

July 26, 2018

Marlene Dortch, Esq.  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street S.W.  
Washington DC 20554

Re: 2014 Quadrennial Regulatory Review *et al.*, including Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services, MB Dockets 14-50, 09-182, 07-294, 04-256 and 17-289

Dear Ms. Dortch:

On Thursday, June 26, meetings was held with the following Commission personnel: Meeting 1: Matthew Berry, Chief of Staff, and Alison Nemeth, Legal Advisor to the Chairman; and Meeting 2: Commissioner Jessica Rosenworcel and Kate Black, Policy Advisor to Commissioner Rosenworcel. Participating in the meeting in their capacities as individual members of the Commission's Advisory Committee on Diversity and Digital Empowerment ("ACDDE") were James Winston and myself (the "FAC Members"). The FAC Members, on their own behalf and on behalf of FAC Broadcast Development Working Group Chair Henry Rivera, FAC Vice Chair Diane Sutter, and FAC Member DuJuan McCoy, addressed the following issues regarding the July 12, 2018 Public White Copy draft of the Broadcast Incubators item ("White Copy").

**1. Eligible Services.** We believe it is vital that an incubator program be available for use in the television industry as soon as practicable. Further, the success of a radio incubation program should not be used as a barometer for whether, or when, television incubation would be implemented. Television and radio operations and dynamics are uniquely different. **We therefore sought the addition of language strongly affirming the Commission's desire for the inclusion of television in the incubator program, and the criteria that would need to be satisfied in order for the program to be extended to television.**

**2. Eligible Entities.** We are at peace with the New Entrant definition and three-years-prior-to-incubation holding requirement anti-fraud measure. *See* White Copy, ¶¶19, 24 (the "Modified New Entrant Definition"). We had two requests, however:

- The Overcoming Disadvantages Preference ("ODP") concept was recommended, unanimously, by the Advisory Committee on Diversity for Communications in the Digital Age (2010) and again by the ACDDE (2018), also unanimously. Although the Commission did not choose this concept for use in its eligible entity definition, **we asked that the Commission state that it would be willing to revisit the ODP concept in the event the Modified New Entrant Definition proves ineffectual or unworkable in practice.**
- Regarding "mission-based entities" (such as HBCUs), and Native American Nations, the White Copy states that "[w]e encourage them to apply and establish clearly in their certified supplemental statements how their participation in the incubator program is consistent with the goals of the program." White Copy, ¶29. We were concerned that this language could discourage applications by these entities, since few entities are likely to apply for inclusion in a program that does not clearly provide in advance for their eligibility and, instead, places on the applicant the entire burden of establishing a new eligibility criterion – a program modification the agency has almost unbridled discretion to reject. **We therefore recommended additional language to the effect that the Commission would (1) perform broad outreach to these entities to encourage them to participate in the program; and (2) state that it appears that many and perhaps most such entities would qualify under the Modified New Entrant Definition.**

**3. Benefits to Incubating Entities.** The White Copy recognizes that “a strong incentive is needed to entice prospective incubating entities.” White Copy, ¶58. The ACDDE preferred a deferral of capital gains taxes (erroneously referred to as a “tax credit”), rather than a program built around waivers of the structural ownership rules. White Copy, ¶59. The White Copy states that efforts by Congress to provide tax relief to support media ownership diversity “have been unavailing” and therefore “rather than indefinitely delaying implementation of an incubator program” decided it is better to proceed with a structural waiver-based program, adding that “[o]f course, following our action today, Congress would be able to adopt legislation either authorizing or mandating the use of tax credits in our incubator program, either in addition to, in lieu of reward waivers, should it so choose.” White Copy, ¶62. The Commission has repeatedly encouraged Congress to restore a version of the 1978 Tax Certificate Policy. *See, e.g., Section 257 Triennial Report to Congress, Identifying and Eliminating, Market Entry Barriers, For Entrepreneurs and Other, Small Businesses*, 26 FCC Rcd 2909, 2965 ¶155 (2011). **Thus we asked that the Commission specifically recommend to Congress that it adopt tax relief for incubation as an alternative incentive to structural ownership waivers such that the incubating entity could choose either tax relief or a waiver.**

**4. Comparable Markets.** To create a greater incentive for incubation than would have obtained had the waivers apply only in the incubated station’s market, the Commission proposed waiver transferability into “comparable” markets. The White Copy sets out a Comparable Markets Algorithm in which the number of independent owners “is no fewer than the number of such owners that were in the incubation market at the time the parties submitted their incubation proposal to the Commission.” White Copy, ¶66. Laudably, this formulation will prevent large-market incubation from being used to produce a dominant and anti-competitive position in a small market. What the formulation fails to prevent is the reverse scenario: the use of incubation in a modest sized, and often not very diverse, 45-voices market like Wilkes-Barre/Scranton (Metro Rank 77), to facilitate the securing of a waiver for a 6th FM station in New York City. This anomaly in the Algorithm would have the unintended effect of deeply diminishing the likelihood that incubation would be used in the top 50 markets. Therefore, **we asked that the Commission revise its Comparable Markets Algorithm by specifically disallowing comparability more than five Nielsen Audio Market Rank sizes removed in either direction from the incubated station’s market.** Shortly following Meeting #1, and also in Meeting #2, after we reviewed market size data from BIA Advisory Services’ Investing in Radio Market Report (2018), Mr. Winston and I advised Ms. Nemeth that we do not object to limiting the proposed five market size comparability limits to incubation in those markets which have 45 or more voices, but we do believe that the limit should be five market ranks rather than more than five ranks, as a protection against gamesmanship. Mr. Winston and I also offered this clarification in Meeting #2.

Finally, in Meeting #2, speaking as representatives of, respectively, the National Association of Black Owned Broadcasters (Mr. Winston, its President) and the Multicultural Media, Telecom and Internet Council (myself, its President Emeritus), we addressed the issue of AM and FM subcaps, which are the number of AM or FM stations a company may own in a market as a portion of the total cap of radio stations it may own. In the upcoming 2018 Quadrennial, the Commission reportedly is considering elimination of the subcaps, so that a company could own eight FM stations in a market (or eight AM stations). Were that to happen, the largest FM owners in the market would promptly find a way to expand up to the eight FM station limit. We predicted that if the largest companies stop investing in AM radio, AM equipment manufacturers will stop designing improved AM equipment and the top engineering firms will stop doing AM work. This would lead to a rapid deterioration in the AM service and undermine the Commission’s AM revitalization efforts. AM stations (which are disproportionately minority owned) would suffer deeply, with diminished or zero asset value. Elimination of the FM subcap would be the death knell for AM broadcasting. We would not, however, oppose the relaxation of the AM subcap.

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This letter is being filed electronically pursuant to Section 1.1206 of the Commission's Rules.

Sincerely,

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cc: Hon. Jessica Rosenworcel, Kate Black, Matthew Berry, and Alison Nemeth