

FEDERAL COMMUNICATIONS COMMISSION  
ADVISORY COMMITTEE ON  
DIVERSITY FOR COMMUNICATIONS  
IN THE DIGITAL AGE  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

October 1, 2009

BY HAND

The Honorable Julius Genachowski  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> St. S.W.  
Washington, D.C. 20554

Dear Chairman Genachowski:

As Chair of the Federal Communication Commission's Advisory Committee on Diversity for Communications in the Digital Age ("Diversity Committee"), I present you with four recommendations that we believe will enhance the ability of minorities and women to participate in telecommunications and related industries. These recommendations originated with our Constitutional Issues Subcommittee and Telecom and Broadband Issues Subcommittee, (whose efforts are to be commended) and have been approved by the Diversity Committee.

**Recommendations on Constitutional Issues**

Renewed Adarand Studies. The Diversity Committee recommends that the Commission undertake new, peer reviewed Adarand studies to explore the current status of ownership disparities in FCC regulated fields and the reasons behind these disparities. Adarand studies are essential for developing a constitutionally appropriate method of promoting racial and gender diversity in media and telecommunications ownership.

After the Supreme Court's decision in Adarand v. Peña,<sup>1</sup> the Commission undertook five studies and considered a sixth, non-commissioned study to examine market entry barriers for minorities and women, as mandated by Section 257 of the

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<sup>1</sup> Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).

Communications Act.<sup>2</sup> As detailed in the attached recommendation, data collected for these studies is over ten years old, and data most recently provided by the Commission is unreliable.<sup>3</sup>

In October 2008, the Diversity Committee found that the small business definition of eligible entities adopted by the Commission in the Broadcast Diversity Order<sup>4</sup> was “so dilute in its impact on minority ownership that it would have virtually no impact,” and is not as effective at meeting the Commission’s compelling interests as a constitutionally sustainable socially and economically disadvantaged business (“SDB”) definition.<sup>5</sup> The Committee concluded with many recommendations, including one that the Commission perform disparity and other studies necessary to implement an SDB program.<sup>6</sup>

Race-conscious government action is analyzed under strict scrutiny and therefore must be narrowly tailored to further a compelling government interest.<sup>7</sup> Agency action, race-conscious or otherwise, should be based upon reliable data and research.<sup>8</sup> Therefore the Diversity Committee recommends that the Commission undertake a new study on

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<sup>2</sup> 47 U.S.C. §257 (2006). These studies were released in December 2000. 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).

<sup>3</sup> See Advisory Committee on Diversity for Communications in the Digital Age, Recommendation on Renewed Adarand Studies (adopted September 22, 2009), at 1 (“Studies Recommendation”).

<sup>4</sup> See Promoting Diversification of Ownership in the Broadcasting Services, Report & Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 5925-27 ¶¶6-9 (2008) (“Broadcast Diversity Order”).

<sup>5</sup> See Advisory Committee on Diversity for Communications in the Digital Age, Report and Recommendation of the Subcommittee on Eligible Entities (October 28, 2008) at 5,7, 30 (“Eligible Entities Report”).

<sup>6</sup> Id. at 31.

<sup>7</sup> See Adarand, 515 U.S. at 227; cf. 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).

<sup>8</sup> See Studies Recommendation at 2-3 (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989); Rothe Dev. Corp. v. U.S. Dept. of Defense, 545 F.3d 1023, 1046 (5th Cir. 2008); Sherbrooke Turf v. Minn. Dep’t of Transp., 345 F.3d 964, 970 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004); 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); Adarand v. Slater, 228 F.3d 1147, 1166 (10th Cir. 2000)).

market entry barriers in broadband services, and update the six earlier studies, released in 2000, that related to programming, access to capital, methods of licensing, auctions, the history of market entry barriers in broadcast and wireless licensing, and advertising.

Recommendation for Adoption and Implementation of Full File Review. In October 2008, the Diversity Committee recommended that the Commission substitute a Full File Review (“FFR”) program for the small business-based eligible entity paradigm adopted in the Broadcast Diversity Order.<sup>9</sup> FFR would act as an eligible entity paradigm at least until the Commission can complete new Adarand disparity studies and explore a constitutionally sustainable SDB program.<sup>10</sup>

In May 2009, the Diversity Committee was tasked with making specific recommendations for how the Commission should administer an FFR program. The Diversity Committee recommends that as the Commission seeks to implement a Full File Review (“FFR”) program, it should strive to achieve the following goals:

- Meaningful impact on ownership diversity;
- Inexpensive, user-friendly procedures;
- Expeditious application processing and review;
- Clarity and consistency of decision making; and
- Minimal need for the commissioners’ involvement in overseeing the day-to-day operations of programs to which FFR is applied.

The Diversity Committee makes a number of specific recommendations for the administration of FFR. FFR is based on the premise that an applicant’s success in overcoming social disadvantages is predictive of entrepreneurial success in public service in media and telecommunications. The Diversity Committee finds that social disadvantage transcends ethnicity and could include the impact of discrimination based on race, gender, national origin, language, disability, age, veteran status, and location of business operation in an economically depressed community or region (e.g., location in a HUB Zone).

The Diversity Committee recommends that, when Commission staff assess claims of disadvantage, reviewers take into account the extent and proximity in time of the disadvantage, the manner in which the disadvantage affected the applicant, how the applicant’s personal initiative enabled her to overcome the disadvantage, and the business proficiency and entrepreneurial skill the applicant derived from overcoming the

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<sup>9</sup> See Broadcast Diversity Order, *supra* n. 4.

<sup>10</sup> Eligible Entities Report at 26-30.

disadvantage. The Commission should adopt objective criteria for examiners to consider and applicants should be reviewed by multiple examiners.

The Diversity Committee recommends that FFR be used for noncompetitive paradigms before it is extended to competitive scenarios. The Commission should have the option to interview FFR applicants where it determines additional information would be helpful. Ownership and control standards should remain consistent with the standards in Note 2 of Sec. 73.3555 and the Commission should rely on its ownership rulemaking and adjudication precedents for ownership and control indicators.

Finally, the Diversity Committee recommends that FFR applicants be pre-certified, allowing them to use their FFR status to obtain financing and negotiate transactions. Applicants should be recertified every three years. If an applicant fails to receive FFR certification, an ALJ or special master should review the application at the applicant's request. The Commission should evaluate the effectiveness of the program by performing annual longitudinal studies and recalibrate the program as needed to ensure its integrity and effectiveness.

### **Recommendations on Telecom and Broadband Issues**

National Broadband Plan. The Diversity Committee recommends that the Commission focus on broadband adoption, education, and training when crafting the National Broadband Plan. The Commission's agenda should include the importance of broadband adoption, barriers to adoption, and means for achieve adoption in minority, multilingual, rural and low-income communities. The cost of the equipment necessary to obtain a broadband connection is one factor the Diversity Committee found to inhibit underserved populations from subscribing to broadband service where it is available. Beyond the economic factors, some households lack access to training and other educational opportunities to make the most of the Internet.

To promote broadband adoption, education and training, the Commission should:

- Consider modifications to the Universal Service Fund's Lifeline and Linkup programs to include subsidies for broadband hardware, service connection, and software, and recognize the success of the Enhanced Tribal Lands programs.
- Review whether the E-Rate program should allow for broader community use of services funded through the E-Rate and include Internet literacy and computer training and access to portable computers for low-income households.
- Consider incentives for adoption of next generation, high speed services at affordable prices.
- Partner with national intermediary nonprofit organizations and community institutions to build awareness for and foster demand.

Restore the Commission's Designated Entity Program. The Diversity Committee recommends that the Commission rescind the April 2006 changes to the Designated Entity ("DE") rule and restore meaningful closed license actions for DEs.

The DE program is the cornerstone for building diversity and promoting competition in wireless and new media technology. Changes to the DE rules in 2006 effectively terminated the DE program. As detailed in the attached "Proposal to Restore the FCC's Designated Entity Program," DEs won \$23 billion, or approximately 50% of licenses prior to the DE rule changes. After the 2006 rule changes, this declined to \$3 billion, or about 3% of licenses, due primarily to the 10-year hold requirement and restrictions on limits to DE wholesales and leasing. At the time, the Commission's decision was broadly opposed by nearly all members of this Committee.<sup>11</sup>

Closed license auctions are key to a meaningful DE program and account for 77% of the \$24 billion in DE licenses awarded in the past. Bidding credits are useful, but used alone are not effective when competing against large carriers. Closed license auctions provide opportunity for DEs to participate in auctions without large incumbent carriers and provide a remedial benefit for the low DE participation since 2006.

In conclusion, as Chair of the Diversity Committee, I want to thank all of its members for their efforts in developing these recommendations for consideration by the Commission. We are confident that Commission approval of the attached recommendations would advance the Commission's goal of promoting diversity of ownership by encouraging minorities and women to seek opportunities in FCC-regulated industries.

Respectfully submitted,



Henry M. Rivera

cc: Hon. Michael Copps  
Hon. Robert McDowell  
Hon. Mignon Clyburn  
Hon. Meredith Atwell Baker

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<sup>11</sup> See Resolution Regarding Designated Entity Investment Rules, Advisory Committee on Diversity for Communications in the Digital Age (adopted April 25, 2006).

Attachments:

Recommendation for Renewed Adarand Studies  
Recommendation for Adoption and Implementation of Full File Review  
Recommendation on Crafting a National Broadband Plan  
Proposal to Restore the FCC's Designated Entity Program