

Remarks of Commissioner Robert M. McDowell
National Association of Black Owned Broadcasters
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Thank you, Sherman, for your kind introduction. And thanks to NABOB for having me this afternoon. Now that the FCC is fully staffed, this is a good time to re-engage in dialogue about the state of the broadcasting industry in general, and about NABOB member stations in particular. It appears that that much of the agency's time and resources are being devoted to the development of a congressionally mandated National Broadband Plan to guide decisionmakers for years to come. But that effort does not mean that we have forgotten about broadcasting.

From all appearances, work is beginning on a number of broadcast-focused fronts. I'd like to touch on a few of them briefly, and then let you tell me what issues are uppermost on your minds.

First, efforts are underway to move forward on diversity initiatives. FCC watchers may remember that I voted in favor of the Commission's *Diversity Order* back in December 2007. While not as comprehensive as some would have liked, the *2007 Order* included new rules that were legally sustainable.

One of those rules bars broadcasters from accepting advertising that comes to them as part of a "no urban/no Spanish" media-buying campaign. Our enforcement of this rule is rather indirect because the Commission does not have authority over advertisers or media buyers themselves. Instead, we must work *through* broadcasters, relying upon them to act appropriately and to alert us – or other entities, like NABOB – when they encounter problematic solicitations.

But rather than wait for such reports, I have actively encouraged compliance with the ban in meetings with advertising executives on Madison Avenue and elsewhere to discuss the matter. I've also been monitoring the advertising industry's ongoing efforts, with the indispensable help of experts like Sherman Kizart, to address problems and create a culture in which "no urban/no Spanish" advertising practices cannot flourish.

Unfortunately, there still is work to be done in this area, as illustrated by this August's incident involving a media buyer's "no urban" solicitation on behalf of BMW. I want to thank the Minority in Media and Telecommunications Council for bringing it to the FCC's attention. Perhaps there is some minor bright side to this case: because the media buyer – conveniently for us, but not intelligently for her – put the no urban dictate into an e-mail, there's no dispute about the existence of the problem. Although the FCC has no direct legal power over the advertising industry, I am quite willing to help educate Madison Avenue about the value of picking up the pace to eradicate these practices. Please just tell me when and where.

The Commission's *2007 Diversity Order* also 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 definition of eligible entities is based on Small Business Administration standards for small businesses – which, obviously, include firms owned by minorities and women. I know that many interested parties would like us to go further with the definition. I, too, am quite concerned about the decline in female and minority ownership of broadcast properties.

As a result, for some time now I have expressed my interest in working with Congress to explore the details of a new tax certificate program to promote broadcast ownership by economically disadvantaged businesses – one designed to pass muster in court. In fact, we all

need to ask why such legislation has not yet reached the President's desk. Tax incentives are not a cure-all, but any Economics 101 class can teach us that the right kind of tax incentive will encourage the flow of capital. One upside to the recession is that it may produce buying opportunities in the broadcasting market. The number one obstacle facing women, minorities and small businesses in buying a station, however, is access to capital. Programs like a tax certificate incentive would undoubtedly help.

It remains to be seen whether there is more that the Commission *alone* can do on this front. The *2007 Diversity Order* called for help in amassing data that could support a revised definition of eligible entity and other, more direct actions the FCC might take. Earlier this year, under Acting Chairman Michael Copps, the Commission rechartered its Diversity Committee and charged it to study options that could satisfy the courts. I look forward to reviewing the results of their work.

Although I haven't yet seen the details, the Diversity Committee voted just this week to recommend that the Commission launch new studies designed to address the demands of the Supreme Court's 1995 *Adarand* decision. As you know, that case sets a very high legal hurdle that race-conscious laws and regulations must meet in order to survive. People inside and outside the FCC are grappling with it, and more recent Supreme Court precedent, in trying to fashion legally sustainable alternatives. I agree with the Committee that focusing up front on the long-term viability of any new rules is the correct approach. It would be a waste of resources, at best, and cynical, at worst, for us to do anything less.

The Diversity Committee also has recommended that the Commission move forward quickly on another initiative while efforts to launch, conduct and peer-review new *Adarand* studies are underway. The Committee proposes what it calls a "Full File Review" approach to

FCC consideration of certain types of applications. This concept, which is modeled on university applications processes that have passed court muster, calls on the Commission to take into account “experiences in overcoming disadvantages” when deciding whether to grant applications. The theory is 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 Committee also has suggested that the Commission first employ the Full File Review approach in considering waiver requests – which generally only involves one party – and learn from experience in using it before applying it to competitive applications. I think this concept is certainly worth considering, but I am uncertain as to how the Commission is to actually administer it in a way that could withstand court challenges. The Diversity Committee’s proposal leaves many practical details to be worked out by the agency, so stay tuned. I look forward to staying engaged in this pursuit, and I hope that all of us can produce something constructive together.

Of course, NABOB members know that obtaining a broadcast license is only the first step – even Washington regulators are well aware that operating a station in today’s business climate is exceedingly difficult. I hear frequently from broadcasters struggling under the twin threats of the worst recession in decades and competition from new media.

In this environment, I understand why Arbitron’s roll-out of its “Portable People Meter” to replace the paper diary system would be a sensitive matter: the reliability of audience ratings directly affects broadcasters’ revenue. Since the Commission launched an inquiry on this matter, which I supported, we have heard from some broadcasters concerned about certain research methodologies employed in connection with the PPM device – and we’ve heard from Arbitron

and other broadcasters about how they think the new automated system improves upon the old diary approach. For me, one of the interesting by-products of the proceeding has been the opportunity to learn more about the Media Rating Council, the independent ratings-accreditation organization, and its role in assessing the reliability of sampling techniques used by ratings agencies.

It's difficult to predict at this point what, if anything, the Commission may do next on the PPM reliability issue. I have been plain-spoken in raising questions about the FCC's statutory authority in this area. But, at a minimum, having FCC commissioners talk about it often could be constructive. While the FCC's authority is debated, however, it seems appropriate to me that NABOB and others concerned about the matter have been making their case in other venues, including before various state Attorneys General and, most recently, the Senate Judiciary Committee. And I hope that progress is being made.

I promised that I would be concise today, and I fear that I may have already broken that promise. Because our time together is short, I'll stop there. I'm happy to field questions – and learn from you which issues are most pressing out in the real world.

Thank you again for having me here.