MASSACHUSETTS
40 main st, suite 301
florence, ma 01062
tel 413.585.1533
fax 413.585.8904

WASHINGTON
1025 connecticut ave. nw, suite 1110
washington, dc 20036
tel 202.265.1490
fax 202.265.1489

March 9, 2018

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

RE: MB Docket Nos. 17-289, 14-50, 09-182, 07-294, and 04-256

Dear Ms. Dortch:

The Commission has long rightly recognized the need to improve diversity of ownership in broadcast services, particularly by encouraging station ownership by women and people of color.[1] As of 2007, women owned just under 6 percent of all full-power commercial television stations, and racial and ethnic minorities owned a mere 3 percent, with similarly dismal rates of radio ownership.[2] In the intervening years, diversity of ownership has declined even further.[3]

In its NPRM in these dockets considering a broadcast incubator proposal, the Commission rightly recognizes that one major barrier to entry for "new and diverse voices"[4] is insufficient access to capital. Would-be new entrants, particularly people of color and women, often struggle to obtain the financial and technical resources necessary to purchase and run broadcast stations. It is critical that the Commission address this serious inequality in its efforts to promote broadcast diversity and the public interest, and we are pleased to see the Commission acknowledge this reality and seek to ameliorate these harms.

However, this particular incubator proposal must not allow established broadcasters to abuse incubator relationships. For example, it must not expand so-called sharing agreements, nor further relax rules that already allow companies other than the nominal licensee to effectively control stations or to reap all of the financial benefits of owning them.

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[1] *See, e.g.*, *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C. 2d 979, 980–81 (May 25, 1978).

[2] *See* S. Derek Turner & Mark Cooper, *Out of the Picture: Minority & Female TV Station Ownership in the United States*, at 2 (Oct. 2007), https://www.freepress.net/sites/default/files/resources/otp2007.pdf ("*Out of the Picture*"); S. Derek Turner, *Off the Dial: Female and Minority Radio Station Ownership in the United States*, at 4-5 (June 2007), https://www.freepress.net/sites/default/files/stn-legacy/off_the_dial.pdf.

[3] Joseph Torres & S. Derek Turner, "A Sorry Moment in the History of American Media," (Dec. 20, 2013), https://www.freepress.net/blog/2013/12/20/sorry-moment-history-american-media

[4] *In the Matter of Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, MB Docket No. 17-289 *et al.*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, ¶ 126 (2017) ("NPRM").

In particular, therefore, we are concerned that the NPRM asks whether sharing agreements such as JSAs and SSAs should play a role in an incubation relationship, and asks whether incubating stations should be permitted to hold an option to acquire the incubated station.[5]

As Free Press has shown repeatedly, these kinds of sharing agreements and rights to acquire the sharing "partner" represent a form of covert consolidation. They let large broadcast groups skirt the Commission's ownership rules and maintain *de facto* control of the incubated station in every meaningful way.[6] In many cases, nominally independent stations operated via sharing agreements become little more than shell companies for the more established entity, with the less established entity exerting little to no control over programming, viewpoints, or competitive decisions.[7] An incubator program that exacerbated these harms would not effectively serve the incubated station and would be very unlikely to lead to future independent ownership by new entrants.

With regards to benefits for incubating entities, we are also gravely concerned about the Commission's proposal to offer waivers of local ownership rules, including potentially allowing incubating entities to obtain "an otherwise impermissible non-controlling, attributable interest in the incubated station."[8] Similar to the sharing agreements discussed above, such an arrangement could seriously impair the ability of the incubated entity to ever become a truly independent competitor in the broadcast market. In fact, by rewarding established broadcasters with even looser local ownership rules, this particular proposal could backfire entirely by encouraging media consolidation rather than diversification -- leaving would-be new entrants without any stations to buy, even should they obtain sufficient capital and technical resources. As Free Press showed empirically in a 2007 report, "any policy changes that allow for increased concentration in television markets will certainly lead to a decrease in the already low number of female and minority-owned TV stations and minority-owned local TV news outlets."[9] Allowing established broadcasters to buy up more stations, and thus foreclose new entrants from having any opportunity to buy those stations, would directly contradict the Commission's statutory mandate to avoid "excessive concentration of licenses" by "disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[10]

This kind of proposal to encourage still more concentration is particularly irresponsible following so closely on the heels of the Commission's decision to gut longstanding local ownership protections including the eight-voices test, the main studio rule, the newspaper cross-ownership rule, and the brightline prohibition against top-four station duopolies.[11] Even the most effective incubator program could not offset the serious harms presented by the rollback of these critical protections. With the broadcast market already in a state of deregulation-fueled

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[5] *Id.* ¶ 134.

[6] *See* S. Derek Turner, *Cease to Resist: How the FCC's Failure to Enforce Its Rules Created a New Wave of Media Consolidation*, (Oct. 2013), https://ecfsapi.fcc.gov/file/7520960125.pdf.

[7] *Id.* at 4-5.

[8] NPRM ¶ 138.

[9] *Out of the Picture* at 38.

[10] 47 U.S.C. § 309(j).

[11] *See generally* NPRM ¶¶ 8-95.

consolidation, it is also impossible for the Commission to claim that allowing established broadcasters to obtain waivers of what few ownership rules remain will lead to more diversity rather than more media consolidation.

Moreover, should the Commission manage to avoid all of these pitfalls in designing an incubator program, its proposal still would fail to satisfy the Third Circuit's mandate that the agency collect the necessary data to promote diverse ownership and assess the impact of its rule changes on that goal.[12] The NPRM suggests several methods for determining eligible entities (including standards previously rejected by that court); and while it asks several questions regarding ease of administration and the risk of constitutional challenges, it once again fails to ask the requisite questions regarding each standard's impact on ownership diversity.[13] Although the Commission presents this incubator proposal as an effective counterbalance to its decision to slash ownership rules without sufficient diversity impact information, as written it does not by itself suffice to serve that purpose, as it neither seeks the relevant data or performs the studies required by the Third Circuit's decisions.

Respectfully submitted,

Dana J. Floberg
Policy Analyst
Free Press

Jessica J. González
Deputy Director & Senior Counsel
Free Press

[12] *See Prometheus Radio Project v. FCC*, 652 F.3d 431, 469-72 (3d Cir. 2011); *Prometheus Radio Project v. FCC*, 824 F.3d 33, 42-50 (3d Cir. 2011)
[13] NPRM ¶¶ 131-32.