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February 4, 2013

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

Re: Notice of *Ex Parte* Presentation, MB Dkt. No. 09-182 – 2010 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 Dkt. No. 07-294 – Promoting Diversification of Ownership in the  
Broadcasting Services

Dear Ms. Dortch:

Pursuant to section 1.1206(b) of the Commission’s rules, this letter provides  
notice regarding an *ex parte* communication in the above referenced proceedings.

On January 31, 2013, Cheryl Leanza, representing the Office of  
Communication of the United Church of Christ, Inc., and Angela Campbell,  
Laura Moy, and law student Brendan Forbes of the Institute for Public  
Representation, serving as counsel to the Office of Communication of the United  
Church of Christ, Inc., (collectively “UCC OC, Inc.”), met with Bill Lake, Chief of  
the Media Bureau; Sara Whitesell, Deputy Chief of the Media Bureau; and

\* Admitted to the Maryland bar only; DC bar membership pending. Practice supervised by members of the DC bar.

Brendan Holland, Judy Herman, Martha Heller, and Hillary DeNigro of the Media Bureau's Industry Analysis Division. Our goal for this meeting was to better understand the Media Bureau's reasoning. Unlike in typical rulemakings, there has been very limited discussion between parties, and we hoped this meeting would allow the Bureau to articulate its understanding and evaluation of the record.

We reiterated our previously-expressed concern that repealing or relaxing the cross-ownership rules would have a detrimental impact on the already low levels of radio station ownership by minorities and women.<sup>1</sup> We urged the Commission to delay any actions loosening restrictions on cross-ownership until the Commission has conducted studies examining the impact such actions would have on ownership diversity.

### **Radio Stations of All Service Types Express Editorial Viewpoint**

We explained that the radio-television and radio-newspaper cross ownership rules remain important because radio contributes to viewpoint diversity. Even radio stations that do not air locally produced news, typically broadcast local events, public service announcements, and commentary on local and national issues. They provide listeners with varied perspectives into an increasingly diverse America, such as commentary provided by hosts of morning shows. Decisions made by radio stations affect viewpoint diversity in a wide variety of ways. For example, even radio stations that produce little independent news choose which external sources of news, talk, or other syndicated programs to broadcast. They determine which genre of music is played, which artists to feature, and whether the music they play glorifies violence, is misogynistic, promotes racial harmony, and/or promotes local culture. They decide which DJs to hire, and whether to tolerate hate speech from these DJs.<sup>2</sup> Minority- and women-owned stations provide unique voices on these issues, and communicating this perspective to listeners is essential for maintaining viewpoint diversity.

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<sup>1</sup> See, e.g., Comments of UCC, *et al.* at 4 (Dec. 26, 2012).

<sup>2</sup> See Comments of National Hispanic Media Coalition, *et al.* at 12-16 (March 5, 2012).

Indeed, it is clear that the Commission itself – and Congress – recognize the relevance of the radio service to viewpoint diversity in other contexts. For example, the Commission recently adopted rules implementing the Local Community Radio Act of 2010 to advance the Act’s “core goals of localism and diversity.”<sup>3</sup>

Not only do we believe that the newspaper/radio cross-ownership rule plays an important role in preserving viewpoint diversity, but we also expressed our concern that if the Commission eliminates the rule because it does not find radio to be a source of viewpoint diversity, we believe this would lead logically to the conclusion that radio ownership diversity does not matter in the context of any rule. Thus, it would not be possible for the Commission to apply any future race-conscious policies, adopted after *Adarand* studies are conducted, to radio. We expressed our view this was unacceptable.

### **Section 202(h) Does Not Compel the Commission to Repeal Any Rules**

We noted that 202(h) does not compel the Commission to repeal rules according to any heightened evidentiary standard, and stressed our support for the Commission’s long-held common sense position that ownership diversity affects viewpoint diversity. The record contains persuasive evidence that ownership diversity contributes to viewpoint diversity; however, even if we were to give the contrary view the benefit of the doubt, the factual evidence is – at most – ambiguous. To the extent current data on this subject is lacking, it is because viewpoint diversity is difficult to measure, and the Commission currently lacks sufficient data to properly study and analyze this link. Given that the current record could support either conclusion, the Commission has discretion to conclude the rule should remain in place. The provisions of 202(h) do not compel repeal in light of the current record unless the Commission revises its interpretation of 202(h). As the Third Circuit Court of Appeals has explained, 202(h) embodies the ordinary rulemaking standard and does not give any additional weight to the term “necessary” beyond that given to “necessary in the public interest.”<sup>4</sup> The Commission can continue promoting ownership diversity

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<sup>3</sup> *Creation of a Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15,402 (2012) at ¶ 69.

<sup>4</sup> See *Prometheus Radio Project v. FCC*, 373 F. 3d 372, 390–95 (3d Cir. 2004).

without making any race-conscious decisions, and it should not default—in the absence of data—to undermining diversity by relaxing cross-ownership restrictions.

### **Relaxing the TV-Radio Cross Ownership Rule Would Increase Consolidation and Create Additional Pressures for Women and Minorities Who Own Radio Stations to Exit the Market**

UCC OC, Inc. expressed concern that allowing increased consolidation would make it more difficult for women and minorities who own broadcast stations to remain in the market and express their diverse viewpoints. We do not advocate any policies that would prevent women and minorities from selling to certain individuals on the basis of race or gender. However, consolidation would increase barriers to entry for all new entrants, and would force some owners who want to remain in the market to sell due to the increased consolidation undermining competitiveness.

With respect to the rules concerning radio ownership, we explained that radio is one of the few communications mediums where women and minorities have purchase, and is an effective entry point into broadcast. We oppose any efforts by the Commission to lessen the ability of diverse interests from entering broadcasting by allowing greater ownership consolidation in radio or any other broadcast service.

We explained that UCC OC Inc. would like to understand further the Bureau's apparent belief that eliminating the radio-television cross-ownership rule would not cause further consolidation. The tentative conclusion in the NPRM did not contain much detail explaining the agency's reasoning behind its tentative conclusions.<sup>5</sup> To the extent that the Commission has developed conclusions in this regard based on market-by-market or other factual analysis of the state of radio broadcasting, we strongly encourage the Commission to share this analysis publicly prior to adoption of the order. To the degree that the Commission's analysis is predicated on a belief that changes to the ownership

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<sup>5</sup> See *2010 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*, Notice of Proposed Rulemaking, 26 FCC Rcd 17,489 (2011) at ¶¶ 119, 126.

rules will not result in any changes in existing ownership, UCC OC Inc. questions why the Commission would feel compelled to change the rule at all. Such a presumption would mean that the rule is not causing any harm in its current format because it is not precluding any behavior.

Moreover, the assumption that view that repealing the radio/television cross-ownership rule will not result in significant consolidation fails to take into account the that the number of stations that can be cross-owned currently depends on the number of remaining independent voices, defined as radio stations and television stations.<sup>6</sup> For example, under the current radio/television cross-ownership rule, in a market with at least 20 independently owned voices a single entity may control a maximum of 2 television and 6 radio stations or 1 television and 7 radio stations. Repeal of the rule would allow such an entity to control up to 2 television stations and 8 radio stations – an increase of 2 broadcast stations total. In a market with 10 independently owned voices, the current rules allow an entity to control up to 2 television stations and 4 radio stations. Repeal of the cross-ownership rules would allow such an entity to acquire an additional radio station.

Significantly, repeal of the independent voices requirement would also allow companies that do not hold the maximum number of stations – but cannot currently acquire additional radio or television stations because of the minimum voices requirement – to control additional broadcast stations. If the rule is repealed, in a community with 2 television stations and 10 commercial radio stations, there might only be two independent voices remaining; *i.e.*, a single entity would be allowed to control up to 5 radio stations as well as a television station.

In addition, repeal of the newspaper/radio cross-ownership rule would allow a company that owns the sole daily newspaper, which under the existing rules may not acquire a single radio station, to acquire up to 8 radio stations.

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<sup>6</sup> 47 CFR §73.3555(c).

## **The Commission Should Move Forward with Gathering Data and Conducting Studies Measuring the Impact of its Policies on Women and Minorities**

UCC OC, Inc. – and the entire civil rights community – have been waiting for almost twenty years since the *Adarand* decision for the Commission to develop the record necessary to support its efforts to increase ownership of broadcast stations by women and people of color. It has not. We expressed our frustration with the Commission’s repeated delay, and stated that proposals that delay race-conscious policies until 2016 are not acceptable. UCC OC, Inc. expressed that, at a minimum, the Commission should be moving ahead with its current studies regardless of the status of the media ownership proceeding. We expressed our support for the OCBO studies, which could provide the Commission with data to measure the impact of current policies on the information needs of underserved communities. We stressed again – as we have repeatedly in the past – the importance of the Commission acquiring accurate data and conducting studies before making any decisions that could harm broadcast ownership opportunities for minorities and women.

## **The Commission Should Close Current Loopholes in its Ownership Rules for Virtual Consolidation via Contractual Sharing Arrangements**

UCC OC, Inc. expressed our support for attribution of Shared Service Agreements (“SSAs”), and urged the Commission to support our previously-explained multifactor test.<sup>7</sup> Recent *ex parte* notices from NBC Television Affiliates and Bonten Media Group support our position that companies would prefer to eliminate the duopoly rule, and are using Joint Service Agreements (“JSAs”) and SSAs as loopholes allowing them to avoid that limit.<sup>8</sup> We believe that failing to attribute JSAs and SSAs means that companies are able to circumvent the existing, and any future versions of, the ownership rules.

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<sup>7</sup> See Comments of UCC, *et al.* at 15–20 (March 5, 2012).

<sup>8</sup> See NBC Television Affiliates *Ex Parte* (January 28, 2013); Bonten Media Group *Ex Parte* (January 22, 2013).

## **Any Modification to the Waiver Process for Newspaper/Television Cross-Ownership Should Enhance Opportunities for Public Comment**

UCC OC, Inc. expressed interest in exploring the possibility that the waiver process for newspaper/television cross-ownership restrictions could be made more predictable and uniform. It is essential that any modified waiver process grant the public adequate notice to exercise the right to comment on proposed waivers. In addition, because companies are typically granted waivers for a set period of time, the Commission must track the existence of waivers and ensure compliance when waivers expire. In the rare case where properties cannot be divested within the Commission-imposed time limit, the waiver holder should be required to file for a new waiver, and the public should have an opportunity to comment.

Respectfully submitted,

/s/ \_\_\_\_\_

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February 4, 2013

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