

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)	MB Docket No. 02-277
Ownership Rules and Other Rules Adopted)	MM Docket No. 01-235
Pursuant to Section 202 of the)	MM Docket No. 01-317
Telecommunications Act of 1996)	MM Docket No. 00-244
)	MB Docket No. 04-228

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

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 reply comments in the above referenced proceedings.

The Minority Media and Telecommunications Council (MMTC) has offered an impressive range of programs and policies designed to increase women and minority ownership. In earlier comments, UCC et al. already addressed many of MMTC’s proposals and urged the Commission to give them serious consideration.¹ Thus, these reply comments are limited to a few points. First, because many of MMTC’s proposals involve giving certain preferences to socially disadvantaged businesses (SDBs), the success of these proposals turns on having an appropriately tailored definition of a SDB. Only one commenter—Clear Channel—has proposed

¹ 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)

and SDB definition, and as detailed below, this proposed definition is too broad and subject to potential abuse. Second, in addition to having an appropriate definition for SDBs, MMTC's incubator proposal can only be effective if the Commission retains strict ownership limits and adopts clear and meaningful standards for evaluating incubator programs. Third, without having information regarding the number of expiring construction permits, it is difficult to evaluate MMTC's proposal to allow the transfer of expiring construction permits to SDBs. However, UCC et al. suggest it might be more effective to re-auction expired construction permits in an SDB-only auction. Finally, UCC et al. reiterate the need for the FCC to reform its data collection and analysis of minority and female ownership.

I. Clear Channel's Proposed Definition of SDBs Is Not Targeted to Achieve Its Intended Purpose

Nearly all comments support the adoption of an SDB definition,² but only Clear Channel proposes a specific definition. Clear Channel's SDB definition includes any entity that:

- (1) Does not hold an attributable interest in more than fifty radio stations nationally and does not hold an attributable interest in any radio station in the local market where the transaction would take place, and
- (2) Does not hold an attributable interest in more than six television stations nationally and does not hold an attributable interest in any television station in the local market where the transaction would take place.³

UCC et al. are concerned that, although Clear Channel claims that its definition is "limited to individuals and entities that do not have a substantial presence in the broadcast

² See e.g. *Comments of The National Association of Broadcasters* at Section III, (filed in MB Dkt. 06-121, Oct. 1, 2007); *Comments of Clear Channel Communications, Inc* at 2, (filed in MB Dkt. 06-121, Oct. 1, 2007).

³ *Comments of Clear Channel Communications, Inc* at 2.

industry,” it would seem to allow the vast majority of existing broadcasters to qualify, as well as anyone else, regardless of resources or other media-related holdings.

A. Clear Channel’s Proposed Definition Fails to Target Socially or Economically Disadvantaged Businesses

Clear Channel’s proposal does not adequately target economically disadvantaged businesses because it fails to include any kind of revenue or income cap in its SDB definition.⁴ Thus, this proposal would allow any person or entity without substantial broadcast holdings to benefit regardless of assets or resources. For example, Microsoft would meet Clear Channel’s definition of a socially disadvantaged business because, even though it possesses billions of dollars in assets, it currently owns no broadcast outlets.⁵ The Google Corporation similarly would be able to successfully apply for SDB status under Clear Channel’s definition. Surely wealthy businesses like Google and Microsoft should not be beneficiaries of any Commission program designed to increase ownership by disadvantaged and underrepresented groups. Additionally, allowing powerful and highly capitalized businesses to enjoy SDB benefits alongside legitimately disadvantaged businesses removes much of the benefit that a disadvantaged business can enjoy. Giving SDB advantages to almost everyone gives an advantage to no one.

⁴ It is not clear whether Clear Channel is proposing these two factors as the sole limitations on SDB status. It may intend the two limitations to supplement the small business definition found in the Small Business Act. 13 C.F.R. 121.201 (NAICS codes 515112 and 515120). But even if this is the case, the Clear Channel proposal would still not be sufficiently targeted to disadvantaged businesses. The SBA defines small businesses as those with annual revenues of \$6.5 million or less in radio and \$13 million or less in television. *Id.* § 124.103. As we stated in our initial comments almost a year ago, “the vast majority of radio and television stations may fall within SBA’s ‘small business entities’ category.” *Comments of UCC et al.* at Section I(D)(2)(b) at note 153, (filed Oct. 23, 2006).

⁵ Indeed, Microsoft is also part owner of a television station—MSNBC—which would not disqualify the company because it is a cable station and Clear Channel’s proposed definition applies only to broadcast station holdings.

A revenue cap would eliminate the ability of large corporations to take advantage of SDB benefits and help ensure that qualifying businesses are truly socially disadvantaged and in need of the Commission's assistance. Such a limit should be set low enough to ensure that a business is genuinely economically disadvantaged. However, in recognition that a successful broadcast venture requires a significant capital investment, it should also be set high enough to ensure that the business will be a viable one. Therefore, the Commission should devise and seek further comment on an appropriate revenue ceiling that would be sensitive to both of these concerns.

B. Clear Channel's Proposed Ownership Caps Would Allow Large Media Companies to Gain SDB Status

Clear Channel's proposal would allow companies with substantial media ownership interests to qualify for SDB benefits. Clear Channel provides no evidence or underlying rationale for its proposed 50-radio station and 6-television station caps, nor does it even address other media holdings. Thus, in addition to imposing a revenue ceiling, the Commission should limit SDB status to companies with limited media holdings.

We agree with Clear Channel's proposal to the extent that it would disqualify from SDB status entities already holding an attributable interest in a broadcast station in the same local market. However, the proposal, which allows SDBs to own up to 50 radio stations, fails to exclude companies with a substantial presence in the broadcast industry. Only the fifteen largest radio station owners control more than 50 stations.⁶ Many large and well known broadcasters—such as Bonneville International with 37 stations, Beasley Broadcast Group with 42 stations, and Cumulus Media Partners with 36 stations—could qualify for preferential treatment under Clear

⁶ Tasneem Chipty, *Station Ownership and Programming in Radio* at Table 2 (June 24, 2007).

Channel's proposal.⁷ Allowing such companies to receive the same preference as truly disadvantaged businesses would eliminate any comparative advantage disadvantaged businesses were supposed to receive.

The television station limit proposed by Clear Channel is also problematic. First, as the Commission recognized in adopting "audience reach" as the measure for its national ownership cap instead of station limits, "stations owned" is a very crude measure of a broadcaster's market power and influence because audience reach varies greatly from station to station depending on market size.⁸ Thus a more relevant measure of "substantial presence" in the television broadcast industry would be the percent of the national audience that an owner reaches through its stations. Yet, even if one were to use station numbers as means to target socially disadvantaged businesses, Clear Channel has provided absolutely no explanation or justification for a six station limit.

These unreasonably high national ownership levels proposed by the Clear Channel proposal are also far higher than those in previous programs implemented by the FCC to increase participation by new entrants. For example, the FCC's current new entrant bidding credit grants auction discounts to bidders who have attributable interests in *three or fewer* media properties.⁹

Additionally, Clear Channel's definition is under-inclusive because it excludes only owners of multiple *broadcast* media. An appropriate definition of "socially disadvantaged" should not merely consider ownership interests in broadcast stations, but also ownership interests in *any media property* to account for the fact that owners of newspapers, satellite services, and

⁷ *Id.*

⁸ *See* 47 C.F.R. § 73.3555(e).

⁹ 47 C.F.R. § 73.5007(a).

cable companies, while not incumbents in the broadcasting arena, are certainly not disadvantaged.¹⁰

C. The Clear Channel Definition Fails to Prohibit Unjust Enrichment and Other Abuses

Another problem created by Clear Channel's definition is its focus on individuals and corporations that *currently* possess attributable interests in television and radio stations. This limitation does nothing to avoid unjust enrichment, whereby a corporation that owns multiple broadcast outlets is able to sell those stations, qualify as an SDB, and then use the proceeds of its previous sale to re-enter the market as a heavily capitalized "new" entrant. As UCC et al. pointed out in its initial comments, such exploitation has occurred before in the commission's broadcast auctions.¹¹ Long-time radio owners Jeffrey Warshaw and Mike Driscoll sold all 39 of their broadcast stations to Cumulus Broadcasting for \$256 million.¹² Then, they applied as new entrants to purchase 10 prime FM licenses at the 35% reduced price reserved for new entrants, creating a total cost reduction of nearly \$10 million.¹³ To eliminate this type of abuse, an effective SDB definition should employ a waiting period that forbids SDB qualification if an entity has *or has had in the past five years* an attributable interest in media outlets that exceeds the SDB definition limits on ownership. Similarly, the Commission would need to adopt anti-

¹⁰ The FCC new entrant bidding credit similarly limits benefits based on ownership of media properties, not merely broadcast interests. 47 C.F.R. § 73.5007(a); 47 C.F.R. § 73.5008(b). A medium of mass communications means a daily newspaper; a cable television system; or a license or construction permit for a television broadcast station, an AM or FM broadcast station, or a direct broadcast satellite transponder. *Id.*

¹¹ *Comments of UCC et al.* at Section II. B. (filed Oct. 1, 2007).

¹² See "Jeff Warshaw is a Connoisseur of Fine Radio," RADIO INK, March 26, 2006, available at <http://www.connoisseurmedia.com/content/radioink.pdf>.

¹³ See Federal Communications Commission, *Auction 37 Applicant Information for Bigglesworth Broadcasting, LLC*, available at https://auctionfiling.fcc.gov/form175/search175/results_detail_appInfo.htm?searchLevel=B&application_id=13265&file_num=0371531118&version=2&Pstart=1&auction_id=37

trafficking rules to prevent entities from using SDB benefits to acquire broadcast licenses for the purpose of re-selling them.

II. MMTC Proposal #5, “The Incubator Program,” Requires Strict Ownership Limits and Clear Oversight to Be Effective

MMTC’s proposal #5 would allow a company to exceed ownership limits if that company fostered an SDB-run station.¹⁴ Both the National Association of Broadcasters and Clear Channel support such an “incubator” program.¹⁵ UCC et al. stress that such a program can only be effective if the Commission maintains strict ownership restrictions, a course of action we have advocated previously for a host of reasons.¹⁶

UCC et al. share Free Press’ concern that an incubator program could allow increased consolidation, which raises market hurdles for women and minorities and creates other problems, in return for the unproven and speculative benefits of incubation.¹⁷ Thus, it is important that the Commission have clear and meaningful standards for assessing the adequacy of incubator programs and for ensuring that such programs are actually carried out.

III. The Goal of MMTC Proposal # 4 Is Better Served by Re-Auctioning Construction Permits to SDBs

Clear Channel supports MMTC proposal #4, which would allow holders of expiring construction permits to sell them to an SDB rather than having them revert back to the FCC. However, no party has presented any information regarding the likely number of such un-built stations. UCC et al. ask the FCC, which possesses such information, to report on the prevalence

¹⁴ *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 at App. A § I, No. 5 (2007)

¹⁵ See Comments of NAB at 8; *Comments of Clear Channel Communications, Inc* at 3.

¹⁶ *Comments of UCC et al.* at Section II (filed Oct. 23, 2006).

¹⁷ *Comments of Consumers Union, Consumer Federation of America and Free Press* at 34 (filed in MB Dkt. 06-121, Oct. 1, 2007).

of expired construction permits so that the public will be able to assess whether such a proposal could actually benefit a significant number of owners from underrepresented groups.

If the number of expiring construction permits is significant, UCC et al. suggest that rather than allowing companies to sell the permits, the Commission should instead allow such permits to expire and re-auction them in an SDB-only auction. Such a policy would ensure that an SDB receives the license. In addition, any amount raised by the auction would go to the U.S. Treasury instead of reimbursing the holder of the construction permit that failed to meet its build-out obligations.

IV. Although Improving Its Data Collection is Essential, the Commission Should Not Delay Adoption of Policies to Further Broadcast Ownership Opportunities for Women and Minorities

The Comments of CU, CFA and Free Press emphasize problems with the FCC's efforts to track broadcast station ownership by women and minorities. UCC et al. agree that the FCC's current processes are insufficient and that proper data collection and analysis is essential for the Commission to monitor the effects of its policies.¹⁸

At the same time, all of the available data show that minorities and women hold very few broadcast licenses. This is beyond dispute. All of the Commenters, industry and public interest groups alike, have urged the Commission to take action to increase the number of stations owned by women and minorities.¹⁹ Thus, the FCC should promptly act adopt policies that will promote opportunities for minorities and women to fully participate in serving the public as broadcast licensees.

¹⁸ *Comments of UCC et al.* at Section II (filed Oct. 1, 2007).

¹⁹ *See e.g. Comments of The National Association of Broadcasters* at Section I; *Comments of Clear Channel Communications, Inc.* at 1-2; *Comments of UCC et al.*, at Section I, (filed Oct. 1, 2007).

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