STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
CONCUR IN PART, DISSENT IN PART

Re: *Promoting Diversification of Ownership in the Broadcasting Services, et al.* (MB Docket Nos. 07-294, 06-121, 02-277, 01-235, 01-317, 00-244 and 04-228).

As the gatekeeper of the public airwaves, the Commission has a solemn obligation to ensure that all Americans have equal access and opportunity to own, operate and control broadcast outlets. Indeed, the founding charter of the FCC requires us to protect the public interest by promoting competition, localism and *diversity*. It requires us to take affirmative steps to *prevent* discrimination on the basis of race, gender, religion, and nationality. It also requires us to take affirmative steps to *promote* diversity of ownership because, in America, *ownership is the key to having your voice heard.* And if these statutory mandates are not sufficient, in section 257 of the Communications Act, Congress specifically encourages us to develop and promote policies that favor diversity of media voices.

Despite these clear and unequivocal mandates to facilitate ownership and participation by new entrants, women and people of color, the Commission has been so hesitant to act it seems to be moving in slow motion. Consequently, it has been standard operating procedure that, as we finally near completion of an item addressing women and minority ownership, so much time has gone by that the Commission has had to start all over again.

Such was the case when the Commission made a good faith attempt to respond to the Supreme Court's decision in *Adarand v. Pena*. In 2000, the Commission developed a series of empirical studies to determine the impact of Commission policy on women and minority businesses. Since that time however, the Commission has done nothing more than to "refresh the record." Interestingly, just two weeks ago in the most recent Section 257 Report, the Commission cited the mere act of refreshing the record as an important step it had taken to reduce regulatory barriers for small businesses and businesses owned by women and people of color. After years of inaction, the studies from 2000 are now too stale to serve as a basis upon which the Commission can develop specific regulatory action to promote women and minority ownership.[1]

As the Commission moved in slow motion to build the record evidence to justify specific regulatory relief for women and minority businesses, significant opportunities have gone by and, as a result, women and minority ownership of broadcast stations has fallen to embarrassingly low levels. As Free Press has shown, an examination of FCC data reveals that women and people of color own about 5 percent and 3 percent of TV stations, respectively. In radio, women and people of color own 6 percent and 8 percent of stations, respectively.

When the Commission is not moving in slow motion, it has taken steps that amount to a retreat from our statutory obligation to promote diversity. When it comes to ensuring that the ownership of the public's airwaves – which are licensed to serve the public – look like the American people, the FCC's legacy does not make us proud.

In 2003, rather than taking regulatory steps to promote diversity of ownership, this Commission took steps to specifically undermine it. The Commission repealed the only remaining policy specifically aimed at fostering diversity. As Senator Barack Obama has said, "we promoted the concept of consolidation over diversity." Luckily, the federal appellate court reversed the Commission. In a stinging

[1] The Commission's failure to act in a timely manner in matters concerning women and minority owners was further demonstrated when the Commission launched its 2006 Quadrennial Regulatory Review and failed to discuss the very proposals that the Third Circuit instructed it to examine on remand. After this blatant omission was brought to our attention, it took the Commission over 11 months to seek public comment.

indictment, the Court said: "repealing its only regulatory provision that promoted minority ownership is [] inconsistent with the Commission's obligation to make broadcast spectrum available to all people 'without discrimination on the basis of race.'"

Despite the significance of some of the reform measures we adopt today, with regard to the most fundamental measure – the definition of the class of businesses eligible for relief – the Commission has simply failed to do its homework. Once again, the Commission has taken a step back, or, under the best scenario, the Commission has taken a step to the side. In either case, the result is just the same: justice is deferred once more. And justice deferred is justice denied. The Commission seems incapable of adopting a comprehensive item that truly advances media diversity in every respect.

Today, the Commission adopts this *Report and Order* to expand broadcasting opportunities to "new entrants and small businesses, *including* minority- and women-owned businesses." This proceeding was originally intended to improve the gross under-representation of women and people of color in broadcast industry ownership. The definition of the entities eligible is so broad, however, that minority- and women-owned businesses are likely to be incidental beneficiaries at best.

It is very disappointing that we could not reach consensus on such an important issue of public and congressional concern. For months, I have encouraged this Commission to create an independent, bipartisan panel to analyze the state of women and minority ownership, review all outstanding proposals, conduct a much-needed census of stations owned by women and people of color, and make priority recommendations to the Commission. One of these priority recommendations would have been a constitutionally sustainable definition of "eligible entity" that would have maximum impact on assisting women and people of color to become owners of broadcast assets. This approach was endorsed by Senator Obama, Senator Kerry, Senator Menendez, Congressman Conyers, Congresswomen Hilda Solis and dozens of civil rights groups. This proposal also was adopted in legislation unanimously passed by the Senate Commerce Committee – our committee of jurisdiction.

Yet in reckless disregard for the creation of an independent panel and for the impact that today's item will have on women and minority ownership, the Commission adopts a revenue-based definition of the class of entities entitled to regulatory relief. Using Free Press data, the Commission predicts that approximately 8.5 percent of commercial radio stations owned by current owners that fit our "small business" definition are minority owned. However, relying on the same data, minority-owned stations make up 8 percent of all radio stations in the industry as a whole. Hence, based on the Commission's own calculation, our definition will help .5 percent more minority stations than if we did nothing at all.

The Commission has a legacy of miscounting, over-counting, under-counting and simply refusing to count minority ownership, but yet it is resting the predicted success of the regulatory relief measures adopted in this item on the basis that .5 percent more minority-owned stations are represented in the FCC's regulatory classification than throughout the entire industry. And yet still, the Commission has been unable to determine whether this definition will affirmatively benefit women-owned radio stations, or women and minority-owned television stations. Such reckless decision-making is the epitome of arbitrary and capricious action by a regulatory agency.

As the Commission knows all too well, there is no accurate census of women- and minority-owned stations. As Professors Arie Beresteanu and Paul B. Ellickson said, "the data currently being collected by the FCC is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis." Yet in spite of these observations, the Commission is basing its decision today on the most speculative incremental benefit of .5 percent. The fact is, we do not even have enough data to determine which owners or stations will actually benefit or be harmed. For safe measure, we should not act in an area of such sensitivity until we can clearly ascertain the actual impact.

The problem of minority ownership has passed the point of crisis, and most race-neutral strategies to correct this problem have repeatedly failed. One way in which the Commission can take meaningful action to address this problem is through developing a consensus procedure to examine whether the adoption of a definition, such as a socially and economically disadvantaged business (SDB), or a process, such as full file and review, could be implemented in a constitutionally acceptable fashion.

Arguably, the Commission could develop this SDB definition based on the Supreme Court's guidance on the promotion of diverse viewpoints as a compelling government interest and the requirements for narrow tailoring. The Supreme Court has long recognized diversity as a compelling educational goal, and in *Metro Broadcasting v. FCC* the Court held that enhancing broadcast diversity is at a minimum an "important government interest."[2] Given the role of media in educating the public, diversity in broadcasting is a compelling government interest.

I dissent in part because it is highly doubtful that today's Order will appreciably help women and people of color own a great share of radio and TV stations. In fact, media diversity advocates have argued that the definition of eligible entities adopted is potentially detrimental to the goal of diversifying broadcast media ownership. I nevertheless concur in part because the *Order* adopts several important reform measures such as requiring a nondiscrimination provision in advertising sales contracts designed to avoid "no urban/no Spanish" dictates, banning discrimination in broadcast transactions, and adopting a zero tolerance standard for ownership fraud. While I believe the adoption of a bad definition undermines many of the steps we take today that are based on it, I nevertheless hope that we can improve upon that definition in the near future. In the struggle of equality, diversity and justice, you can never give up on hope.

I would like to thank David Honig from the Minority Media and Telecommunications Council, Jim Winston from the National Association of Black-Owned Broadcaster, Jesse Jackson, Rainbow Push, Free Press, Consumers Union, the Consumer Federation of America and countless other organizations across America who believe that the ownership is power and should be shared by all Americans. Thank you for your hard work and perseverance.

Today is just the first step. Let's keep hope alive.

[2] Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 566 (1991).