

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

In the Matter of	)	
	)	
Media and Wireless Telecommunications	)	GN Docket No. 10-244
Bureaus Seek Comment on Recommendation	)	
of the Advisory Committee on Diversity for	)	
Communications in the Digital Age for a New	)	
Auction Preference for Overcoming	)	
Disadvantage	)	

**COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

**I. INTRODUCTION**

The National Association of Broadcasters (“NAB”)<sup>1</sup> files these comments in response to the public notice<sup>2</sup> seeking comment on the recommendation of the Advisory Committee on Diversity for Communications in the Digital Age (the “Diversity Committee”) that the Federal Communications Commission (“FCC” or “Commission”) initiate a rulemaking proceeding regarding a new preference program for competitive bidding purposes.<sup>3</sup> The proposed program would create a competitive bidding credit for license applicants who have “faced substantial disadvantages and overcome those

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<sup>1</sup> The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts.

<sup>2</sup> *Media and Wireless Telecommunications Bureaus Seek Comment on Recommendation of the Advisory Committee on Diversity for Communications in the Digital Age for a New Auction Preference for Overcoming Disadvantage*, Public Notice, GN Docket No. 10-244, DA No. 10-22259 (rel. Dec. 2, 2010) (“*Notice*”).

<sup>3</sup> Recommendation on Preference for Overcoming Disadvantage, FCC Advisory Committee on Diversity for Communications in the Digital Age (October 14, 2010) available at <http://www.fcc.gov/DiversityFAC/meeting101410.html> (“*Recommendation*”).

disadvantages.” NAB supports the launch of a rulemaking proceeding to further examine the components of such a new preference program. As NAB and the Commission have consistently recognized, one of the most significant hurdles to obtaining a license to offer communications services is access to capital. To the extent that the proposed preference program would help overcome that obstacle, NAB believes it should be explored.

## **II. ISSUES FOR COMMENT**

NAB believes that the proposed preference could further the goals of the Communications Act of 1934, as amended. In particular, if structured correctly, the preference could promote the statutory goals of “disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women” and “ensur[ing] that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.”<sup>4</sup>

The *Notice* asks how the program would offer opportunities different from what is available under existing bidding credit programs.<sup>5</sup> NAB notes that the Diversity Committee identified a non-exhaustive list of disadvantages (where they are substantial and have been/are being overcome) for which the preference might apply, including such unique attributes as suffering trauma in connection with military service, unequal access to institutions of higher education, unequal access to credit, and unequal treatment in

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<sup>4</sup> See 47 U.S.C. §§ 309(j)(3)(B) and (4)(D).

<sup>5</sup> *Notice* at ¶ 3.

hiring.<sup>6</sup> While the Commission's current designated entity and new entrant bidding credits might entitle some individuals in these categories to bidding credits and facilitate their entry into ownership and operations of communications facilities, a program of bidding credits based on overcoming substantial disadvantage can reach a broader array of individuals. Even if the Commission found that the beneficiaries of current programs sometimes overlap with those that might qualify for a substantial disadvantage preference, the preference would still increase the variety of license applicants consistent with section 309(j)(3)(B), thereby serving important public and governmental interests.<sup>7</sup>

The *Notice* also asks at what level of success an applicant who has overcome a substantial disadvantage should become ineligible for the preference.<sup>8</sup> NAB recognizes that establishing safeguards, such as a cap on eligibility, is important for preserving public trust in a bidding credit program. The Commission could establish a formula based on marketplace factors and set that as a limit on the income of the applicant seeking a substantial disadvantage bidding credit. The formula could be set using a service-specific and/or auction-specific methodology. For example, if the applicant wishes to participate in a wireless license auction where comparable spectrum drew \$1/MHz/pop in a previous auction, the Commission could consider the annual revenue of winning bidders who paid a similar rate in a prior auction, and establish the highest annual revenue (or even the average annual revenue) as a cap on the annual revenue of applicants seeking a

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<sup>6</sup> Recommendation at 4.

<sup>7</sup> *Notice* at ¶ 4.

<sup>8</sup> *Notice* at ¶ 9.

substantial disadvantage preference.<sup>9</sup> Under such a model, if the applicant has the same income as winning bidders in another auction of comparable spectrum, then he/she will have achieved a measure of wealth and access to capital such that the benefit of the preference is no longer needed.

Although NAB has no recommendation regarding the specific information or documentation required to be submitted in connection with demonstrating a particular substantial disadvantage or showing that one has overcome the disadvantage,<sup>10</sup> NAB generally urges the Commission to rely as much as possible on objective factual data, even while involved in what is, by definition, a somewhat subjective analysis. The *Notice* also asks whether a corporation should be able to participate in this program based on the qualifications of its principal.<sup>11</sup> Since most FCC licenses are held by corporations, limited liability companies, or partnerships, NAB believes that the preference would have little or no practical application if it applied *only* where an individual wishes to hold a license as a sole proprietor. At a minimum, if the majority of voting control of an entity is held by a party (or parties) that qualify for a substantial disadvantage competitive bidding credit, that entity should, in turn, qualify for the credit.

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<sup>9</sup> Comparing the income of a licensee organization to the income of the specific individual seeking a substantial disadvantage bidding credit will only be effective if the individual intends to hold the license as a sole proprietor. NAB anticipates that applicants seeking to use this bidding credit would not only be sole proprietors but might also be principals within a partnership, limited liability company, or corporation that would hold the FCC license. In such instances, the annual revenue of the prospective licensee would need to be compared to the annual revenue of previous winning bidders awarded comparable licenses.

<sup>10</sup> *Notice* at ¶ 10.

<sup>11</sup> *Notice* at ¶ 14.

### III. OTHER ISSUES

NAB also urges the Commission to continue the process of evaluating other proposals before it that would promote the same goals as the competitive bidding preference under consideration in this *Notice*. For example, NAB has previously supported proposals that would expand diversity in broadcasting by establishing incentives that will promote ownership of broadcast properties by minorities, women, and new entrants.<sup>12</sup> We note that action on these proposals also would facilitate new entry into the communications marketplace by a wide variety of applicants. Some of these proposals include:

- Proposals that the Commission adopt a system of waivers/exceptions to its ownership rules for broadcasters taking actions that enhance ownership opportunities for socially disadvantaged businesses;<sup>13</sup>
- Proposals that the Commission allow sellers of broadcast properties to hold a reversionary interest in properties for certain sales;<sup>14</sup>

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<sup>12</sup> See, e.g., NAB Comments in MB Docket No. 09-182 at 37-40 (Jul. 12, 2010); NAB Reply Comments in MB Docket No. 09-182 at 23-26 (Jul. 26, 2010).

<sup>13</sup> See NAB Reply Comments in MB Docket No. 09-182 at 23 (Jul. 26, 2010) (citing Clear Channel Comments in MB Docket No. 09-182 at 48-49 (Jul. 12, 2010); Comments of the Diversity and Competition Supporters in MB Docket No. 09-182 at 22-25 (Jul. 12, 2010)). Actions that would qualify a broadcaster for such rule waivers could include, for example: (i) sale of a station to a qualified entity; (ii) providing loans or other financial assistance for the ownership or operation of a station by a qualified entity; (iii) contributing a portion of the purchase price of a station to a broadcast education, training, or professional development program; and (iv) leasing an HD channel to a qualified entity at a low cost, etc. *Id.* See also Comments of the Diversity and Competition Supporters in MB Docket No. 09-182 at 22 (Jul. 12, 2010) (“incubator programs could encompass management or technical assistance, loan guarantees, direct financial assistance through loans or equity investment, training and business planning assistance”).

<sup>14</sup> NAB Reply Comments in MB Docket No. 09-182 at 23-24 (Jul. 26, 2010) (citing Alliance for Women in Media Comments in MB Docket No. 09-182 at 7-8 (Jul. 12, 2010)).

- Proposals that the Commission permit the sale of broadcast subchannels to socially disadvantaged businesses.<sup>15</sup>

The Commission also should consider whether those who qualify for a substantial disadvantage preference also could qualify for some of the above-referenced proposals, which were aimed at “socially disadvantaged businesses.” Similarly, the Commission should consider whether those who overcome a substantial disadvantage could qualify for the opportunities that currently apply to “eligible entities” under the Commission’s broadcast ownership rules.<sup>16</sup>

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<sup>15</sup> See NAB Reply Comments in MB Docket No. 09-182 at 24. NAB and other supporters of this proposal have noted that obtaining financing for operation of a subchannel pursuant to a local marketing or lease agreement presents additional challenges for minority broadcasters seeking financing due to the temporal nature of these arrangements. Actually holding a subchannel license, by contrast, would better facilitate financing for prospective operators of subchannels. *Id.* See also NAB Reply Comments in MB Docket No. 07-294 at 7-8 (Aug. 29, 2008) (urging consideration of the DCS share time proposals, but cautioning against imposition of undue restrictions on sales, which will impede the efficacy of these proposals and harm the potential market for secondary channels).

<sup>16</sup> See 47 C.F.R. § 73.3555, Note 2(i) (defining eligible entity). The Commission allows the holder of an equity or debt interest in the applicant to exceed the above-noted 33 percent threshold without triggering attribution provided (1) the combined equity and debt in the eligible entity is less than 50 percent; or (2) the total debt in the eligible entity does not exceed 80 percent of the asset value, and the interest holder does not hold any equity interest, option, or promise to acquire an equity interest in the eligible entity or any related entity. *Promoting Diversification of Ownership in the Broadcasting Services*, 23 FCC Rcd 5922 (2008) (“*Diversity Order*”). Additionally, the Commission has a small business cluster transfer policy intended to promote diversity of ownership, which permits sales of grandfathered combinations that exceed the ownership limits to and by eligible entities. *2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules*, 18 FCC Rcd 13620, 13810-11 ¶ 488 (2003). In addition, eligible entities may sell existing grandfathered combinations without restriction. *Diversity Order* at ¶ 61. Moreover, the Commission has modified section 73.3598 of its rules to afford eligible entities that acquire an expiring construction permit additional time to build out the facility. 47 C.F.R. § 73.3598.

#### IV. CONCLUSION

The Diversity Committee's Recommendation could result in significant public interest benefits and bring new parties into ownership and operation of communications facilities. NAB urges the Commission to commence a rulemaking proceeding to further examine the establishment of competitive bidding credits for those who have overcome substantial disadvantages. Moreover, NAB urges the Commission to act expeditiously on past proposals for incentive-based means of increasing diversity in broadcast ownership. Finally, the Commission should consider whether overcoming a substantial disadvantage should qualify a party for other opportunities, such as those that currently apply to eligible entities and those that have been proposed for socially disadvantaged businesses.

Respectfully submitted,

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