NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS

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November 19, 2007

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: Ex Parte Submission--Minority Ownership Policy and Rule Changes, MB Dockets Nos. 06-121, 02-277, 01-235, 01-317, 00-244, and 04-228

Dear Chairman Martin:

The National Association of Black Owned Broadcasters, Inc. ("NABOB") and Rainbow/PUSH Coalition, Inc. ("Rainbow/PUSH") have been advised that the Commission will in the very near future adopt one or more policy or rule changes that will be announced as policy changes to increase minority ownership of broadcast facilities. However, from the reports that we have heard, the contemplated policy announcements will have little or no benefit for minority owners or potential minority owners, because they will only be directed at "small businesses," as defined by the Small Business Administration. Moreover, in your FCC News statement, released November 13, 2007, you stated that you propose relaxing the newspaper/broadcast ownership rule, an action that will definitely harm ownership growth opportunities for minority entrepreneurs. Therefore, it is clear that the minority ownership rule changes you have proposed will harm minority ownership opportunities, and your proposed small business policy changes will have no offsetting benefit to promote minority ownership growth.

NABOB and Rainbow/PUSH submit that the Commission must adopt policies either specifically designed to promote minority ownership, or, at a minimum, adopt policies to promote ownership by "socially and economically disadvantaged businesses." Such proposals must include the proposals previously submitted by NABOB and Rainbow/PUSH in the above-referenced proceedings. Moreover, the Commission must delay any action on changes in its ownership rules until a task force to establish policies to promote minority ownership, as proposed by Commissioner Jonathan Adelstein, has been created, and it has completed its work and reported back to the Commission with its recommendations.

A. "Small Business" Policies Will Not Promote Minority Ownership

It is reported that the Commission will consider adoption of rule and policy changes that will seek to promote ownership of broadcast facilities by "small businesses," as defined by the Small Business Administration. There are significant problems with such a proposal. First, the definition of small business, as defined by the SBA is far too small to use in the broadcast context. Since 1996, when Congress passed the Telecommunications Act of 1996, the broadcast industry has consolidated greatly into the hands of a few large companies. During this period of time, small broadcast companies have been forced out of the industry at an alarming rate. The number of minority owned companies in the broadcast industry has decreased by 40% during this time period. The companies that have survived are primarily companies that were able to acquire stations and grow while others were selling. The result is that most minority owned companies that own broadcast stations are substantially larger that the small business definition of the SBA. Paradoxically, many of these minority owned companies are among the smallest companies in the broadcast industry, because of the consolidation of ownership. Therefore, it is necessary and appropriate to adopt policies to promote ownership among these existing broadcast companies. Use of the SBA small business definition will not have that result.

It might be the view of the Commission that a small business approach is preferable, because the Commission wants to promote "new entry" into the industry. While this sounds laudable, new entry as a standalone policy for promoting minority ownership cannot possibly create a significant increase in minority ownership. In recent years, new entry into the broadcast industry by minorities has occurred at such a limited pace that any policy to promote minority ownership could only create a trickle of new entrants, if any. There are several important reasons for this. First, consolidation has pushed the prices of broadcast stations to levels beyond the reach of most small businesses. Second, financing sources, recognizing that in virtually every market there are one or two owners with clusters of stations that dominate advertising revenue in the market, are disinclined to invest in a standalone station. Therefore, a new entrant is often required to purchase a cluster of stations to get financed. But purchasing a cluster requires far more investment capital than purchasing a standalone station, so purchasing a cluster is even more outside the reach of the typical new entrant.

Third, because of consolidation, there are rarely clusters of stations for sale. Clustering stations has proven to be a very profitable method of operation for the major companies, because when revenues fall in one format, they often rise in another, thereby protecting the overall income level of the clusters and creating a disincentive to sell. Fourth, even when standalone stations or clusters become available for purchase, they are rarely in the large urban markets where minorities are concentrated. Minority entrepreneurs are drawn to the broadcast industry primarily because of a desire to be a voice for the minority community. It defeats the objective of the typical minority entrepreneur to be offered stations to purchase in small rural communities with few if any minorities. Fifth, the number of minority owned small businesses in America is only a tiny fraction of the total number of small businesses in America. Therefore, it is unlikely that any significant number of the persons taking advantage of a small business policy will in fact be minority owned businesses. It is much more likely that the small businesses taking advantage of any such policy will be non-minority small businesses financed by family members associated with companies too large to take advantage of the small business designation. For all of the foregoing reasons, any small business policy will have little or no effect in promoting minority ownership.

B. The Commission Must Adopt Policies Specifically to Promote Minority Ownership

The Commission must adopt policies to promote minority ownership, and there is no constitutional prohibition to adoption of such policies. The Supreme Court has not issued any ruling that would prohibit the Commission from adopting a policy to promote minority ownership. The Supreme Court merely requires that any such policy meet the requirements of "strict scrutiny."[1] The Commission has never tried to meet this standard or even discussed this standard in the context of a specific minority ownership initiative. Rather, as the *Prometheus* court recognized, the Commission has ignored this issue completely.[2] Adopting "window dressing" policies, incapable of promoting minority ownership, and labeling them "small business" policies fails to meet the objections of the *Prometheus* court.

Alternatively, some parties have suggested that, to avoid the strict scrutiny standard, the Commission should adopt policies to promote opportunities for "socially and economically disadvantaged businesses" ("SDBs"). This standard has been used by other federal agencies for many years. If the Commission is disinclined to address the issue of adopting policies to promote minority ownership, the Commission should, at a minimum, adopt a definition for SDBs in this proceeding and adopt policies to promote opportunities for them.

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[1] *Adarand Constructors, Inc. v. Pena,* 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).
[2] *Prometheus Radio Project, Inc. v. Federal Communications Commission*, 373 F.3d 372, 421-422, (3d Cir. 2004), *stay modified on rehearing*, No. 03-3388 (3d Cir. Sept. 3, 2004), *cert. denied,* 73 U.S.L.W. 3466 (U.S. June 13, 2005) (Nos. 04-1020, 04-1033, 04-1045, 04-1168 and 04-1177).

NABOB and Rainbow/PUSH have presented a number of proposals to promote minority ownership in this proceeding. A number of them are ready for adoption in this proceeding. Those proposals are:

1. As a part of its public interest review, the Commission should assess the impact on minority ownership of all assignment of license and transfer of control applications.

2. The Commission should require divestiture of radio ownership clusters that exceed the local radio ownership rules and should not grandfather these clusters. If the Commission does not eliminate its grandfathering policy, the Commission should allow minority owned companies to own stations equal to the number of stations owned by the largest group owner in the market, and allow station clusters to be sold to minority owned companies, regardless of the size of the minority owned company.

3. The Commission should eliminate its policy of granting 6, 12 and 18 month waivers of the broadcast ownership rules, which waivers are often cited as providing parties exceeding the rules time to find potential minority buyers. Applications to sell stations to third party buyers should be filed simultaneously with the underlying assignment and transfer applications, thereby negating the problem of promises to sell to minority buyers that invariably fail to materialize.

4. Support Congressional reinstatement of the minority tax certificate policy.

With the exception of the tax certificate policy, the Commission has never discussed these proposals. Therefore, NABOB and Rainbow/PUSH submit that the Commission should create a task force to consider NABOB and Rainbow/PUSH's proposals, along with all of the other proposals that have been put forth by the Minority Media Telecommunications Council and other parties. Such a task force is only of value and will only have an actual role in shaping Commission ownership policy if the task force's work product and recommendations are considered in this proceeding prior to Commission action on its ownership rules. Currently, the Commission has scheduled December 18, 2007, as the date the Commission will vote on rule changes in this proceeding. This date provides no opportunity for the task force to be created, analyze the record, have additional studies conducted if necessary and provide recommendations to the Commission. Therefore, the Commission must postpone the December 18, 2007, vote if the Commission expects the task force to have any meaningful role in shaping media ownership policy. Without such a postponement, any such task force will be delivering after-the-fact recommendations that will be shelved and forgotten, like much of the work done over the past decade.

NABOB and Rainbow/PUSH, therefore, request that the Commission: (1) take no action in the above-referenced ownership proceedings until the Commission has created a task force to address minority ownership issues and that task force has completed its work and submitted its recommendations to the Commission, (2) not adopt any "small business" proposals as a purported way of promoting minority ownership in the broadcast industry, (3) analyze specific minority ownership proposals consistent with the constitutional requirements of strict scrutiny, (4) alternatively, consider adoption of policies to promote ownership among "socially and economically disadvantaged businesses," and (5) adopt NABOB and Rainbow/PUSH's specific proposals to promote minority ownership.

Respectfully submitted,

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