

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

2006 Quadrennial Regulatory Review –)	MB Docket No. 06-121
Review of the Commission’s Broadcast)	
Ownership Rules and Other Rules Adopted)	
Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
)	
2002 Biennial Regulatory Review – Review)	MB Docket No. 02-277
of the Commission’s Broadcast Ownership)	
Rules and Other Rules Adopted Pursuant to)	
Section 202 of the Telecommunications Act of)	
1996)	
)	
Cross-Ownership of Broadcast Stations and)	MM Docket No. 01-235
Newspapers)	
)	
Rules and Policies Concerning Multiple)	MM Docket No. 01-317
Ownership of Radio Broadcast Stations in)	
Local Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244
)	
Ways to Further Section 257 Mandate and To)	MB Docket No. 04-228
Build on Earlier Studies)	

**COMMENTS OF
OFFICE OF COMMUNICATION OF UNITED CHURCH OF CHRIST, INC.
NATIONAL ORGANIZATION FOR WOMEN FOUNDATION
MEDIA ALLIANCE
COMMON CAUSE
BENTON FOUNDATION**

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SUMMARY

UCC et al. submit these comments in response to the Commission's request for comments on proposals put forth by the Minority Media and Telecommunications Council (MMTC) for advancing broadcast ownership opportunities for women and minorities consistent with constitutional requirements and the Commission's statutory authority. UCC et al. have already commented at length on MMTC's proposals, as well as the Failed Station Solicitation Rule (FSSR), in its comments filed in October 2006; therefore, it will not duplicate those points here.

The Commission is obligated to consider and adopt rules and policies for increasing minority and female ownership. Not only did the Third Circuit Court of Appeals instruct the Commission to consider proposals to encourage minority and women's ownership, the Commission is also bound by sections 257 and 309(j) of the Communications Act to review and eliminate barriers to entry for underrepresented groups, including women, minorities, and small businesses, and to develop policies to encourage their acquisition of broadcast licenses.

Taken in tandem, these provisions impose a compelling mandate on the Commission to adopt rules and procedures to increase women's and minority access to broadcast ownership. Recent developments in equal protection law emphasize the need to consider neutral alternatives before resorting to measures that would trigger elevated constitutional scrutiny. Case law does not foreclose the adoption of race- and gender-based preferences, but instead highlights contemplation and evaluation of neutral plans first.

These comments propose neutral methods that would encourage women's and minority participation in broadcast ownership without reliance on gender- or race-based classifications. First, we reiterate that tightening and enforcing current ownership restrictions is the single most

effective gender- and race-neutral method of increasing ownership by underrepresented groups. Data show that women and minorities are more likely to own broadcast stations in competitive, un-concentrated markets; as markets consolidate, ownership by underrepresented groups decreases. Limiting station ownership to current or even stricter levels will also enhance opportunities for minorities and women to own broadcast stations by freeing-up additional stations for purchase and by making it easier for them to obtain the capital needed to finance such purchases.

While the Commission must adopt ownership rules that will encourage ownership by women and minorities, it must also assess the impact of its current programs. In particular, the new entrant bidding credit, which was adopted by the Commission in 1998 to help women and minorities acquire licenses in broadcast auctions, has never been evaluated by the Commission. Unfortunately, the credit appears to have been exploited by wealthy incumbent broadcasters and, as a result, “true” new entrants have been edged out and tax payers have been deprived of millions of dollars in lost revenue.

Finally, the Commission must reform its data collection and analysis. The Commission is well aware of the myriad problems concerning its data on minority and women’s ownership levels. Good policy cannot be built upon bad data. Thus, the Commission must cure its chronic failure to collect and analyze information on ownership by underrepresented groups.

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The Office of Communication of the United Church of Christ, Inc. (“UCC”), the National Organization for Women Foundation (“NOW”), Media Alliance, Common Cause, and the Benton Foundation (collectively, UCC et al.), by their counsel, the Institute for Public Representation, respectfully submit these comments in response to the Second Further Notice of Proposed Rule Making (2007 FNPRM) in the above referenced proceeding, which was released

on August 1, 2007. The Commission seeks comments on proposals for advancing broadcast ownership opportunities for women and minorities consistent with constitutional requirements and the Commission’s statutory authority.

This is the second FNPRM issued in response to the court’s order in *Prometheus Radio Project v. FCC*.¹ The first, issued in July 2006, sought comment on proposals for advancing minority ownership put forth by the Minority Media and Telecommunications Council (MMTC), as well as the effect of its ownership rule proposals on minorities, women, and small businesses.² However, the 2006 FNPRM provided no additional proposals, nor did it address the effectiveness or legality of MMTC’s proposals. In response, in August of 2006, MMTC filed a “Motion for Withdrawal” requesting that the Commission revise its 2006 FNPRM to remedy the above mentioned deficiencies.³ Nearly one year later, the Commission has issued a Second Further Notice of Proposed Rulemaking seeking comments on MMTC’s proposals for advancing broadcast ownership opportunities for women and minorities, as well as constitutional requirements and the Commission’s statutory authority.⁴ Additionally, the Commission has consolidated the ongoing section 257 proceeding on barriers to entry for small businesses, women, and minorities with the media ownership docket.⁵

¹ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 435 n.82 (3d Cir. 2004).

² See *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*, Further Notice of Proposed Rule Making, 21 FCC Rcd. 8834 (2006) (“2006 FNPRM”).

³ *Motion for Withdrawal of the Further Notice of Proposed Rulemaking and for the Issuance of a Revised Further Notice*, at 1, (filed in MB Dkt. 06-121, August 23, 2006) (“MMTC Motion for Withdrawal”).

⁴ *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*, Second Further Notice of Proposed Rulemaking, 2007 WL 2253100 (2007) (“2007 FNPRM”).

⁵ *2007 FNPRM*, at ¶2.

UCC et al. have already commented at length on MMTC's proposals, as well as the Failed Station Solicitation Rule (FSSR), in its comments filed in October 2006; therefore, it will not duplicate those points here.⁶ Instead, these comments will focus on the Commission's obligations, by the order of the Third Circuit and the statutory mandates of sections 257 and 309(j) of the Communications Act, to analyze and remove barriers to entry for women and minorities and to consider policies and rules to promote ownership among underrepresented groups. To that end, these comments demonstrate that tightening and enforcing current ownership restrictions is the single most effective race- and gender-neutral way of promoting media ownership by underrepresented groups. We also urge the Commission to analyze the impact its current policies have on women and minorities. Finally, recent studies, including those commissioned by the FCC, demonstrate that the Commission must cure its chronic failure to collect and analyze information on minority and women ownership levels. Better data is essential if the Commission is to achieve its stated objectives, thus we urge the Commission to reform its data collection and analysis.

I. The Commission Must Adopt Rules and Policies to Promote Ownership by Women and Minorities

The Commission has acknowledged a "long history of recognition by this agency, as well as by courts, Congress, and the public, that minorities and women have experienced serious obstacles in attempting to participate in the telecommunications industry [and] that their greater participation would enhance the public interest."⁷ Developing policies to encourage ownership

⁶ See *Comments of the Office of Communication of the United Church of Christ, National Organization for Women, Media Alliance, Common Cause, and Benton Foundation*, at Section I, (filed in MB Dkt. 06-121, Oct. 23, 2006) ("UCC et al 2006 Comments").

⁷ *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, Report, 12 FCC Rcd. 16802, 16831 (1997).

among minorities and women, in addition to assessing the impact of ownership rules on underrepresented and disadvantaged groups, is not merely an option for the Commission – it is an imperative. Not only did the Third Circuit Court of Appeals instruct the Commission to consider proposals to encourage minority and women’s ownership in the ownership proceeding,⁸ the Commission is also bound by sections 257 and 309(j) of the Communications Act to review and eliminate barriers to entry for underrepresented groups, including women, minorities, and small businesses, and to develop policies to encourage their acquisition of broadcast licenses.

Under section 257, the Commission is instructed to identify and eliminate “market barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services” and to do so in a manner “favoring diversity of media voices.”⁹ Section 257 requires the Commission to report to Congress every three years on its regulatory efforts to eliminate market entry barriers for entrepreneurs and other small businesses “in the provision and ownership of telecommunications services and information services,” and to recommend any such obstacles that should be eliminated.¹⁰ Similarly, section 309(j) directs the Commission to adopt competitive bidding procedures and to issue licenses in a manner that avoids “excessive concentration of licenses” and to “disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of *minority groups and women*.”¹¹

Taken in tandem, these provisions impose a compelling mandate on the Commission to adopt rules and procedures to increase women and minority access to broadcast ownership. The

⁸ *Prometheus*, 373 F.3d at 435 n 82.

⁹ 47 U.S.C. §257 (2007).

¹⁰ 47 U.S.C. §257(a) (2007).

¹¹ 47 U.S.C. § 309(j)(3)(B) (2007) (emphasis added).

Supreme Court’s recent decision in *Parents Involved in Community Schools v. Seattle School District No.1* emphasizes that before employing constitutionally suspect classifications, such as race or gender, government must first demonstrate that it has taken into account available neutral alternatives.¹² In *Seattle Schools*, a majority of the justices stressed the necessity of first considering race-neutral approaches when the state’s goal is increasing diversity.¹³ Indeed, Justice Kennedy, writing separately and concurring in the judgment, stated that race-neutral measures “must be exhausted.”¹⁴

Faced with a clear mandate, the Commission is required to consider ways to increase the level of broadcast ownership among women and minorities. *Seattle Schools* does not preclude adoption of race- and gender-based classifications for broadcasting; but it does strongly encourage government to first explore a wide array of neutral tools to achieve such goals before relying on classifications that would trigger heightened constitutional scrutiny. Thus, it is essential that the Commission consider available neutral rules and policies, and put in place measures that will encourage ownership by women and minorities.

A. The Commission Should Tighten and Enforce Strict Ownership Limits

As we have noted in prior comments, the most effective race- and gender- neutral step that the Commission can take towards increasing opportunities for women and minorities is to tighten and enforce media ownership limits.¹⁵ The continued concentration of the broadcast industry exacerbates the difficulties minorities and women face in obtaining financing by

¹² *Parents Involved in Community Schools v. Seattle School District No.1*, 127 S.Ct. 2738, 2760 (2007) (“Seattle Schools”).

¹³ *See id.* at 2761.

¹⁴ *Id.* at 2797.

¹⁵ *See UCC et al 2006 Comments* at 25-28.

increasing the purchase price of stations. Additionally, because minorities and women are more likely to own smaller stand-alone stations, they are hard-pressed to compete for advertising revenues against the large station group owners that have resulted from increased consolidation in the industry.

Recent studies further support the position that minority and female ownership levels suffer in markets that are more concentrated. An FCC-commissioned study by Allen S. Hammond looked at the effects of the Commission's relaxation of ownership rules. The study entitled "*The Impact of the FCC's TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations 1999-2006*" tracks the decline of the number of broadcast stations owned by women and minorities due to the emergence of corporations who are now permitted to own more than one station in a single market.¹⁶ Hammond found that no minorities or women were able to create and sustain duopolies through the study's time period.¹⁷ During the seven year period studied, levels of minority ownership fell by 27% nationwide, compared to a 39% drop in markets where a duopoly was formed subsequent to the Commission's relaxation of the rule.¹⁸ The study also found that the relaxation of the duopoly rule most heavily benefited the 25 largest broadcast group owners—all of whom were non-minority and non-female owned.¹⁹

Similarly, research on minority and female ownership of radio stations conducted by Free Press illustrates that women and minorities are more likely to own broadcast stations in competitive, un-concentrated markets, and that as markets consolidate, ownership by these

¹⁶ Allen S. Hammond, *The Impact of the FCC's TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations 1999-2006* (July 2007).

¹⁷ *Id.* at 46, 54.

¹⁸ *Id.* at 55.

¹⁹ *Id.* These "25 largest" accounted for 83 of the 109 duopolies formed, or 76%.

underrepresented groups decreases.²⁰ Limiting station ownership to one television station per market, lowering the maximum number of radio stations in a market, retaining the prohibition on newspaper-broadcast cross-ownership and reinstating the prohibition on radio-television cross-ownerships will enhance the opportunities for minorities and women to own broadcast stations by freeing-up additional stations for purchase and by making it easier for them to obtain the capital needed to finance such purchases.

B. The Commission Must Assess the Effectiveness of Policies Intended to Facilitate Women and Minority Ownership

Maintaining and enforcing ownership limits is critical to promoting ownership by women and minorities. However, the Commission must also assess the impact of existing programs intended to facilitate ownership by underrepresented groups. The Commission currently has very few rules in place to promote broadcast ownership by new entrants, such as women and minorities. Unfortunately, anecdotal evidence suggests that, in some cases, poor implementation and lax oversight of such rules has hurt these groups rather than helped them.

In 1998 the Commission adopted a race- and gender-neutral “new entrant bidding credit” aimed at meeting the command of section 309(j).²¹ This new entrant program offered auction bidding credits to “entities holding no or few mass media licenses [to] promote opportunities by minorities and women consistent with congressional intent”²² The Commission concluded that “a bidding credit for entities who have no or few other media interests will work to give

²⁰ S. Derek Turner, *Off the Dial: Female and Minority Radio Station Ownership in the United States* (June 2007) (“Off the Dial”). Another study by Free Press, focusing on television ownership found similar results. S. Derek Turner and Mark Cooper, *Out of the Picture: Minority & Female TV Station Ownership in the United States* (Sept. 2006) (“Out of the Picture”).

²¹ 47 U.S.C. § 309(j)(3)(B) (2007).

²² *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd. 15920, 15987 (1998) (“§309(j) R&O”).

these groups the additional opportunities intended by Congress, in furtherance of the statutory objectives” of section 309(j).²³

The Commission’s new entrant bidding credit, which is intended to level the financial playing field between new entrants and incumbents, subsidizes the cost of a winning bid for broadcast licenses by awarding a 35% price reduction for auction participants with no attributable interests in any other “media of mass communications,” and 25% for those who have attributable interests in three or fewer.²⁴ However, the agency made clear that the new entrant bidding credit was adopted as a stop-gap measure and was not “as direct and fine-tuned as measures [the Commission] may ultimately adopt after further development of the record”²⁵ Instead, adoption of additional measures to increase broadcast ownership opportunities for small, minority- and women-owned businesses was deferred pending completion of the section 257 studies’ review of barriers to entry for women and minority groups, then underway. After the 257 studies were completed in 2000, however, the Commission never revisited the issue and over 400 broadcast licenses have been sold at auction with this makeshift definition in place.²⁶ Although these credits are aimed at promoting “opportunities by minorities and women consistent with congressional intent,” the Commission has never assessed how many women- or minority-owned businesses have actually benefited from the new entrant credit.²⁷

Not only is there no indication that the intended recipients of the new entrant credit have benefited from the program, there is actually evidence that non-women and non-minorities, who

²³ *Id.*

²⁴ 47 C.F.R. § 73.5007(a).

²⁵ §309(j) R&O, 13 FCC Rcd. at 15987.

²⁶ See *FCC Summary of Completed Auctions*, available at http://wireless.fcc.gov/auctions/default.htm?job=auctions_all.

²⁷ §309(j) R&O, 13 FCC Rcd. at 15987.

cannot reasonably be considered “new entrants” have taken advantage of the credit.²⁸ For example, Randy Michaels, former CEO of Clear Channel Radio, and founder of Radioactive, Inc., was able to take advantage of the credit in a 2004 auction of FM radio licenses. Because his company Radioactive had no attributable interests in any other communications media, it qualified for the new entrant bidding credit.²⁹ Further, because only properties owned at the time of the auction proceeding count against receipt of the credit, Radioactive received a 35% reduction on each of the 21 licenses it purchased, for a total cash discount of nearly \$5 million. If Radioactive had instead purchased the same number of licenses in successive auctions, as opposed to all at once, it could not have qualified for the discount. Thus, the auction process, in conjunction with the new entrant bidding credit, favors incumbent bidders who can amass enough capital to purchase multiple licenses in a single auction. As a result, women and minorities, who are more likely to be true “new entrants” and thus have greater challenges in accessing capital, cannot fairly compete in the current system. Additionally, the current system encourages multiple ownership and increased consolidation, which creates even more obstacles to new entrant participation.

Another example of how the bidding credit scheme has been exploited can be seen in the case of another “new entrant” bidder, Bigglesworth Broadcasting, LLC. Bigglesworth, an entity founded by long-time radio owners Jeffrey Warshaw and Mike Driscoll, also had no attributable media interests at the time of auction, and qualified for the new entrant bidding credit. It

²⁸ See e.g., Gregory F. Rose and Mark Lloyd, *The Failure of FCC Spectrum Auctions*, at 3, at http://www.americanprogress.org/kf/spectrum_auctions_may06.pdf (concluding that the auction process favors incumbents and auction outcomes skew in favor of “a small subset of bidders – and those bidders are not small entrepreneurs”).

²⁹ See Federal Communications Commission, *Auction 37 Applicant Information for Radioactive, Inc.*, available at <https://auctionfiling.fcc.gov/form175/search175/index.htm> (At search page: select auction 37, search by applicant name for “Radioactive”).

received a 35% reduction on the cost of 10 prime FM licenses, for a total cost reduction of nearly \$10 million.³⁰ What was not obvious from Bigglesworth's application was that Warshaw and Driscoll had no attributable media interests because they had just sold all 39 of their broadcast stations to Cumulus Broadcasting for \$256 million shortly before the auction.³¹ After acquiring the 10 new licenses at auction, Bigglesworth became Connoisseur Media, LLC and currently owns 22 radio stations.³²

The Commission does not require auction applicants to identify their race or gender, nor does it appear that the Commission has ever undertaken an assessment of whether the new entrant bidding credit has accomplished Congress' express intent to "promote economic opportunity and competition ... by avoiding concentration of licenses and by disseminating licenses among a wide variety of applications, including small businesses . . . and businesses owned by members of minority groups and women."³³ Indeed, when the Commission released its most recent triennial section 257 Report to Congress in early 2004 – nearly 6 years after broadcast bidding credits were adopted – it failed completely to discuss whether the measure had achieved its goal.³⁴

Unfortunately, because of the Commission's sloppy record keeping and lack of oversight of the implementation of the bidding credit in the auction process, we cannot assess the extent to

³⁰ See Federal Communications Commission, *Auction 37 Applicant Information for Bigglesworth Broadcasting, LLC*, available at <https://auctionfiling.fcc.gov/form175/search175/index.htm> (At search page: select auction 37, search by applicant name for "Bigglesworth").

³¹ See *Jeff Warshaw is a Connoisseur of Fine Radio*, RADIO INK, March 26, 2006, at 17, available at <http://www.connoisseurmedia.com/content/radioink.pdf>.

³² <http://www.connoisseurmedia.com/>.

³³ 47 U.S.C. 309(j)(3)(B) (2007).

³⁴ *Section 257 Triennial Report to Congress*, 19 FCC Rcd. 3034 (rel. Feb. 2004). Since then the FCC has taken no further action toward diversifying broadcast ownership, nor has it produced a new Triennial Report for Congress, despite the fact that the last report was released over three years ago.

which women and minority applicants have benefited from the new entrant bidding credit; nor do we know how many wealthy and established broadcasters have taken advantage of the bidding credit, edging out smaller applicants and depriving the U.S. treasury of millions in revenue.

II. The Commission Must Improve Its Collection and Analysis of Data on Women and Minority Broadcast Ownership

The Commission must act immediately to cure its chronic failure to collect and analyze information on the level of minority and women ownership.

New FCC studies highlight the paucity of data collection and analysis that the FCC has conducted regarding minority and women broadcast owners. According to Study 7, conducted by Ari Beresteanu, “the data currently being collected by the FCC is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis.”³⁵ The study further recommends “that the FCC take steps to ensure that a complete census of media firms is carefully assembled so that ownership patterns can be accurately reported and tracked over time.”³⁶ Even the FCC’s own staff admits the data is deficient. In Appendix A of Study 2, the Office of General Counsel’s Chief Economist finds that “every database supplied by the Video Division of the Media Bureau is noisy or incomplete” and that in fact “all FCC databases on station ownership contain noise.”³⁷

These problems are not new and were brought to the FCC’s attention before the ownership studies were commenced. In our fall 2006 comments, we pointed out gross gaps in

³⁵ Ari Beresteanu & Paul B. Ellickson, *Minority and Female Ownership in Media Enterprises*, at 2 (June 2007).

³⁶ *Id.* at 12.

³⁷ C. Anthony Bush, “*Minority and Women Broadcast Ownership Data*” at Study 2, Appendix A, at 18 (July 24, 2007).

the FCC ownership data, citing studies by Dr. Carolyn Byerly and S. Derek Turner.³⁸ According to Dr. Byerly, “these problems... mean that the data bases provided by the FCC on its website represent a greatly inadequate source of public information on women-and-minority media ownership... the extent and magnitude of these flaws suggest a troubling level of ineptitude and/or irresponsibility”³⁹ Turner also agreed, stating that “the FCC has abdicated its responsibility to monitor and foster increased minority and female broadcast ownership” and that “the Commission cannot account for the actual state of female and minority ownership.”⁴⁰

The collection of race and gender data is imperative to fulfill the FCC’s statutory mandate under sections 257 and 309(j) to promote diversity and competition in broadcast ownership. Collecting ownership data is the only way to provide an accurate picture of the current state of minority and female ownership and to enable the Commission to identify and eliminate any barriers to entry. Additionally, in the *Seattle Schools* case, the Supreme Court recently affirmed the validity of collecting race-conscious data for the purposes of race-neutral programs.⁴¹ Collection of race-conscious data does not distribute government benefits on the basis of race, and therefore is not subject to strict scrutiny.⁴² Indeed, collection of race conscious

³⁸ See *UCC et al 2006 Comments*, at 5-8, 39-40.

³⁹ Carolyn Byerly, *Questioning Media Access: Analysis of FCC Women and Minority Ownership Data*, at 4 (Sept. 2006) (“Questioning Media Access”).

⁴⁰ Turner, *Out of the Picture*, at 2.

⁴¹ *Seattle Schools*, 127 S.Ct. at 2792 (Kennedy, J. concurring).

⁴² *Id.* at 2792. Similarly, Justice Roberts in his Plurality Opinion, affirms the constitutionality of race-conscious data collection when he writes, “[A] provision of the No Child Left Behind Act that requires States to set measurable objectives to track the achievement of students from major racial and ethnic groups, have nothing to do with the pertinent issues in these cases.” *Id.* at 2767 (citation omitted).

data is one of several race-neutral actions Justice Kennedy cites as being constitutionally desirable.⁴³

Better data collection and analysis is essential if the Commission is to achieve its stated objectives. Good policy cannot be built upon bad data. Thus, the FCC must make a concerted effort to improve its data collection and analysis process to better assess the effectiveness of its rules.

Respectfully Submitted,

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⁴³ *See id.*