

Remarks of Commissioner Robert M. McDowell
Annual Rainbow PUSH Coalition and Citizenship Education Fund
Media & Telecommunications Symposium
“First Class Digital Citizenship: A Civil and Human Right”

Friday, November 20, 2009
Capitol Hilton Hotel

As prepared for delivery

Thank you, David, for your kind introduction. I thank Rainbow PUSH for inviting us here this morning to discuss some critical aspects of the new media and telecommunications landscape. An important priority for me in my three-and-a-half years on the Commission has been to help create a competitive environment that allows minority entrepreneurs and other new entrants a real opportunity to build viable communications businesses – whether they are in broadcasting, telecom or the Internet ecosystem. So, although our conversation today may range well beyond ownership concerns, I thought I would spend my time at the outset briefly sharing some thoughts relevant to minority entrepreneurs.

As I work on these issues, I tend to follow two general tenets. First, I am interested in exploring options for fostering minority ownership that are legally sustainable. Second, with respect to specific proposals for new regulation, I take a “first do no harm” approach. I am mindful that new rules – however well intentioned – may carry unintended consequences that operate in the real world to thwart the ability of small businesses, including those owned by minorities, from entering markets or from succeeding after they’ve launched.

With respect to the first point, the Commission's Diversity Committee, which was recently rechartered by Acting Chairman Mike Copps, last month delivered a set of recommendations to Chairman Genachowski. Under the leadership of experts in this area, the Diversity Committee has urged the Commission to focus up front on the long-term legal viability of any actions we take. I agree with that advice. It would serve no purpose – and might actually waste the economic resources of minority entrepreneurs – for us to advance rules or programs that cannot withstand court review.

As you may know, the Commission's 2007 *Diversity Order*, which I enthusiastically supported, included several measures designed to help “eligible entities” enter and succeed in broadcasting, such as easing rules to encourage greater investment in such licensees. The key definition is based on the Small Business Administration's classification for small businesses. While such entities obviously include firms owned by minorities and women, many interested parties would like us to go further. Before we attempt to do so, the Diversity Committee suggests that we commission new studies to address the demands of the Supreme Court's 1995 decision in *Adarand v. Peña*. That case sets a very high legal hurdle that any race-conscious laws and rules must clear in order to survive, whether they are in the context of broadcasting, auction bidding credits, or other ownership constructs. The most recent *Adarand* studies we have on hand are almost 10 years old, so I expect that there may be new relevant data for us to consider.

The Diversity Committee also has recommended that, while the *Adarand* studies are pending, the Commission work to fashion a race-neutral “Full File Review” approach

to FCC consideration of certain types of applications. The concept is modeled on university applications processes that have passed court muster. This approach would ask the Commission to consider “experiences in overcoming disadvantages” when deciding whether to grant applications – based on the theory that such experience can translate into entrepreneurial skill, creativity, sophistication and tenacity needed for successful operation of media and telecommunications companies. Relevant disadvantages might include, but would not be limited to, race and gender discrimination. The concept is certainly worth considering, although the Diversity Committee’s proposal leaves many practical details to be worked out by the agency. I look forward to learning more about how the Commission might make this proposal more concrete and, at the same time, transparent to those whom it will affect. Both aspects are important if we are ever called upon to defend a Full File Review approach in court.

As we sort through the complexities of the legal standards and such, however, it is important that none of us loses sight of the pragmatic realities that surround the ownership issue. To boil it down, if you want to own something, somehow you have to find the money to buy or build it. This isn’t a matter of “blue” America versus “red” America. It’s not about focusing on the differences among black, white or brown America. Instead, we should focus on the color that can unify us all, the color that can empower small entrepreneurs to change a dream into a reality. And that color is the color green.

Earlier this year, we experienced the passing of one of my favorite public servants

– a truly inspirational leader who saw optimism and opportunity in every corner of America. I’m speaking of Jack Kemp. He was fond of saying, “You can’t have capitalism without capital.” And, of course, he was absolutely right. It doesn’t matter how smart, creative or hard-working you are – if you want to own a broadcast station or telecom business, you will need cold green cash to buy it or build it. Policymakers call this concept “access to capital.”

Finding ways to improve entrepreneurs’ access to capital has been a priority of mine since becoming a Commissioner. For that reason, I was very pleased to support the measures adopted in the 2007 *Diversity Order*, which sets forth 13 different rule changes or new initiatives. At least nine of those measures aim, directly or indirectly, to help licensees that qualify as eligible entities to acquire capital or make efficient use of the financial resources they have. Examples include easing ownership attribution rules to encourage greater investment in eligible stations, extending construction and sale deadlines for eligible licensees, and convening conferences to bring small entrepreneurs and potential funding sources together. In fact, the Commission’s Office of Communications Business Opportunities just hosted a “Capitalization Strategies Conference” earlier this month, and I was honored to help kick it off.

In the same vein, since my earliest days as a Commissioner, I have called for the reinstatement of a legally sustainable tax certificate program designed to help socially disadvantaged businesses enter the communications arena. Actually, it’s a bit surprising, and disappointing, that such an effort hasn’t yet gotten off the ground. Bills have been

pending in Congress for years now. A tax certificate policy can't guarantee success, but especially in tough economic times, it makes sense for policymakers to actively look for programs that will attract investment capital – and to try to avoid regulations that will unnecessarily scare it away. I hope we can all work together to encourage Congressional leaders to pass a sensible tax certificate bill.

Let me turn now to the “do no harm” point. I support measures that help bolster the operation of a fair and competitive marketplace without triggering unintended – and negative – consequences. So, for example, I've been a strong proponent of the Commission's ban on “no urban, no Spanish” advertising practices. Engaging in blanket avoidance of a wide group of potentially productive advertising outlets serves no one's interests, *particularly* including that of the advertiser or media buyer who may employ them. I delivered that message directly to executives on Madison Avenue shortly after the Commission adopted the ban, rather than wait for enforcement cases to bubble up. I continue to monitor compliance with the rule, and have reached out to explore the facts behind the first major incident reported to the Commission – a “no urban” dictate issued last summer by a media buyer working on BMW's Mini Cooper account. That incident resulted in no sanctions for broadcasters, but it did something that may be considerably more important: It got attention in the advertising trade press and prompted BMW to move its account elsewhere. I hope that broadcasters and groups such as Rainbow PUSH and others will continue to alert us to any similar situations that may arise, because informal attention from the FCC can be helpful.

On the other hand, the law of unintended consequences has led me to be wary of some proposals. For instance, in 2007 I cast the only dissenting vote against auction rules for the 700 MHz band because they included “open access” mandates concerning devices and applications for some, but not all, blocks of that spectrum. I dissented partly because evidence in the record convinced me that new rules were unnecessary. Marketplace forces were moving network providers in that direction anyway. But I also feared that the open access mandates would undermine the Commission’s goal of encouraging entry of new providers into the wireless services marketplace. I was especially concerned that larger carriers would avoid the encumbered spectrum and outbid smaller players for the unregulated spectrum blocks. It gives me no joy to report that my fears proved to be correct – the smaller providers did indeed lose out.

Similar concerns have prompted me to question several proposals in the Commission’s pending broadcast localism proceeding. For instance, the agency called for comment on reinstating an old rule that required stations to be manned live throughout their broadcast day – a mandate that the Commission eliminated more than 20 years ago when technological advancements made remote operation possible. We’ve since heard from many broadcasters that reviving that rule likely would burden the smallest stations the most. In fact, just last week, I met with an African-American licensee of a single AM station in the small town of Hamilton, Texas. He explained to me that if the Commission reimposed a manned operation rule, he likely would have to cut back his evening broadcasts because he simply couldn’t afford to keep an employee

onsite after the end of the normal business day. This licensee, by the way, won the Texas Broadcaster of the Year award in 2007. Do we want to impose – or resurrect – mandates that would indirectly squelch a minority-owned, award-winning station's ability to serve its listeners after sundown?

I'm just as concerned about other proposals raised in connection with localism for the same fundamental reason: I fear that they would have a disproportional negative effect on minority broadcasters and other small licensees because of their size and limited capital. Such proposals as reinstatement of the main studio rule, for example, would deny small group broadcasters the efficiency benefits of remote operations, though their older and larger rivals may be able to keep enjoying such efficiencies simply because they were able to acquire several stations within the core of one community many years ago.

Another localism-related concept is the Enhanced Disclosure form. In 2007, the Commission adopted – over my dissent – a highly detailed, overly complex standardized form for TV broadcasters. It has been hung up, thankfully, at the Office of Management and Budget, because of paperwork burden concerns. And no wonder: Some estimate that broadcasters would have to hire up to two people to work full time to fill out the form and send it to Washington to tell us what they were broadcasting. Now, correct me if I'm wrong, but the last time I checked, broadcasters generally speaking do *not* want to keep their work product a secret. I was under the impression that broadcasters wanted to have as many people watch and hear their product as possible. So why does Washington need

to require a small broadcaster to hire two employees to tell the FCC what people could find out by just turning on their TVs? I really hope that the Commission will rethink that form before it takes effect for TV stations or gets extended to radio licensees. I would not want to see minority broadcasters, or any licensee, have to divert precious resources away from programming or other areas that directly affect their over-the-air service to the public simply to make things easier for the government.

Because I look forward to hearing your thoughts on these points, I'll stop here. I welcome your advice today, or at any time, so please consider my office door to be always open. Thank you again to Rainbow PUSH for giving me the opportunity to share ideas and concerns with all of you.

