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Federal Communications Commission
Office of the Secretary

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

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	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	
Ways to Further Section 257 Mandate and To Build on Earlier Studies	)	MB Docket No. 04-228

REPLY TO OPPOSITION
TO PETITION FOR RECONSIDERATION

CBS Corporation ("CBS"),[1] by its attorneys and pursuant to Section 1.429(g) of the rules of the Federal Communications Commission ("FCC"), hereby replies to the Opposition to Petition for Reconsideration filed by the Office of Communication of the United Church of

[1] CBS is a publicly-traded company controlled by a single majority shareholder, NAIRI, Inc. ("NAIRI"). NAIRI is a wholly-owned subsidiary of National Amusements, Inc., which is controlled by Sumner Redstone through the Sumner M. Redstone National Amusements Trust u/d/t dated June 28, 2002. Because CBS is controlled by a single majority shareholder, minority ownership interests in CBS are not attributable.

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Christ, Inc., Benton Foundation, Common Cause, Media Alliance and National Organization for Women Foundation (collectively, "UCC *et al.*") in the above-captioned proceeding (the "Opposition").

In its Petition for Reconsideration ("Petition") of the FCC's Report and Order in this proceeding,[2] the National Association of Broadcasters ("NAB") urged the FCC to reconsider certain changes to FCC Form 323 (Ownership Report for Commercial Broadcast Stations) reporting obligations set forth in Section 73.3615 of the FCC's Rules, including the requirement that broadcast station licensees controlled by a single majority shareholder be obligated to report, for the first time, information about other investors who do not hold attributable interests. CBS agrees with NAB that requiring broadcasters to report interests held by non-attributable investors, who have no ability to meaningfully influence station programming decisions or other core operating functions in entities having a single majority shareholder, will impose significant reporting burdens but will not advance the FCC's goal of enhancing the accuracy of the data collected on minority and female ownership in the broadcast industry. Moreover, as NAB explained, adoption of the new reporting obligations violates the Administrative Procedures Act ("APA"), and there is no factual basis in the record of this proceeding to support the FCC's conclusion that these new reporting requirements will not deter new or alienate existing equity investments in broadcast entities.

I. The Collection Of Minority And Female Ownership Data From Shareholders In A Corporation Controlled By A Single Majority Shareholder Will Not Advance The FCC's Goals In This Proceeding.

In the Report and Order, the FCC asserted, without factual support or meaningful explanation, that its minority and female ownership data collection efforts will be "materially

[2] *Promoting Diversification of Ownership in the Broadcasting Services,* Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 09-33 (released May 5, 2009) ("*Report and Order*").

advanced" by collecting data from holders of equity interests that are non-attributable under the FCC's multiple ownership rules due to the single majority shareholder exemption.[3] The Opposition similarly fails to provide any evidentiary support for the proposition that the additional reporting obligations applicable to non-attributable shareholders will advance the FCC's goal. Although CBS supports the FCC's efforts to improve the accuracy and reliability of data collected on minority and female ownership, as NAB correctly points out, these new reporting obligations will not advance that process, and instead are likely to deter investment in broadcast entities and will impose new regulatory burdens on FCC licensees with no discernable public interest benefit.[4]

The FCC's collection of data on the racial and gender composition of radio and television licensees, part of its long-standing and commendable effort to promote broadcast station ownership by minorities and women, is premised on the FCC's determination that diversity in broadcast ownership promotes diversity in programming.[5] Inherent in the FCC's conclusion that minority and female participation in broadcast station ownership positively affects program diversity is the assumption that minorities and women will be afforded the opportunity to fully participate in and influence station operations. As the Commission's Minority Ownership Task Force Report concluded:

> Acute underrepresentation of minorities among the owners of broadcast properties is troublesome in that it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial portion of our citizenry will remain underserved, and the larger non-minority audience will be deprived of the views of minorities.[6]

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[3] *Report and Order* at ¶ 17.

[4] *Petition* at 5-9.

[5] *Report and Order* at ¶ 2.

[6] Federal Communications Commission's Minority Ownership Task Force, Minority Ownership Report (1978).

In reliance on this Report, the FCC concluded that "[*f*]*ull* minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming."[7]

The FCC's broadcast attribution rules "identify those interests in or relationships to licensees that confer on their holder a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions."[8] Unlike attributable interest holders, other shareholders in a corporation controlled by a single majority shareholder cannot and do not exercise meaningful influence over a station's programming or other material decisions, because control of that corporation is firmly vested in the single majority shareholder. When it adopted the single majority shareholder exemption, the Commission correctly concluded that other shareholders, "even acting collaboratively, would be unable to direct the affairs or activities of the licensee on the basis of their shareholdings."[9] The FCC subsequently affirmed that finding, and further held that in those limited circumstances where a non-majority investor may have the incentive and means to exert influence over a licensee's core operating functions (for example, where that shareholder is a major program supplier or holds an attributable interest in another media outlet in the same market), the equity/debt plus ("EDP") rule would act as a safety valve to capture the disclosure of those otherwise non-attributable interests.[10]

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[7] *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 (1978) (emphasis added).

[8] *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd 12559, 12560 (1999) ("*1999 Broadcast Attribution Order*").

[9] *Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities,* 97 F.C.C.2d 997, 1008-1009 (1984).

[10] *1999 Broadcast Attribution Order*, 14 FCC Rcd at 12579.

Because investors in corporations with single majority shareholders lack the ability to exert meaningful influence over a broadcast station's programming or other decisions, the collection of racial and gender data on such minority investors imposes significant reporting burdens but serves no useful purpose. In fact, incorporating data from essentially passive investors with no meaningful role in station operations could actually distort minority and female ownership statistics by suggesting that these non-attributable minority and female investors are actually in a position to influence programming or other decisions of a licensee, thereby distorting the accuracy and reliability of the data the FCC is seeking to collect.

II. The FCC Failed To Satisfy APA Requirements, And The Record Is Inadequate To Support The FCC's Conclusion That The New Reporting Obligations Will Neither Deter Investment In Broadcast Entities Nor Impose An Undue Burden On Affected Broadcast Licensees.

The FCC's decision to amend Section 73.3615 to require that a particular group of broadcast licensees disclose detailed information concerning certain non-attributable interest holders was based on its conclusion that the modified reporting obligations would neither deter investment in broadcast entities nor impose an undue burden on affected broadcast licensees.[11] However, as NAB demonstrated in its Petition,[12] the FCC, in violation of APA requirements, failed to provide adequate notice of that rule change in the underlying Third Further Notice of Proposed Rulemaking.[13] Because potentially affected parties were not afforded adequate notice that such a change in reporting obligations was under consideration, they had no reasonable opportunity to comment on that proposal. As a consequence, the record in this proceeding is incomplete and contains no support for the FCC's action.

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[11] Report and Order at ¶ 17.

[12] Petition at 6.

[13] *Promoting Diversification of Ownership in the Broadcasting Services,* Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008) ("*Third FNPRM*").

A. The FCC Provided Inadequate Notice Of The New Non-Attributable Interest Holder Reporting Requirements.

Section 553(b)(3) of the APA requires that an agency provide "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[14] While the FCC sought comment on "whether expansion of the scope of parties required to file the biennial ownership report" would improve its collection of minority and female ownership data,[15] as NAB correctly observed, the FCC's reference to "parties required to file," coupled with its identification of sole proprietorships and partnerships composed entirely of natural persons as examples of entities not presently required to submit ownership reports, strongly suggested that the FCC merely was proposing that these additional classes of licensees (by definition, parties holding attributable ownership interests) not previously subject to ownership reporting obligations be required to submit broadcast station ownership reports.[16] The Third FNPRM contains no discussion of, or the solicitation of comment on, the prospect of subjecting non-attributable investors to new reporting obligations. In fact, the very first discussion of such new obligations appears in the Report and Order, at paragraph 17 thereof.

In applying Section 553(b)(3), courts have consistently held that the rulemaking notice requirement is satisfied if the agency's final rule is a "logical outgrowth" of its rulemaking proposal." *See, e.g., Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445-46 (D.C. Cir. 1991); *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981). A new rule is a "logical outgrowth" of an agency's rulemaking notice if "[the party], ex ante, should have anticipated that such a requirement might be imposed." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

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[14] 5 U.S.C. § 553(b)(3).

[15] Third FNPRM at ¶ 95 (emphasis added).

[16] Petition at 6.

Contrary to the position taken in the Opposition,[17] CBS submits that the "logical outgrowth" criterion was not satisfied here, because potentially affected parties could not reasonably have anticipated that the FCC would require the disclosure of non-attributable ownership interests in broadcast station ownership reports. First, as noted above, the collection of minority and female ownership data from non-attributable investors in a single majority shareholder entity will not yield information relevant to the FCC's stated goal of enhancing the accuracy of the racial and gender data collected. Second, there was no discussion whatsoever in the Third FNPRM of the types of interests required to be disclosed in FCC Form 323, let alone any suggestion that the FCC was contemplating requiring the disclosure of anything other than attributable interests. Third, reinforcing the conclusion that interested parties were not given adequate notice of the FCC's intentions as required by the APA, there is no indication that any third party either submitted comments on this issue or proposed such a change either in connection with the FCC's quadrennial media ownership review or in response to the Third FNPRM.

B. Requiring The Disclosure Of Non-Attributable Minority Investors Will Likely Deter Investment And Impose An Undue Burden On Broadcast Entities.

In the Report and Order, the FCC summarily concluded, without the benefit of public comment, that it "can be more inclusive in collecting this information without causing an adverse effect on capital investment."[18] However, for the reasons set forth in NAB's Petition, the new disclosure rules are very likely to discourage investment in broadcast properties.[19] Moreover, the Opposition over generalizes the nature and extent of information collected and retained by

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[17] Opposition at 5, n.21.

[18] Report and Order at ¶ 17.

[19] Petition at 5-8.

broadcasters' attorneys and banks related to attributable and non-attributable investors.[20] Many publicly traded companies have limited knowledge of the demographic information of an overwhelming majority of their shareholders. Substantial stock positions are often held in "street name" by custodial banks, brokers, or other financial institutions, and the licensee may not have knowledge of the underlying beneficial owners without engaging in substantial, time consuming inquiry, thereby by imposing additional costs on broadcasters during the most challenging operating and investment environment in recent memory, perhaps in the history of the medium. The imposition of new, detailed and burdensome reporting obligations on non-attributable investors in a single majority shareholder entity provides no discernable public interest benefit and is precisely the wrong course of action at this time. Cautious and discerning investors evaluating a multitude of investment opportunities – particularly passive, non-attributable funding sources – are far less likely to select an investment vehicle saddled with burdensome and intrusive reporting obligations, filing fees and potential legal costs associated with the preparation and submission of ownership reports than other investment opportunities without such disadvantages.

Similarly, the FCC concluded that its "minority and female ownership data collection efforts will be materially advanced by deviating from the attribution rules, and we believe we can do so without unreasonably burdening respondents."[21] This determination that the new reporting obligations will not result in an undue burden, also reached without the benefit of public comment, is contradicted by the FCC's own findings in the 1998 Biennial Review, where the FCC first required broadcast licensees to report race, ethnic origin and gender data on FCC Form

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[20] Opposition at 6.

[21] Report and Order at ¶ 17.

323.[22] In that proceeding, the FCC concluded that reporting race, ethnic origin and gender data would not constitute an undue burden precisely because licensees "will not be required to obtain information from anyone whose interests are not already reportable."[23] If the FCC concluded in 1998 that requiring broadcasters to survey non-attributable interest holders for their race, ethnic origin and gender and reporting that information could without more pose an undue burden, it is not clear how it now could find – *sua sponte*, without any input from the public – that no undue burden would result from the implementation of the new reporting requirements adopted in this proceeding.

As NAB makes clear, the process of surveying investors for all relevant information required by the FCC Form 323 and completing in some cases multiple ownership reports for licensees with complex ownership structures is a time consuming and potentially costly process that often requires the assistance of specialized counsel. Corporations controlled by a single majority shareholder will be required to conduct additional surveys of its affected non-attributable interest holders – who have never been required to submit any information in the past – to obtain not just race, ethnic origin and gender data, but the full range of information required by FCC Form 323, including percentage of equity, percentage of total assets and other media interests. Compliance with these new reporting requirements will be particularly burdensome for investors in single majority shareholder corporations that are not natural persons. Such a non-attributable investor will now be required to submit an FCC Form 323 not only for itself but potentially for other entities in its ownership chain. While the Opposition casually

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[22] *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities,* Report and Order, 13 FCC Rcd 23056, 23096-97 (1998).

[23] *Id.* at 23097; emphasis added.

asserts that the Form 323 is "hardly extensive" and is "largely self explanatory,"[24] even the FCC, in its Supporting Statement to the Office of Management and Budget, concedes that it will require an attorney about eight hours to complete just one report.[25] However, the accuracy of that estimate is impossible to assess given that the FCC has yet to release a draft revised Form 323.[26] Moreover, in CBS' experience, conducting the underlying shareholder surveys and collecting other data for inclusion in the current version of the Form 323 can take months. Given their lack of familiarity with the rules and practices of the FCC, and the potential costs associated with the new reporting requirements, non-attributable investors who have not had to file ownership reports with the FCC in the past may conclude that the cost and other burdens of compliance with these reporting requirements are excessive and could instead elect to invest elsewhere or even divest their existing ownership interests.

Respectfully submitted,

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[24] Opposition at 6.

[25] See FCC Supporting Statement to Ownership Report for Commercial Broadcast Station, FCC Form 323, dated August 11, 2009, submitted to the Office of Management and Budget at 9. The FCC estimates the annual cost of the paperwork burdens on the broadcast industry associated with these new regulatory requirements (*i.e.*, the filing of some 9,200 ownership reports) to be over $14,000,000.

[26] See Comments of the National Association of Broadcasters, *In the Matter of Notice of Public Information Collection(s) Being Reviewed by the Federal Communication Commission*, OMB Control Number 3060-0010, MB Docket No. 07-294 at 3-4.

CERTIFICATE OF SERVICE

I, Rebecca J. Cunningham, hereby certify that on this 21st day of August, 2009, the foregoing Reply to Opposition to Petition for Reconsideration was served by first-class mail, postage paid, on the following:

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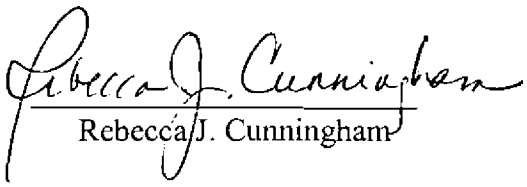

Rebecca J. Cunningham