February 1, 2013

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Notice of Ex Parte Communication in MB Docket Nos. 09-182, 07-294

Dear Ms. Dortch:

On January 30, Jane Mago of the National Association of Broadcasters (NAB), David Honig of the Minority Media & Telecommunications Council (MMTC) and Mace Rosenstein of Covington & Burling LLP met with Elizabeth Andrion of the Office of Chairman Genachowski and William Lake of the Media Bureau. The primary focus of the meeting was on steps the Commission might take to improve opportunities for ownership in broadcasting. Mr. Honig and Ms. Mago reiterated positions taken in their comments that the Commission should explore race and gender neutral ways to increase ownership diversity. They specifically discussed the overcoming disadvantage preference endorsed by the FCC's Diversity Committee and emphasized their organizations' commitments to helping develop a practical, reasonable incubator program as discussed in the attached written ex parte.

In addition to the above, Mr. Honig suggested that the Commission might focus on proposals to revitalize AM radio. He emphasized that the proposals in the MMTC Radio Rescue petition[1] (many of which are endorsed by NAB) would help the many minority and female owners of those stations. AM radio may also be the most affordable entry point to broadcasting.

Mr. Rosenstein urged the Commission to move forward on the long pending request of the Coalition for Broadcast Investment (CBI) to clarify its policy on foreign investment in broadcast facilities. CBI specifically asked the Commission to clarify and affirm that it will "conduct a substantive, facts and circumstances evaluation of proposals for foreign investment in excess of 25 percent in the parent company of a broadcast licensee, consistent with and in furtherance of its authority under Section 310(b)(4) of

[1] NAB Reply Comments in MB Docket No. 09-182 at 33 (filed April 13, 2012). *See also* NAB Comments in MB Docket No. 09-52 (filed Oct. 23, 2009) (supporting MMTC proposals to remove the nighttime coverage rules from section 73.24(i); modify the principal community coverage rules for commercial stations; replace the minimum efficiency standard for AM stations with a "minimum radiation" standard; allow FM applicants to specify Class C, C0, C1, C2 and C3 facilities in Zones 1 and 1A; remove non-viable FM allotments; relax the limit of four contingent applications; relax the main studio rule; conduct tutorials on the radio engineering rules; and appoint a public engineer).

the Communications Act."[2] Mr. Honig and Ms. Mago expressed support for that proposal.

Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,

/s/
Jane E. Mago
Executive Vice President and General Counsel
Legal and Regulatory Affairs

/s/
David Honig
President
Minority Media & Telecommunications Council

/s/
Mace Rosenstein
Counsel for the Coalition for Broadcast Investment
Covington & Burling LLP

cc: Chairman Genachowski, Commissioner McDowell, Commissioner Clyburn, Commissioner Rosenworcel, Commissioner Pai, Elizabeth Andrion, Erin McGrath, Dave Grimaldi, Alex Hoehn-Saric, Matthew Berry, Bill Lake

[2] Letter to Marlene H. Dortch, Secretary, FCC, from Mace Rosenstein and Gerald Waldron of Covington & Burling LLP, Counsel for the Coalition for Broadcast Investment (filed Aug. 31, 2012).

January 30, 2013

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Written Ex Parte Communication in MB Docket Nos. 09-182, 07-294

Dear Ms. Dortch:

As noted in our previous filings in the above-referenced proceedings, the National Association of Broadcasters ("NAB") and the Minority Media & Telecommunications Council ("MMTC")[1] have urged the Commission to adopt and test an overcoming disadvantages preference ("ODP")[2] by applying it in the context of an incubator program.[3] NAB and MMTC have also expressed willingness to participate in discussions with the FCC and other interested parties about the practical steps that would be involved in implementation of such a program.[4]

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[1] NAB Reply Comments in MB Docket Nos. 09-182 and 07-294 (filed Jan. 4, 2013) ("NAB Data Reply Comments") at 4-5; Comments of Diversity & Competition Supporters ("DCS") in MB Docket Nos. 09-182 and 07-294 (Dec. 26, 2012) ("DCS Data Comments") at 12-13. MMTC is a member of and counsel for DCS.

[2] The ODP standard is a race- and gender- neutral definition that targets those who have overcome substantial disadvantages. The use of an ODP standard was proposed in 2010 by the FCC's Diversity Committee. The FCC later issued a public notice seeking comment on whether to conduct a rulemaking proceeding to evaluate use of an ODP standard. *See 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, 25 FCC Rcd 16854 (2010).

[3] NAB Data Reply Comments at 4-5; DCS Data Comments at 13. *See also* DCS Data Coments at 7-8 (discussing incubator program); Comments of the National Association of Black Owned Broadcasters in MB Docket Nos. 09-182 and 07-294 (Dec. 26, 2012) at 5, n.13 (the incubator proposal could be an effective tool "if connected to a definition of eligible entity that could meaningfully promote minority ownership.").

[4] *See, e.g.,* NAB Data Reply Comments at 5.

Attached are discussion papers providing some additional detail about potential ways to implement this proposal. The suggestions attached are grounded in MMTC's extensive experience with minority owners of television and radio broadcast stations who regularly participate in MMTC programming and activities.[5] Likewise, NAB's input is based on relationships with its members, including broadcast industry owners and executives who are minorities, women and new entrants into the field. Aside from the presence of such owners and executives on the NAB's Board of Directors, NAB has built these relationships though the programs offered by its affiliates, including the NAB Education Foundation ("NABEF").[6]

NAB and MMTC again urge the Commission to move forward with efforts to enhance diversity in the broadcast industry through this incentive-based approach and stand ready to assist the Commission with whatever practical issues may arise. In particular, NAB and MMTC will undertake to identify, recruit, and prepare minorities and women for ownership opportunities that may arise through the Commission's test of an incubator program.

Please direct questions concerning this matter to the undersigned.

Respectfully submitted,

/s/

David Honig
President
MMTC

/s/

Jane E. Mago
Executive Vice President & General Counsel
Legal & Regulatory Affairs
NAB

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[5] Since 2009, MMTC has been the licensee of commercial stations through its affiliate, MMTC Broadcasting, LLC. Currently, MMTC's stations are located in Minneapolis, Minnesota; Laurel, Mississippi; Ft. Smith, Arkansas, and Augusta, Georgia, with another being acquired in Detroit, MI. Since 1997, MMTC has operated MMTC Media and Telecom Brokers, which has participated in $1.7B in sales to minority buyers, representing about 1/3 of all sales to minorities since MMTC founded its brokerage.

[6] NABEF sponsors a variety of programs to provide professionals and students with access to employment in the broadcasting industry, as well as with the tools they need to excel in broadcast management and ownership. NABEF's flagship program, the Broadcast Leadership Training ("BLT") program, offers MBA-style executive training for station managers and others who aspire to own stations or advance to senior management. To date, 32 graduates of the program currently own (or have owned) broadcast stations and many others have been promoted within their companies or are in various stages of station acquisition.

cc: Chairman Genachowski, Commissioner McDowell, Commissioner Clyburn, Commissioner Rosenworcel, Commissioner Pai, Elizabeth Andrion, Erin McGrath, Dave Grimaldi, Alex Hoehn-Saric, Matthew Berry, Bill Lake

Incubator Program – Practical Implementation

Premise of Program:

A broadcaster that incubates a qualifying entity would be given a waiver of the structural ownership rules with regard to one media outlet. For example, a radio owner that incubates a qualifying entity in a large market could own nine stations in that market (or any larger market) instead of the eight stations currently permitted under the rule.

Scope of Program:

If the FCC has concerns about implementing an incubator program nationwide, NAB and MMTC suggest that, for purposes of an initial incubator effort, the FCC could limit the program to a sampling of radio markets of various sizes. While NAB believes that ultimately, the program should apply for waivers of any structural rule, we do not object to initiating the program in the radio context.

Qualifying Incubation Efforts

For the pilot incubation program, the incubating entity should be required to offer any *two* of the following forms of assistance to the incubated entity.[1]

- Providing direct, low-interest loans or equity investment of 50% or more of the debt or equity of an incubated entity

- Guaranteeing 50% or more of the debt of an incubated entity

- Providing an average of ten hours per week of management or technical assistance to an incubated entity (the incubated entity would retain control of its programming, personnel, and finances)

Such assistance would be required to continue for a period of three years from the date of FCC approval of the incubation effort.

The entity that is "incubated" must, at the time of its application:

(1) meet the criteria for an overcoming substantial disadvantages preference ("ODP") entity as defined in the ownership proceeding;

(2) meet the character, legal, and financial qualification standards applicable to Commission licensees; and

(3) have attributable interests in no more than two broadcast stations or construction permits nationwide.

[1] NAB and MMTC do not object to the FCC identifying and authorizing other types of qualifying incubation efforts, but included only a few possibilities here in order to streamline analysis of our proposal.

Over the term of the incubation relationship, the incubated entity would be required to: (i) acquire a radio or television station through an assignment, transfer of control, or successful auction bid; or (ii) build out a construction permit and apply for a license to cover the permit.

The incubated entity may operate in the same market as the incubating entity, or they may operate in different markets.

Neither the incubating entity nor the incubated entity shall hold an attributable interest in the other entity (e.g., they cannot share common officers or directors). The provision of financial assistance to an incubated entity under the approved incubation relationship would not be deemed an attributable interest for purposes of the Commission's broadcast ownership rules.

Application Process

- We suggest developing an FCC Form for parties to apply for an incubation relationship. As part of the incubation application, the FCC would determine whether the entity that proposes to be incubated meets the ODP standard.

- Only after the incubation application is approved would the incubating entity be able to file a transfer of control or assignment application to acquire one additional station over the multiple ownership limits. The incubating entity would have a period of three years from the date of grant of the incubation application to apply for ownership of the additional station.

- Good faith requirement: Both parties to an incubator relationship must certify that they will make good faith efforts to ensure the success of the incubated entity.

- Applicants must certify that the incubated entity will maintain control over the programming, personnel, and finances of its operations.

Compliance and Enforcement

- Both parties to the incubation relationship would file periodic reports regarding the incubation project. The FCC's Enforcement Bureau (or other designated Bureau or Office) would review the reports. The reports would have to be signed by an officer or director and would contain the same certification that is required for FCC application forms.

- If the incubation relationship ends for any reason before the completion of the two-year period, the incubating broadcaster must divest a station and come into compliance with the then-current radio ownership rule. Such divestiture must occur within one year of the termination of the incubation relationship.

Standard Based on Diversity Committee's Proposed Overcoming Substantial Disadvantages Preference ("ODP") – Practical Implementation

The goal of developing and applying the ODP standard is to identify entities controlled by persons who (1) have experienced a disadvantage; (2) that had a substantial negative impact on their entry into or advancement in the educational and/or professional environment or other comparable context; and (3) that they have at least partially overcome.

Control will be determined under the Commission's traditional tests of either *de jure* (a majority of voting and equity interest) or *de facto* control. Not all of the persons involved in controlling the qualifying entity must have faced the same disadvantage, as long as majority control is exercised by individuals that meet the criteria (e.g., the qualifying entity may owned in equal parts five people, three whom overcame different disadvantages).

Disadvantages to Be Considered

- Physical disabilities that rendered professional or business advancement substantially more difficult than for most individuals;
- Physical injury or Post Traumatic Stress Disorder in connection with military service;
- Unequal access to institutions of higher education, including due to physical limitations, substantial economic disadvantage, natural or human disaster, or as a result of discrimination;
- Unequal access to credit, including due to physical limitations, substantial economic disadvantage, natural or human disaster, or as a result of discrimination.

Evaluation

Application of this standard does not involve use of certain features, such as race, gender, or ethnicity, to create a presumption of disadvantage. For example, the Diversity Committee has observed that:

- A female applicant would be permitted to demonstrate that she suffered a qualifying disadvantage in connection with gender discrimination in the workplace. But she would also need to show that the experience substantially reduced her opportunities for advancement in the workplace or otherwise impacted negatively her professional or educational prospects but that she had achieved professional successes notwithstanding this disadvantage.

- No applicant would be entitled to or presumed entitled to the preference by virtue of being a woman or a minority.

- A male or non-minority applicant could also establish substantial disadvantage by making a similar showing in connection with gender- or race-based discrimination.

The determination would look at all relevant evidence in evaluating whether an individual had suffered substantial disadvantage.

Overcoming the Disadvantage

A qualifying individual must also have at least partially overcome the disadvantage. The FCC routinely evaluates the character, legal, and financial qualifications of prospective licensees. An individual that satisfies this test can also be considered to have at least partially overcome the disadvantages he or she experienced.

Avoiding Abuse

Questions have been raised about how an ODP standard should be applied where an individual who experienced substantial disadvantages in the past but, from an economic standpoint, no longer needs the assistance provided by an incubator program. For example, how would such a standard apply to a person who demonstrates that she once faced unequal access to credit, but eventually owned and/or operated several successful businesses and now enjoys a very high net worth? NAB and MMTC believe that safeguards can be imposed to prevent the unintended consequence of allowing such individuals to meet the ODP standard by capping the maximum net worth of *individuals* evaluated under this standard.

The rationale for such a cap is that, even if an individual has certainly faced and overcome a substantial disadvantage that may or may not be related to economics or access to credit, the *benefits derived* from the ODP standard applied in the broadcasting start-up context are largely economic. An individual who now has the resources to make significant investments in a broadcast startup outlet and/or pay for the management and technical expertise provided by an incubator relationship should not qualify under the ODP standard for determining eligibility for an incubator or similar program.