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July 3, 2018

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

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

Dear Ms. Dortch:

In a brief initial comment in this proceeding,¹ Free Press explained why the incubator proposal in the above-captioned dockets is highly unlikely to increase broadcast ownership diversity. We also explained that it does nothing to fulfill the Third Circuit's mandate, handed down in the *Prometheus Radio Project v. FCC* line of cases, to examine the impacts of broadcast ownership limit relaxation on ownership opportunities for women and people of color.²

The National Association of Broadcaster's *ex parte* letter filed on March 26, 2018 fails to change those facts. In that letter, NAB submitted self-serving research purporting to "assess the efficacy" of new entrant bidding credits that the FCC uses in broadcast auctions, and which are intended to increase the auction chances of owners who are new to the market.

The NAB concludes "that the new entrant standard has been a successful means of promoting minority and female ownership in the context of broadcast auctions."³ Yet the data presented does not support this conclusion.⁴ Even the NAB acknowledges that "the standard certainly [also] fosters broadcast ownership by a wide range of new entrants who are not minorities or women."⁵ In fact, approximately 81 percent of the permits awarded to entities using the new entrant bidding credit (445 of the 547) were awarded to entities that were NOT owned by a woman or a person of color. If anything, NAB's research demonstrates that the new entrant bidding credit has been a poor tool for increasing participation by women and people of color in the FM auction context it purported to study.

¹ Letter from Dana J. Floberg to Ms. Marlene H. Dortch, MB Docket Nos. 17-289, 14-50, 09-182, 07-294, and 04-256, at 3 (filed Mar. 9, 2018).

² *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. 2016).

³ National Association of Broadcasters, Written Ex Parte Notification, MB Docket Nos. 17-289, 14-50, 09-182, 07-294, 04-256, at 4 (filed Mar. 26, 2018) ("NAB *Ex Parte*").

⁴ *Id.* The NAB found that "winning bidders relying on new entrant bidding credits were...93% more likely to be women than winning bidders who did not use a credit [and] ... 40% more likely to be minorities," and that "winning bidders using new entrant bidding credits were 64% more likely to be minorities or women than other winning bidders." *Id.* This proves little more than the likelihood that new entrants who are people of color or women are more likely to use the bidding credit than not.

⁵ *Id.* (emphasis added).

Overall, of the 1,022 construction permits granted in the nine auctions the NAB examined, 547 were awarded to entities using bidding credits (54%). However, female-owned and/or “minority-owned” entities accounted for just 102 of the 547 construction permits awarded to entities using bidding credits (18.6%). Put another way, more than 4 out of every 5 entities using new entrant bidding credits were businesses not owned by women and/or people of color. This is an extremely low-bar “success” rate considering that approximately 67% of Americans are either women, people of color, or both.

And even if the new entrant bidding credit were a “successful” means of advancing ownership diversity and bringing new licensees into the industry, that still would not be applicable to the incubator proposal at issue here. For instance, current owners with three or fewer stations can be incubated; and wealthy friends of large conglomerates can be used as intermediaries to escape FCC ownership rules, meaning there is no need for big broadcasters to incubate stations for women and people of color and thus increase ownership diversity from its presently dismal levels.

Most importantly, there is no reason to expect, even were the incubated licensee a woman or a person of color, that the incubation would lead to actual ownership. This is especially true because the program – by definition – actually reduces the number of independently-owned stations and increases the number of stations owned by conglomerates that only ever grow bigger and never shed stations unless forced to do so. Moreover, incubators will do nothing to solve the challenge of independent access to capital and the tremendous barriers to entry posed by the hyper-consolidated marketplace that this proposal will only further consolidate.

NAB’s Conclusions Are Vastly Overstated

Close examination of the NAB’s data⁶ reveals that it has greatly overstated the strength of its conclusions. First off, the NAB relies on data from just nine FM radio station auctions, and only looks at winning bidders in those auctions. In these nine FM auctions in aggregate, “minority-owned” businesses won 14% of the construction permits granted to entities using bidding credits, while 10% of the construction permits were granted to minority-owned entities not using bidding credits.

⁶ Free Press examined NAB’s data at two levels. First it examined the auction level (N=9) and the construction permit level (N=1,022) data. Using NAB’s summary data, we examined whether or not the proportion of winning bidders who were people of color or women were more likely to use the new entrant bidding credit in any given auction than not use it. This approach provides insight into whether or not the new entrant bidding credit is consistently a differentiator for a designated entity (“DE”). If it is not, this is an indication that reliance on the new entrant bidding credit to facilitate greater ownership by DEs in auctions is heavily dependent upon the specifics of the auction. Next, Free Press examined the data collectively. Using NAB’s summary data, Free Press created a simple data set with 1,022 observations (one for each construction permit winner), and for each we note whether or not the construction permit winner used or did not use a bidding credit; whether or not it was “minority-owned”; whether or not it was female-owned; and whether or not it was either female- or minority-owned.

This relatively small gap lacks statistical significance at the auction-level,⁷ and at the individual bidder level the effect size is small.⁸ Moreover, the difference is small, and these levels are still very low, and well below the percentage of the general population that are people of color. For instance, in the nine FM auctions in aggregate, a total of 123 of the 1,022 construction permits went to “minority-owned” firms (12 percent). This is well below the proportion of people of color in the general population, which was more than one-third during the time period studied.

In other words, the high variation of use of the new entrant bidding credit by owners of color between each auction indicates a strong lack of general applicability of these new entrant bidding credit findings to other situations, if the Commission’s goal is inducing higher participation by businesses owned by women and people of color.

The NAB data on female-owned businesses follows some similar patterns. Female-owned businesses comprised 9% of the construction permits granted to entities using bidding credits, compared to 5% of the construction permits granted to female-owned entities not using bidding credits. Also, the proportion of permits going to female-owned firms using bidding credits exceeded the proportion of permits going to female-owned firms not using bidding credits in six of the nine auctions, with three of these six only differing by a single permit. These results reflect the issues identified above for owners of color: (1) The difference in the proportion of construction permits going to female-owners is very small between those that used new entrant bidding credits and those that did not; (2) Only 9% of the permits granted to all entities using the new entrant bidding credits were female-owned businesses, which is very low considering that women are more than half of the population. In the nine FM auctions in aggregate, 74 of the 1,022 construction permits went to female-owned firms (7%). This also is well below the proportion of the general population that are women; and finally, (3) The variation in use of the new entrant credit by female-owned businesses between each auction is an indicator, in any case, of a lack of general applicability of the new entrant bidding credit results to other situations.

Overall, female-owned and/or minority-owned entities accounted for just 54 of the 475 construction permits awarded to entities that did not use a new entrant bidding credit (11.4 percent). As stated above, this small difference in the aggregate proportion between female and/or minority owned winning entities that used bidding credits and such winners that did not use bidding credits (18.6 percent of all winners that used bidding credits vs. 11.4 percent of all winners that did not use bidding credits) and the variation between each auction’s results limits the usefulness of this analysis and analogy to non-auction situations (and even its usefulness in predicting the impact on other auctions, as the results suggest that the tool is a weak one heavily dependent upon the specifics of the given auction).

⁷ The proportion of permits going to minority-owned firms using bidding credits exceeded the proportion of permits to minority-owned firms not using bidding credits in five of the nine auctions. This illustrates the high variation between each of the nine auctions, and indicates the small effect size of the NEBC on inducing greater participation in bidding, showing too that it can easily be outweighed by other considerations. The auction-level average (*i.e.*, the result of each auction’s proportion of owners of color using the NEBC, averaged) of the nine auctions’ proportion of new entrant bidding credit-using winners that were minority-owned is 14.7 percent, as opposed 10.4 percent for non-bidding credit-using minority-owned winners. There is no significant difference in the proportion of “minority-owned” permit winners that used the new entrant bidding credit and those that did not use it, at the auction-level.

⁸ Cohen’s *d* equal to -0.12.

Two things, however, are quite clear: NAB’s view of what “success” looks like for women and people of color in the broadcast industry is despicably inadequate, and the incubator proposal will do far more to allow NAB’s members to use and tokenize people of color and women than it will to advance our broadcast ownership opportunities.

The So-Called “Success” of New Entrant Bidding Credits in FM Auctions Likely Would Not Apply in Other Circumstances

There was substantial variation between each of these nine auctions in the proportion of minority-owned and female-owned entities that submitted winning bids using the new entrant bidding credit. For example, in Auction 68, none of the new entrant bidding credit winners were “minority-owned” entities, but in Auction 94 thirty-five percent of them were. Similarly, the proportion of new entrant bidding credit winners that were female ranged from a low of 2 percent (Auction 93) to a high of 34 percent (Auction 91). This indicates that the use of the new entrant bidding credit to induce successful auction bidding is greatly dependent upon each auction’s specific circumstances, and suggests that the applicability of the NAB’s new entrant bidding credit analysis to other situations is limited.

Conclusions

It is not surprising that firms owned by women and people of color make up a slightly higher share of the firms that successfully used the new entrant bidding credit. As earlier Free Press research showed, small businesses and singleton broadcast owners are much more likely to be sole proprietorships owned by persons of color or women.⁹ Conversely, if a firm didn’t qualify to use the credit, it means it would not qualify as a “new entrant” per the FCC’s definition in 47 CFR § 73.5008, and therefore we should expect this non-bidding credit eligible group to more closely mirror existing owners: corporate-owned and/or white-male-owned entities.

However, it is critical to note that:

1. The overall proportion of female- and/or “minority-owned” winning bidders was very low overall. Only 15.3 percent of all permits went to businesses owned by women and/or people of color.
2. Approximately 81 percent (445 of the 547) of the permits awarded to entities using the new entrant bidding credit were awarded to entities that were NOT owned by women or people of color.
3. The difference between the proportion of all “minority owners” and female owners that used the new entrant bidding credit to win permits (18.6% of all of the winners using bidding credits) versus bidders in those demographic groups that won permits without using the bidding credit (11.4% of such winners) was statistically significant. Yet the difference for each sub-group (that is, either “minority-owned” winners or female winners)

⁹ See, e.g., S. Derek Turner, Free Press, “Out of the Picture – 2007” (Oct. 2007).

were very small. That means the “success” (if any) of the new entrant bidding credit demonstrated by NAB’s analysis is of very weak probative value in the FCC’s incubator inquiry here.

4. And whatever the value of the results NAB attempts to analogize from here, the incubator context is vastly different from auctions. Incubator licensees are established owners looking to get bigger, and they are 100% in control over whom they choose to incubate. Unless there is a very strong incentive for them to incubate a person of color, why should we expect them to do that instead of “incubating” a cousin of the owner or a banker friend?

For the foregoing reasons, Free Press urges the Commission to rethink its incubator proposal. Specifically, the Commission should not and cannot use the incubator proposal to legitimize its harmful rollback of media ownership limits.

Respectfully submitted,

/s/ Jessica J. González

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