

July 26, 2018

Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington DC 20554

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

Dear Ms. Dortch:

This ex parte filing, submitted by the United Church of Christ, OC Inc., Free Press, the Communications Workers of America and Common Cause is in response to the Commission's release of its *Draft Order* in the above captioned docket laying out its planned radio incubator program. The *Draft Order* is completely inadequate to the task laid out for the Commission by the U.S. Court of Appeals for the Third Circuit.

The *Draft Order*: 1) fails to respond to the mandate from the Third Circuit that the Commission analyze the impact of its ownership rules changes on ownership by women and people of color and will do nothing to remediate the harms to ownership diversity caused by last year's *Reconsideration Order* because the incubator attempts to address ownership diversity in radio while last year's relaxation of ownership rules primarily affected television ownership; and 2) relies on inadequate and irrelevant data that does not in fact show the incubator program will improve ownership diversity, directly contravening the Commission's representations to the Third Circuit and the Third Circuit's mandate.

As an initial matter, our organizations are emphatic that we would fully endorse a Commission proposal that would in fact improve ownership rates by women and people of color. The current incubator proposal will do nothing to improve ownership diversity. Such a proposal would require accurate ownership data and a detailed research program. The Commission has ignored our insistence that it adopt measures which have been scientifically validated for their effectiveness through data and study.

The Draft Incubator Order Does Not Respond to the Third Circuit's Mandate

As our organizations have outlined innumerable times, the Third Circuit's series of decisions on the quadrennial review requires the Commission to "consider the effect of its rules on minority and female ownership."¹ While the Commission claimed to the Third Circuit that the pending incubator proposal might "moot" the claims of citizen petitioners,² the incubator proposal, while revising the definition of eligible entities for the purposes of the incubator program, will have virtually no impact on the consequences of the relaxation of media ownership rules in the *Reconsideration Order* in November. The *Reconsideration Order* eliminated the Newspaper Broadcast Cross Ownership Rule; eliminated the local TV ownership eight voices test and implemented a case-by-case review of whether combinations of two top-4 television stations in a

¹ *Prometheus Radio Project v. FCC*, 652 F.3d 431 at 471 (3d Cir. 2011) (*Prometheus II*).

² Supplement to FCC Motion to Hold in Abeyance, *Prometheus v. FCC*, Docket No. 17-1107, 3d. Cir at 3 (filed June 26, 2017).

market should be permitted; eliminated the radio/television cross ownership rule; and ended attribution of JSAs. These decisions predominantly impact the ownership of television stations and yet the incubator proposal is putatively directed solely towards improving ownership diversity in radio.³ And in its own right, the incubator program does nothing to analyze the impact on ownership diversity of the increased consolidation that will result from the successful implementation of the incubator program as proposed.

The Draft Incubator Order's Definition of Eligible Entity Violates the Third Circuit's Mandate

The Commission has not formally abandoned its goal of improving ownership diversity—specifically ownership by women and people of color—in the broadcast industry,⁴ but it continues to arbitrarily and capriciously adopt policies with no likelihood of making progress toward that goal. The Commission's previous decisions to adopt policies that it has no reason to believe will further its own goals have caused it to repeatedly fall afoul of judicial review. The new decision repeats the mistakes of the past.

The Third Circuit invalidated the Commission's previous definition of "eligible entity" because it "lack[ed] a sufficient analytical connection to the primary issue that [the] Order intended to address," *i.e.*, broadcast ownership by women and people of color.⁵ The new definition of eligible entity fares no better. The new definition of eligible entity adopted by the Commission for the incubator program includes two prongs: (1) an eligible entity must be a small business as defined by the Small Business Administration, and (2) it must qualify for the Commission's auction new entrant bidding credit because it holds attributable interests in no more than three full-service AM or FM radio stations and no TV stations.⁶

The Small Business Revenue Prong is Meaningless

The Commission's own staff analysis concludes that the revenue-based definition of a small radio station adopted by the SBA encompasses 99.9 percent of all radio stations.⁷ Therefore, the revenue component of the eligible entity definition for the incubator program is meaningless.⁸

The New Entrant Bidding Credit Data Does Not Support a Conclusion that Ownership Diversity will Increase and is Inaccurate and Unreliable

The Commission's analysis of the connection between the new entrant bidding credit and improving ownership diversity is not analytically sound. Two pieces of data analysis were submitted into the record attempting to support the suitability of the new entrant criterion for eligible entities, but neither does.⁹

First, the NAB submitted a study whose conclusions did not support the notion that the new entrant bidding credit would be likely to improve ownership by women and people of color. That data show, as explained in an earlier filing in this docket by Free Press, that 81 percent of new

³ Draft Incubator Order at ¶ 13.

⁴ Draft Incubator Order at ¶¶ 5, 14, 24, 71, 73.

⁵ *Prometheus II*, 652 F.3d at 471.

⁶ Draft Incubator Order at ¶ 18.

⁷ Draft Incubator Order, Final Regulatory Flexibility Analysis at ¶13.

⁸ See Advisory Committee Comments at Comments at 11, n.28 (the revenue-based small business definition "has little or no value in advancing ownership diversity in the broadcast context.")

⁹ We address below the data that was not submitted into the record but appears for the first time in the *Draft Order*.

entrant bidding credit beneficiaries are neither women nor people of color—they are white men.¹⁰ A supposed diversity policy that benefits companies controlled by white men four times for every one time it benefits an entity controlled by a woman or person of color will not come close to remediating the still dismal ownership rates by women and people of color. The Commission has not even articulated a measurable goal for ownership diversity, and certainly has not articulated how this program could help it achieve such a goal in any reasonable time horizon.

Second, the Commission relies on a brief point submitted by the Advisory Committee. In a footnote, the Advisory Committee states it analyzed 20 broadcast auctions between 1995 and 2015. There were 2,534 applicants in these auctions, of which 1,681 were found to be qualified for the new entrant bidding credit. The Advisory Committee said (but did not submit any detailed analysis of its conclusions), that “[q]ualified minority-owned new entrants (12.4%) were slightly more prevalent than qualified minority-owned applicants who were not new entrants (8.7%); and qualified women-owned new entrants (10.8%) were slightly more prevalent than qualified women-owned bidders who were not new entrants (7.9%).”¹¹ Thus, from this data we learn that it is slightly more likely that a woman or person of color participating in an auction also controls three or fewer other broadcast licenses—but this does not offer any insight into improvements in the applicant pool or the success of those applicants in the auction. Similar to the NAB data, the Advisory Committee data appear to show (although it is unclear given that the full data analysis was not submitted into the record), that 87.6 percent of new entrants were white, and 89.2 percent of new entrants were men. And, also like the NAB data, this data demonstrate nothing about the likelihood of auction success, the likelihood of changing overall ownership rates, or the likelihood of business success by auction winners given other factors (such as, for example, increased consolidation).

The final piece of data upon which the Commission relies—its own Form 175 data analysis—appears for the first time in the *Draft Order* and was not part of the record. No study or data with regard to these conclusions were submitted into the record or is appended to the *Draft Order*. Thus, at a minimum, reliance on this data is impermissible because it did not give parties a reasonable opportunity to review or comment on material relied upon by the Commission to make a decision.¹² Parties do not have the time at this point in the proceeding to make a meaningful review of the Commission’s data analysis or conclusions, even if they had access to the underlying methodology, which they do not.¹³

Even if the Commission had submitted its analysis appropriately into the record, the data are unreliable. The Commission based its analysis of Form 175 data, which does not require applicants to provide information about their race, ethnicity, or gender. As the Commission

¹⁰ Letter from Jessica J. González, Free Press to Marlene Dortch, FCC, MB Docket Nos. 17-289, 14-50, 09-182, 07-294, and 04-256, at 1 (filed July 3, 2018) (“Free Press ex parte letter”).

¹¹ Advisory Committee comments at note 27.

¹² See, e.g., *Solite Corp. v. E.P.A.*, 952 F.2d 473, 484 (D.C. Cir. 1991) (“Integral to the notice requirement is the agency’s duty to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.... An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.”) (quotations omitted).

¹³ The Commission’s use of this data would appear to violate the standards of the Data Quality Act. See *Implementation of Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Pursuant to Section 515 of Public Law No. 105-554*, 17 FCC Rcd. 19890 (2002); 44 U.S.C. § 3516.

admits, “the ability to make definitive statements about the participation of minorities and women in Commission broadcast auctions is limited” based on Form 175 data.¹⁴

And even if the data were reliable, the analysis is not persuasive. The Commission’s conclusions suffer from the same flaws as the other analysis of Form 175 data. The Commission finds that:

the percentage of winning bidders that used a new entrant bidding credit and identified as women-owned was three times larger (12 percent) than the percentage of bidders that won without a new entrant bidding credit and were women-owned (4 percent). Similarly, the percentage of winning bidders that used a new entrant bidding credit and identified as minority-owned was almost three times larger (14 percent) than the percentage of bidders that won without the new entrant bidding credit and were minority-owned (5 percent).¹⁵

Just as with the NAB and Advisory Committee analysis, the data apparently show that 88 percent of the new entrant bidding credit winners were men and 86 percent of the winning new entrant bidders were white. Neither of these figures is robust enough to increase the participation and ownership of underrepresented participants in broadcasting.

Free Press examined the results of the auctions identified by NAB because that study was submitted into the record. This analysis determined that the use of the new entrant bidding credit was no different than no credit at increasing the proportion of female and people of color licensees at the auction level, and the effect size of the new entrant bidding credit was small at the individual winning bidder level. In that analysis, Free Press was able to consider, for example, whether the data used in that study was generalizable to all auctions, whether it was valid at the auction level, and whether the data was statistically significant.¹⁶ The NAB data failed these tests.¹⁷ The underlying data and analyses submitted by the Advisory Committee and generated by the Commission were not similarly submitted in the docket, and thus no party has had an opportunity to conduct this kind of test on that data. There is no analysis in the Commission’s order which explains whether it is generalizable or addresses the methodological questions raised by Free Press with regard to the NAB data.

The New Entrant Bidding Credit Data is Inapplicable to the Incubator Program

Nothing in the *Draft Order* signals why the analysis of bidding credit outcomes is applicable to the incubator program. A new entrant bidding credit gives an auction participant a 25 percent or 35 percent bonus on any bid it makes in an auction, depending on whether the new entrant holds no other “media of mass communications” or if it owns no more than three “mass media facilities.”¹⁸ It is no surprise that bidders receiving an extra 25 percent or 35 percent bonus increase in their bids are more likely to be successful at auction. To conclude that such a bonus is directly applicable to a successful completion of an incubator program is an unsupported analytical leap. The auction is a simple monetary contest—whoever has the most money wins. To evaluate success is to evaluate whether a financial bump from the FCC increases the likelihood of a participant to win at auction—a direct and obvious impact. The incubator

¹⁴ Draft Incubator Order at note 48 (quoting 2014 FNPRM, 29 FCC Rcd at 4507-08, n.917).

¹⁵ Draft Incubator Order at ¶ 22.

¹⁶ Free Press ex parte letter at 2-3.

¹⁷ *Id.*

¹⁸ 47 C.F.R. §§ 73.5007, 73.5008.

program involves a complex contract and agreement between two companies for assistance over three years potentially involving training, financing and other assistance. Success will be evaluated on whether the incubation results in a viable radio station at its completion. The simple percentages provided by the FCC from the auction results offer no analytical basis to evaluate the potential success of the proposed eligible entity definition used in the incubator program or its impact on ownership diversity, *i.e.* increased ownership by women and people of color.

The Incubator Proposal Does Not Protect Against Abuse

While the Commission describes some of the data that must be submitted to it as part of an application for incubation, the Commission does not adequately protect against abuse of the program. While the Commission says that a company must qualify as a small business in order to qualify as an eligible entity, the Commission's proposed rules are limited at best. They do not, for example, prevent wealthy individuals or friends of large broadcast owners from serving as incubated intermediaries to escape the Commission's ownership rules as long as they own three or fewer radio stations.

In sum, the *Draft Order's* conclusions with respect to eligible entities are not well-supported, do not analyze the potential impact of consolidation on ownership by women and people of color, and do not justify, address or remediate in any way the Commission's decision in this docket to dramatically relax other media ownership rules.

Sincerely,

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