8. **Radio Broadcasting.** The Small Business Administration defines a radio broadcasting entity that has $6.5 million or less in annual receipts as a small business.[12] Business concerns included in this industry are those "primarily engaged in broadcasting aural programs by radio to the public."[13] According to Commission staff review of the BIA Financial Network, Inc. Media Access Radio Analyzer Database as of December 7, 2007, about 10,500 (95 percent) of 11,050 commercial radio stations in the United States have revenues of $6.5 million or less. We note, however, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations[14] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

9. In this context, the application of the statutory definition to radio stations is of concern. An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time and in this context to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any radio station from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

10. **Class A TV, LPTV, and TV translator stations.** The rules and policies adopted herein may also apply to licensees of Class A TV stations, low power television ("LPTV") stations, and TV translator stations, as well as to potential licensees in these television services. The same SBA definition that applies to television broadcast licensees would apply to these stations. The SBA defines a television broadcast station as a small business if such station has no more than $13.0 million in annual receipts.[15] Currently, there are approximately 567 licensed Class A stations, 2,227 licensed LPTV stations, and 4,518 licensed TV translators.[16] Given the nature of these services, we will presume that all of these licensees qualify as small entities under the SBA definition. We note, however, that under the SBA's definition, revenue of affiliates that are not LPTV stations should be aggregated with the LPTV station revenues in determining whether a concern is small. Our estimate may thus overstate the number of small entities since the revenue figure on which it is based does not include or aggregate revenues from non-LPTV affiliated companies. We do not have data on revenues of TV translator or TV booster stations, but virtually all of these entities are also likely to have revenues of less than $13.0 million and thus may be categorized as small, except to the extent that revenues of affiliated non-translator or booster entities should be considered.

11. **FM Translator Stations and Low Power FM Stations**. The proposed rules and policies could affect licensees of FM translator and booster stations and low power FM (LPFM) stations, as well as to potential licensees in these radio services. The same SBA definition that applies to radio broadcast licensees would apply to these stations. The SBA defines a radio broadcast station as a small business if

[12] *See* 2007 NAICS code 515112.

[13] *Id.*

[14] "[Business concerns] are affiliates of each other when one business concern controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1).

[15] *See* 13 C.F.R. § 121.201, NAICS Code 515120.

[16] *See* News Release, "Broadcast Station Totals as of December 21, 2006," (Jan. 26, 2007), *available at* http://www.fcc.gov/mb/.

such station has no more than $6.5 million in annual receipts.[17] Currently, there are approximately 5540 licensed FM translator stations and 262 FM booster stations and 820 licensed LPFM stations.[18] Given the nature of these services, we will presume that all of these licensees qualify as small entities under the SBA definition.

12. **International Broadcast Stations.** Commission records show that there are approximately 24 international high frequency broadcast station authorizations. We do not request nor collect annual revenue information, and are unable to estimate the number of international high frequency broadcast stations that would constitute small businesses under the SBA definition.

13. **Daily Newspapers.** The SBA has developed a small business size standard for the census category of Newspaper Publishers; that size standard is 500 or fewer employees.[19] Census Bureau data for 2002 show that there were 5,159 firms in this category that operated for the entire year.[20] Of this total, 5,065 firms had employment of 499 or fewer employees, and an additional 42 firms had employment of 500 to 999 employees. Therefore, we estimate that the majority of Newspaper Publishers are small entities that might be affected by our action.

E. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

14. Licensees engaged in the sale of a commercially operated AM, FM, TV, Class A TV, or international broadcast station will be required to certify on Form 314 or 315 that they did not discriminate on the basis of race, color, religion, national origin, or sex in the sale of their station. Broadcasters that are renewing their licenses will have to certify on Form 303-S that their advertising sales contracts do not contain discriminatory clauses.

15. The Commission revised its rules to afford eligible entities that acquire an expiring construction permit additional time to build out the facility (either the time remaining on the original construction permit or 18 months, whichever is greater). To obtain this benefit, eligible entities will have to demonstrate that they meet the eligibility criteria. In addition, the Commission relaxed its equity/debt plus attribution standard for interest holders in eligible entities in order to encourage investment in smaller companies. For both these rule changes, there will be revisions to application forms or the forms' instructions.

F. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered

16. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small

---

[17] *See* 13 C.F.R. § 121.201, NAICS Code 515112.

[18] *See News Release*, "Broadcast Station Totals as of December 31, 2006" (Jan. 26, 2007), *available at* (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269784A1.doc).

[19] 13 C.F.R. § 121.201; NAICS code 511110.

[20] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 511110 (issued Nov. 2005).

entities.[21]

17. The Commission's intent in adopting the rule modifications in the *Order* was to expand broadcast ownership opportunities for new entrants and small businesses, including minority- and women-owned businesses. Therefore, it is anticipated that the adopted rule changes will benefit small businesses, not burden them. Although the Commission adopted numerous proposals to benefit small businesses, it declined to adopt certain other proposals after considering the various ramifications involved. The *Order* describes in detail the Commission's reasoning for each proposal adopted or declined.

18. To promote and expand media ownership diversity, the Commission: (1) changed the construction permit deadlines to allow eligible entities that acquire expiring construction permits additional time to build out the facility; (2) revised the equity/debt plus attribution standard to facilitate investment in eligible entities; (3) modified the distress sale policy to allow certain licensees – those whose license has been designated for a revocation hearing or whose renewal application has been designated for a hearing on basic qualifications issues – to sell the station to an eligible entity prior to the commencement of the hearing; (4) adopted an Equal Transactional Opportunity Rule that bars race or gender discrimination in broadcast transactions; (5) adopted a "zero-tolerance" policy for ownership fraud and agreed to "fast-track" ownership-fraud claims; (6) required broadcasters renewing their licenses to certify that their advertising sales contracts do not discriminate on the basis of race or gender; (7) resolved to conduct annual longitudinal studies of minority and female ownership after the Commission improves its data gathering process; (8) encouraged local and regional banks to participate in SBA-guaranteed loan programs in order to facilitate broadcast and telecommunications-related transactions; (9) adopted modifications to give priority to any entity financing or incubating an eligible entity in certain duopoly situations; (10) permitted the consideration of requests to extend divestiture deadlines in mergers in which applicants have actively solicited bids for divested properties from eligible entities; (11) revised the exception to the prohibition on the assignment or transfer of grandfathered radio station combinations; (12) agreed to convene an access-to-capital conference; and (13) decided to create a guidebook on increasing diversity in the media and telecom industries.

19. The Commission considered but did not adopt proposals: (1) to permit the licensee of a grandfathered station combination to sell the cluster intact to a socially and economically disadvantaged business ("SDB"); (2) to adopt a "structural" waiver of its broadcast ownership rules for applicants selling a station to an SDB and to implement any ownership deregulation in stages; (3) to permit applicants to acquire stations beyond permissible ownership limits if they establish and implement an "incubator" program for disadvantaged businesses; (4) to adopt certain measures to open FM spectrum for new entrants; (5) to work with the Treasury Department to encourage institutions to place capital in minority-focused private equity funds; (6) to initiate discussions with the major pension funds to encourage the establishment of a special fund to place capital with minority-focused private equity funds; (7) to consider relaxing foreign ownership restrictions where non-controlling foreign investment would help supply capital to domestic, minority-owned broadcasters; and (8) to repeal the subcaps on ownership of same service (AM or FM) local radio stations.

G. Report to Congress

20. The Commission will send a copy of this Order, including this FRFA, in a report to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.[22] In

[21] 5 U.S.C. § 603 (c).

[22] *See* 5 U.S.C. § 801(a)(1)(A).

addition, the Commission will send a copy of this *Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[23]

[23] *See* 5 U.S.C. § 604 (b).

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

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).

In order to ensure that the American people have the benefit of a competitive and diverse media marketplace, we need to create more opportunities for different, new and independent voices to be heard. The Commission has recently taken steps to address the concern that there are too few local outlets available to minorities and new entrants.

Last month, we significantly reformed our Low Power FM rules in order to facilitate LPFM stations' access to limited radio spectrum. The new order streamlines and clarifies the process by which LPFM stations can resolve potential interference issues with full-power stations and establishes a going-forward processing policy to help those LPFMs that have regularly provided eight hours of locally originated programming daily in order to preserve this local service. The new rules are designed to better promote entry and ensure local responsiveness without harming the interests of full-power FM stations or other Commission licensees.

The Commission also adopted an order last month that will facilitate the use of leased access channels. Specifically, the order made leasing channels more affordable and expedited the complaint process. These steps will make it easier for independent programmers to reach local audiences.

I believe it is important for the Commission continually look for ways to foster the development of independent channels and voices. The item before us today adopts rules that are designed to promote diversity by increasing and expanding broadcast ownership opportunities for small businesses, including minority and women-owned businesses. For example, we adopt a new rule that gives small businesses and new entrants that acquire expiring construction permits additional time to build out their broadcast facilities. We also revise the Commission's equity/debt attribution standard to facilitate investment in small businesses in order to promote diversity of ownership in broadcast facilities. I believe that these actions, along with others like adopting a rule barring race or gender discrimination in broadcast transactions, adopting a "zero-tolerance" policy for ownership fraud, and committing to the Commission convening an "Access-to-Capital" conference in the first half of 2008 in New York City will go to a long way towards opening up opportunities for small businesses and new entrants. All of the rules and policies that we adopt are designed to serve the public interest, providing for competition, localism, and diversity in the media.

Now, some maintain that the Commission's definition of "eligible entity" – which uses the SBA definition – is insufficient. They argue that the adoption of this definition is regressive and the Commission is better off doing nothing than adopting this definition. I disagree. First, we specifically disagree with the methodology used to argue that our definition is regressive. The item explains how even using Free Press data, we find that at least 8.5 percent, not 5.88 as Free Press claims, of commercial radio stations owned by SBA-defined small businesses are minority-owned. Moreover, their methodology does not account for the new entrants that may come in as a result of the opportunities presented by the order. Based on this, we find claims that our definition of eligible entity is regressive to be unfounded.

Second, I disagree that the public would be well-served if the Commission would to delay its consideration of these issues. The fact is that the Commission has put off these issues too long. It is far better that the Commission adopt these proposals that are geared toward promoting minority and female ownership of the airwaves than to wait for a more perfect definition of eligible entity. In this regard, I note that we have also opened up a further notice specifically considering the issue of whether a more

expansive definition should adopted. Although I admit that the legal hurdle is a high one, I remain open to considering any other definitions that are put forward. For example, I understand that the Commission's Diversity Committee is planning to examine this issue and I look forward to reviewing their findings. In the meantime, I am confident that small businesses, including minorities and small businesses will benefit from the new rules that we adopt today. Further delay in the implementation of these rules would be a mistake.

The Commission's actions today strike an appropriate balance. They carefully take into account the opportunities and challenges of today's media marketplace and, at the same time, prioritize the commitment to localism and diversity. I hope that our policies prove to have a beneficial affect on the diversity of voices in the media market.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS
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).

Today's decision would make George Orwell proud. We claim to be giving the news industry a shot in the arm—but the real effect is to reduce total newsgathering. We shed crocodile tears for the financial plight of newspapers—yet the truth is that newspaper profits are about double the S&P 500 average. We pat ourselves on the back for holding six field hearings across the United States—yet today's decision turns a deaf ear to the thousands of Americans who waited in long lines for an open mike to testify before us. We say we have closed loopholes—yet we have introduced new ones. We say we are guided by public comment—yet the majority's decision is overwhelmingly opposed by the public as demonstrated in our record and in public opinion surveys. We claim the mantle of scientific research—even as the experts say we've asked the wrong questions, used the wrong data, and reached the wrong conclusions.

I am not the only one disturbed by this illogical scenario. Congress and the American people have done everything but march down to Southwest DC and physically shake some sense into us. Everywhere we go, the questions are the same: Why are we rushing to encourage more media merger frenzy when we haven't addressed the demonstrated harms caused by previous media merger frenzy? Women and minorities own low single-digit per centages of America's broadcast outlets and big consolidated media continues to slam the door in their faces. It's going to take some major policy changes and a coordinated strategy to fix that. Don't look for that from this Commission.

Instead we are told to be content with baby steps to help women and minorities—but the fine print shows that the real beneficiaries will be small businesses owned by white men. So even as it becomes abundantly clear that the real cause of the disenfranchisement of women and minorities is media consolidation, we give the green light to a new round of—yes, you guessed it—media consolidation.

Local news, local music and local groups so often get shunted aside when big media comes to town. Commissioner Adelstein and I have heard the plaintive voices of thousands of citizens all across this land in dozens of town meetings and public forums. From newscasters fired by chain owners with corporate headquarters thousands of miles away to local musicians and artists denied airtime because of big media's homogenization of our music and our culture. From minorities reeling from the way big media ignores their issues and caricatures them as people to women saying the only way to redress their grievances is to give them a shot to compete for use of the people's airwaves. From public interest advocates fighting valiantly for a return of localism and diversity to small, independent broadcasters who fight an uphill battle to preserve their independence. It will require tough rules of the road to redress our localism and diversity gaps. Do you see any such rules being passed today? To the idea that license holders should give the American people high quality programming in return for free use of the public airwaves, the majority answers that we need more study of problems that have been documented and studied to death for a decade and more. Today's outcome is the same old same old: one more time, we're running the fast-break for our big media friends and the four corner stall for the public interest.

It is time for the American people to understand the game that's being played here. Big media doesn't want to tell the full story, of course, but I have heard first-hand from editorial page editors who have told me they can cover any story, save one—media consolidation, and that they have been instructed to stay away from that one. But that's another story.

Today's story is a majority decision unconnected to good policy and not even incidentally concerned with encouraging media to make our democracy stronger. We are not concerned with gathering valid data, conducting good research, or following the facts where they lead us.

Our motivations are less Olympian and our methodology far simpler—we generously ask big media to sit on Santa's knee, tell us what it wants for Christmas, and then push through whatever of these wishes are politically and practically feasible. No test to see if anyone's been naughty or nice. Just another big, shiny present for the favored few who already hold an FCC license—and a lump of coal for the rest of us. Happy holidays!

If you need convincing of just how non-expertly this expert agency has been acting lately, you couldn't have a better example than the formulation of the cross-ownership rule that the majority is adopting today. I know it's a little detailed to see how the sausage is made, but it's worth a listen.

On November 2, 2007—with just a week's notice—the FCC announced that it would hold its final media ownership hearing in Seattle. Despite the minimal warning, 1,100 citizens turned out to give intelligent and impassioned testimony on how they believed the agency should write its media ownership rules. Little did they know that the fix was already in, and that the now infamous *New York Times* op-ed was in the works announcing a highly-detailed cross-ownership proposal.

Put bluntly, those Commissioners and staff who flew out to Seattle with staff, the sixteen witnesses, the Governor, the State Attorney General and all the other public officials who came, plus the 1,100 Seattle residents who had chosen to spend their Friday night waiting in line to testify were, as Rep. Jay Inslee put it, treated like "chumps." Their comments were not going to be part of the agency's formulation of a draft rule—it was just for show, to claim that the public had been given a chance to participate. The agency had treated the public like children allowed to visit the cockpit of an airliner—not actually allowed to fly the plane, of course, but permitted for a brief, false moment to imagine that they were.

The *New York Times* op-ed appeared on November 13, the next business day after the Seattle hearing. That same day, a unilateral public notice was issued, providing just 28 days for people to comment on the specific proposal, with no opportunity for replies. The agency received over 300 comments from scholars, concerned citizens, public interest advocates, and industry associations—the overwhelming majority of which condemned the Chairman's plan. But little did these commenters know that on November 28, two weeks ***before*** their comments were even due, the draft Order on newspaper-broadcast cross ownership had already been circulated. Once again, public commenters were treated as unwitting and unwilling participants in a Kabuki theater.

Then, last night at 9:44 pm—just a little more than twelve hours before the vote was scheduled to be held and long after the Sunshine period had begun—a significantly revised version of the Order was circulated. Among other changes, the item now granted all sorts of permanent new waivers and provided a significantly-altered new justification for the 20-market limit. But the revised draft mysteriously deleted the existing discussion of the "four factors" to be considered by the FCC in examining whether a proposed combination was in the public interest. In its place, the new draft simply contained the cryptic words "[Revised discussion to come]." Although my colleagues and I were not apprised of the revisions, *USA Today* fared better because it apparently got an interview that enabled it to present the Chairman's latest thinking. Maybe we really are the Federal Newspaper Commission.

At 1:57 this morning, we received a new version of the proposed test for allowing more newspaper-broadcast combinations. I can't say that I fully appreciate the test's finer points given the lateness of the hour and the fact that there was no time afforded to parse the finer points of the new rule. But this much is clear: the new version keeps the old loopholes and includes two new one pathways to cross ownership approval. So please don't buy the line that the rule we adopt today involves fewer loopholes—it adds new ones. Finally, this morning at 11:12 a.m. as I was walking out my office door to come to this meeting, we received an e-mail containing additional changes. The gist of one of these seems to be that the Commission need not consider all of the "four factors" in all circumstances.

This is not the way to do rational, fact-based, and public interest-minded policy making. It's actually a great illustration of why administrative agencies are required to operate under the constraints of administrative process—and the problems that occur when they ignore that duty. At the end of the day, process matters. Public comment matters. Taking the time to do things right matters. A rule reached through a slipshod process, and capped by a mad rush to the finish line, will—purely on the merits—simply not pass the red face test. Not with Congress. Not with the courts. Not with the American people.

It's worth stepping back for a moment from all the detail here to look at the fundamental rationale behind today's terrible decision. Newspapers need all the help they can get, we are told. A merger with a broadcast station in the same city will give them access to a revenue stream that will let them better fulfill their newsgathering mission. At the same time, we are also assured, our rules will require "independent news judgment" (at least among consolidators outside the top 20 markets). In other words, we can have our cake and eat it too—the economic benefits of consolidation without the reduction of voices that one would ordinarily expect when two news entities combine.

But how on earth can this be? To begin with, to the extent that the two merged entities remain truly "independent," then there won't be the cost savings that were supposed to justify the merger in the first place. On the other hand, if independence merely means maintaining two organizational charts for the same newsroom, then we won't have any more reporters on the ground keeping an eye on government. Either way, we can't have our cake and eat it, too.

Also, since when do unprofitable businesses support themselves by merging with profitable ones—and then sink ***more*** resources into the money-losing division simply as a public service? Think about it this way. If any of us were employed by a struggling company, and we suddenly learned that a Wall Street financier had obtained control, would we (1) clap our hands with joy because we expect the new owner is going to throw a bunch of cash our way and tell us to keep on doing what we'd been doing, except more lavishly or (2) start to fear for our jobs and brace for a steady diet of cost cutting?

Here's my prediction on how it will really work. Mergers will be approved in both the top 20 and non-top-20 markets—towns big and small—because the set of exceptions we announce today have all the firmness of a bowl of Jell-O. Regardless of our supposed commitment to "independent news judgment" the two entities' newsrooms will be almost completely combined, with round after round of job cuts in order to cut costs. It's interesting to hear the few proponents of this rule bemoan the lost jobs that they say result from failing newspapers. Ask them this: in this era of consolidation in so many industries, isn't cutting jobs about the first thing a merged entity almost always does so it can show Wall Street it is really serious about cutting costs and polishing up the next quarterly report? These job losses are the ***result*** of consolidation. And more consolidation will mean more lost jobs. Newly-merged entities will attempt to increase their profit margins by raising advertising rates and relentless cost-cutting. Herein is the ***real*** economic justification for media consolidation within a single market.

The news isn't so good for other businesses in the consolidated market, either. Think about the other broadcast stations there. It's just like Wal-Mart coming to town—the existing news providers look around at the new reality and figure out pretty fast that they ought to head for the exit when it comes to producing news. Now, it may not be as stark as actually cancelling the evening news—it could just mean doing more sports or more weather or more ads during that half hour. But at the end of the day, the combined entity is going to have a huge advantage in producing news—and the other stations will make a reasonable calculation to substantially reduce their investment in the business. This is why, by the way, experts have been able to demonstrate—***in the record before the FCC, using the FCC's own data***—that cross ownership leads to ***less*** total newsgathering in a local market. And that has large and devastating effects on the diversity and vitality of our civic dialogue.

Let's also be careful not get too carried away with the supposed premise for all this contortionism, namely the poor state of local newspapers. The death of the traditional news business is often greatly exaggerated. The truth remains that the profit margins for the newspaper industry last year averaged around 17.8%; the figure is even higher for broadcast stations. As the head of the Newspaper Association of America put it in a Letter to the Editor of the *Washington Post* on July 2 of this year: "The reality is that newspaper companies remain solidly profitable and significant generators of free cash flow." And as Member after Member Congress has reminded us, our job is not to ensure that newspapers are profitable—which they mostly are. Our job is to protect the principles of localism, diversity and competition in our media.

Were newspapers momentarily discombobulated by the rise of the Internet? Probably so. Are they moving now to turn threat into opportunity? Yes, and with signs of success. Far from newspapers being gobbled up by the Internet, we ought to be far more concerned with the threat of big media joining forces with big broadband providers to take the wonderful Internet we know down the same road of consolidation and control by the few that has already inflicted such heavy damage on our traditional media.

In the final analysis, the real winners today are businesses that are in many cases quite healthy, and the real losers are going to be all of us who depend on the news media to learn what's happening in our communities and to keep an eye on local government. Despite all the talk you may hear today about the threat to newspapers from the Internet and new technologies, today's *Order* actually deals with something quite old-fashioned. Powerful companies are using political muscle to sneak through rule changes that let them profit at the expense of the public interest. They are seeking to improve their economic prospects by capturing a larger percentage of the news business in communities all across the United States.

Let's get beyond the weeds of corporate jockeying and inking up our rubber stamps for a new round of media consolidation to look for a moment at what we are ***not*** doing today. That's the real story, I think—that the important issues of minority and female ownership and broadcast localism and how they are being short-changed by today's rush to judgment.

Minority and Female Ownership

Racial and ethnic minorities make up 33 percent of our population. They own a scant 3 percent of all full-power commercial TV stations. And that number is plummeting. Free Press recently released a study showing that during just the past year the number of minority-owned full-power commercial television stations declined by 8.5%, and the number of African American-owned stations decreased ***by nearly 60%***. It is almost inconceivable that this shameful state of affairs could be getting worse; yet here we are.

In most places there is something approaching unanimity that this has to change. Broadcasters, citizens, Members of Congress, and every leading civil rights organization agree that the status quo is not acceptable. Each of my colleagues has recognized, I believe, that paltry levels of minority and female ownership are a reality—which makes today's decision all the more disappointing. There was a real opportunity to do something meaningful today after years of neglect, and we blew it.

It didn't have to be this way. I proposed both a process and a solution. We should have started by getting an accurate count of minority and female ownership—the one that the Congressional Research Service and the Government Accountability Office both just found that we didn't have. The fact that we don't even know how many minority and female owners there are is indicative of how low this issue is on the FCC's list of priorities. We also should have convened an independent panel proposed by Commissioner Adelstein, and endorsed by many, that would have reviewed all of the proposals before us, prioritized them, and made recommendations for implementation. We could have completed this process in ninety days or less and then would have been ready to act.

Today's item ignores the pleas of the minority community to adopt a definition of "Eligible Entity" that could actually help their plight. Instead, the majority directs their policies at general "small businesses"— a decision that groups like Rainbow/Push and the National Association of Black Owned Broadcasters assert will do little or nothing for minority owners. Similarly, MMTC and the Diversity and Competition Supporters conclude that they would rather have no package at all than one that includes this definition. Lack of a viable definition poisons the headwaters. Should we wonder why the fish are dying downstream?

So while I can certainly support the few positive changes in this item that do not depend on the definitional issue—such as the adoption of a clear non-discrimination rule—these are overshadowed by the truly wasted opportunity to give potential minority and female owners a seat at the table they have been waiting for and have deserved for far too long. My fear now is that with cross ownership done, the attentions of this Commission will turn elsewhere.

Localism

At the same time that we have shamefully ignored the need to encourage media ownership by women and minorities, we have also witnessed a dramatic deterioration of the public interest performance of all our licensees. We have witnessed the number of statehouse and city hall reporters declining decade after decade, despite an explosion in state and local lobbying. The number of channels have indeed multiplied, but there is far less local programming and reporting being produced.

Are you interested in learning about local politics from the evening news? About 8 percent of such broadcasts contain any local political coverage at all, including races for the House of Representatives, and that was during the 30 days before the last presidential election. Interested in how TV reinforces stereotypes? Consider that the local news is four times more likely to show a mug shot during a crime story if the suspect is black rather than white.

The loss of localism impacts our music and entertainment, too. Just this morning, I had an e-mail from a musician who took a trip of several hundred miles and heard the same songs played on the car radio everywhere he traveled. Local artists, independent creative artists and small businesses are paying a frightful price in lost opportunity. Big consolidated media dampens local and regional creativity, and that begins to mess around pretty seriously with the genius of our nation.

All this is a travesty. We allow the nation's broadcasters to use half a trillion dollars of spectrum—for free. In return, we require that they serve the public interest: devoting at least some

airtime for worthy programs that inform viewers, support local arts and culture, and educate our children—in other words, that aspire to something beyond just minimizing costs and maximizing revenue.

Once upon a time, the FCC actually enforced this bargain by requiring a thorough review of a licensee's performance every three years before renewing the license. But during decades of market absolutism, we pared that down to "postcard renewal," a rubber stamp every eight years with no substantive review.

To begin with, the FCC needs to reinvigorate the license-renewal process. We need to look at a station's record every three or four years. I am disappointed that the majority so cavalierly dismisses this idea. And we should be actually ***looking*** at this record. Did the station show original programs on local civic affairs? Did it broadcast political conventions? In an era where too many owners live thousands of miles away from the communities they allegedly serve, do these owners meet regularly with local leaders and the public to receive feedback? Why don't we make sure that's done ***before*** we allow more consolidation?

In 2004, the Commission opened up a Notice of Inquiry to consider ways to improve localism by better enforcing the *quid pro quo* between the nation's broadcasters and the public. The Notice addressed many of the questions raised by earlier, dormant proceedings dating from years before. Today's Localism Notice asks more questions and tees up meritorious ideas—but again my question: why the rush to vote more consolidation now, consolidation that has been the bane of localism, and why put off systematic actions to redress the harms consolidation has inflicted?

Our FCC cart is ahead of our horse. Before allowing Big Media to get even bigger—and to start the predictable cycle of layoffs and downsizing that is the inevitable result of, indeed the economic rationale for, many types of mergers—we should be enforcing clear obligations for each and every FCC licensee.

Conclusion

Those who look for substantive action on these important issues concerning localism and minorities will look in vain, I predict, once the majority works its way on cross ownership. We are told that we cannot deal with localism and minority ownership because that would require ***delay***. But these questions have been before the Commission for almost a decade—and they have been ignored year after year. These issues could have been—should have been—teed up years ago. We begged for that in 2003 when we sailed off on the calamitous rules proposed by Chairman Powell and pushed through in another mad rush to judgment. Don't tell me it can't be done. It should have been done years ago. And we had the chance again this time around. Now, because of a situation not of Commissioner Adelstein's or my making, we are accused of delaying just because we want to make things better before the majority makes them far worse. I see.

When I think about where the FCC has been and where it is today, two conclusions:

First, the consolidation we have seen so far and the decision to treat broadcasting as just another business has ***not*** produced a media system that does a better job serving most Americans. Quite the opposite. Rather than reviving the news business, it has led to ***less*** localism, ***less*** diversity of opinion and ownership, ***less*** serious political coverage, ***fewer*** jobs for journalists, and the list goes on.

Second, I think we have learned that the purest form of commercialism and high quality news make uneasy bedfellows. As my own hero, Franklin Delano Roosevelt, put it in a letter to Joseph Pulitzer, "I have always been firmly persuaded that our newspapers cannot be edited in the interests of the

general public from the counting room." So, too, for broadcast journalism. This is not to say that good journalism is incompatible with making a profit—I believe that both interests can and must be balanced. But when TV and radio stations are no longer required by law to serve their local communities, and are owned by huge national corporations dedicated to cutting costs through economies of scale, it should be no surprise that, in essence, viewers and listeners have become the products that broadcasters sell to advertisers.

We could have been—should have been—here today lauding the best efforts of government to reverse these trends and to promote a media environment that actually strengthens American democracy rather than weakens it. Instead, we are marking not just a lost opportunity but the allowance of new rules that head media democracy in exactly the wrong direction.

I take great comfort from the conclusion of another critic of the current media system, Walter Cronkite, who said, "America is a powerful and prosperous nation. We certainly should insist upon, and can afford to sustain, a media system of which we can be proud."

Now it's up to the rest of us. The situation isn't going to repair itself. Big media is not going to repair it. This Commission is not going to repair it. But the people, their elected representatives, and attentive courts ***can*** repair it. Last time the Commission went down this road, the majority heard and felt the outrage of millions of citizens and Congress and then the court. Today's decision is just as dismissive of good process as that earlier one, just as unconcerned with what the people have said, just as heedless of the advice of our oversight committees and many other Members of Congress, and just as stubborn—perhaps even more stubborn—because this time it knows, or should know, what's coming. Last time a lot of insiders were surprised by the country's reaction. This time they should be forewarned. I hope, I really hope, that today's majority decision will be consigned to the fate it deserves and that one day in the not too distant future we can look back upon it as an aberration from which we eventually recovered. We have had a dangerous, decades-long flirtation with media consolidation. I would welcome a little romance with the public interest for a change.

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

[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.

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 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).

STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE

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).

One of the primary goals of this Commission should be the promotion of diverse voices in media. This means not only in terms of the number of voices, but also voices that represent *all Americans*. This Order adopts more than a dozen proposals, all aimed at the promotion of ownership by women and minorities, groups that have historically been terribly underrepresented in the leadership of this important industry.

According to a 2007 study, women own just 3.4% of the 11,884 radio stations in this country, despite the fact that women make up 51% of the population. Only 7% of the directors of the 14 largest radio companies are women. Only 4 of the 42 "Most Powerful People in Radio" are women. Television is sadly remarkably similar. There are currently 1,349 full-power commercial television stations in the United States. A paltry sixty-seven, or 4.97%, are owned by women.

The story is even more dramatic for minorities. Minorities own 3% of all broadcast television stations. Hispanics comprise 14% of the entire U.S. population, but only own a total of 15 stations, or barely over 1% percent of all stations nationwide. African Americans comprise 13% of the entire U.S. population, but only own a total of 18 stations, or 1.3% of all stations. Asians comprise 4% of the entire U.S. population, but only own a total of 6 stations, or 0.44% of total stations.

The challenge before us is not to cast blame, but to offer solutions. The time to act is now. In our hearings across the country over the past four years, it has become clear that there are three primary hurdles women and minorities face: lack of access to financing, both capital and debt; lack of access to spectrum; and lack of access to opportunity.

The Minority Media & Telecommunications Council, along with the FCC's Diversity Committee, proposed a list of initiatives with the goal of assisting women and minorities to clear these hurdles and thus enhance the diversity of voices in the media industry-- from extending the timeline for construction permits to revamping our longitudinal research studies, to requiring non-discrimination provisions in advertising contracts to the creation of a guidebook on diversity. These can have immediate and perhaps lasting impact on improving opportunities for minorities and women.

I will not go into detail on each of the proposals we adopt today, but I do want to single out two that I find appealing because of their strong chance of successful implementation and potential for prompt results.

First, we will convene an annual "Access to Capital Conference" to link potential buyers with prospective investors. This proposal was also strongly supported by the National Association of Broadcasters, which identified access to capital as "the largest roadblock to a more diverse broadcast industry." The Conference will allow for an annual dialogue between those interested in owning broadcast stations and investors or institutions that want to provide this access to capital and make a difference in the media marketplace. The initial Conference is tentatively scheduled for the first quarter of 2008. I hope this will become an annual event and I plan to lend my time and energies to helping make it a success. Perhaps it can also be held at different locations across the nation both to educate the investor community and to open more doors for ownership throughout the U.S.

The second proposal I have strongly supported is the modification of our Equity-Debt Plus attribution rule. The EDP rule was designed to resolve concerns that multiple non-attributable interests could be combined to allow the holders to exert a significant influence over licensees. In effect, the present rule has caused potential investors to cautiously avoid investments that might be combined to approach the ownership limit, which has reduced the available capital in the market. This Order does not repeal the rule entirely, but rather allows an interest holder to exceed the 33% ownership limit without triggering attribution. I hope that this change will trigger an influx of investment for women and minorities seeking to own broadcast stations.

However, let me also be clear that this Order is not the last hurdle, but rather a first step. Unfortunately, a step that has already taken this Commission too long and therefore we need to move forward expeditiously- beginning today. That is not to say that we cannot accommodate other new ideas or improve the proposals herein; in fact, we should be committed to reviewing our progress on a regular basis to consider the successes and any failures in order to continue additional constructive efforts to enhance women and minority ownership in the future.

We owe a debt of gratitude to Chairman Henry Rivera and the entire FCC Diversity Task Force; David Honig and the Minority Media & Telecommunications Council; and members of the industry for their tireless work in this important arena.

STATEMENT OF COMMISSIONER ROBERT M. MCDOWELL

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).

In considering the important issues we decide today, we explore a vexing question: what can the FCC do to promote ownership among people of color and women? Many positive and constructive ideas before the Commission may be hobbled by Supreme Court rulings regarding race-specific remedies on one side, and a lack of statutory authority for doing much more on the other side. Like it or not, whatever the Commission does must withstand constitutional muster to succeed. What we have done in this Order is to focus on the possible -- and the legally sustainable. While perhaps imperfect and incomplete, I hope the ideas we adopt today will increase ownership of traditional media properties by women and people of color.

At the outset, we face the difficult constitutional question of how to define the groups eligible for relief under the proposals we adopt. Given the Supreme Court's decision in *Adarand v. Pena,* which prohibits distinctions based on race, in today's Order, we define these "eligible entities" as any entity that would qualify as a small business, under the Small Business Administration standards for industry grouping, based on revenue. This means that television stations with no more than $13 million in annual receipts and radio stations with no more than $6.5 million in annual receipts are eligible entities.

We have heard from many who are concerned that this definition will not benefit minority and women-owned broadcasters. I disagree. As the order explains, concerns that our definition of eligible entities would be regressive are based on flawed calculations. Large companies controlling smaller subsidiaries are <u>not</u> included in our definition, despite allegations to the contrary. Our definition does not dilute the ownership position of women and people of color, as some have suggested. Rather, the position of those most in need have been enhanced. The definition we adopt today, although not perfect, is the best option we have before us now. The record does not contain, nor has the Commission been able to develop, any race-conscious definition of a socially and economically disadvantaged business that would pass constitutional muster. The "full file review system" suggested by some parties, while intriguing and potentially beneficial, would be too vague a standard as it is written currently and extremely difficult to administer or defend on appeal. However, we invite comment on alternative definitions of an eligible entity.

I also beseech Congress to give us more statutory authority to help this situation, especially the hardest challenge which lies at the beginning of the process: gaining access to capital. But I guess we'll have to wait for that.

I thank our Diversity Committee and the Minority Media and Telecommunications Council for their tireless work developing and advocating these measures. I hope that the "small steps" measures we adopt today will spur the education, investment and economic incentives necessary to improve the state of diversity in broadcast ownership. I look forward continuing to work with you toward the day when we are free to bound ahead more boldly.

I thank the Chairman for his leadership on this issue and thank the Bureau for their hard work, into the wee hours, on this Order.