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I want to thank the Media Bureau for addressing the issues of media consolidation and ownership by women and minorities. It is an honor to speak with you regarding these topics of great importance to our American democracy. As I wrote in a law review article a few years ago, it is imperative that while the Commission goes about addressing the issue of localism in broadcasting, it must not lose sight of the continued relevance and importance of minority ownership. While localism and minority ownership are closely tied, they must be addressed as distinct issues. Additionally, it is important that the Commission not forget about broadcasting as it goes about the important work of addressing broadband availability and accessibility in rural and low-income areas.

Unfortunately, the current landscape of media ownership is not particularly encouraging. The number of minority broadcast licensees has dropped significantly since the enactment of the Telecommunications Act of 1996, and broadcasters of all races are facing increasing competition from the Internet and other media platforms. Advertising dollars and bank financing are harder to secure as a result of economic challenges facing our country's businesses and as a result of a broadcast market laden with assets bought at inflated prices in recent years. Additionally, minority licensees, as well as nonminority licensees broadcasting radio formats appealing to minority audiences, continue to face discriminatory practices by advertisers. This sad reality is worsened by an overabundance of syndicated programming on urban radio stations and the

unfavorable allocation of advertising dollars derived from syndicated programming. The answer to the question of how the Commission might improve minority and women ownership statistics is not an easy one, and I commend the Commission for undertaking it.

As a communications law scholar and member of the Syracuse community, I have witnessed the impact of the lack of any minority-owned broadcast outlets on the city's communities of color. In the 1990s, local businessmen Robert Short and Butch Charles were licensed to operate full-power radio stations in Syracuse. They were the first and only African Americans ever to hold FM radio licenses in the city. During their time as licensees, both men fulfilled lifelong dreams of becoming broadcasters and of delivering relevant, useful, and high-quality informational and entertaining programming to their community. By most accounts, they were successful in that endeavor. However, the consolidation resulting from the 1996 Act, made it nearly impossible for them and other small licensees, regardless of race, to compete with conglomerates for advertising dollars which are necessary to manage overhead and other financial costs. As a result, both men were saddled with significant debt burdens and opted to sell their stations to nonminorities who had less of a connection to their audiences and who saw the urban format primarily in terms of dollars and cents and less as a platform for civic engagement and education. The result is that Syracuse now has only one radio station primarily serving its African-American community. The station is owned by nonminorities, and although having made significant positive changes in the past year, struggles to remain simultaneously profitable and relevant to its target audience. In the past year, Syracuse also lost an African-American television station due to a shared services agreement that transferred management of the station to a nonminority-owned corporation that also owns and operates another major

network affiliate in the market. The two television stations now simulcast the same news programming, depriving the market of an essential voice and independent source of information.

In my work with local media outlets, I hear a continuing concern among those serving communities of color about the difficulty they face in securing advertising dollars from local and national businesses. In 2010, there is still a reluctance of advertisers to purchase time on urban radio. Although the Commission requires broadcasters to certify upon license renewal that they include in their advertising sales contracts nondiscrimination clauses prohibiting so-called "no urban/no Spanish dictates," the practice continues, making it more difficult for stations serving these communities to survive in an advertising-driven radio market. Advertisers continue to forgo purchasing airtime on urban radio stations so as not to encourage minority patronage of their businesses, products, and services and because of a sentiment that the minority listening audience cannot be persuaded via the medium to patronize their businesses. The Commission must actively enforce this rule prohibiting discriminatory advertising practices. Additionally, to the extent licensees and advertisers are suspected of violating other federal and state anti-discrimination laws, the Commission must not turn a blind eye.

In recent years, the federal judiciary has been somewhat hostile to affirmative action programs intended to help racial minorities. The Supreme Court has held that the appropriate constitutional standard to evaluate any race-based governmental program is that of strict scrutiny. Under this standard, the government's program must serve a compelling governmental interest, and the program must be narrowly tailored to serving that interest. In 1990, the Supreme Court, in *Metro Broadcasting, Inc. v. FCC*, applied a lower standard of review in the

context of broadcasting, but in *Adarand v. Pena*, and most recently in *Parents Involved in Community Schools v. Seattle School District*—cases not involving broadcast licensees—the Court has adhered to the more formidable strict scrutiny standard. In *Metro Broadcasting*, the Court upheld two FCC programs designed to increase minority ownership. It held that neither the Commission's minority enhancement credit policy nor its distress sale policy violated the equal protection component of the Fifth Amendment because the benign race-conscious measures mandated by Congress—even if they were not remedial in the sense of being designed to compensate victims of past governmental or societal discrimination—served an important governmental objective, and the programs were substantially related to achieving that objective. The Court held in *Adarand*, however, that the Court applied the improper standard in *Metro Broadcasting*, and that the proper standard to be applied to all race-based classifications is strict scrutiny. What remains unclear after these cases is whether the Court will deem broadcast diversity to be a compelling governmental interest. Equally unclear is whether the Court will require additionally that the Commission demonstrate use of the least restrictive alternative in furthering an interest in broadcast diversity as could be inferred to be a requirement from a reading of cases challenging FCC policies and rules in other contexts.

Although the Court has recognized diversity in education as a compelling governmental interest, it has differed in *Grutter v. Bollinger* and *Parents Involved* as to whether the particular program in question actually served a compelling governmental interest and whether the program was narrowly tailored to serving that interest. It remains unclear to what extent analogies can be drawn between diversity in education and diversity in broadcasting. In 1998, in *Lutheran Church-Missouri Synod v. FCC*, the D.C. Circuit in reviewing the Commission's equal

employment opportunity rules questioned whether broadcast diversity could ever be a compelling governmental interest. I believe it is.

The government has a compelling interest in broadcast program diversity as well as broadcast ownership diversity. The broadcast media is essential to our democracy, serving as a check on the three branches of government and continuing to serve a compelling educational and informative function for the millions of households that still rely solely on free over-the-air signals for television, the millions who listen to broadcast radio for news and information, as well as the millions who receive broadcast programming via subscription cable or satellite service. Despite a highly competitive current media landscape populated by cable and satellite service, the Internet, and highly capable mobile devices of all sorts, the broadcast media continues to be a relevant and vital part of our democracy serving to educate and inform children and adults on issues of paramount local and national importance including politics, education, healthcare, the arts, and social justice, as well as a variety of issues of global relevance. This fact was brought to bear so profoundly during the historic 2008 presidential campaign. Today, people of color continue to rely significantly on free over-the-air broadcast signals to keep them connected and engaged with the world around them. Barriers to entry such as monthly access fees for broadband service and early termination fees for mobile service suggest that the Internet and mobile devices are not adequate substitutes for free over-the-air broadcast service. As such, significant efforts must be expended to ensure that a diverse range of voices participate in a robust marketplace of ideas.

Diversity of programming choices is essential to achieving a balanced view of current issues and events, and diverse ownership is essential to achieving diverse programming. As it relates to localism, local communities are best served by locally owned, managed, and operated licensees who are uniquely vested in the local community and whose efforts are not impeded by permissive federal regulation. As it relates to people of color and news and information that is relevant to them, we logically can assume that their interests are best served by outlets that are owned and managed by licensees who also are people of color with local ties to those communities. Without structural limits on ownership and efforts to enhance both local ownership and minority ownership, a community loses the opportunity to tell its own story in its own voice. It loses the opportunity to meaningfully participate in the marketplace of ideas and to be in a position to influence the tone and tenor of news stories and to focus on topics of particular interest to the communities served.

Any race-based program adopted by the Commission also must be narrowly tailored to achieving the government's compelling interest. In order to satisfy constitutional scrutiny, the Commission must have data on the programming choices of its licensees in order first to address concerns about a nexus between minority ownership and programming and second to address the issue of whether the policies are sufficiently narrowly tailored to the goal of programming diversity. The Commission should evaluate and compare the programming choices of small licensees operating one or two stations with those of their larger competitors and follow up on any reasons for the differences, if any. The Commission must gather accurate data about the race of broadcast licensees via Form 323. Additionally, the Commission must thoroughly and accurately assess the effectiveness of its prior efforts to promote broadcast diversity—namely its

distress sale policy, comparative hearing enhancements, and tax certificates. While some of its past policies no longer are relevant due to the nature in which licenses currently are awarded, their record of success or failure must be properly documented and what about those programs made them successes or failures must be analyzed.

One thing is apparent, the Commission must have current and accurate data, and more importantly, it must thoroughly analyze that data to accurately assess what anecdotally appears to be a dismal situation. Finally, the Commission must investigate and evaluate its own past practices with an eye to any discriminatory practices it might have engaged in over the course of its history. In sum, any program or policy designed to enhance minority ownership must clear significant constitutional hurdles. We might take comfort, *albeit* very little, in the acknowledgement by the Court in *Adarand* that strict scrutiny is not necessarily "strict in theory, but fatal in fact." With careful analysis of accurate and robust historical and current empirical data, I feel the Commission can indeed craft a policy that survives strict scrutiny analysis.