

**REMARKS OF
COMMISSIONER ROBERT M. MCDOWELL
OF THE
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COMMUNICATIONS OPPORTUNITIES FOR ALL

[AS PREPARED FOR DELIVERY]

Thank you to MMTC and David Honig for having me here today. I am delighted to be back at an MMTC event. It is a privilege to be part of such an esteemed panel of experts. I am sure we will have a lively and constructive dialogue regarding diversity issues.

As you know, I like to study history, so I think having a historical context for our dialogue today is important. In December of 2007, four other commissioners and I voted to adopt the 13 action items contained in the historic Diversity Order. In other words, it was a unanimous Order. Unanimity is virtually unheard of in Washington, but it is fairly common at the FCC. This Order was ground breaking because, among many other things, it codified the first federal civil rights rule in a generation: the FCC's non-discrimination rule prohibiting so-called "no urban, no Hispanic" dictates in broadcast advertising. Our rule ended insidious race-based dictates that served as barriers to entry for minority broadcasters. Thankfully, the Third Circuit upheld this important and historic rule.

Unfortunately, many of the other rules adopted in the Diversity Order did not enjoy the same success. The Third Circuit remanded 6 of the 13 rules, because it found that the Commission's adoption of the eligible entity definition was arbitrary and capricious. Even though I was born on the 13th of June and, as a result, 13 is my lucky number, apparently, 13 was unlucky for our diversity initiative.

Despite these setbacks, we must remember that the non-discrimination rule was first proposed in 1984. The long road to its codification 23 years later can serve as a lesson in the virtues of patience and persistence. Thanks, in large part, to the effective advocacy of MMTC, NABOB and other like-minded organizations, and specifically Sherman Kizart, we made large strides and achieved success.

As the FCC continues working on the 2010 review of its media ownership rules and diversity policies, I recognize that many inside and outside this room are not satisfied with the Commission's diversity efforts of late. I am among the unsatisfied, as I have stated many times over the years. So, let's discuss what should and could be done to ensure diverse participation in the media, telecommunications and Internet industries. Unfortunately, many of you have heard me discuss some of these ideas before, but we must not relent.

First and foremost, as a matter of good government, the Commission must initiate and conclude the diversity studies, which are required by law. I sense that the Third Circuit would greatly appreciate us doing that! Warning: in this next sentence, I'm going to sound like a lawyer, because I am one. Any action the Commission would undertake regarding race- and/or gender-based regulations to expand opportunities for minorities and women must satisfy the rigorous demands of the Constitution's Equal Protection Clause, including the strict scrutiny standard under the Supreme Court's *Adarand*¹ line of cases. Although the Commission has taken constructive steps to improve its minority ownership data and acquire information regarding the information needs of communities, it must conclude these crucial studies to determine the best approaches to increase media diversity and whether race- and/or gender-based rules are legally sustainable under the Constitution. Simply put, the Commission cannot delay these actions any longer.

In the meantime, I hope the Commission will pursue legally sustainable gender- and race-neutral means to increase diversity, including minority and female ownership, such as launching an incubator program, similar to the one proposed by MMTC. (And many thanks to MMTC under David's leadership for your helpful contributions to FCC policy making over these many decades.) Incubator programs could be especially effective in introducing new entrants into the radio market.

The Commission also needs to seriously consider MMTC's 46 *other* "race neutral" proposals. Some of these proposals are outside the context of the media ownership proceeding or need Congressional action, but we should move forward as best we can.

For instance, throughout the current media ownership proceeding, many advocates have underscored the difficulties in accessing capital. Unfortunately, this is not a problem the FCC can directly fix. Nonetheless, the Commission should continue its efforts to assist small and minority- and women-owned businesses to locate financing by connecting people who have money with people who *need* money, such as through workshops and mentoring. Furthermore, we should adopt policies and programs that will remove barriers to obtaining capital. Like all entrepreneurs, MMTC's members, and *all* Americans for that matter, would benefit tremendously if U.S. tax and regulatory policy did more to encourage the free formation and exchange of capital.

Included in those policies should be a new and improved tax certificate program. Providing broadcasters with a tax incentive to sell to small and disadvantaged businesses would dramatically increase the volume and frequency of such exchanges.

More generally, we should revitalize bipartisan efforts to spur the creation of urban enterprise zones. These areas are free from excessive taxes and regulations to attract new job-creating businesses. Building on that concept, broadcast entrepreneurs could leverage the freedom provided by enterprise zones and grow stronger while serving urban audiences and enhancing their local communities. Not only would such policies increase media diversity, but we would also witness a tremendous economic surge in America's urban cores.

¹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

As for regulatory actions that the Commission is currently considering, it is time to eliminate the 1975 newspaper/broadcast cross ownership ban. A growing body of evidence indicates that this obsolete rule is actually producing the opposite result of its intended effect by exacerbating the demise of diverse voices that provide local news and information. In today's economic climate, new investment dollars will continue to flow towards less-regulated new media as opposed to providing a much-needed capital infusion to existing news-gathering operations that are struggling to continue to serve American communities.

It makes no sense to me that, in cities such as Chicago where several daily newspapers serving local ethnic communities proliferate, the ban prevents minorities and women from distributing content across *all* platforms – all in the name of diversity. The notion that a producer of content is allowed to distribute its product over radio, television, the Internet, outdoor advertising and other platforms, but that printing that same content on a piece of paper every day is – somehow – a threat to diversity and democracy, is nothing more than a defenseless policy that is out of touch with today's dynamic and competitive communications market.

I applaud MMTC for recognizing the current climate facing the newspaper industry in not “oppos[ing] the relaxation of the cross-ownership rule so long as the rule, as applied, would not discourage or lead to a decrease in minority ownership.” I know it was not easy for MMTC to arrive at this new policy juncture, but a modernization of this rule will help your members and consumers across America.

Finally, the Commission must resist calls for limiting, and therefore discouraging, the use of joint sales, shared service, and local news service agreements. These agreements provide efficiencies that lower operation and production costs for broadcasters enabling them to deploy more resources that benefit more consumers. In fact, I have heard from many broadcasters that such arrangements have directly and indirectly helped foreign-language and women- and minority-owned stations enter markets and improve their programming.

Furthermore, these types of agreements are bringing new sources of news and information to smaller towns across America. For instance, tiny markets such as my father's hometown of San Angelo, Texas or Utica, New York would only have one source for local news were it not for joint sales agreements. Simply put, JSA's add hours of local news to smaller markets that would not have it otherwise. The Commission must not regulate without a full understanding of how these agreements are used and how they *enhance* viewpoint diversity and augment local news and information programming in the places that need it most. By creating new counterproductive attribution rules targeting these agreements, especially with a dearth of evidence to support such a radical policy shift, the FCC may end up raising costs, reducing local programming and ultimately diminishing diversity.

I look forward to discussing these ideas and others with the panelists.