

November 9, 2017

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

Dear Ms. Dortch:

UCC OC Inc. files this *ex parte* letter in response to the release of the Commission's Draft Order in the above-captioned proceedings and to memorialize meetings with the following Commission staff on November 8, 2017: Allison Nemeth, Chairman Pai's office; Nirali Patel, Commissioner Carr's office; David Grossman, Commissioner Clyburn's office; and Kate Black, Commissioner Rosenworcel's office as well as a telephone call with Brooke Ericson of Commissioner O'Reilly's office on November 9, 2017.

UCC OC Inc. asserts its strong opposition to the Draft Order. It is abusing the process associated with Petitions for Reconsideration and ignoring its rules which require new evidence for grant of such petitions. Most important, after three remands from the U.S. Court of Appeals for the Third Circuit, the FCC once again refuses to collect or analyze any current or robust data related to ownership by women and people of color, and instead merely assumes increased consolidation will have no impact on ownership diversity. And it patently ignores the record in this docket, as is evidenced by its complete reversal of virtually every decision of this Commission just over one year ago accompanied by no new evidence.

Abuse of Petition for Reconsideration Process

The Commission's rules state that a petition for reconsideration "will be granted only" when:

- (1) The facts or arguments relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission;
- (2) The facts or arguments relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity; or
- (3) The Commission determines that consideration of the facts or arguments relied on is required in the public interest.

47 CFR § 1.429(b). See also UCC OC Inc. et al. Opposition to Petitions for Reconsideration at 4. Commission rules express its further discouragement of petitions of this type by explaining that petitions "plainly do not warrant consideration by the Commission may be dismissed or denied by the relevant

bureau(s) or office(s) if they “[r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding...” 47 CFR § 1.429(l). The petitions for reconsideration being granted in this docket fit the definitions of petitions that will not be granted and which “plainly do not warrant consideration by the Commission.”

The Commission’s wholesale reversal with no new evidence to support its reasoning is an abuse of the Commission’s rules and will only encourage waste of Commission resources as every disappointed commenter seeks to reassert the same facts and arguments previously raised in repeated petitions for reconsideration. The Commission’s actions in this docket, while expedient for the Commission’s temporary political purpose, do damage to the long-term ability of the Commission to render decisions and for those decisions to reach finality. This lack of finality will only serve to make it more difficult for the industries regulated by this agency to function in with on-going lack of certainty and predictability.

Failure to Analyze Impact on Ownership Diversity

For the Newspaper/Broadcast Cross Ownership Rule, the Radio/Television Cross Ownership Rule, and the Local Television Ownership Rule, the Commission completes a cursory, simplistic and anecdotal discussion in an inadequate attempt to pretend that it has considered the impact on media ownership diversity required by three remands from the Third Circuit.

To start, the Commission once again mischaracterizes UCC’s position with regard to the *Prometheus* mandates and creates a straw man position to knock down.¹ The *Prometheus* cases hold that the Commission must collect and analyze rigorous data with regard to the potential impact of ownership by women and people of color before relaxing ownership rules. This position is consistent with a number of civil rights organizations in this docket.² The Commission has not collected or analyzed any data and thus has still not met the mandate.³

The current Draft Order also repeats an error from the previous 2016 decision with regard to media ownership diversity. It claims that the NBCO, local television and radio/television cross-ownership rules are not expected to improve ownership diversity at all,⁴ walking back from decades of FCC policy and extensive record support for the connection with multiple owners and the increased likelihood that some of the increased number of owners would be women and people of color.⁵

The Commission’s points to only two data points to support its analysis that the NBCO’s repeal will not impact diversity. Notably neither uses the FCC’s ownership data. The Commission cites to numbers regarding the ownership of full power television stations and radio stations in in the Second Report and Order.⁶ In that analysis the commission relies on a simple, non-exhaustive NTIA count prior to the Commission’s relaxation of the local TV ownership rule which shows that the number of stations

¹ Draft Order para. 47.

² Letter from The Leadership Conference on Civil and Human Rights et al. to FCC Chairman Ajit Pai, Docket Nos.17-105, 14-50, 07-294 (filed Aug. 17, 2017).

³ UCC OC Inc. et al., 2014 Quadrennial Comments, Dockets 14-50, 09-182, 07-294 at 13-14 (filed Aug. 6, 2014).

⁴ Draft Order at paras. 48, 64-65, 83 (citing Second Report and Order at para. 77, 126, 197).

⁵ See Common Cause/UCC OC Inc. Reply Comments at 8 (citing meta study of 42 studies showing a nexus between minority ownership and content tailored toward minority communities).

⁶ Draft Order at 64-65, 83 (citing Second Report and Order at paras. 77, 126.).

controlled by women or people of color *declined*.⁷ After the initial decline, over the intervening decades, some progress has been made, but no one, including the Commission, believes the current levels of ownership diversity in television is appropriate given the diverse make-up of the country.⁸ Similarly, the Commission cites a simple count of radio station ownership by NTIA before Congress relaxed radio ownership rules in the 1996 Act, and notes that the number had declined after the policy change, but stakes its analysis on a subsequent increase in the NTIA ownership count even though NTIA attributed over half those increases to “improved methodology” for identifying diversely owned stations. Even worse, the Commission goes on to a conclusory reliance on more recent numbers in the FCC’s ownership database which does not take into account any differences in the FCC’s more complete census, changes in national demographics or any other exogenous change which could have caused increased numbers. The analysis from the Second Report and Order does not stand on its own and certainly does not support the Commission’s decision to eliminate the NCBO. This is particularly true because the Second Report and Order held the existing media ownership rules in place, so in that decision the FCC was retaining rules that would be expected to maintain competition and diversity. The FCC repeats the same simplistic and non-contextual analysis with regard to local television ownership and radio/TV cross-ownership.

Newspaper Broadcast Cross Ownership Rule

The Commission’s Draft Order concludes that the loss of an independent radio or television station “will be mitigated by the multiplicity of alternative sources of local news and information available in the marketplace and the overall decline of newspapers.”⁹ The Commission’s analysis does not bear up under scrutiny. While the current Draft Order points to additional radio and television stations that exist today as compared with 1975, it ignores the Second Report and Order’s conclusion that “the record does not reflect a significant increase in facilities since our most recent ownership reviews in which the Commission determined that continuing regulation of newspaper/broadcast combinations was necessary to promote and protect viewpoint diversity.”¹⁰ Nor does the current Draft Order give any consideration to the number of LPTV and full power television stations which are about to go off the air as a result of the incentive auction. The idea that the Commission will consider the impact in a subsequent proceeding once the consolidation already authorized in this proceeding is finalized shows a deliberate attempt to ignore knowable facts in order to favor the industry at the expense of the public.

FCC Draft Order ignores that many media owners, contrary to their request years ago, have abandoned plans to combine broadcast and newspaper outlets,¹¹ therefore the Commission’s conclusion that these

⁷ Second Report and Order at para. 77.

⁸ *E.g.*, Promoting Diversification of Ownership, Report and Order and 4th FNPRM, 24 FCC Rcd 5896, 5997 (2009) (dismal levels of diverse ownership); Promoting Diversification of Ownership, Report and Order, 2d Report and Order, and Order on Recons., 31 FCC Rcd 398, 399 (2016).

⁹ Draft Order at para. 15.

¹⁰ Second Report and Order at para. 149

¹¹ See, e.g., “Media General Spins off Newspapers,” RBRTVBR (May 17, 2012); Robert Channick, “Tribune completes spin-off of newspapers” Baltimore Sun (Aug. 4, 2014); David Carr, “Print is Down, and Now Out,” New York Times (Aug. 10, 2014) (describing multiple major spin-offs of newspapers); Roger Yu, “Tampa Bay Times buys, shuts down rival Tampa Tribune” USA Today (May 3, 2016) (describing previous spin offs).

combinations are likely to benefit localism is in error.¹² The Commission asserts that broadcast/newspaper combinations will promote localism even as it acknowledges that “cost savings from common ownership will not necessarily be invested in the production of local news....”¹³

The Commission concludes its previous decision in August 2016 is inadequate, but there is no changed data upon which the Commission relies.¹⁴ And while the Commission’s Draft Order acknowledges that the NBCO applies only to newspaper which are published at least 4 days per week, it imagines a positive impact on cross-ownership because newspapers and TV stations owned by people of color or women might acquire the other medium, when there is no evidence of newspapers that are owned by people of color or women that publish more than four times per week which have been stopped from acquiring broadcast outlets.

Radio/Television Cross Ownership Rule

While the Commission points to analysis in the 2014 Quadrennial NPRM,¹⁵ the Commission incorrectly analyzed studies 8A and 8B, as UCC OC Inc. and Common Cause explained in our reply comments.¹⁶ In its discussion of the increasing sources of non-broadcast news, the Commission cites only to a single study proffered by the NAB which cited significant digital only outlets in only one city of the three cities studied, and noted it was atypical.¹⁷

Further while the Commission agrees radio provides a viewpoint,¹⁸ it continues to rely on the national number of all-news radio as a justification and claims that the status of radio as a purveyor of local news changed since its conclusions about local radio in 2006. The Commission’s Information Needs of Communities study noted “In the mid-1980s, the Radio Information Center reported that there were 50 commercial all-news radio stations throughout the United States. But in 2010 there were only 30 all-news radio stations.”¹⁹ This data show that a decline in all-news radio has no impact on whether a radio station has a viewpoint, and the Commission’s linking of viewpoint with news provision has been in error.

Local TV Ownership Rule

The Commission justifies, in part, elimination of the eight-voices test, and thus radical relaxation of the local TV ownership rule because “stations *may* find common ownership enables them to provide more high-quality programming....”²⁰ And yet the Commission earlier recognizes in radio that it has no guarantee cost savings will go to increased news coverage and it similarly has no guarantee in this context either. Further, the Commission did not consider the impact of an incentive auction which has

¹² Draft Order at paras. 26-31.

¹³ Draft Order at para. 31.

¹⁴ Draft Order at para. 38.

¹⁵ Draft Order at para. 50.

¹⁶ Common Cause/UCC OC Inc. Reply Comments at 7.

¹⁷ Pew Research, Local News in a Digital Age, at 13, 15 (Denver is a “tech hub”; “Denver stands out compared with the other two cities studied....”).

¹⁸ Draft Order at para. 61.

¹⁹ Steven Waldman, Federal Communications Commission, Information Needs of Communities at 62 (2011).

²⁰ Draft Order at para. 77.

come to conclusion in recent months and which will likely radically reshape the local television market.²¹

JSA Attribution

The Commission's critique of JSAs does not include a recognition that the stations themselves and the Securities and Exchange Commission often treat the stations as jointly owned.²² It further oversimplifies and ignores the Commission's detailed findings that JSAs often include a variety of financial arrangements, not just percentage fees, and they are often combined with other agreements, such as programming agreements which influence the programming of the brokered station. It further ignores the comments of the Department of Justice, based on its extensive review of many broadcast transactions, that television JSAs provide incentives similar to common ownership and should be made attributable under the Commission's rules. The Commission cites a potential benefit to ownership by women and people of color but cites only one example²³ when the elimination of the rule demonstrably increased ownership diversity by at least ten stations.²⁴ The Commission's Draft Order cites only anecdotal benefits of JSAs, it does not include any systematic or numerical analysis of the marketplace.

Conclusion

In sum, the Commission's Draft Order is inconsistent with Commission process, fails to analyze the impact of the Commission's relaxation rulings on ownership diversity, mischaracterizes the previous Commission decision, ignores substantial portions of the record. The Commission should delay voting on the Draft Order, offer formal notice and comment on the radically revised decision, and collect and utilize data that will analyze its impact on ownership diversity.

Sincerely,



Cheryl A. Leanza
Policy Advisor

²¹ Draft Order at para. 85. See also Letter from Wade Henderson, Leadership Conference on Civil and Human Rights to FCC Chairman Tom Wheeler, MB Docket 14-50 (filed March 22, 2016).

²² See, e.g., Comments of the Department of Justice, 2010 Quadrennial Review, Docket09-182 et al., (filed Feb 2013) at 11, n. 18.

²³ Draft Order at para. 111.

²⁴ Mignon Clyburn and Tom Wheeler, *Making Good on the Promise of Independent Minority Ownership of Television Stations*, blog (Dec. 4, 2014).