list of meeting participants is attached.

NAB representatives emphasized that, to ensure a robust incubator program, the Commission should strongly consider the experiences of long-established broadcasters, those who have recently entered the industry and prospective new entrants. Given that access to capital is one of the most critical challenges to increasing diversity of ownership, NAB observed that the program must provide sufficient incentives to attract established broadcasters. The Commission has learned the hard way that ownership limits themselves do nothing to increase diversity. We reviewed the following key elements of such a program:

Incubating Activities

Incubating Entity's Obligations

- Provide direct, substantial financial support to the incubated entity through some combination of loan guarantees, low-interest loans or equity investments.
- Dedicate executive and management personnel to provide training, strategic advice, technical assistance and other support to the incubated entity. This could include regularly scheduled training programs on the various aspects of running a radio or television station.
- During the meeting, we discussed whether there should be a minimum or maximum amount of financial investment made by the incubating entity. NAB would not oppose a minimum threshold of financial investment for the incubating broadcaster, but we continue to oppose caps on financial investment. It is our understanding from conversations with member stations that an incubated broadcaster could still face tremendous (and likely insurmountable) financial hurdles if required to provide 20% or even 10% of the financing for a television or radio station. Moreover, a new

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entrant could still be considered to have “skin in the game” at much lower thresholds depending on their financial circumstances.¹

Incubated Entity’s Obligations

- Maintain de jure control (51% or greater voting interest) of the incubated entity and de facto control of the incubated station’s day-to-day operations, including decisions regarding personnel, programming, and finances.
- Be involved in identifying and obtaining the broadcast station to be incubated (this could be an existing station that is struggling financially).
- Avail itself of the technical support, training and strategic advice provided by the incubating entity.
- Engage in good faith efforts to successfully construct and/or operate the incubated station(s), fully comply with the terms of the incubator agreement and follow Commission rules and policies governing incubation arrangements.
- Take concrete steps toward obtaining a broadcast property, which could include making financial arrangements towards acquiring full ownership of the incubated station or another broadcast property. However, the Commission should not direct or limit the incubatee’s activities following its participation in the incubator program, given that multiple outcomes could ultimately lead to full station ownership.² During the meeting, we discussed how the Commission should measure the success of the program if the incubation relationship does not immediately lead to 100% ownership of the incubated station by the incubated entity. NAB does not oppose a regime where the incubated entity continues to report on its involvement in the broadcast industry for some period of time following the end of an incubation agreement to allow the Commission to identify situations where an incubated entity makes a future ownership investment in a station.
- During the meeting, we discussed whether there should be a minimum amount of financial commitment made by the incubated entity. As discussed above, from conversations with member stations, NAB believes that adopting a financial investment threshold would likely exclude many potential new entrants from participating in incubation relationships. The investment thresholds needed to ensure that a new entrant has a strong incentive to operate the station to the best of his/her ability will vary depending upon the financial circumstances of the principals involved.

¹ For example, a new entrant led by a single principal who invests \$200,000 of personal funds in a \$3 million station may appear to have little financial investment in the station. However, if the \$200,000 represents virtually all of the principal’s personal savings, the stakes are very high, and would provide the new entrant with every incentive to operate the station to the best of his/her ability.

² An incubation relationship that does not end in the incubatee’s immediate 100% ownership of the incubated station is not necessarily a failed incubation relationship. Rather, the incubated entity may achieve success by purchasing a different station at a later date, as some current minority broadcasters have done. Reply Comments of NAB in MB Docket Nos. 17-289 et al. (Mar. 9, 2018) at 4 (NAB Reply Comments).

Incubation Agreement

- NAB representatives urged the Commission not to limit the ability of the parties to an incubation agreement to enter into other agreements, such as shared services agreements or joint sales agreements. Such agreements may be critical to the success of the incubation relationship. We also observed that, as these relationships are generally not deemed attributable interests under the Commission's rules, it would be inappropriate to subject incubation relationships to a higher standard than any another separately owned stations in a local market.
- Applicants must also certify that the incubated entity will maintain control over the day-to-day operations of the incubated station.

FCC Application/Monitoring Compliance

- NAB has proposed that parties proposing to enter into an incubation relationship file an application seeking FCC approval to do so. During the meeting, FCC staff asked whether there were additional safeguards it could adopt that would prevent potential fraud or abuse of the incubator program. We stated that, while we believe such activity is unlikely, NAB does not object to the FCC application containing questions designed to assess whether the incubating entity and incubated entity are truly independent operators, and requiring the parties to make certifications to that effect.³ This may include questions regarding familial relationships, trust relationships, business relationships outside the proposed incubation relationship, etc.

Incubator Program Incentives

- While NAB and other broadcasters have long supported adoption of an updated version of the Tax Certificate program that was once very successful in promoting broadcast ownership diversity, we understand that reinstatement of such a program is not within the scope of the FCC's authority. NAB supports the FCC's adoption of a fully-formed incubator program at this time, rather than one that is contingent on future Congressional action that may or may not occur.
- In our comments and reply comments, NAB has proposed that incubating broadcasters receive a waiver of an otherwise applicable ownership cap as an incentive to enter into incubation agreements.
 - The waiver could be applied with respect to the incubating broadcaster's attributable interest in the incubated station.
 - The waiver could be used in connection with a future transaction.

³ FCC applications generally contain the following language at the signature line: "Willful false statements on this form are punishable by fine and/or imprisonment (U.S. Code, Title 18, section 1001), and/or revocation of any station license or construction permit (U.S. Code, Title 47, Section 312(a)(1)), and/or forfeiture (U.S. Code, Title 47, Section 503)."

- The waiver could be used in connection with a proposed transaction in a different market.
- FCC staff asked whether there should be a limit on the number of incubation relationships that a particular broadcaster can enter into. NAB representatives stated that the Commission should not limit the number of incubation relationships that an established broadcaster can have (or that an incubated entity can have). Rather, if an established broadcaster wishes to incubate more than one station, or if an incubated entity wishes to operate more than one station pursuant to an incubation relationship, this should be viewed as expanding the potential for additional new entry into the broadcast industry. We could imagine some unusual circumstances in which the Commission might wish to disallow an incubation proposal, but we believe that such situations are unlikely, and that the Commission can address such circumstances on a case-by-case basis.⁴
- FCC staff asked whether participation in a proposed incubation relationship involving two television stations would automatically result in a waiver of the top-four restriction, or whether the Commission would still conduct a general public interest analysis as discussed in its 2017 Ownership Reconsideration Order.⁵ There, the Commission stated that it was not providing a “rigid set of criteria for [its] case-by-case analysis,” but gave examples of the types of information that would help it determine that “the reduction in competition is minimal and is outweighed by public interest benefits.”⁶ NAB observed that participation in an incubation relationship is precisely the kind of situation in which the potential public interest benefits are so significant that they should presumptively result in a Commission finding that the Top-Four waiver standard has been met. Because the incubated station remains a separately owned and operated entity, there is minimal impact on competition, and if the incubating relationship ultimately results in 100% station ownership by a new

⁴ An unusual circumstance may be that a broadcaster operates radio or television stations in twenty markets and wishes to enter into an incubation relationship in all of its markets with the same incubated entity. The Commission may determine that such a proposal would be inconsistent with the purpose of the incubation program. An incubated entity that has the financial wherewithal and technical/operational expertise to own and operate a large number of stations is unlikely to be a truly “new” entrant and likely does not require the support of an incubation relationship.

⁵ *2014 Quadrennial Regulatory Review*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, ¶ 82 (2017) (2017 Ownership Reconsideration Order).

⁶ *Id.* Such information could include (but is not limited to): (1) ratings share data of the stations proposed to be combined compared with other stations in the market; (2) revenue share data of the stations proposed to be combined compared with other stations in the market, including advertising (on-air and digital) and retransmission consent fees; (3) market characteristics, such as population and the number and types of broadcast television stations serving the market (including any strong competitors outside the top-four rated broadcast television stations); (4) the likely effects on programming meeting the needs and interests of the community; and (5) any other circumstances impacting the market, particularly any disparities primarily impacting small and mid-sized markets. *Id.*

entrant, the number of competitors in the local market will increase. We urge the Commission to give significant weight to participation in an incubator relationship.

Qualifying Entities

- While NAB supports the adoption of either the FCC's New Entrant Bidding Credit standard or the Revenue-Based Eligible Entity standard with some modifications, we believe the new entrant standard is more directly targeted to promoting the FCC's goal of entry by new, diverse parties into broadcasting.
- Both standards are familiar to the Commission and the broadcast industry, race- and gender-neutral, and legally sustainable.
- Either standard will promote regulatory certainty, allowing prospective parties to the incubation relationship to assess quickly and easily whether a party will qualify as an incubated entity.
- 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.⁷
- NAB also agrees with the ACDDE that Native Nations would be a race-neutral criterion that could be used for purposes of the Commission's eligibility standard.⁸

Respectfully submitted,



Rick Kaplan
General Counsel and Executive Vice President
Legal and Regulatory Affairs

cc: Michelle Carey, Chris Clark, Brendan Holland, Jamila Bess Johnson, Radhika Karmarkar, Sarah Whitesell

⁷ Letter from Rick Kaplan, NAB, to Marlene H. Dortch, Esq., MB Docket Nos. 17-289, et al. (Mar. 26, 2018). See *also* 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) at 9-10 (similarly finding that women and minorities are more likely to be found among those who applied to participate in auctions using bidding credits).

⁸ NAB Reply Comments at 10, *citing* ACDDE Comments at 28-29.

Meeting Participants

Media Bureau

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Chris Clark
Brendan Holland
Jamila Bess Johnson
Radhika Karmarkar
Sarah Whitesell

NAB

Erin Dozier
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