



September 4, 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, 04-256

Dear Ms. Dortch:

The National Association of Broadcasters (NAB) is writing to oppose efforts by a small subgroup of members of the Advisory Committee on Diversity and Digital Empowerment (ACDDE) and/or the ACDDE's Broadcast Development Working Group (the "Subgroup")¹ to modify the incubator program order adopted at the Commission's August meeting.² We urge the Commission not to modify the Order to further restrict the markets in which an incubating entity can exercise its use of a reward waiver upon successful completion of an incubation relationship. As NAB previously observed, limiting the exercise of a reward waiver to markets within five market sizes of the incubation market is unduly restrictive and would inhibit participation by potential incubating broadcasters.³ This would, in turn, reduce opportunities for prospective incubated broadcasters.

While the Order did not adopt all of NAB's proposals, we believe it generally struck a reasonable balance between the need for flexibility to attract incubating and incubated

¹ Letter from David Honig to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289 et al. (Aug. 20, 2018) (Subgroup August Ex Parte). The letter states that it is being filed on behalf of ACDDE members David Honig, Henry Rivera, Diane Sutter and James Winston—four members of the 31-member ACDDE. *Id.* at 1. The letter also identifies Mr. DuJuan McCoy as an ACDDE Member, but Mr. McCoy is a member of the Broadcast Development Working Group (not the ACDDE). *FCC Announces Working Group Members of the Advisory Committee on Diversity and Digital Empowerment*, Public Notice, GN Docket No. 17-208, DA 18-290 (rel. Mar. 23, 2018).

² *Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, Order, MB Docket No. 17-289, FCC No. 18-114 (rel. Aug. 3, 2018) ("Order").

³ Letter from Patrick McFadden, Associate General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289 et al. (Jul. 26, 2018) at 5.

broadcasters and the structure needed to foster public trust in the program. One of the challenges the Commission faced was defining where an incubating entity could use its reward waiver upon successful completion of an incubation relationship. The Commission specifically sought comment on this issue.⁴ Ultimately, the FCC determined that a reward waiver could be used in the same market or a comparable market, and defined comparable as: (i) a market within the same market size tier as the incubation market under its Local Radio Ownership Rule; and (ii) a market where the number of independent owners of full-service, commercial and noncommercial radio stations 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.⁵

NAB opposes the Subgroup's proposed definition of a comparable market because it is too restrictive. The incubator program already sets a very high bar for incubating broadcasters to receive waivers. They must identify a qualified incubated entity, enter into an incubation agreement, obtain Commission approval for the incubation arrangement and invest financial and other resources in the incubated entity for a significant period of time. Even after this substantial effort, the incubated entity only receives the benefit of a reward waiver when the incubated entity succeeds in independently owning a station. Adding yet more hurdles for an incubating entity to overcome could deter participation and reduce opportunities for prospective incubated entities. The Subgroup apparently believes that further limiting broadcasters' flexibility in using incentives is harmless because broadcasters have never "objected to the incubator concept on the grounds of insufficiency of incentives."⁶ This misses the point. Broadcasters and others who have supported an incubator program, including NAB and the ACDDE, have made incentivizing participation in the program a centerpiece of their incubator program analyses and advocacy.⁷ Unduly restricting use of

⁴ 2014 Quadrennial Regulatory Review, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, 9863 ¶137 (2017) (Notice). In seeking comment on whether the potential benefit to an incubating entity should be a waiver and how such a waiver should be structured, the Commission asked "... should the waiver be limited to the market in which the incubating activity is occurring? Alternatively, should waiver be permissible in any sized market? How would the Commission determine which markets are similar in size?" *Id.*

⁵ Order at ¶ 67.

⁶ Subgroup August Ex Parte at 1.

⁷ See, e.g., 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 2-3 (listing "creat[ing] a sufficient incentive for industry leaders to create incubators" as the second of five goals); *id.* at 4 (program must "deliver value" by "provid[ing] industry leaders with a way to grow their businesses while sharing, with others, opportunities the industry leaders enjoyed earlier in their careers"); Letter from DuJuan McCoy, President and CEO, Bayou City Broadcasting, LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289 et al. (May 22, 2018) at 3 ("I feel strongly that there need to be incentives for 'incubating' broadcasters to justify an investment of time and resources into an incubated entity."); NAB Reply Comments in MB Docket Nos. 17-

reward waivers may not generate political opposition to the entire program, but it certainly disincentivizes actual participation and, thus, will very likely undermine its effectiveness.

The Subgroup's proposal also is premised on the unproven, somewhat cynical assumption that incubated entities will only engage in incubation relationships in certain smaller, less populated markets that fall within the top tier so they can obtain reward waivers for use in very large markets in that tier.⁸ NAB does not believe this will necessarily be the case. In fact, while in our initial comments NAB supported a definition that would allow the reward waiver to be used only in markets similar in size to or larger than the incubation market,⁹ additional research convinced us that broadcasters might wish to incubate in larger markets and exercise a reward waiver in smaller markets. Accordingly, in our reply comments, NAB urged the Commission to permit use of reward waivers in such smaller markets.¹⁰ We therefore disagree with the Subgroup's purely speculative assumption.

The Subgroup also assumes, without explanation, that no minority or female owners want to enter the broadcast marketplace in less populated markets within the largest tier, such as Traverse City-Petoskey-Cadillac (Rank #159) or Greenville-New Bern, NC (Rank #91).¹¹ But just a cursory review of the record in this proceeding shows that even smaller market stations have been acquired by minorities and women, including stations in Joplin, MO

289 et al. (April 9, 2018) (NAB Reply Comments) at 4-9 (discussing specific ways to set up the waiver incentive and observing that “[a] successful incubator program must be based on marketplace realities and provide meaningful incentives for both prospective and established broadcasters to participate”); NAB Comments in MB Docket Nos. 17-289 et al. (Mar. 9, 2018) (NAB Comments) at 4, 11-15 (discussing ways to structure the waiver incentive and observing that “[a]n incubator program simply will not succeed unless it provides sufficient market-based incentives to ensure significant participation by radio and TV broadcasters.”).

⁸ Subgroup August Ex Parte at 1-2.

⁹ NAB Comments at 14.

¹⁰ NAB Reply Comments at 5 (“Upon further reflection and discussion with member stations, we recognize that, depending on the ownership structure of the particular radio or television markets at issue, there may be circumstances where it would be more appropriate to allow waivers to be used in markets smaller than the incubation market.”).

¹¹ Subgroup August Ex Parte at 2 (“the markets where most people of color reside would seldom, if ever, germinate incubators”). NAB has not confirmed the number of stations in the Subgroup's cited markets or analyzed the entire universe of markets that have 45+ radio stations, but even the examples cited fail to prove the Subgroup's point that minorities do not reside in these markets. U.S. Census Bureau “QuickFacts” data show that New Bern, North Carolina, for example, is 31.8% African-American, while Greenville, NC is 38.7% African-American.

(Rank #232);¹² Nebraska City, NE (unrated);¹³ Yankton, SD (unrated);¹⁴ Astoria, OR (unrated);¹⁵ and Anchorage, AK (Rank #174).¹⁶

Beyond being based on unwarranted assumptions, the Subgroup's arguments are unmeritorious for additional reasons. Complaining that an incubator program intended to enhance diversity would incentivize incubation in "relatively small (and *often non-diverse*) markets"¹⁷ seems, at the least, ironic. NAB also does not believe that allowing an incubating broadcaster to obtain an additional radio station in a large market through a reward waiver would harm competition or diversity in those media-rich markets. And even assuming that some broadcasters at first attempted to find prospective incubation partners in markets such as Traverse City or Greenville-New Bern, that does not mean multiple broadcasters – and certainly not every broadcaster who might want a reward waiver – would succeed in finding suitable entities to incubate in the "handful" of markets identified by the Subgroup as likely to germinate incubators.¹⁸ Based on sheer numbers, it is unlikely that the scenario envisioned by the Subgroup would come to pass.

Finally, NAB is confused by the Subgroup's claim that the issue of market definition for reward waivers "first arose" at the White Copy stage of this proceeding.¹⁹ While it appears that the Subgroup chose not to address this issue during the comment or reply comment phases of this proceeding,²⁰ the Commission explicitly sought comment on the issue, and parties in this proceeding, including NAB, addressed it. Indeed, this precise issue was raised at least as early as 2013 in a joint MMTC-NAB ex parte letter supporting adoption of an

¹² Letter from James Z. Hardman, Chief Executive Officer and President, Hardman Broadcasting, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289 (May 22, 2018).

¹³ Letter from Carolyn Becker, President, Riverfront Broadcasting, LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289 (May 15, 2018).

¹⁴ *Id.*

¹⁵ Letter from Trila Bumstead, Chief Executive Officer and President, O'hana Media Group, LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289 (May 14, 2018).

¹⁶ *Id.*

¹⁷ Subgroup August Ex Parte at 1 (emphasis added).

¹⁸ *Id.* at 2 (identifying a total of six smaller markets that broadcasters wanting a reward waiver would allegedly focus on).

¹⁹ Subgroup August Ex Parte at 1.

²⁰ The Subgroup first focused on this issue in ex parte meetings in late July. See Letter from David Honig to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289 et al. (Jul. 26, 2018); Letter from David Honig to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289 et al. (Jul. 21, 2018).

incubator program.²¹ The letter, signed by Subgroup member David Honig on behalf of MMTC, proposed that an incubating entity's waiver could be used in the same market as the incubation relationship, *or any larger market*.²² Significantly, the market definition advocated in the MMTC-NAB Joint Ex Parte is far less restrictive than that adopted in the Order. In any event, no rational reading of the record could support a view that there has not been sufficient notice of the reward waiver market definition issue.

NAB congratulates the Commission and its staff on developing a comprehensive incubator program and looks forward to seeing incubation relationships unfold. We urge the Commission not to needlessly limit the potential of this program in the manner proposed by the Subgroup.

Respectfully submitted,

A handwritten signature in dark 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: Matthew Berry, Alison Nemeth, Brooke Ericson, Evan Swarztrauber, Kate Black, Paula Silberthau, Chin Yoo, Carla Conover, Sarah Whitesell, Albert Schuldiner, Brendan Holland, Radhika Karmarkar, Jamila Bess Johnson

²¹ See Letter from David Honig, President, Multicultural Media, Telecom and Internet Council (MMTC), and Jane E. Mago, Executive Vice President and General Counsel, Legal and Regulatory Affairs, NAB, to Marlene H. Dortch, FCC, Secretary, MB Docket No. 09-182 (Jan. 30, 2013) (MMTC-NAB Joint Ex Parte) at Attachment, p. 1 (“A broadcaster that incubates a qualifying entity would be given a waiver of the structural ownership rules with regard to one media outlet. For example, *a radio owner that incubates a qualifying entity in a large market could own nine stations in that market (or any larger market)* instead of the eight stations currently permitted under the rule.”).

²² *Id.*