

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Promoting Diversification of Ownership In the Broadcasting Services |) | MB Docket No. 07-294 |
| |) | |
| 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 |) | MB Docket No. 06-121 |
| |) | |
| 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 |) | MB Docket No. 02-277 |
| |) | |
| Cross-Ownership of Broadcast Stations And Newspapers |) | MB Docket No. 01-235 |
| |) | |
| Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations In Local Markets |) | MB Docket No. 01-317 |
| |) | |
| Definition of Radio Markets |) | MB Docket No. 00-244 |
| |) | |
| Ways to Further Section 257 Mandate And To Build on Earlier Studies |) | MB Docket No. 04-228 |
| |) | |

**COMMENTS OF THE ASSOCIATION OF PUBLIC TELEVISION STATIONS,
THE CORPORATION FOR PUBLIC BROADCASTING, NATIONAL PUBLIC RADIO,
AND THE PUBLIC BROADCASTING SERVICE**

The Association of Public Television Stations (“APTS”)¹, the Corporation for Public Broadcasting (“CPB”)², National Public Radio (“NPR”)³ and the Public Broadcasting Service

¹ APTS is a non-profit organization whose membership comprises the licensees of nearly all of the nation’s CPB-qualified noncommercial educational television stations. The APTS mission is to support the continued growth and development of a strong and financially sound noncommercial television service for the American public.

(“PBS”)⁴, (collectively referred to as “Public Broadcasting”), hereby submit comments in response to the Commission’s *Further Notice of Proposed Rulemaking* in the above-captioned proceeding.⁵

INTRODUCTION

As reflected in the Public Broadcasting Act, an essential mission of Public Broadcasting is to “constitute an expression of diversity and excellence”⁶ and to address the needs of those who are unserved and underserved by the commercial media, particularly minorities. Public Broadcasting places an intense focus on ensuring that its airwaves are accessible to diverse

² CPB is a private, non-profit corporation created and authorized by the Public Broadcasting Act of 1967 to facilitate and promote a national system of public telecommunications. Pursuant to its authority, CPB has provided millions of dollars in grant monies for support and development of public broadcasting stations and programming. *See* 47 U.S.C. § 390 *et seq.*

³ NPR is a non-profit membership corporation that produces and distributes noncommercial educational (“NCE”) radio programs through more than 800 NCE radio stations nationwide. In addition to broadcasting award-winning NPR programming, including *All Things Considered*®, *Morning Edition*®, and *Talk of the Nation*®, NPR’s member stations are significant producers of local, regional, and national news, information and cultural programming. NPR also operates the Public Radio Satellite Interconnection System and provides representation and other services to its member station licensees.

⁴ PBS is a media enterprise that serves 355 public noncommercial television stations and reaches nearly 73 million people each week through on-air and online content. A trusted community resource, PBS uses the power of noncommercial television, the Internet and other media to enrich the lives of all Americans through quality programs and education services.

⁵ *In re Promoting Diversification of Ownership in the Broadcasting Services; 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Ways to Further Section 257 Mandate and To Build Upon Earlier Studies*, Report and Order and Fourth Further Notice of Proposed Rulemaking, MB Docket Nos. 07-294, 06-121, 02-277, 01-235, 01-317, 00-244, 04-228, FCC 09-33 (rel. May 5, 2009) (hereinafter “*FNPRM*”).

⁶ 47 U.S.C. § 396(a)(5).

voices and that its on-the-air and on-the-ground services are responsive to the needs of diverse populations. We resolutely support the Commission’s goals of ensuring that our media outlets “reflect[] the diversity of America,”⁷ and we constantly strive to broaden the gender and ethnic diversity of our ranks.

In this spirit, public television and radio stations can provide the Commission with information on the genders and ethnicities of those individuals listed on their Forms 323-E; indeed, stations already provide this information to CPB on their annual Station Activities Surveys. However, because “ownership” is a complicated concept in the context of public broadcasting—no individuals, including those listed on stations’ Forms 323-E, hold equity interests in public broadcasting stations—we must caution that the data the Commission is seeking would not provide a meaningful representation of the role of minorities and women in shaping the programming and services stations offer. In addition, to the extent the Commission views this data as “necessary to provide a comprehensive picture of broadcast ownership,” we emphasize that because of the fundamental differences in governance between commercial and public television and radio stations, it would be unhelpful, and potentially misleading, to aggregate data from across the broader broadcasting industry.

Furthermore, as a general matter, Public Broadcasting has concerns that the renewed discussion of “ownership” concepts in the context of public television and radio stations raises the specter of improper application of this framework in ways that would be harmful to stations without serving the public interest. Finally, if the Commission does choose to collect information on the gender and ethnicity of officers or board members of public broadcasters, we urge it to incorporate rules and safeguards in the reporting requirements and forms that would

⁷ *FNPRM*, Statement of Acting Chairman Michael J. Copps, at p. 32.

not result in undue burden on stations that, as the Commission well knows, are extremely financially strained.

DISCUSSION

I. PUBLIC BROADCASTING HAS A STRONG COMMITMENT TO DIVERSITY IN GOVERNANCE AND TO THE PROVISION OF SERVICES TO DIVERSE AUDIENCES.

As reflected in the Public Broadcasting Act, an essential mission of Public Broadcasting is to “constitute an expression of diversity and excellence” and to address the needs of those who are unserved and underserved by the commercial media, particularly minorities.⁸ Driven by these goals, Public Broadcasting places an intense focus on ensuring that its airwaves are accessible to diverse voices and that its on-the-air and on-the-ground services are responsive to the needs of diverse populations.

At the national level, CPB, PBS and NPR are instrumental in funding, developing and making available to local public broadcasters programming and resources that focus on the interests and needs of women and minorities and enhance the role of women and minorities in the delivery of public media. At the local level, public radio and television stations across the country are engaged in unique broadcast, internet, and outreach initiatives designed to broaden

⁸ 47 U.S.C. § 396(a)(5) (“[I]t furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and will constitute a source of alternative telecommunications services for all citizens of the Nation”); § 396(a)(6) (“[I]t is in the public interest to encourage the development of programming that involves creative risks and that addresses the needs of unserved and underserved audiences, particularly children and minorities”); In addition, CPB is authorized to “facilitate the full development of public telecommunications in which programs of high quality, diversity, creativity, excellence, and innovation, which are obtained by diverse sources, will be made available to public telecommunications entities, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature.” 47 U.S.C. § 396(g)(1)(A).

the opportunities and information available to minorities and women.⁹ Attached at Appendix A are just a few examples of the efforts in which these national organizations and local stations engage.

As demonstrated by stations' annual reports to CPB, and CPB's subsequent annual reports to Congress on service to minorities and diverse audiences, public television and radio stations continue to strive for racial equity in employment and in leadership roles. Minority employment increased at public radio and television stations from 2006 to 2007, the most recent year for which data is available. In public television, minority employment increased from 19.2 percent to 19.4 percent. The level of minority employment at public radio stations was even higher, 19.8 percent. In addition, 23.2 percent of all new hires at public radio stations in 2006 were from minority groups, as were 21.8 percent of those hired at public television stations.¹⁰ Furthermore, according to CPB's 2008 report, in the case of 77 public broadcasting stations, at least 50 percent of their full-time employees *and* at least 50 percent of their governing boards are members of minority racial or ethnic groups.¹¹

The presence of women in leadership positions at public broadcasting stations is also significant. According to data from the 2008 Station Activities Survey, 48 percent of all public television station officials and managers are women, as are 41 percent of officials and managers

⁹ For an in-depth examination of Public Broadcasting's service to minorities and diverse audiences, see CPB's annual reports, *Services to Minorities and Diverse Audiences*, available at <http://www.cpb.org/aboutcpb/reports/diversity/> (last visited June 26, 2009). CPB prepares these reports pursuant to 47 U.S.C. § 397(m)(2). The most recent report, submitted to Congress in June 2009, is attached as Appendix B.

¹⁰ See Appendix B, Section D.

¹¹ See *id.*

at public radio stations.¹³ In addition, 34 percent of governing board members at public television stations and 33 percent of governing board members at public radio stations are women. There is still progress to be made, but Public Broadcasting resolutely shares the Commission’s goals of ensuring that our media outlets “reflect[] the diversity of America.”¹⁴

II. DATA ON ‘OWNERSHIP’ OF PUBLIC BROADCASTERS WOULD NOT SERVE THE COMMISSION’S GOALS.

The Commission in this rulemaking states that it intends to use the data sought “to establish and maintain effective policies over time”¹⁵ and for the “promotion of diversity of ownership.”¹⁶ As noted above, Public Broadcasting¹⁷ strongly supports the Commission’s goals of increasing diversity in the broadcast industry, and we are working actively toward the achievement of these goals. Furthermore, public broadcasters are ready and willing to provide the Commission with information on the genders and ethnicities of those individuals listed on their Forms 323-E. However, we must emphasize that because “ownership” is an inapposite concept in the context of public broadcasting stations, the data the Commission is seeking to collect would not provide a meaningful representation of the role of minorities and women in shaping the programming and services stations offer. Furthermore, to the extent the Commission

¹³ An “official” is defined as a corporate officer or station executive, including president, vice president, general manager, station manager, or other station executive who is responsible for directing major operational areas. A “manager” is a person responsible for allocating or supervising departmental or other organizational resources and/or personnel.

¹⁴ *FNPRM*, Statement of Acting Chairman Michael J. Copps, at p. 32.

¹⁵ *FNPRM* at ¶ 1.

¹⁶ *Id.* at ¶ 12.

¹⁷ We note that “Public Broadcasting” is a subset of the larger universe of NCE stations the Commission’s rulemaking would affect.

views this data as “necessary to provide a comprehensive picture of broadcast ownership, including ownership by women and minorities in the broadcast industry,”¹⁸ we caution that because of the fundamental differences in governance between commercial and public television and radio stations, it would be unhelpful, and potentially misleading, to aggregate data from across the broader industry.

A. Ownership Is Not Easily Definable In the Public Broadcasting Context.

The Commission rightfully recognizes in the *FNPRM* that the structure and organization of public broadcast stations “raise difficult issues as to how to define ownership in the NCE context.”¹⁹ Pursuant to federal law and regulations, all public television and radio licensees are either non-profit, non-stock entities, including community foundations and universities; municipalities; or political subdivisions of a state.²⁰ For example, in the Washington, D.C., area, the licensee of WAMU-FM is the Executive Committee of the Board of Trustees of American University, a nonprofit educational institution; the licensee of WHUT-TV is Howard University, a nonprofit educational institution; the licensee of Maryland Public Television is the Maryland Public Broadcasting Commission, an agency of the state of Maryland; and the licensee of WETA-TV and WETA-FM is the Greater Washington Educational Telecommunications

¹⁸ *FNPRM* at ¶ 27.

¹⁹ *Id.* at ¶ 28.

²⁰ See 47 U.S.C. § 397(6) (defining “public broadcast station” as “a television or radio broadcast station which--(A) under the rules and regulations of the Commission in effect on November 2, 1978, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or (B) is owned and operated by a municipality and which transmits only noncommercial programs for education purposes.”); 47 U.S.C. § 397(8) (defining “nonprofit” as “a foundation, corporation, or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.”); see also 47 C.F.R. § 73.621.

Association, Inc., a nonprofit organization. In no case does an individual person hold an investment or equity interest in a public television or radio station. Thus, there is no clear analogy between ownership of commercial broadcasters and “ownership” in the public broadcasting context.

B. Boards of Trustees Do Not Control the Programming or Operational Decision Making.

The Commission seeks comment on whether examining the composition of the board of directors or other governing entity of a noncommercial educational station would meaningfully expand its information on minority and female ownership.²¹ Currently, when they file Form 323-E, public television and radio stations list information about members of their governing boards, although such members are not paid for their service and do not hold equity interests in the stations. Public Broadcasting can easily report the genders and ethnicities of these board members to the Commission; indeed, stations already provide this information to CPB on their Station Activities Surveys each year. However, we must caution that this data does not, on a station-by-station basis or in the aggregate, provide a meaningful representation of the role minorities and women play in shaping the programming and services that public broadcasting stations offer. Thus, the purpose and efficacy of such a data collection is questionable.

While the governing boards of trustees of stations have responsibility for overall station affairs, including setting appropriate policies to govern station goals and operations, they do not, and should not, involve themselves in day-to-day operations, including, significantly, the selection of programming to air on the station. This is crystal-clear particularly in the case of state or institutional licensees, where the governing boards are appointed by the state governors or legislatures.

²¹ *FNPRM* at ¶ 29.

For example, in the case of the Maryland Public Broadcasting Commission, which holds the licenses for six public television stations in the state, the individuals listed on the station's Form 323-E include 10 members who were appointed by the governor, as well as the governor-appointed State Superintendent of Schools, Nancy S. Grasmick, who serves *ex officio*. The body essentially oversees the stations' critical infrastructure investments—towers, transmitters, satellite dishes, buildings, and other equipment—but does not generally involve itself in station operations or programming decisions.

The New Jersey Public Broadcasting Authority Board, which operates the New Jersey Public Television and Radio Network (“NJN”), consists of 5 Board Members appointed by the Governor of New Jersey and 4 Ex-Officio Members who are the state's Treasurer, Attorney General, Commissioner of Education, and the New Jersey Commissioner of Community Affairs. The Authority appoints an Executive Director to carry out the Authority's policies. Operation of the NJN also involves a Foundation for New Jersey Public Broadcasting, which is devoted to the sponsoring of activities and the raising of funds for the support and promotion of the New Jersey Public Broadcasting Authority and its purposes. NJN also relies on a 14 member Professional Advisory Board.²²

In the case of WHUT-TV in Washington, the individuals listed on the station's Form 323-E include the president, provost, and officers of Howard University, as well as members of the university's board of trustees, including Brown University president Dr. Ruth J. Simmons and the Honorable L. Douglas Wilder, the former Virginia governor and mayor of Richmond.

²² See New Jersey Public Broadcasting Authority Board, <http://www.njn.net/about/njpbaboard/> (last visited June 26, 2009); NJN Foundation Board of Trustees, <http://www.njn.net/about/foundation/> (last visited June 26, 2009); Professional Advisory Board, <http://www.njn.net/about/professionaladvisory/> (last visited June 26, 2009).

As officers and trustees of the university, these individuals have general oversight of the finances and policies of the station, but they do not become involved in the day-to-day governance of the station, including employment and programming decisions.

Similarly, the San Diego Community College District, licensee of KSDS-FM, San Diego, CA, is governed by its five-member, locally elected Board of Trustees and a student board member. The five trustees are elected in even-numbered years to four-year terms by the voters of San Diego. Trustee candidates first run in district-only elections. The top two vote-getters in each district run citywide in the general election. Three students serve a one-year term filling the student trustee position on a rotating basis. The Chancellor, the district's chief executive officer, is responsible for carrying out policies approved by the Board of Trustees, but the day-to-day operation of the station, a full-time mainstream/traditional jazz radio station, is managed by the station staff.²³

Public Broadcasting strives for diversity in employment and leadership, and we are proud of our efforts in expanding opportunities for women and minorities. Unfortunately, the true impact of these efforts cannot be captured by a simple examination of the ethnicities and genders of stations' board members. Public television and radio stations, as the term "public" would indicate, represent a broad collaboration of influences, from staff members to station managers to members of the community. Notably, however, while public broadcasting stations' boards play significant roles in shaping overall policies and goals, they are not, and should not be, "hands on" regarding the stations' day-to-day operations and program decision-making. Public Broadcasting therefore questions whether data on the genders and ethnicities of board members would meaningfully expand the Commission's information on minority and female ownership,

²³ Board of Trustees, <http://www.sdccd.edu/public/district/trustees/> (last visited June 26, 2009).

or form a proper basis for the Commission's development of policies to expand diversity in station ownership.

C. Aggregating 'Ownership' Information From Commercial and Noncommercial Stations Would Compromise the Integrity of the Data.

The *FNPRM* evinces an intent by the Commission to aggregate data from *all* broadcasters, commercial and noncommercial, for the purposes of establishing and maintaining effective policies to promote ownership by women and minorities. Because of the difficulties in defining "ownership" in the public broadcasting context, and the fundamental differences between governance of commercial and public broadcasting stations, aggregating information from all stations would compromise the integrity of the data and undermine the Commission's goal of developing records that would become the defensible basis of any future race- or gender-based affirmative action policies.

As discussed above, all public television and radio licensees are either non-profit, non-stock entities, including community foundations and universities; municipalities; or political subdivisions of a state. The selection of governing board members varies by licensee, but in many cases these individuals are elected officials, political appointees or serve by virtue of their role in the governance of a larger institution, such as a university. Except in the case of some officers, who are station employees, the board members are volunteers and are not compensated for their service. In no case do individual persons, including the individuals listed on stations' Forms 323-E, hold investment or equity interests in public television and radio stations. This is in stark contrast to commercial broadcasters, for which many individuals and entities listed on stations' Forms 323 are attributable interest holders by way of their financial interests in the stations.

Thus, aggregating data from commercial and noncommercial broadcasters would muddle, rather than clarify, the true picture of broadcast ownership, which is by definition a purely commercial construct. Furthermore, any policies regarding governing boards that might be developed to enhance diversity in ownership of commercial stations would almost certainly not fit within the context of governance of public television and radio stations. Public Broadcasting posits that, in the interest of focusing on the collection of reliable, complete, and defensible data on the state of ownership of commercial stations, the Commission may wish to refrain at this time from confusing the picture with data from public broadcasters that is not comparable.

III. DEFINING ‘OWNERSHIP’ IN THE PUBLIC BROADCASTING CONTEXT CREATES POTENTIAL FOR UNINTENDED REGULATORY CONSEQUENCES THAT COULD INTERFERE WITH THE SMOOTH OPERATION OF STATIONS.

Public Broadcasting also has concerns that the renewed discussion of “ownership” concepts in the context of public television and radio stations raises the specter of improper application of this framework in ways that would be harmful to stations. As the Commission notes in its *FNPRM*, in 1989 it issued a proposal based on a misplaced concept of “ownership” of noncommercial stations under which changing membership of a non-stock entity licensee’s governing board typically would be considered a transfer of control requiring Commission approval.²⁶ As public broadcasters commented at the time, the proposal would have massively increased the regulatory compliance burdens for public television and radio stations and would not serve the public interest because of the fundamental differences between traditional stock corporations and non-stock entities such as public television licensees.²⁷ Furthermore, it would

²⁶ *In re Transfer of Control of Certain Licensed Non-Stock Entities*, Notice of Inquiry, 4 F.C.C. Rcd. 3403 (1989).

²⁷ *See Joint Comments of Noncommercial Licensees*, *In re Transfer of Control of Certain Licensed Non-Stock Entities*, MM Docket No. 89-77 (July 17, 1989); *Comments of the National*

have put the Commission in the untenable position of having to grant prior consent to board membership changes in government licensees or large state or private universities.²⁸

The Commission wisely did not take action on its proposals, and in 2002 it formally terminated the proceeding.²⁹ We are pleased that the Commission has referred to this proceeding in the *FNPRM* and has recognized that the structure and organization of noncommercial educational stations raise difficult issues as to how to define ownership in that context.³⁰ We are hopeful that the Commission will refrain from adopting a conclusion here (i.e., that directors and/or board members of public broadcasting licensees are their “owners”) that might lead to the future application of ownership concepts to public broadcasters that are inappropriate and not in the public interest.

IV. AT THE LEAST, THE COMMISSION SHOULD TAILOR ANY POTENTIAL REPORTING REQUIREMENT TO THE UNIQUE CIRCUMSTANCES OF PUBLIC BROADCASTING STATIONS.

As discussed above, Public Broadcasting requests that the Commission refrain from defining “ownership” in the public television and radio context because it would not lead to the generation of useful data or clarify the “ownership” picture in the broader industry. However, if the Commission does choose to collect information on the gender and ethnicity of officers or board members, we urge it to incorporate rules and safeguards in the reporting requirements and

Association of Public Television Stations, National Federation of Community Broadcasters, and National Public Radio, In re Transfer of Control of Certain Licensed Non-Stock Entities, MM Docket No. 89-77 (July 13, 1989) (“Comments of NAPTS, NFCB and NPR”).

²⁸ *Comments of NAPTS, NFCB and NPR* at 10; *Joint Comments of Noncommercial Licensees* at 17-18.

²⁹ *In re Termination of Rulemaking Proceedings*, Order, FCC No. 02-3 (Rel. Jan. 11, 2002).

³⁰ *FNPRM* at ¶ 28.

forms that would not result in undue burden on public broadcasting stations that, as the Commission well knows, are extremely financially strained.

First, if the Commission chooses to establish a uniform biennial filing date, Public Broadcasting would suggest that it select a date in the first quarter of the calendar year, so stations may compile the data once to submit both to the Commission and to CPB, which requires responses to its annual Station Activities Survey by mid-February.

Second, while Public Broadcasting understands the Commission's desire to create safeguards to preclude the filing of incomplete data, we emphasize that there must be a way for public television and radio licensees to state that a member of a governing board declines to report his or her gender, race, or ethnicity. As we have noted, in the public broadcasting context, members of governing boards are not financially invested in an entity that licenses government-owned spectrum. They are volunteers. To the extent an owner in the context of a commercial station might be obligated in some sense to provide personal information to a federal agency, governing board members of public radio and television stations bear no such obligation. It would be unfair to require stations to list such information against their board members' wills or risk financial forfeitures because they are unable to submit a complete report.³¹

CONCLUSION

Public Broadcasting supports the Commission's goals of ensuring that our media outlets "reflect[] the diversity of America," and public television and radio licensees are willing to provide information on the genders and ethnicities of the individuals listed on their Forms 323-E. However, because of the difficulties and likely adverse unintended consequences of defining "ownership" in the public broadcasting context, and the inherent differences in governance

³¹ See *FNPRM* at ¶ 10 (noting that the Commission's filing system precludes the filing of incomplete forms).

between commercial and noncommercial stations, we urge the Commission to consider whether this collection of data from public broadcasters may complicate rather than enhance its efforts to gain an accurate picture of broadcast ownership.

Respectfully submitted,

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