

**DISSENTING STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: 2014 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, 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, Promoting Diversification of Ownership in the Broadcasting Services, Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets, Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services, MB Docket Nos. 14-50, 09-182, 07-294, 04-256, 17-289, Order on Reconsideration and Notice of Proposed Rulemaking

The problems with this Order on Reconsideration are so glaring – both on process and substance, it is truly hard to decide just where to begin.

Do I start by describing why the wholesale elimination of key media ownership rules will harm localism, diversity, and competition? Do I focus on the number of loopholes this Commission blesses through this Order? Or do I highlight how the FCC majority has chosen to take some of the same facts used by this Commission just over a year ago to reach the exact opposite conclusions? After I address each of these failures in greater detail, allow me to explain the alternative proposal I put forward to my colleagues.

Let me begin by establishing this: that despite what you have been told about the genesis of this Order, it is not really about helping small, struggling broadcasters or newspapers. While the jury is still out on whether it could actually achieve that goal, this is really about helping large media companies grow even larger which is actually in stark contrast to what the President said just last week in discussing the importance of having as “many news outlets as you can.”¹ Because if our aim were to provide help for the smallest entities in the tiniest of media markets, we would have adopted a narrowly tailored proposal focused expressly on these financially challenged stations. Instead, today’s action, coupled with recent FCC actions, including the reinstatement of the UHF discount and the elimination of the Main Studio Rule, we have paved the way for a new crop of broadcast media empires that will be light years removed from the very local communities they are supposed to serve.

These media titans will have degrees of power far beyond the imagination of our local communities. Our local outlets that inform us of what is happening in our community; our outlets investigate allegations of improprieties within government; they inform us of whether we need an umbrella or an overcoat; and they are there on the ground before, during, and after a major natural or man-made disaster. Our local stations clearly play a unique role in our communities and unlike those 24-hour cable news networks, our local outlets deliver their broadcast signal using the public airwaves and with that comes, the responsibility to serve the public interest.

Now if you were to stop someone randomly on the street and ask them who owns their local television or radio station, how many people would be able to answer? Would they know if two out of the top four television stations in their community had the same owner and a third station was affiliated with the stations through a sharing agreement? Would they know that their local news anchor is reporting a story using the same script as dozens of other stations around the country, or even another station in their own community? While these may not be top of mind questions for most Americans, the answers matter and viewers or listeners have a right to know those answers. They should also be aware that these

¹ The Hill, *Trump says US needs ‘many news outlets’ amid rumored CNN sale* (November 11, 2017).

practices are already happening today and when this Order is adopted, the floodgates to more consolidation will come without transparency or accountability.

To be clear, the media landscape has changed a lot over the past thirty years and when it comes to coverage of national and international events, there is no question that Americans have more choice today than they did in 1975. But if we are going to play that game of making comparisons between the legacy platforms and newer entrants, including cable news and online sources, we need a neutral umpire to keep the score: these platforms are not created equal and the reality is, that they are not substitutes when it comes to local news and event coverage. As one news publication aptly put it last week, “Consolidating ownership won’t put more reporters on the ground—but it will certainly amplify the influence of a small number of corporations.”² I could not have said it better.

Citing to “simple fairness,”³ the Chairman is fond of making a comparison between local broadcasters and tech companies like Google, Twitter and Facebook. Yet the last time I checked, none of these companies are in the newsgathering business nor to my knowledge are they engaged in local news production. A recent visit to Google’s News page underscored this very point. Under the ‘local’ news tab for the District of Columbia, nine out of the first 10 search results linked to stories produced by guess what? A traditional local newspaper or a broadcast television or radio outlet. These are the simple facts that we cannot ignore when evaluating the current media landscape.

While I am not here to vilify financial success, the horror stories depicted in ex parte filings or cited in this Order by the largest of broadcasters as reason for eliminating the rules, do not match the realities of what is being presented on Wall Street. One major broadcast group, in fact, reported that their revenues are up 15% this year, a new record. Another’s revenues are up 17%, and yet another broadcaster saw its stock price reach a record high earlier this year.⁴ As even further evidence of facts not matching filings, retransmission consent fees: they are up year-over-year by as much as 162%.⁵ If these are the financial realities on the ground, why then are we in such a rush to eliminate protections that may prevent consolidation, but have untold benefits on localism and viewpoint diversity?

What may be less obvious to the casual observer, are the loopholes in our media ownership rules that this Order blesses. Take the use of Joint Sales Agreements (JSAs) for example. As I have shared in past statements, there have been cases in which these agreements have been shown to be in the public interest, albeit rare. But I have also described arrangements that amounted to the full-scale control of the brokered station, including the same programming, the same talent, the same management, and the same studio. Such an agreement coupled with the dismantling of other key media ownership rules substantially distorts the reality of how much control a broadcast station owner has in any given local market.

This Order also fails to acknowledge the past benefits from unwinding these JSAs. In a December 2014 blog, then Chairman Wheeler and I described how by enforcing the Local Television Ownership Rule, ten new minority and women-owned stations were established.⁶ Similarly, absent from the

² Slate.com, *Only Sinclair Can Save You* (November 9, 2017).

³ Op-Ed of FCC Chairman Ajit Pai, *Media Ownership Rules Must Adjust to the Digital Era*, The New York Times (November 9, 2017).

⁴ See, e.g., Broadcasting & Cable, *Meredith Revenue Hits Record \$630M in Fiscal 2017* (July 27, 2017); TVNewsCheck, *Gray IQ Revenue Hits Record \$203.5M* (May 4, 2017); Reuters, *Exclusive: Sinclair approaches Tribune Media about possible deal – sources* (March 1, 2017).

⁵ Communications Daily, *Media Notes* at 19 (November 15, 2017).

⁶ Blog Post of FCC Chairman Wheeler and Commissioner Clyburn, *Making Good on the Promise of Independent Minority Ownership of Television Stations* (December 4, 2014).

Commission's analysis is the harms to minority ownership by eliminating ownership attribution of these agreements. As MMTC and NABOB pointed out in a recent joint filing, non-attribution of JSAs coupled with the repeal of the eight voices test could enable a single company to "completely dominat[e] [a] market's television advertising sales and mak[es] new entry impossible."⁷ Once again, the Order fails to properly consider this very tangible reality.

Turning now to process, where we reverse course not much more than one year after the Commission completed its last Quadrennial Review. Certainly, something must have changed in those last 15 months to warrant such a drastic change in direction, right? Yet the facts are the facts and while my colleagues in the majority may not have agreed with the policy adopted by the previous Administration, it was based on a record that has not changed. If they disagree with policy – and that is their right to hold such a belief – then what they should have done was open a new proceeding and build a case for that position. The courts have admonished this agency in the past for changing our rules without a supporting record and today's Order on Reconsideration ignores the courts' instructions.

Continuing with the topic of process, take a look at how the Order incorrectly invokes Section 202(h) to suit its policy goals. Three times the courts have told us that if we want to make meaningful changes to our rules to promote minority and female ownership, then we must get comprehensive, reliable data. In *Prometheus II* for example, the court stated that, "[a]t a minimum, in adopting or modifying its rules, the FCC must 'examine the relevant data and articulate a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'"⁸ Here, the Commission flips those instructions on its head by concluding without the benefit of any new data that "we cannot continue to subject broadcast television licensees to aspects of the Local Television Ownership Rule that can no longer be justified based on the unsubstantiated hope that these restrictions will promote minority and female ownership."

Now some supporters of this Order, may point to the Commission's newly commissioned Advisory Committee on Diversity and Digital Empowerment as evidence that we are on a path towards obtaining better data. The problem with such a notion is that we are adopting today's Order, less than two months after the Committee held its first meeting. What is the point of establishing a Committee, if the FCC majority has already reached the conclusion that our core media ownership rules are no longer necessary to support our goal of increasing diversity? The 31 members of this committee have agreed to step away from their busy schedules to do what the Chairman describes as "tak[ing] important steps towards increasing diversity throughout the communications industry and bringing digital opportunity to all Americans."⁹ So, why not let them get to work and make recommendations to the full Commission and rely on data, instead of reversing the actions of the previous Administration simply because you feel differently.

⁷ Letter from Multicultural Media, Telecom and Internet Council (MMTC) & National Association of Black Owned Broadcasters (NABOB) to Marlene H. Dortch, Secretary, FCC (filed November 9, 2017).

⁸ *Prometheus Radio Project v. FCC*, 652 F.3d at 469 (3d Cir. 2011) (*Prometheus II*).

⁹ Remarks of FCC Chairman Ajit Pai before the Advisory Committee on Diversity and Digital Empowerment (September 25, 2017).

News flash: There was in fact a path forward that could have garnered my support but regrettably the proposal I put forth was rejected. All petitions for reconsideration should have been denied on the basis of Section 1.429 of the Commission's rules. Specifically, this section of our rules outlines a narrow set of criteria by which the Commission will consider a petition that introduces new facts or arguments which have not previously been presented. Yet here, neither the facts nor arguments have changed in the year since the Commission completed the last Quadrennial Review. This majority has routinely rejected petitions for reconsideration that failed to meet these requirements, but here it ignores these rules to satisfy its own self-serving interests.

Second, I proposed opening a new proceeding to explore the adoption of an incubator program. Such a concept has been debated for many years with bipartisan support, but is largely untested. I believe the questions posed in the accompanying Notice of Proposed Rulemaking (NPRM) are the right ones to be asking, but we are undertaking this process in the wrong order.

Third, I urged my colleagues to initiate a proceeding that would build a comprehensive set of data examining the impact of ownership diversity on the broadcast marketplace. The proceeding should also examine how further media consolidation would impact localism and competition. I proposed that this data collection be undertaken expeditiously and completed prior to the start of the 2018 Quadrennial Review.

And lastly, I proposed that any changes to the Commission's media ownership rules be considered as part of the 2018 Quadrennial Review, once the appropriate data is collected and an assessment can be made of the impact that an established incubator program has had in creating opportunities for new entrants and small businesses.

These asks, in my opinion, were not unreasonable. They are consistent with Commission rules, the instructions of the Third Circuit, and our commitment as an agency to be data-driven. Now my colleagues in the majority and other proponents of eliminating these rules might suggest that my aim was to further delay the inevitable. This could not be further from the truth. The reality is that the rule changes made in this Order are all interrelated. By looking independently at each change, rather than assessing the collective impact of the changes on the media landscape, we are left with a deeply flawed Order with no data to support its conclusions.

So, welcome my friends back to "Industry Consolidation Month" at the Federal Communications Commission where it seems my colleagues in the majority are more intent on granting the industry's wish list rather than looking out for the public interest. Mark my words, today will go down in history as the day when the FCC abdicated its responsibility to uphold the core values of localism, competition and diversity in broadcasting.

I vociferously dissent and look forward to the day when the court issues a decision to right this sad wrong.