

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

In the Matter of

	)	
2014 Quadrennial Regulatory Review –	)	MB Docket Nos. 14-50, 09-182,
Review of the Commission’s Broadcast	)	07-294 and 04-256
Ownership Rules and Other Rules	)	

To The Commission

**COMMENTS OF THE MULTICULTURAL MEDIA, TELECOM  
AND INTERNET COUNCIL ON THE INCUBATOR ISSUE**

The Multicultural Media, Telecom and Internet Council (“MMTC”) respectfully submits these Comments in response to the portion of the December 1, 2016 Petition for Reconsideration of the National Association of Broadcasters (“NAB 2016 Petition”) at 25, and the portion of the February 24, 2017, Letter of the National Association of Black Owned Broadcasters (“NABOB 2017 Comments”) at 3-4, which address the Incubator Issue.

**The History of the Incubator Proposal at the FCC**

The concept of a Media Incubator originated in the deliberations of Chairman Alfred Sikes’ Minority Ownership Task Force in 1990, which was co-chaired by the late Zora Brown and MMTC President Emeritus David Honig. James Winston, who represented NABOB on the Sikes Task Force, originated the concept of a Media Incubator. Since 1990, NABOB and MMTC have been the primary proponents of the concept.

The concept is that a licensee could receive a permanent waiver to exceed one of the local or national station ownership limits if the licensee makes possible the creation of an independent new voice.

Certainly flesh needed to be placed on this basic structure, but many questions remained. What rules could be waived? What efforts would qualify? What would be the consequences if the efforts were unsuccessful?

To secure answers to these questions, Chairman Sikes had the concept put out for comment in an NPRM, which was issued in 1992 by a unanimous vote of the commissioners.<sup>1</sup> Several supporting comments and no opposing comments were filed. The history of the proposal from 1990 to 2011 is set out in the margin<sup>2</sup> and at length in the Diversity and Competition Supporters' ("DCS")

---

<sup>1</sup> *Revision of Radio Rules and Policies, MM Docket 91-140, Reconsideration*, 7 FCC Rcd 6387, 6391-92 ¶¶21-25 (1992) ("*Radio Rules (1992)*").

<sup>2</sup> The incubator proposal was endorsed by each of the commissioners in office in 1992 and again in 1995. See *Radio Rules (1992)*, 7 FCC Rcd at 6391-92 ¶¶21-25; *Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities MM Docket No. 94-149, Notice of Proposed Rulemaking*, 10 FCC Rcd 2788, 2791-94 ¶¶15-24 (1995). In 1995, the proposal was included in a new minority ownership docket. See *id.* That docket was closed in 2002. See *Termination of Stale or Moot Docketed Proceedings, Order*, 17 FCC Rcd 1199, 1205 (2002). In 2002, MMTC assembled the Diversity and Competition Supporters ("DCS") – 57 national organizations that included virtually all of the national mainstream civil rights organizations. DCS endorsed the incubator concept and placed it among the top five priorities for FCC action to advance minority media ownership. The incubator proposal was introduced by DCS into a 2001 proceeding that was later consolidated into the 2002 Biennial review. See Comments of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking, 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 *et al.* (Oct. 1, 2007), p. 12 n. 47, available at <https://ecfsapi.fcc.gov/file/6519739043.pdf> (last visited March 18, 2017) ("DCS 2007 Initial Comments") (citing *Multiple Ownership of Radio Broadcast Stations in Local Markets, MM Docket 01-317*, 16 FCC Rcd 19861 (2001); see *Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 17 FCC Rcd 18503, 18506 ¶7 (2002)). The Commission's (former) Advisory Committee on Diversity for Communications in the Digital Age ("Diversity Committee") endorsed the incubator proposal in 2004. See Recommendation of the Financial Issues Subcommittee, Advisory Committee for Diversity in the Digital Age (June 14, 2004), p. 6, available at <http://transition.fcc.gov/DiversityFAC/recommendations.html>, then follow link to "Incentive-Based Regulations" (last visited March 18, 2017) ("2004 Recommendation on Incentive Based-Regulations"). DCS expanded upon the 1992 proposal and offered additional suggestions as to what might qualify for incubation activities, including creating an HBCU business planning center for minority entrepreneurs, training similar to the National Association of Broadcasters Foundation's Broadcast Leadership Training Program, a line of credit for SDBs, and financial investments and mentorship opportunities for SDBs. See DCS 2007 Initial Comments at p. 13 (citing Initial Comments of Diversity and Competition Supporters, MB Docket 02-277 (Jan. 2, 2003), p. 105, available at <https://ecfsapi.fcc.gov/file/6513400596.pdf> (last visited March 18, 2017) ("DCS 2003 Comments"). In its Supplemental Comments filed in the 2006 quadrennial regulatory review proceeding, DCS further modified the incubator proposal. See Supplemental *Ex Parte* Comments of the Diversity and Competition Supporters In Response to the Second Further Notice of Proposed Rulemaking, MB Docket No. 06-121 *et al.* (Nov. 20, 2007), pp. 5-8, available at <https://ecfsapi.fcc.gov/file/6519813830.pdf> (last visited March 18, 2017) ("2007 DCS Supplemental *Ex Parte* Comments").

April 3, 2012, Supplemental Comments (“DCS Supplemental Comments”).<sup>3</sup> All commissioners in office in 1992 and 1995 endorsed the incubator concept, and the Commission’s expert Diversity Committee endorsed it unanimously in 2004.<sup>4</sup>

In 2012, to flesh out the concept, DCS identified several activities that might qualify an incubator for a waiver, subject to ongoing review “to ensure the effectiveness of the incubating activity in increasing opportunities for SDBs, without abuses”:<sup>5</sup>

- Sale or donation of a commercial radio station to a qualified entity on the condition that the recipient of a donated station certify that it will hold the station license for a period of three years following closing of the transaction effectuating the donation, subject to exceptions for economic distress or subsequent sale or donation to another qualified entity.
- Five years of an LMA (local marketing agreement) operating structure for an independent programmer on an FM HD-2 or HD-3 channel, with the independent programmer obligated to pay the licensee no more than the licensee’s actual out-of-pocket expenses associated with operation of the subchannel.
- Underwriting, including financing of one year of operations and the in-kind provisions of technical or engineering assistance or equipment that enables the re-activation and restoration to full service of a dark commercial or noncommercial station licensed to an eligible entity where the licensee or permittee certifies that it is otherwise unable to resume or commence service prior to the date on which the license or permit would be cancelled by operation of law.
- Arranging for the donation of a commercial or noncommercial station to a Historically Black College or University (HBCU), a Hispanic Serving Institution (HSI), an Asian American Serving Institution (AASI) or a Native American Serving Institution (NASI).
- Providing loans, loan guarantees, lines of credit, equity investments, or other direct financial assistance to a qualified entity to cover more than fifty percent of the purchase price of a radio station.
- Any other action that the company seeking a waiver demonstrates is likely to enhance radio station ownership opportunities for qualified entities.

---

<sup>3</sup> See 2010 DCS Supplemental Comments, 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, pp. 4-7 (filed April 3, 2012), *available at* <https://ecfsapi.fcc.gov/file/7021906604.pdf> (last visited March 18, 2017).

<sup>4</sup> See 2004 Recommendation on Incentive Based-Regulations, *supra*.

<sup>5</sup> *Id.* at p. 6. An “SDB” is a “small disadvantaged business.”

In 2013, a citizen group filed an opposition to the proposal, asserting that *any* action that had the effect of relaxing an ownership limit, no matter whether or not it brought a new voice into a market, was contrary to the public interest. And with that, the proposal was defeated by a vote of 3-2 in 2014.<sup>6</sup> Commissioners Pai and O’Rielly dissented.<sup>7</sup>

---

<sup>6</sup> *2014 Quadrennial Regulatory Review, MB Docket 14-50 et al.*, 29 FCC Rcd 4371, 4514-16 (2014) (“*2014 Quad Review*”), *affirmed in part and reversed in part on other grounds; Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016) (“*Prometheus III*”) (fns omitted) (concluding that DCS’ incubation proposal “could create a substantial loophole to our ownership caps without sufficient offsetting benefits” because “[b]y allowing broadcasters to exceed [the local ownership] caps, DCS’ proposal could result in more local radio consolidation than is presently permitted under our rules. Moreover, it is unclear based on the record in this proceeding what kind of entities should be eligible to benefit from incubation.” Further, the majority was “concerned that implementation of such proposals would pose substantial legal, administrative, and practical challenges...and could potentially open a wide loophole in our ownership rules, while possibly having little or no significant effect on minority and female ownership.” Finally, the majority was concerned about “the challenges of monitoring over time the types of complex financing and other arrangements suggested under DCS’ incubation proposal, there is a substantial risk that the Commission would not be able to ensure that such arrangements would be, or prospectively would remain, beneficial to eligible entities or other intended beneficiaries.”

<sup>7</sup> *See* Dissenting Statement of Commissioner Ajit Pai, *2014 Quad Review* at 4601-4602:

Since taking office, I have heard repeatedly that the greatest barrier to minority ownership in the broadcast industry is a lack of access to capital. That’s why the Commission should establish a voluntary incubator program as proposed by the Diversity and Competition Supporters--a program I’ve publicly supported for a long time now. Through this program, established broadcasters would be able to provide financing and other forms of assistance for new entrants looking to break into the business. By incubating a “valid eligible entity,” a broadcaster under certain circumstances would be allowed to own one more radio station in a market than they otherwise could under our local radio ownership rule. This would be a limited and targeted measure. And the benefits of incubating a new voice in the market would far outweigh any harm--especially since an incubator is likely to be most valuable in small-town markets where broadcast spectrum is plentiful but the economics are tough.

Commissioner O’Rielly and I supported including an incubator program in today’s item, but unfortunately, we fell one vote short. An incubator program has received widespread support from civil rights organizations, including the NAACP, LULAC, the National Urban League, the Rainbow PUSH Coalition, the National Council of La Raza, the Minority Media and Telecommunications Council, and the Asian American Justice Center. I am saddened that we couldn’t join together across party lines to establish such a program.

Here too, it appears the Commission’s handling of media ownership is impervious to the law and impervious to the facts. An incubator program would increase minority ownership. But that’s no match for the fervent ideological commitment to opposing at all costs any

## The NAB's Petition for Reconsideration and NABOB's Comments

In Comments filed in the 2014 Quadrennial Proceeding, the NAB joined with MMTC in proposing an incubator program:<sup>8</sup>

NAB will also continue to support race-neutral, incentive-based approaches that reduce barriers to entry for all prospective owners. NAB specifically urges the Commission to reexamine and test an overcoming disadvantages preference (ODP) by applying it in the context of an incubator program as MMTC has proposed.... The Commission expresses concern that an incubation program that allows blanket waivers of the local radio caps could create a loophole to the current rules, resulting in more consolidation than allowed under the existing caps.... NAB respectfully urges the Commission to remain open to proposals for a voluntary incubation program that reasonably defines eligibility to participate, while also ensuring that such arrangements continue to serve the public interest in protecting both competition and new entry. NAB remains willing to participate in discussions with the Commission and other parties about the practical steps relevant to implementation of such a program (fns. omitted).

In the NAB 2016 Petition, the NAB reaffirmed its support for a test of “the feasibility of the proposed overcoming disadvantages preference” as a means of defining eligibility for an incubator program. The NAB concluded that “[a]dopting an incubator program would not only provide a practical method for increasing ownership diversity, but also would respond more affirmatively to the Third Circuit’s concerns in the *Prometheus* cases,”<sup>9</sup> adding that “[r]ather than merely reinstating a revenue-based standard that the court has already rejected, *Prometheus Radio Project v. FCC*, 652 F.3d 431, 470-472 (2011), implementation of an incubator program with a more targeted eligibility standard would show through concrete action the FCC’s commitment to boosting diversity of ownership.”<sup>10</sup>

In the NABOB 2017 Comments, NABOB stated that while it had originated the incubator concept, it “has not pressed the proposal recently because of concern that the joint sales agreements

---

relaxation of a single media ownership regulation, no matter how slight or necessary that relaxation might be.

<sup>8</sup> NAB Comments, 2014 Quadrennial Regulatory Review, MB Docket 14-50 *et al.*, August 6, 2014, pp. 92-93, available at <https://ecfsapi.fcc.gov/file/7521751376.pdf> (last visited March 18, 2017).

<sup>9</sup> NAB Petition for Reconsideration at p. 25.

<sup>10</sup> *Id.* at p. 25 n. 70.

(“JSAs”) and shared services agreements (“SSAs”) utilized by some broadcasters might be offered up as the model for such an incubator program.<sup>11</sup>

Many of the JSAs and SSAs permitted by the Commission over the past decade have provided no opportunity for actual minority ownership. In many of those arrangements, the minority licensee has relied almost completely upon the group station owner for financing, programming, advertising and operations, and the group owner has had an option, that lasted as long as 30 years, to purchase the minority licensee’s station at a price that did not appreciate over that 30-year period. This is not an incubator program.

While NABOB has seen a number of things that would not work well as an incubator program, the exact outline of an incubator program that might be productive has not been fully developed on the record. Therefore, NABOB requests that the Commission issue a further notice of proposed rulemaking and request public comment on a possible incubator program.

### **MMTC Agrees that the Commission Should Issue a Further NPRM**

MMTC is confident that the concerns expressed by the Commission majority in the 2014 Quadrennial proceeding (*see n. 6 supra*) can be satisfied. The Commission is capable of determining when the addition of a new voice in a market carries more positive public interest weight than any adverse public interest weight that might be attributed to an additional station being held by an existing voice. The Commission is also capable of determining what kind of entities should be eligible to benefit from incubation. The Overcoming Disadvantages Preferences (“ODP”) concept, which the Commission rejected as insufficiently fleshed out in the 2014 Quadrennial, was supplemented by MMTC on remand from *Prometheus III*. Unfortunately, this very thorough filing happened to have been submitted on the very day that the remand order came down. The filing, a link to which is contained in the margin,<sup>12</sup> would provide a useful starting point for a re-analysis of this race-neutral concept. The ODP – endorsed unanimously by the Diversity Committee in 2010<sup>13</sup> –

---

<sup>11</sup> NABOB Comments, February 24, 2017, pp. 3-4.

<sup>12</sup> MMTC: A Pilot Program for Developing the Overcoming Disadvantages Preference (October 11, 2016), available at <https://ecfsapi.fcc.gov/file/108112692723704/MMTC--A%20PILOT%20PROGRAM%20FOR%20DEVELOPING%20THE%20ODP.pdf> (last visited March 18, 2017).

<sup>13</sup> See Preference for Overcoming Disadvantage, Advisory Committee for Diversity in the Digital Age (October 14, 2010), available at <http://transition.fcc.gov/DiversityFAC/recommendations.html>,

could resolve the dilemma of affirmative action by premising eligibility on personal initiative to overcome racial prejudice or other profound disadvantage. ODP is far too important to throw away because of unsubstantiated allegations that it may be “too difficult” to administer. Most of the alternatives have proven to be far more difficult.

Incubators should not pose great administrative difficulties – any more than MOUs and similar documents containing conditions to mergers. Such conditions are commonplace in FCC practice. They will not be large in number, and citizen groups will be watching closely. To be sure, incubators must be operated with transparency, and as NABOB correctly points out, the Commission must be highly skeptical of arrangements modeled after SSAs and JSAs posing as incubators. Many SSA and JSA arrangements posing as incubators will not actually “incubate” minority owners. NABOB is absolutely correct in pointing out that these arrangements sometimes come with options built in that run only in the direction of the larger company having the right to take out the minority “owner” and seldom for actual value.

On the other hand, it is possible to structure an incubator program using LMAs in a manner that genuinely incubates minority owners. MMTC does this through its MMTC Broadcasting LLC program, which is untethered to the ownership rules.<sup>14</sup> In 2008, MMTC, a 501(c)(3) District of Columbia corporation, formed MMTC Broadcasting LLC, a 100% owned affiliate, to acquire and operate radio and television assets. Over the years, donors have given MMTC 10 AM stations and 99 LPTV translators. In most instances, MMTC has been able to recruit a qualified minority or woman entrepreneur who aspired to be a new station owner, place her into an LMA as the station operator, train her to make the transition from management to ownership, and then, when she is

---

then follow link to “Recommendation on Preference for Overcoming Disadvantage” (last visited April 17, 2017).

<sup>14</sup> MMTC’s proposal is not a useful model for the industry as a whole since it contains only very modest incentives for broadcaster participation (*i.e.*, a small tax deduction for the donation of the station). Thus, nearly all of the stations donated to MMTC have been small facilities. At the moment, MMTC does not own any stations.

ready to become an owner, sell her the station at a significant discount below market value, thereby providing her with equity and a head start.

An incubator could also be structured as an adjunct to the recently-reinstated Distress Sale Policy, under which a licensee facing loss of license through an evidentiary hearing can avoid the hearing if it sells its station to a small business for seventy-five percent or less of fair market value.<sup>15</sup>

While most of the discussion of incubators has focused on radio and on potential waivers of the local radio ownership rules, the NPRM should invite the parties to address incubation in television.

In the NPRM, the Commission should seek comment on how incubators have worked in other fields, such as high tech, energy, transportation, and agriculture, and how these experiences could yield insights transferrable to the broadcast space.<sup>16</sup>

The Small Business Administration (“SBA”) has produced a highly useful guide to incubators and accelerators.<sup>17</sup> Given its extraordinary subject matter expertise, the SBA’s Office of Advocacy should specifically be requested to submit comments in response to the NPRM.

---

<sup>15</sup> See *2014 Quadrennial Review, MB Docket No. 14-50, Second Report and Order*, 31 FCC Rcd 9864, 10042 ¶46 (on remand from *Prometheus III*) (reinstating the Distress Sale Policy after a period of suspension due to uncertainty about the correct definition of an eligible entity). The policy, which originated in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979, 983 (1978), allowed a licensee in hearing to sell its station and have the hearing terminate if the sale was to a minority controlled entity for seventy-five percent or less of fair market value. The new and currently eligible entity definition is a revenue-based small business definition.

<sup>16</sup> See *Solidworks for Entrepreneurs Program: Accelerator and Incubator Community Members*, available at <http://www.solidworks.com/sw/communities/SOLIDWORKS-for-Entrepreneurs/sw-incubators.htm> (last visited March 17, 2017); Aaron Gregg, *Two years in, Halcyon Incubator’s charitable start-ups are finding private investors*, *The Washington Post*, October 9, 2016, available at [https://www.washingtonpost.com/business/capitalbusiness/two-years-in-halcyon-incubators-charitable-start-ups-are-finding-private-investors/2016/10/08/5a51e30c-8cb3-11e6-875e-2c1bfe943b66\\_story.html?utm\\_term=.c0fb16c2eb81%22%20-%20Google%20Search](https://www.washingtonpost.com/business/capitalbusiness/two-years-in-halcyon-incubators-charitable-start-ups-are-finding-private-investors/2016/10/08/5a51e30c-8cb3-11e6-875e-2c1bfe943b66_story.html?utm_term=.c0fb16c2eb81%22%20-%20Google%20Search) (last visited April 14, 2017); Penn State College of Agricultural Sciences, Penn State Extension, *Agricultural Incubators Provide Access to Land, Equipment, Infrastructure for Farm Start-Up* (April 26, 2012), available at <http://extension.psu.edu/business/start-farming/news/2012/agricultural-incubators-provide-access-to-land-equipment-infrastructure-for-farm-start-up> (last visited April 14, 2017).

<sup>17</sup> See C. Scott Dempwolf, Jennifer Auer, and Michelle D’Ippolito, *Innovation Accelerators: Defining Characteristics Among Startup Assistance Organizations, U.S. Small Business*

Finally, we hope the FCC will expedite the rulemaking in light of the 27-year delay in this matter – an FCC record. In addition to issuing an NPRM promptly, the Commission should invite broadcasters to offer specific, innovative incubator arrangements for the Commission’s consideration immediately.<sup>18</sup> If such a proposed arrangement draws no serious opposition, it could be granted during the rulemaking and could provide a living laboratory to help guide the proceeding-in-process. While the Commission might not be able to grant every such proposal before it adopts final rules, some of these experiments might illuminate the paths the rulemaking could take, as well as expedite long-overdue diversity relief once rules are adopted.

This relatively noncontroversial proposal has been pending in seven dockets for 27 years. It presents a genuine opportunity to increase the diversity of voices over the airwaves. Expedition is justified because “the arc of the moral universe is long, but it bends towards justice.”<sup>19</sup> The time to take action is now.

Respectfully submitted,<sup>20</sup>

*Kim M. Keenan*

Kim M. Keenan  
President and CEO  
David Honig  
President Emeritus and Senior Advisor  
Multicultural Media, Telecom and Internet Council  
1620 L St. NW, Suite 250  
Washington, D.C. 20036  
(202) 332-0500  
[kkeenan@mmtconline.org](mailto:kkeenan@mmtconline.org)

April 17, 2017

---

*Administration* (October 2014), available at <https://www.sba.gov/sites/default/files/rs425-Innovation-Accelerators-Report-FINAL.pdf> (last visited March 17, 2017).

<sup>18</sup> Per NABOB’s Comments, these should not include SSA or JSA-based proposals. See p. 6 *supra*.

<sup>19</sup> Martin Luther King, Jr., *The Gospel Messenger, Out of the Long Night*, Start Page 3, Quote Page 14, Column 1, Official Organ of the Church of the Brethren, published weekly by the General Brotherhood Board, Elgin, Illinois (Feb. 8, 1953).

<sup>20</sup> MMTC acknowledges and appreciates the editorial assistance of its Earle K. Moore Fellow, University of Miami law student Alexander Petak, and the research assistance of Raquel Wright.