FCC Advisory Committee on Diversity for Communications in the Digital Age
Constitutional Issues Subcommittee

Recommendation for Renewed Adarand Studies

Drafted for Consideration by the full Committee
September 11, 2009

The Advisory Committee on Diversity for Communications in the Digital Age ("Diversity Committee") approves its Constitutional Issues Subcommittee's Recommendation for the Commission to renew its 2000 Adarand studies and thereby complete the task of developing a constitutionally appropriate method of promoting racial and gender diversity in media and telecommunications ownership.

BACKGROUND

After the Supreme Court's decision in Adarand v. Peña,[1] 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 Communications Act.[2] These studies were released in December 2000 and 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]

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[1] Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (all race-conscious government action is analyzed under strict scrutiny review and must be narrowly tailored to further a compelling government interest).

[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 September 2, 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

In the Broadcast Diversity Order, the Commission adopted a race-neutral eligible entity paradigm that is based on a small business definition.[6] In October 2008, the Diversity Committee issued a report stating that a "race-conscious and constitutionally sustainable [socially and economically disadvantaged business ("SDB")] program would be the gold standard for promoting diversity."[7] The Diversity Committee found that while the small business definition is race-neutral, "it is 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 an SDB definition.[8] The report concluded with many recommendations, including one that the Commission perform disparity and other studies necessary to implement an SDB program.[9]

THE USE OF DISPARITY STUDIES TO DETERMINE THE PROPRIETY AND EXTENT OF RACE-CONSCIOUS INITIATIVES

It is well established that all race-conscious government action is analyzed under strict scrutiny and therefore must be narrowly tailored to further a compelling government interest.[10] As such, when a government agency creates regulatory programs where race is a selection or eligibility factor, the regulations must be narrowly tailored to address a compelling government interest.[11] The narrow tailoring prong of strict scrutiny review requires that the government agency explore a variety of race-neutral means to meet these interests before it can consider race-conscious methods.[12] When the government determines that it must use race-conscious methods to address a compelling government interest, it must have a strong basis in evidence to support its decision.[13]

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http://www.fcc.gov/ownership/studies.html.

[6] 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").

[7] See Advisory Committee on Diversity for Communications in the Digital Age, Report and Recommendation of the Subcommittee on Eligible Entities (Oct. 28, 2008) at 7 ("Eligible Entities Report"), available at http://www.fcc.gov/DiversityFAC/102808/eligible-entities-report-102808.pdf (last visited September, 2009).

[8] Id. at 5, 30.

[9] Id. at 31.

[10] 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).

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

[12] See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) ("Parents"); Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) ("Croson").

[13] See Croson, 488 U.S. at 500 (finding that the government lacked evidence of discrimination necessary to sustain race-conscious remedial action); Adarand v. Slater, 228 F.3d 1147, 1166 (10th Cir. 2000) ("Adarand VII") (discussing the "evidentiary basis" relied upon by the

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 discrimination.[14] Disparity studies are a significant portion of this record evidence and are relevant to the courts' strict scrutiny analysis because they may give rise to an inference of discriminatory exclusion.[15] Courts will look to disparity indices to determine if the government's evidentiary burden is satisfied.[16] Statistical and anecdotal evidence are necessary for the government to meet its evidentiary burden.[17]

Defects in disparity studies may lead a court to conclude that the studies are insufficient, unreliable, and will not establish the "strong basis in evidence" required to meet scrutiny.[18] As it stands, the Commission's most recent, reliable data was collected in the 1990's.[19] The Commission's 2000 Section 257 studies identify and describe disparities and market entry barriers facing minorities and women.[20] The studies released in 2007 do not appear to be reliable

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government for its race-conscious contracting program, including statistical and anecdotal evidence); Rothe Dev. Corp. v. U.S. Dept. of Defense, 545 F.3d 1023, 1046 (5th Cir. 2008) (discussing whether older disparity studies establish a strong basis in evidence). The "strong basis in evidence" standard was recently upheld by the Supreme Court in Ricci v. DeStefano. ___ U.S. ___, 129 S.Ct. 2658, 2675-76 (2009) (Title VII employment discrimination case where government's race-conscious rejection of employees' test results did not meet strong basis in evidence of disparate impact). The Court declined to discuss the application of the strong basis in evidence standard to Equal Protection challenges. Id.

[14] 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-conscious 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).

[15] Rothe, 545 F.3d at 1037-38, citing Croson, 488 U.S. at 509 (analyzing the relevance of disparity studies in meeting the government's showing of a compelling interest).

[16] Rothe, 545 F.3d at 1038 (citation omitted). For example, a discriminatory motive can be inferred from the results shown in disparity studies on obtaining financing. See Concrete Works of Colorado v. Denver, 321 F3d 950, 977-78 (2003) ("Concrete Works"), citing Adarand VII, 228 F.3d at 1170. While that alone may not be sufficient to justify government action, it can demonstrate current market entry barriers. Id. Some circuits have taken "judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects." Id.

[17] Concrete Works, 321 F3d at 977-78.

[18] Rothe, 545 F.3d at 1045-46.

[19] See n. 3 supra.

[20] Id.

enough to support race-conscious remedial measures.[21] One of the studies may be probative because of its relevance to the history of entrepreneurs in FCC regulated industries, focusing on almost 50 years of market entry barriers experienced by minorities and women.[22] The remaining studies are likely to be found insufficient and unreliable because the data is neither current nor adequate for serious analysis.[23]

RECOMMENDATION

The Committee recommends that new, peer reviewed Adarand studies be undertaken and that sufficient funding be authorized to produce scholarship meeting the standards expected by a reviewing court. The studies should include a new study on broadband (#1 infra) and updates and, where appropriate, improvements in the six earlier studies (#2-7 infra):

1. Broadband Study: A new study should be performed on barriers to entry in broadband, including practices that that discourage MBE participation while having no significant business justification, including project bundling, company size requirements, large project experience requirements, years-in-business requirements, and excessive bonding requirements.

2. Content/Ownership Study: The study Diversity of Programming in the Broadcast Spectrum: Is there a Link between Owner Race or Ethnicity and News and Public Affairs Programming? Santa Clara University and University of Missouri (2000) should be updated with current survey data using a methodology generally similar to that employed in the original study. The new study should also examine potential benefits stemming from MBE participation in broadband contracting including, inter alia, MBEs' propensity to hire and train the structurally unemployed in racially isolated communities.

3. Capital Markets Study: The study Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes, William D. Bradford, University of Washington (2000) should be updated to address capital availability disparities manifesting themselves since the recession began to take hold in 2007.

4. Broadcast Licensing Study: The study Estimation of Utilization Rates/Probabilities of Obtaining Broadcast Licenses from the FCC, KPMG LLP (2000) should be supplemented with an analysis of FM and TV construction permit auctions and on new barriers to entry in broadcasting including those stemming from unequal employment opportunity.

5. Auction Utilization Study: The study FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority-and Women-Owned Companies in FCC Wireless Spectrum Auctions, Ernst & Young LLP (2000) should be supplemented with an analysis of wireless spectrum auctions conducted under the pre-2006 and post-2006 designated entity rules.

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

[22] See Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing, 1950 to Present, Ivy Planning Group LLC (2000). This study is referenced in the Section 257 studies in n. 3 supra.

[23] See n. 5 supra and accompanying discussion.

6. Historical Study: The study Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing, 1950 to Present, Ivy Planning Group LLC (2000) should be updated to address post-2000 broadcast and wireless licensing, as well as station retention and financing issues stemming from the impact of radio audience measurement methodologies.

7. Advertising Study: The study When Being No. 1 Is Not Enough: The Impact of Advertising Practices On Minority-Owned & Minority-Formatted Broadcast Stations, Kofi Asiedu Ofori (2001) should be updated with post-2001 data on no urban and no-Spanish dictates, power ratios, and any impact of the advertising nondiscrimination rule the Commission adopted in December 2007.

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