

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Promoting Diversification of Ownership in) MB Docket No. 07-294
the Broadcasting Services)

COMMENTS

The Office of Communication of the United Church of Christ, Inc., Media Alliance, the National Organization for Women Foundation, Benton Foundation,¹ Common Cause, Communications Workers of America, Media Council Hawai`i, and Prometheus Radio Project (collectively, “UCC *et al.*”), by their counsel, the Institute for Public Representation, respectfully submit these comments in response to the Fifth and Sixth Further Notices of Proposed Rulemaking in the above-referenced proceeding.²

UCC *et al.* support the proposal in the Fifth FN to require certain holders of otherwise non-attributed interests to file ownership report Form 323. UCC *et al.* also support the proposal in the Sixth FN to no longer allow entities filing Form 323 to utilize a Special Use FCC Registration Number (FRN). Adoption of both proposals is necessary for the Commission and the public to evaluate the effectiveness of existing and/or proposed ownership policies and rules, particularly those related to minority and women. In addition, these changes are necessary steps

¹ The Benton Foundation is a nonprofit organization dedicated to promoting communication in the public interest. These comments reflect the institutional view of the Foundation, and unless obvious from the text, are not intended to reflect the views of individual Foundation officers, directors, or advisors.

² *Promoting Diversification of Ownership in the Broadcasting Services*, Memorandum Opinion and Order and Fifth Further Notice of Proposed Rulemaking, 24 FCC Rcd 13040 (2009) (“*323 Reconsideration Order*” and “*Fifth FN*”); *Promoting Diversification of Ownership in the Broadcast Services*, Sixth Further Notice of Proposed Rulemaking, 28 FCC Rcd 461 (2013) (“*Sixth FN*”).

toward the creation of a database of broadcast owners that is “searchable, and can be aggregated and cross-referenced electronically.”³

I. Background

It has been a “longstanding goal of the FCC to promote diverse ownership of broadcast stations, including ownership by women and minorities.”⁴ Although the Commission has required broadcast license holders to report racial, ethnic, and gender data on Form 323 since 1998, the Commission later discovered that the data collected was “incomplete, inaccurate, duplicative, and subject to significant measurement error.”⁵ In 2008, the Commission found “that the current collection methodology . . . cannot accurately be used to determine the state of minority and female broadcast ownership.”⁶ It also concluded that longitudinal studies were needed to “provide real-time feedback on the impact of the Commission’s rules and policies” on minorities and women.⁷

Consequently, in May 2009, the Commission took several steps to improve its data collection process. Among other things, it: (1) directed the staff to revise Form 323 and the electronic interface so that the data incorporated into the database would be searchable, and could be aggregated and cross-referenced; (2) directed the staff to build in checks to verify the data and preclude filing of incomplete or inaccurate data; and (3) required entities with non-

³ *Promoting Diversification of Ownership In The Broadcast Services*, Report and Order and Fourth Further Notice of Proposed Rulemaking, 24 FCC Rcd 5896, 5908 ¶ 20 (2009) (“323 Order” and “Fourth FN”).

⁴ *Sixth FN*, 28 FCC Rcd at 463 ¶ 4; see *Promoting Diversification of Ownership in the Broadcast Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 5924 (2008) (“2008 Diversity Order” and “Third FN”).

⁵ *323 Order*, 24 FCC Rcd at 5903 ¶ 7; see *2008 Diversity Order*, 23 FCC Rcd at 5942 ¶ 53; *Third FN*, 23 FCC Rcd at 5954–55 ¶¶ 93–96.

⁶ *323 Order*, 24 FCC Rcd at 5900 ¶ 7.

⁷ *2008 Diversity Order*, 23 FCC Rcd at 5942 ¶ 52.

attributed interests under either the single majority shareholder (SMS) exemption or the Equity/Debt Plus (EDP) exemption to file ownership reports.⁸

The National Association of Broadcasters (“NAB”) sought reconsideration of the third requirement on the grounds that the Commission failed to give adequate notice.⁹ In October 2009, the Commission reconsidered and reversed this aspect of its decision. At the same time, it cured the notice problem by including a Fifth FN proposing to require licensees to report the same non-attributed interests. Although the Fifth FN was released in October 2009, it was not published in the Federal Register until January 2013.¹⁰

In the meantime, the staff revised Form 323. To file Form 323, one needs to obtain an FRN generated by the Commission Registration System (CORES). To obtain a CORES FRN, one must provide a Taxpayer ID Number, which for individuals is a Social Security Number. Only the CORES FRNs, not the Social Security Numbers, are available to the public.¹¹ However, in some cases, the Commission “allowed filers, as an interim measure, to obtain a Special Use FRN for individuals reported on the form in lieu of obtaining a CORES FRN.”¹²

Broadcast station owners filed Form 323s reflecting ownership as of November 2009 and October 2011. In November 2012, the Media Bureau released a report compiling this data to

⁸ The Commission adopted the third requirement because it found this data necessary “to measure the extent of minority and female ownership of broadcast outlets and assess the need for and effectiveness of any policies designed to promote minority and female ownership.” *323 Order*, 24 FCC Rcd at 5905–08 ¶ 12.

⁹ *Petition for Reconsideration of the National Association of Broadcasters*, MB Docket No. 07-294, at 3 n.7 (June 26, 2009).

¹⁰ *323 Reconsideration Order*, 24 FCC Rcd at 13042 ¶ 2.

¹¹ *Sixth FN*, 28 FCC Rcd at 463 ¶ 4; *323 Order*, 24 FCC Rcd at 5908 ¶ 21. The CORES FRN is a unique identification number used by the Commission that enables it to “verify the identity of persons and other entities doing business with” the Commission, by requiring the input of an individual’s Social Security Number (SSN) to ensure uniqueness. Form 323 Frequently Asked Questions, *Form 323 – Specific Questions 4*, Federal Communications Commission (Sept. 29, 2011), <http://www.fcc.gov/guides/form-323-frequently-asked-questions#4>.

¹² *Sixth FN*, 28 FCC Rcd at 466–67 ¶ 8.

provide “the first two snapshots of broadcast ownership in a series of planned biennial data collections that, taken together, should provide a reliable basis for analyzing ownership trends in the industry, including ownership by racial and ethnic minorities and women.”¹³

In January 2013, the Commission proposed in the Sixth FN to eliminate the interim Special Use FRN and make other changes to ensure the accuracy, reliability and usefulness of the Form 323 data. UCC *et al.* support both the proposal to require certain non-attributed owners to report their holdings and to eliminate Special Use FRNS.

II. The Commission Should Adopt the Proposals in the Fifth Further Notice

The Fifth FN proposes to require broadcast station owners that are non-attributed because of the SMS and EDP exemptions to nonetheless file Form 323. UCC *et al.* supports these proposals.

A. Shareholders that would be Attributed Owners but for the SMS Exemption Should File Form 323.

Under the SMS exemption, if a single shareholder owns more than 50 percent of the voting stock in a corporation, the other shareholders are not considered to be attributed owners and are not required to file Form 323.¹⁴ Thus, in some cases, individuals may control up to 49% of the stock and exercise significant influence over a broadcast station’s operation. But unless those individuals are required to file Form 323, the Commission has no way to know about them. Thus, the Commission could be under-counting or over-counting the number of actual minority and women with ownership interests in broadcast stations.

¹³ 2010 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, Report on Ownership of Commercial Broadcast Stations, 27 FCC Rcd 13814, 13815 ¶ 2 (2012) (“Ownership Report”).

¹⁴ Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interest, 14 FCC Rcd 12559 (1999), recon. granted in part, 16 FCC Rcd 1097, 1115 (2001).

B. Shareholders that would be Attributed but for the EDP Revision Should File Form 323

The EDP rule attributes interests where equity and debt together exceed 33% of a station's total asset value and the interest holder also serves the same market or supplies 15% or more of the programming. In response to “the financing problems that small businesses, including those owned by women and minorities, have faced,” the Commission relaxed the EDP rule in the 2008 *Diversity Order*.¹⁵ Specifically, the *Diversity Order* adopted a mechanism to allow an interest holder to exceed the 33 percent threshold without triggering attribution if the investment would enable an “eligible entity” as that term is defined in the *Diversity Order* under certain conditions. This change was intended to make it easier for eligible entities, that is, small businesses, to attract investors.

In July 2011, the Media Bureau suspended the eligible entity rule in response to the decision in *Prometheus Radio Project v. FCC*.¹⁶ Because the revised EDP rule was only in effect for about three years, it is not clear how many entities or individuals would be required to report interests under the proposed rule. And there is no way of knowing how many are affected in the

¹⁵ See 323 Order, 24 FCC Rcd at 5907 ¶ 19; 2008 *Diversity Order*, 23 FCC Rcd at 5931–37 ¶¶ 17–34. “Eligible entities” are those “that [qualify] as a small business under the Small Business Administration's size standards for their industry grouping . . . at the time the transaction is approved by the FCC.” 47 C.F.R. § 73.3555 n.2(i)(2)(ii). The new EDP threshold allowed a non-attributed owner combined equity and debt holdings up to 50 percent, or if “the total debt of the interest holder in the eligible entity . . . [did not] exceed 80 percent of the asset value of the station being acquired by the eligible entity[.]” 2008 *Diversity Order*, 23 FCC Rcd at 5936 ¶ 31. Those who invested in an eligible entity beyond the normal EDP threshold were not attributed unless they exceeded the newly established eligible entity EDP threshold. The eligible entity exception to the general EDP rule was limited to situations where it is necessary to acquire a broadcast station. *Id.*

¹⁶ *Media Bureau Provides Notice of Suspension of Eligible Entity Rule Changes and Guidance in the Assignment of Broadcast Stations Construction Permits to Eligible Entities*, 26 FCC Rcd 10370 (2011). In *Prometheus Radio Project v. FCC*, the court found that the definition of “eligible entity” was arbitrary and capricious because the Commission failed to show “a connection between the definition chosen and the goal of the measures adopted—increasing ownership of minorities and women,” and remanded to the Commission. 652 F.3d 431, 471 (3d Cir. 2011) (*Prometheus II*).

absence of reporting. If the number is small, it will not be burdensome. If the number is large, it is especially important that these interests be reported so the Commission can assess whether its rule change had the intended effect of increasing investment in small businesses, including those owned by women or minorities. Moreover, if the Commission adopts its proposal in the 2010 Quadrennial Review to reinstate the same definition of eligible entity for the purpose of promoting small businesses, it will be important to track the impact of this decision to see if it achieves the intended purpose.

The Fifth FN seeks comment on NAB's suggestion that if non-attributed interest holders are required to be included on Form 323, the data should be anonymous and limited to race, gender, and ownership percentage.¹⁷ The Commission should not adopt this proposal.

Anonymous data could not be verified for accuracy and completeness, nor could it be aggregated or cross-referenced. Rather, the Commission should collect the same data from the non-attributed owners in these two limited categories that they collect from attributed owners. The Commission should also, as we discuss below, require all filers to use a CORES FRN so that the interests can be aggregated and tracked over time.

III. The Commission Should Adopt the Proposals in the Sixth Further Notice

In the Sixth FN, the Commission tentatively concludes that it should continue requiring licensees and other entities filing an FCC Form 323 to provide a CORES FRN for each attributed individual reported on the form.¹⁸ It also proposes to strengthen its data collection process by eliminating the Special Use FRN and requiring all parties that file Form 323, as well as any individual with a reportable interest, to obtain a CORES FRN. UCC *et al.* support these proposals because they are necessary to ensure the accuracy and reliability of the ownership data.

¹⁷ *Fifth FN*, 24 FCC Rcd at 13050 ¶ 24.

¹⁸ *Sixth FN*, 28 FCC Rcd 468 ¶ 11.

Eliminating the Special Use FRN exception will enable the Commission to uniquely identify individuals, which is a necessary step towards creating the promised complete, accurate, aggregated, searchable database.

Both the Commission and public researchers need to be able to uniquely identify individuals to conduct proper longitudinal research. Longitudinal research relies on tracking the same entity across time; any departure from this introduces bias and unreliability into the data, and undermines any conclusions that the Commission or public studies might draw.¹⁹ Thus, it is imperative that the Commission continues to strengthen its data collection techniques and enhance its ability to determine the same unique individual over time or different broadcast stations.

The Commission also needs to be able to aggregate, cross-reference and track ownership interests over time to meet the Third Circuit’s mandate in *Prometheus II*. In that decision issued in 2011, the court found the Commission had “no accurate data to cite.”²⁰ While the court noted that the Commission had taken steps to improve its data collection, it told the Commission that “[i]f the Commission requires more and better data . . . it must get the data and conduct up-to-date studies.”²¹

The recent Media Bureau Report on Ownership of Commercial Broadcast Stations suggests the data collected using the revised Form 323 remains incomplete and unreliable. The report acknowledges that it did not include stations that did not file ownership reports at all or

¹⁹ Fernando Rajulton, *The Fundamentals of Longitudinal Research: An Overview*, 28 Can. Stud. Population (Special Issue on Longitudinal Methodology) 169, 170–71 (2001) (Explaining that “the term ‘longitudinal data’ denotes repeated measurements of the *same* individuals over a time span *long enough to encompass a detectable change* in their developmental status”). When unable to measure the same individual over time, “it is often difficult to state precisely the comparability of the initial and final samples.” *Id.* at 176–77.

²⁰ *Prometheus II*, 652 F.3d 431, 470 (3d Cir. 2011).

²¹ *Id.* at 431 & 471 n.42.

stations that submitted insufficient data to identify ownership.²² In some cases the percentage of stations that did not file or filed insufficient data was quite high.²³ As a result, the report admits that “several factors counsel caution” in conducting trend analyses and that “changes in gender, ethnicity and race of the owners of [full power television] stations between 2009 and 2011 . . . could . . . be somewhat misleading because of the missing 2009 data.”²⁴

The data from the 2009 and 2011 filings would be incomplete if some filers used Special Use FRNs. If an individual uses different Special Use FRNs, the Commission has no way to know that the filers are the same person. The Commission cannot rely on names and addresses because as it explained, “there is no way to determine with certainty whether a listing for ‘John Smith’ on one report and a listing for ‘J. Smith’ on a different report are the same person.”²⁵ The CORES FRNs *are* backed by a unique identifier,²⁶ thus allowing researchers to identify a unique individual when she is listed on two or more Form 323s in one filing period, or across different filing periods, regardless of any misspellings, nicknames, address changes, or other discrepancies.

The substantial benefits from eliminating the Special Use FRNs certainly outweigh the minimal cost. As the Commission points out, it is easy to obtain a CORES FRN: filers need only register once and the registration process takes only a few minutes to complete. Moreover, registering does not put anyone’s privacy at risk. Individuals with reportable interests who are not required to file can obtain a CORES FRN on their own and simply provide the CORES FRN

²² *Ownership Report*, 27 FCC Rcd at 13816 ¶ 5 n.8.

²³ *Id.* at 13832 (Explaining that the response rate for low power television in 2011 was only 60%, and warning that “the computer code was unable to process a number of biennial submissions due to filing errors”).

²⁴ *Id.* at 13818 ¶ 9 n.10.

²⁵ *Sixth FN*, 28 FCC Rcd at 464 ¶ 5 & n.21.

²⁶ *Id.* at 470–71 ¶ 15.

