

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

In the Matter of)	
)	
Promoting Diversification of Ownership)	MB Docket No. 07-294
In the Broadcasting Services)	
)	

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)¹ submits these reply comments concerning proposals to expand ownership reporting obligations to holders of certain non-attributable interests in broadcast entities. As demonstrated by the record, the proposed data collection would place broadcasters at a disadvantage vis-à-vis their competitors in seeking investment dollars, and would impose burdens on licensees and their investors. At the same time, the proposal would not contribute to a better understanding of minority and female ownership by either the Commission or other parties interested in advancing broadcast ownership diversity.² Accordingly, the Commission should not expand reporting requirements as proposed in the Fifth Further Notice of Proposed Rulemaking in the above-referenced proceeding.³ We urge the Commission to continue to refine its Form 323 process in other ways, such as the streamlining measures proposed in the

¹ NAB is a nonprofit trade association that advocates on behalf of free, local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² See, e.g., NAB Comments in MB Docket Nos. 09-182 and 07-294 (Dec. 26, 2012) (responding to FCC request for comment on its report on ownership of commercial broadcast stations based on Form 323 data).

³ See *Promoting Diversification of Ownership in the Broadcasting Services*, Memorandum Opinion & Order and Fifth Further Notice of Proposed Rulemaking, 24 FCC Rcd 13040 (2009)(“*Fifth FNPRM*”).

Sixth FNRPM,⁴ and to focus its efforts on substantive proposals to promote ownership diversity.

I. The Record Demonstrates That Reporting by Holders of Non-Attributable Interests Will Not Advance Commission Goals

NAB and the Joint Commenters agree that reporting of non-attributable interests in single majority shareholder entities is an unwarranted and arbitrary departure from longstanding attribution policies.⁵ The broadcast attribution rules are designed to “identify those interests in or relationships to licensees that confer on their holders 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.”⁶ The Commission does not treat investors with minority interests in single majority shareholder licensees, or those that meet the equity/debt plus (“EDP”) eligible entity thresholds,⁷ as attributable because it has determined that these interests do not rise to that level of influence over licensee operations. Thus, there is no evident purpose to

⁴ See *Promoting Diversification of Ownership in the Broadcasting Services*, Sixth Further Notice of Proposed Rulemaking, MB Docket No. 07-294, FCC No. 12-166 (rel. Jan. 3, 2013) (“*Sixth FNPRM*”). The *Sixth FNPRM* sought comment on certain proposals submitted in the *Review of Media Bureau Data Practices Proceeding*. *Id.* at ¶ 23. These include NAB proposals to modify Form 323 to: (i) allow for cross-referencing to other reports; (ii) allow a filer with multiple subsidiaries to list all licensees/stations in Section I, Item 7; (iii) eliminate Section II-B, Item 3(c) as duplicative; and (iv) modify form instructions to eliminate certain inconsistencies. See Comments of NAB in MB Docket No. 07-294 (filed Feb. 14, 2013) at 9-10 (“NAB Comments”), *citing* NAB Reply Comments in MB Docket No. 10-103 (filed Sept. 13, 2010) at 6-8. No commenter has opposed these proposals.

⁵ See Comments of Beasley Broadcast Group Inc., CBS Corporation, Emmis Communications Corporation, and Entercom Communications Corp. (the “Joint Commenters”) in MB Docket Nos. 07-294 *et al.* (filed Feb. 14, 2013) at 3-4 (“Joint Comments”).

⁶ Joint Comments at 4, *citing* *Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Regulation and Policies Affecting Investment in the Broadcast Industry and Reexamination of the Commission’s Cross Interest Policy*, 14 FCC Rcd 12559, 12560 ¶ 1 (1999) (“1999 Attribution Order”). See also NAB Comments at 6.

⁷ *Promoting Diversification of Ownership in the Broadcasting Services*, 23 FCC Rcd 5922 (2008) (“*Diversity Order*”).

“count” in the reporting context an interest that does not “count” in the ownership attribution context.

As NAB discussed in its comments,⁸ we also agree with the Joint Commenters’ observation that gathering data regarding non-attributable investors in single majority shareholder entities will “distort the existing minority and female ownership database” with information on “investors [who] are simply not in a position to influence programming or other decisions of a licensee.”⁹ Contrary to the Commission’s intended goal of making its database *more* accurate and reliable—and thereby sufficient to support potential future policies to promote ownership diversity—compiling data about non-attributable investors as if they *were* attributable will only muddy the ownership data waters that the FCC wishes to clear.¹⁰ To better develop a strong foundation for diversity policies, the Commission should not include those interests that do not rise to the level of attribution.

UCC claims that unless the Commission collects ownership data via Form 323 from holders of equity interests in a licensee that would be attributable but for the single majority shareholder exemption, then the Commission would not know about individuals

⁸ NAB Comments at 6-8.

⁹ Joint Comments at 10-11. The Joint Commenters discuss how expanded reporting could be harmful to the Commission’s efforts. Specifically, the primary rationale for increasing minority and female ownership diversity is the potential for diverse owners to offer more diverse programming. *Id.* at 4. By including in its analysis investors who are non-attributable and who therefore do not influence programming, the Commission would “confuse analysis of viewpoint diversity in the broadcasting industry and thereby undermine the legitimacy of any future Commission policies designed to promote that diversity.” *Id.* at 11.

¹⁰ As a further complication, the *Fifth FNPRM* proposes to require reporting of only certain non-attributable interests. As the Joint Commenters point out, someone holding a 4.99% voting stock interest in a licensee corporation or a 70% insulated limited partner in a partnership exercises no more meaningful influence over station operations than does a minority shareholder in a single majority shareholder entity. Joint Comments at 12. While NAB does not support Form 323 reporting concerning *any* non-attributable interests, we agree with the Joint Commenters that would seem illogical to treat certain non-attributable interests as more important than others.

who “may control up to 49% of the stock and *exercise significant influence over a broadcast station’s operation.*”¹¹ This statement reflects UCC’s fundamental disagreement with the current FCC rule, not a valid concern about data collection.

Under the Commission’s rules—and as a matter of corporate law—an individual that is a minority shareholder in a single majority shareholder licensee corporation cannot direct the operations of the corporation.¹² As a matter of black letter law, Commission precedent, and current FCC rules, there is no possibility that such a minority shareholder could “exercise significant influence” over a station. As a result, there is no possibility that, by not “counting” minority shareholders in single majority shareholder licensees, the FCC “could be under-counting or over-counting” minority or female “ownership.”¹³ The interests at issue simply are not deemed cognizable under any form of ownership analysis. If the interests are not counted for purposes of any other form of ownership analysis, counting them for the sole purpose of analyzing minority and female ownership diversity would be an inconsistent and arbitrary choice

¹¹ Comments of the Office of Communication of the United Church of Christ, Inc., Media Alliance, the National Organization for Women Foundation, Benton Foundation, Common Cause, Communications Workers of America, Media Council Hawai’i, and Prometheus Radio Project (collectively, “UCC”) in MB Docket No. 07-294 (filed Feb. 14, 2013) at 4 (“UCC Comments”) (emphasis added).

¹² In proposing to retain the single majority shareholder exemption, the FCC has explained that “the existence of a single majority shareholder sufficiently attenuates the voting power of minority shareholders such that it should not be a basis for attribution.” *Implementation of Section 11 of the Cable Television and Consumer Protection Act of 1992*, 23 FCC Rcd 2134, 2183 ¶ 110 (2008). The FCC correctly noted that “[a] single majority shareholder has the right to manage and control a corporation,” that corporate management cannot be expected to be significantly influenced by a minority shareholder where there is a single majority shareholder, and that generally, a single majority shareholder would be able to outvote minority shareholders on any issue. *Id.* Earlier comments observed that, because a single majority shareholder controls the election of all members of the board of directors, minority shareholders have no ability to influence the directors or management of the corporation. See, e.g., Viacom Comments in MM Docket Nos. 92-264 *et al.* (Jan. 14, 2002) at 8; AT&T Comments in MM Docket Nos. 92-264 *et al.* (Jan. 14, 2002) at 77-78. See also *1999 Attribution Order* at 12560 (where there is a single majority shareholder, the “other shareholders, ‘even acting collaboratively, would be unable to direct the affairs or activities of the licensee on the basis of their shareholdings’”) (internal citations omitted).

¹³ UCC Comments at 4.

that does not contribute to the Commission's understanding of who actually controls station operations.

UCC also asserts that the Commission should collect data regarding holders of interests that would be attributable but for the higher EDP thresholds adopted in the *Diversity Order*. They assert that such information would allow the Commission to "assess whether its rule change had the intended effect of increasing investment in small businesses, including those owned by women or minorities."¹⁴ However, nothing about the proposed data-gathering exercise would provide such information.

Ownership reports are already required to be filed by each entity that holds a broadcast license (and any individuals or entities holding attributable interests in the licensee).

The success or failure of a policy designed to foster *investment in* small businesses cannot be determined by assessing the race, ethnicity or gender of the parties investing in that small business at such low levels that they are not even deemed to hold attributable interests.

UCC does not explain how this data could present a more complete picture of minority and female station ownership, how it could be beneficial to the Commission or other interested parties in developing policies to promote ownership of broadcast stations by minorities or women, or what deficiencies in FCC data these proposals would cure. NAB submits that the resources of the FCC and others concerned about broadcast ownership diversity would be better spent analyzing data regarding

¹⁴ UCC Comments at 4-5.

attributable interest holders who do play a significant role in station ownership and operations, and evaluating concrete proposals to enhance ownership diversity.¹⁵

II. Comments Show that Additional Reporting Requirements Would Impose Burdens and Deter Investment

A. Proposed Reporting Would Result in Undue Burdens

The Joint Commenters agree with NAB that the proposed reporting requirements would impose significant and undue burdens on respondents.¹⁶ They correctly observe that the *Fifth FNPRM* departs from the Commission's earlier conclusion that race, gender and ethnicity reporting was not unduly burdensome because it did not require filers to obtain information from anyone whose interests were not already reportable.¹⁷ The Joint Commenters also explain that proposals to expand reporting to include non-attributable investors will impose a significant burden because such information will be more difficult to obtain:

Many publicly traded companies have little or no demographic information about their non-attributable shareholders. Substantial stock positions often are held in 'street name' by custodial banks, brokers, or other financial institutions, and licensees generally have only limited information regarding the identity of the underlying beneficial owners without engaging in substantial, time consuming and costly inquiries or surveys.¹⁸

¹⁵ See, e.g., Letter to Marlene H. Dortch, FCC Secretary from David Honig of the Minority Media and Telecommunications Council and Jane E. Mago of NAB in MB Docket Nos. 07-294 and 09-182 (Jan. 30, 2013)(providing discussion points for the use of an overcoming substantial disadvantages standard in connection with an incubator program); Reply Comments of NAB in MB Docket Nos. 09-182 and 07-294 (Jan. 4, 2013) at 2-4; NAB Comments in MB Docket Nos. 09-182 and 07-294 (Dec. 26, 2012) at 7-8 (proposing reinstatement or adoption of various new proposals to advance diversity); Comments of the National Association of Media Brokers in MB Docket Nos. 07-294 and 09-182 (Dec. 26, 2012) at 7; Comments of the Newspaper Association of America at 10.

¹⁶ Joint Comments at 6-10; NAB Comments at 2-5.

¹⁷ Joint Comments at 6-7, citing *1998 Biennial 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, 23097 (1998).

¹⁸ Joint Comments at 7.

Compounding the burden of such data-gathering and the completion of Form 323 itself¹⁹ is the potential intrusiveness of a related proposal. The *Sixth FNPRM* proposes that if the Commission requires reporting for non-attributable interest holders, those parties obtain an FCC Registration Number (“FRN”) generated by the Commission’s Registration System. Because social security numbers are used to obtain FRNs, this requirement raises privacy and data security issues. The Joint Commenters suggest that, at a minimum, an FRN requirement for non-attributable investors will obligate single majority shareholder licensees “to devote substantial time and resources to the collection of this sensitive, intrusive information and to explain why this information is needed from investors who are non-cognizable for ownership attribution purposes due to their lack of influence or control over station operations.”²⁰ NAB agrees and urges the Commission to permit use of Special Use FRNs in the event that it requires reporting by non-attributable investors.²¹

B. The Commission Should Weigh the Potential Disincentives to Investment

The Joint Commenters paint a clear picture of what non-attributable investors are seeking in structuring their investments: they “have intentionally and carefully structured their investments to be non-attributable” as they may “have no interest in playing an active role in station management” or wish to “avoid having to comply with costly, intrusive and time consuming ownership reporting obligations.”²² They represent

¹⁹ See Joint Comments at 9-10 (discussing time-consuming nature of Form 323 preparation); NAB Comments at 4-5.

²⁰ Joint Comments at 8-9.

²¹ NAB Comments at 8-9.

²² Joint Comments at 12.

“utterly passive sources of funding” to broadcast licensees;²³ indeed, “[t]he essence of a noncontrolling investment in an [single majority shareholder] [e]ntity is passivity.”²⁴ The Commission should not compound the difficulties of attracting these types of investors to provide funding to regulated businesses with additional obligations that do not serve any public interest objectives.

As NAB explained in our initial comments, attribution rules are designed to identify entities with the ability to influence licensee operations without “unduly restricting the means by which capital investment may be made available to the broadcast industry.”²⁵ The Commission’s usual evaluation of whether its attribution rules would unduly restrict the flow of capital into the broadcast industry should apply equally to its determination of whether to treat certain non-attributable interests as attributable for purposes of Form 323 reporting.

NAB particularly urges the Commission to give serious consideration to the potential deterrent effect of its proposals here, given their asymmetrical application only to broadcasting. As the Joint Commenters observe, investors—especially more passive ones—face a broad array of choices of where to invest funds, and are less likely to select an investment saddled with burdensome, intrusive and costly reporting requirements.²⁶

²³ Joint Comments at 16.

²⁴ Joint Comments at 13.

²⁵ NAB Comments at 3, *citing Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Fourth Further Notice of Proposed Rulemaking, 24 FCC Rcd 5896 at 17 (2009) (internal citations omitted).

²⁶ Joint Comments at 15-16.

III. Conclusion

For the reasons explained above, the Commission should not expand ownership reporting requirements to non-attributable investors. Data-gathering and reporting regarding non-attributable investors would burden licensees and disadvantage them in the marketplace, without advancing any public interest objectives. At a minimum, this requirement should be implemented in a way that minimizes burdens and reduces the risk of deterring investors.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430



Jane E. Mago
Jerianne Timmerman
Erin L. Dozier

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