

Minority Media and Telecommunications Council

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MEMORANDUM

To: Henry M. Rivera, Chair, FCC Advisory Committee on Diversity for Communications in the Digital Age (“Diversity Committee”)

FROM: David Honig, Executive Director, MMTTC; Member, Diversity Committee
Joycelyn James, John W. Jones Fellow, MMTTC; Subject Matter Expert, Diversity Committee

RE: The FCC’s Ability to Rely Upon Previous Adarand Studies

DATE: May 5, 2009

ISSUE PRESENTED

Can the FCC use its current set of Adarand studies to satisfy strict scrutiny if the FCC adopts race conscious measures aimed at promoting diversity or remedying the effects of past discrimination in the media and telecommunications industries?

BRIEF ANSWER

While the Commission may continue to rely on this data to a certain extent, the agency should begin to collect current data upon which to base narrowly tailored regulations that would survive strict scrutiny review.

BACKGROUND

After the Supreme Court’s decision in Adarand v. Peña,¹ the Commission undertook six studies to examine market entry barriers for minorities and women, as mandated by Section 257

¹ 515 U.S. 200, 227 (1995) (all race-based government action is analyzed under strict scrutiny review and must be narrowly tailored to further a compelling government interest).

of the Communications Act.² These studies, which were released in December 2000, analyzed a number of issues related to market entry barriers such as methods of licensing, programming, advertising, and access to capital.³ In June 2004, the Commission sought comment on these studies.⁴ Additional studies were released in 2007; however, some of the authors of these studies did not find that the data provided by the Commission was reliable for “serious analysis.”⁵

In August 2007, the Commission sought comment on 29 race-neutral proposals as part of its Quadrennial Regulatory Review.⁶ Four months later, in the Broadcast Diversity Order, the agency adopted 13 of these proposals and set out 12 others for comment.⁷ As of this date, the Commission has not fully implemented the 13 proposals,⁸ nor has it acted on the 12 proposals on

² 47 U.S.C. §257 (2006).

³ See Studies Indicate Need To Promote Wireless and Broadcast License Ownership By Small, Women- And Minority-Owned Businesses, Press Release, 2000 FCC LEXIS 6530 (Dec. 12, 2000). The studies are available on the Commission’s web site at http://www.fcc.gov/opportunity/meb_study/, and http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/.

⁴ See Comment and Reply Comment Dates Set For Comments On Ways To Further Section 257 Mandate And To Build On Earlier Studies, Public Notice, 19 FCC Rcd 11046 (2004).

⁵ See Arie Beresteanu and Paul B. Ellickson, “Minority and Female Ownership in Media Enterprises” (released July 31, 2007), pp. 2-3 available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A8.pdf (last visited May 4, 2009). This particular report stated that 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” and as such their conclusions “should be viewed more as points of discussion, rather than a prescription for policy.” Id. The remaining studies released in 2007 can be found on the Commission’s website at <http://www.fcc.gov/ownership/studies.html>.

⁶ See 2006 Quadrennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Second Further Notice of Proposed Rule Making, 22 FCC Rcd 14215 (2007).

⁷ See generally Promoting Diversification of Ownership in the Broadcasting Services, Report & Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008) (“Broadcast Diversity Order”).

⁸ See, e.g., Letter from David Honig, Executive Director, MMTC, to Hon. Kevin Martin, Chairman, FCC, July 15, 2008 (requesting that the Commission enforce the advertising non-

which it sought comment.⁹ In the Broadcast Diversity Order, the Commission also adopted a race-neutral eligible entity paradigm that is based on a small business definition.¹⁰ In October 2008, the Diversity Committee issued a report stating that while such action is race-neutral, the small business definition “is so dilute in its impact on minority ownership that it would have virtually no impact,” and therefore not as effective at meeting the Commission’s compelling interests related to this action as a socially and economically disadvantaged business (“SDB”) definition.¹¹ The Diversity Committee suggested that the Commission substitute a paradigm called Full File Review (“FFR”) until a constitutionally sustainable SDB program could be adopted.¹²

THE COMMISSION MUST RELY ON RACE-NEUTRAL ALTERNATIVES UNTIL THE AGENCY CAN DEVELOP A RECORD TO SUPPORT RACE CONSCIOUS ALTERNATIVES

A. Exhaustion of Race Neutral Alternatives: Standard of Review for Narrowly-Tailored, Race Neutral Alternatives

It is well established that all race-based government action is analyzed under strict scrutiny and therefore must be narrowly tailored to further a compelling government interest.¹³

discrimination rule adopted in the Broadcast Diversity Order by designating a Compliance Officer to alert broadcasters of their obligations).

⁹ The Commission recently took action to revise FCC Form 323 and more accurately collect race, ethnic origin, and gender data on broadcast licensees. See Promoting Diversification of Ownership In the Broadcasting Services, Report and Order and Fourth Further Notice of Proposed Rulemaking, MB Docket No. 07-294 (released May 5, 2009).

¹⁰ Broadcast Diversity Order, 23 FCC Rcd at 5925-27 ¶¶6-9.

¹¹ See Advisory Committee on Diversity for Communications in the Digital Age, Report and Recommendation of the Subcommittee on Eligible Entities (Oct. 28, 2008) at 5, 30 (“Eligible Entities Report”), available at <http://www.fcc.gov/DiversityFAC/102808/eligible-entities-report-102808.pdf> (last visited May 6, 2009).

¹² See Eligible Entities Report at 30-31.

¹³ See Adarand, 515 U.S. at 227; Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 354-56 (D.C. Cir. 1988) (striking down Commission equal employment opportunity rules that resulted in racial classifications and were thus subject to strict scrutiny under Adarand).

As such, when a government agency creates regulatory programs where race is an applicant selection or eligibility factor, the regulations must be narrowly tailored to address a compelling government interest.¹⁴ The narrow tailoring prong of strict scrutiny review requires that the government agency explore a variety of race-neutral means of meeting these interests before it can consider race-conscious methods.¹⁵

As discussed in the Diversity Committee’s Eligible Entities Report,¹⁶ before it could undertake narrowly tailored race-conscious measures, the Commission would need to conclude that virtually all race-neutral alternatives it pursued were inadequate.¹⁷ The Commission is currently considering such alternatives in the 13 race-neutral proposals it adopted in 2007 and the 12 it still has under consideration. While not every race-neutral proposal would need to be completely exhausted,¹⁸ it appears that, at this date, it would be premature for the Commission to engage in race-conscious action as the agency has not yet implemented and evaluated the effectiveness of race-neutral regulations.

B. Steps The Commission Should Take While It Evaluates Race-Neutral Methods

Race-conscious programs, such as SDB programs in other industries, have withstood strict scrutiny review when based upon the government’s record evidence of actual

¹⁴ See Adarand, 515 U.S. at 235 (citing Fullilove v. Klutznick, 448 U.S. 448, 496 (1980)).

¹⁵ See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 127 S. Ct. 2738 (2007) (“Parents”); Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) (“Croson”). But see Grutter v. Bollinger, 539 U.S. 306, 339 (narrow tailoring requires serious, *good faith* consideration of workable race-neutral alternatives that will achieve the diversity” state actor wants to achieve) (emphasis added). Programs based on quotas or rigid point systems are not narrowly tailored options that the government may pursue. See Croson, 488 U.S. at 507; Gratz v. Bollinger, 539 U.S. 244, 271 (2003).

¹⁶ Eligible Entities Report at 30-31.

¹⁷ See Parents, *supra* n. 15.

¹⁸ See Grutter, *supra* n. 15.

discrimination.¹⁹ As it stands, the Commission's most recent, reliable data was collected in the 1990's.²⁰ The Commission's 2000 Section 257 studies indicate disparities and market entry barriers for minorities and women.²¹ The studies released in 2007 do not appear to be reliable enough to support race-based remedial measures.²²

The Supreme Court will not accept historical data alone as a justification for race-conscious regulations.²³ While there is no established time where data becomes stale, an agency should rely on current, reliable data when available.²⁴ The Commission's recent steps to collect ownership data on Form 323 will help to refresh the record by providing researchers current data,²⁵ thereby creating a stronger foundation upon which the agency can craft race-conscious measures should it find that its race-neutral efforts are insufficient.

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¹⁹ See Sherbrooke Turf v. Minn. Dep't of Transp., 345 F.3d 964, 970 (8th Cir. 2003) cert. denied 541 U.S. 1041 (2004) (Congressional findings of past discrimination in government highway contracting were sufficient to support need for race-based remedial measures); Western States Paving Co. v. Wash. Dep't of Transp., 407 F.3d 983, 998 (9th Cir. 2005) cert. denied 546 U.S. 1170 (2006) (federal programs take on a compelling interest nationwide, even where evidence of past discrimination did not come from or apply each state individually).

²⁰ See n. 3 supra. Two of these reports were published in 1999 and the remaining four were published in 2000.

²¹ Id.

²² See n. 5 supra criticizing quality of the Commission's data. See also Eligible Entities Report, App. 1 at 3, n.105 (discussing deficiencies in current Commission data).

²³ See Croson, 488 U.S. at 505 (stating that the history of school desegregation in Richmond did not point to discrimination in the local construction industry); see also Parents, 127 S. Ct. at 2752 (race-conscious government action, after past discrimination is remedied, may only continue if justified on another basis).

²⁴ See Rothe Dev. Corp. v. U.S. Dept. of Defense, 545 F.3d 1023, 1038-39 (5th Cir. 2008).

²⁵ See n. 9 supra.