

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

Recommendation for Adoption and Implementation of Full File Review

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 on Full File Review (“FFR”) to aid the Commission in developing a constitutionally defensible method of promoting racial and gender diversity in media and telecommunications ownership.

In March 2008, the Commission released Promoting Diversification of Ownership in the Broadcasting Services,¹ (“Broadcast Diversity Order”), adopting a small business-based eligible entity paradigm. At that time, the Commission also sought comment on other race-neutral eligible entity paradigms, specifically FFR.² In October 2008, the Diversity Committee released a Report and Recommendation on Eligible Entities (“Eligible Entities Report”), in which the Committee found that the impact of the small business eligible entity paradigm on minority ownership would be so dilute that a program based on that paradigm would have virtually no impact on minority media ownership.³ The Committee recommended that the Commission substitute FFR for the small business-based eligible entity paradigm until the Commission can complete new Adarand disparity studies and thereby adopt a constitutionally sustainable SDB-based program.⁴

Native Americans as Eligible Entities

Federally Recognized Native American Tribal Entities generally may be treated as eligible entities now, without awaiting Adarand studies. Federally recognized Native American Tribal Entities are politically classified rather than racially classified. As sovereign entities, Federally Recognized Native American Tribal Entities share a unique government-to-government relationship with the federal government as recognized in the Constitution, numerous federal laws, policies, and Supreme Court cases. This is the reason for the existence of several federal

¹ See Promoting Diversification of Ownership in the Broadcasting Services (Report & Order and Third Further Notice of Proposed Rulemaking) (“Broadcast Diversity Order”), 23 FCC Rcd 5922, 5925-27 ¶¶6-9 (2008).

² Id. at 5951-52 ¶¶84-86.

³ See Report and Recommendation on Eligible Entities, FCC Advisory Committee on Diversity for Communications in the Digital Age (Oct. 28, 2008) at 5-6, (“Eligible Entities Report”), available at <http://www.fcc.gov/DiversityFAC/102808/eligible-entities-report-102808.pdf> (last visited August 26, 2009).

⁴ Id. at 26-30.

agencies, institutions, and programs aimed at Indians, including the Bureau of Indian Affairs, the Indian Health Service, and the Administration for Native Americans. It is also the basis for virtually the entire Title 25 of the United States Code, entitled “Indians.” As such, the rational basis review, rather than strict scrutiny, applies to citizens of federally recognized American Indian and Alaska Native tribal entities.⁵

Notably, the Commission recognized in 2000 its own government-to-government relationship and responsibilities to reduce regulatory burdens on Tribal Entities.⁶ Significantly,

⁵ See Morton v. Mancari, 417 U.S. 535, 554 (1974) (“[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the B.I.A. in a unique fashion”). The Supreme Court in Mancari went on to note: “The preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.” Id., n.24. While commonly used, in speaking, to refer to persons who self-identify as being of racial descent as “Indians,” the term “Native Americans” is employed above for the purposes of this recommendation to mean federally recognized American Indian Tribe and Alaska Native Village Tribal Entities, their member citizens, and their economic instrumentalities, such as Tribally-owned or controlled businesses. See also United States v. Antelope, 430 U.S. 641, 645 (1977) (“[t]he decisions of [the Supreme] Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications”). See also American Federation of Government Works, and AFL-CIO v. U.S. (“AFGE v. U.S.”), 330 F.3d 513, 524 (D.C. Cir. 2003), cert. denied, 540 U.S. 1088 (2003) (“regulation of commerce between the federal government and tribal entities, including tribally controlled corporations is “at the heart of the [U.S. Constitution’s Indian Commerce] Clause”). In AFGE v. U.S., the D.C. Circuit specifically rejected the plaintiff’s claim that the preference should be reviewed under a strict scrutiny standard, stating “In Narragansett Indian Tribe v. National Indian Gaming Commission, 158 F.3d 1335 (D.C. Cir. 1998), we summed up the state of the law this way: ‘ordinary rational basis scrutiny applies to Indian classifications just as it does to other non-suspect classifications under equal protection analysis.’ Id. at 1340.” Id. The Department of Justice has maintained this position consistently since the issuance of Adarand, and in 1995 issued a Memorandum of Legal Guidance stating that “Adarand does not require strict scrutiny review for programs benefiting Native Americans as members of federally recognized Indian tribes. In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court applied rational basis review to a hiring preference in the Bureau of Indian Affairs for members of federally recognized Indian tribes. The Court reasoned that a tribal classification is ‘political rather than racial in nature,’ because it is ‘granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities.’ Id. at 554. See id. at 553 n. 24.” Legal Guidance on the Implications of the Supreme Court’s Decision in Adarand Constructors, Inc. v. Pena, Memorandum to General Counsels, Walter Dellinger, Assistant Attorney General, U. S. Department of Justice, Office of Legal Counsel, June 28, 1995, <http://www.fedcivilrights.org/www.fedcivilrights.org/DOJAdarand.pdf> at p. 8 (last visited September 15, 2009).

⁶ See Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, 16 FCC Rcd 4078, 4082 ¶III ¶4 (2000) (“The Commission will endeavor to

the FCC Senior Attorney/Tribal Liaison position and Tribal Outreach are located in the Office of Intergovernmental Affairs in the Consumer and Governmental Affairs Bureau.

The Committee recommends that even if the Commission recognizes Federally Recognized Native American Tribal Entities as eligible entities, it would still be desirable also to permit them to avail themselves of such advantages as might be derivable from the use of FFR.

Administration of Full File Review

The Eligible Entities Report did not contain comprehensive recommendations on how an FFR system could be administered. The recommendations set out below are intended to address all of the key implementation that the Commission must consider in anticipation of issuing a notice of proposed rulemaking that would seek comment on the creation of a race- and gender-neutral FFR system.

In implementing an eligible entities program, including Full File Review (“FFR”), the Committee recommends that the Commission strive to achieve these goals:

- meaningful impact on ownership diversity, both in the application of the paradigm and in eligible entities’ ability to use their qualifications as an incentive with which to secure access to capital;
- inexpensive, user-friendly procedures for applicants and other interested parties;
- 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 the eligible entity paradigm is applied.

The Committee specifically finds and recommends as follows:

a. The Premise of FFR: An Applicant’s Success in Overcoming Social Disadvantages Is Predictive of Entrepreneurial Success and Public Service in Media and Telecommunications

The arc of history is built on evidence that many people derive extraordinary knowledge, strength and wisdom from their experiences in overcoming disadvantages.⁷ The knowledge,

streamline its administrative process and procedures to remove undue burdens that its decisions and actions place on Indian Tribes. As administrative and organizational impediments that limit the FCC’s ability to work with Indian Tribes, consistent with this Policy Statement, are identified, the Commission will seek to remove those impediments to the extent authorized by law.”)

⁷ The strength and knowledge derived from overcoming disadvantages can produce remarkable achievements. Helen Keller, blind and deaf at the age of two, overcame these

strength and wisdom derived from overcoming a disadvantage can last a very long time and are often translated into entrepreneurial skill, creativity, sophistication and tenacity - attributes predictive of success and public service in the management and operation of media and telecommunications ventures.

b. Sources of Social Disadvantage

Social disadvantage may transcend ethnicity and could include, but not be limited to 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). These are all race and gender-neutral factors and the terms of reference of an FFR program should make that clear to avoid misunderstanding.

c. Assessment of Claims of Overcoming Disadvantages

Commission staff review of how much credit to assign to an applicant's claim of overcoming a disadvantage should 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

disabilities and, at age 24, graduated *magna cum laude* from Radcliffe College. Keller spent much of her life as a champion for humanitarian issues and received the Presidential Medal of Freedom. See Helen Keller, Hellen Keller Intl., available at <http://www.hki.org/about/helenkeller.html> (last visited August 27, 2009). Frederick Douglass was born a slave in Maryland. At times he was whipped daily and barely fed. However, he learned to read and write, understanding the value of education, and eventually escaped to the North. At age 23, Douglas delivered what was to be the first of many speeches and pursued the abolition of slavery, racial and gender equality. See People & Events: Frederick Douglass, PBS, Africans in America, available at <http://www.pbs.org/wgbh/aia/part4/4p1539.html> (last visited August 27, 2009). Stevie Wonder was blind, but started his recording career at age 12 and went on to become one of the greatest singers and songwriters of the 20th century. See Stevie Wonder Biography, Biography.com, available at <http://www.biography.com/articles/Stevie-Wonder-9536078> (last visited August 27, 2009). Wilma Rudolph was born premature and after a number of childhood illnesses, including polio, she was fitted for a leg brace at age six. With determination, she was out of her braces by age nine and went on, in the 1960 Olympics, to become the first American woman to win three gold medals. See M.B. Roberts, Rudolph Ran and World Went Wild, ESPN Sports Century, available at <http://espn.go.com/sportscentury/features/00016444.html> (last visited August 27, 2009). John F. Kennedy overcame severe injuries received in World War II to later be elected to the U.S. Senate and eventually the White House. See Biographies & Profiles, John F. Kennedy, The 35th President of the United States, John F. Kennedy Presidential Library & Museum, available at <http://www.jfklibrary.org/Historical+Resources/Biographies+and+Profiles/Biographies/John+F.+Kennedy+The+35th+President+of+the+United+States.htm> (last visited August 27, 2009). Sonia Sotomayor, raised in a single parent home in a public housing project in New York, went on to graduate from Ivy League schools and was appointed to the U.S. Supreme Court. See Press Release, Judge Sonia Sotomayor, The White House, available at http://www.whitehouse.gov/the_press_office/Background-on-Judge-Sonia-Sotomayor (last visited August 27, 2009).

personal initiative enabled her to overcome the disadvantage, and the business proficiency and entrepreneurial skill the applicant derived from overcoming the disadvantage.

d. Competitive and Non-Competitive Licensing Paradigms

Initially, FFR should be used to qualify applicants as eligible entities for relief embedding noncompetitive paradigms first (e.g. a factor in considering waivers). Based on the Commission's experience with the use of FFR in these noncompetitive contexts, FFR could then be extended to competitive, Ashbacker⁸ scenarios for which the grant of one application is mutually exclusive from the grant of another application (e.g. a factor in the administration of auctions).

e. Contents and Evaluation of Applications

Those seeking eligible entity status should submit with a written application, either hard copy or online. The Commission would have the option to interview FFR applicants where it determines that additional information would be helpful. Interview questions would be standardized to promote uniformity, but to avoid compromising the interviews, not all potential questions would be asked of each applicant. In cases where FFR applicants are competing for the same opportunity, they should all be interviewed. Applicants would be interviewed to assess claims of disadvantage as well as ownership, and control of the applicant's company. Based on this assessment, the applicant would be certified as an FFR-qualified eligible entity.

f. Ownership and Control Issues

The Commission should apply a practical test to determine ownership structure, consistent with the standards in Note 2 of Sec. 73.3555 of the Commission's rules.⁹ This test would be applied on a case-by-case basis and include evaluating certain indicators that point to actual control and less to the formal structure of the applicant. In interpreting its standards, the Commission should rely upon its precedents, which are based upon these indicators: who has authority to hire and fire employees; who is responsible for managing the company's finances; who has control or delegated authority on the board of directors; and, for broadcasters, who determines the station's programming.¹⁰

g. Validation of Applicant Claims to Preserve the Integrity of the Program

To the extent possible, the Commission should adopt objective criteria for examiners to consider and credit applicants. To minimize subjectivity, interviews of candidates by multiple reviewers would be more desirable than sole reliance on the applicants' paper submissions. These interviews could be designed to assess applicants' veracity. Agency staff or an outside

⁸ Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 333 (1945) (concerning more than one mutually exclusive application for a Commission license).

⁹ 47 C.F.R. § 73.3555, n. 2 (2009).

¹⁰ See, e.g., Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Report & Order, 14 FCC Rcd 12559, 12607-610 ¶¶108-114 (1999).

contractor with SDB expertise could conduct these interviews. To further preserve the integrity of the program, five percent (5%) of the applications should be randomly selected for a thorough audit, with additional audits conducted upon the recommendation of applicant reviewers.¹¹ Potential for gamesmanship can be minimized by recommending that all applications or interviews used in the process be subject to the certifications that are common for other FCC applications (*i.e.*, penalties for willful misstatements).¹² Those examining or auditing applications should be expected to be aggressive in ferreting out and prosecuting fraud and abuse.

h. Pre-certification and Re-certification

FFR candidates should be pre-certified. Pre-certification for an eligible entity program would act as a “coin” applicants could use to obtain financing and negotiate for the acquisition of an asset. Applicants should be re-certified every three years, and the showing required for re-certification, while substantial, need not be repetitive of the historic elements of the showing required for the initial certification.

i. Determinations of Ineligibility

If an applicant fails to receive FFR certification and requests review of her application, an administrative law judge (“ALJ”) or special master should complete the review. This would add credibility and stability to the process.

j. Evaluation of the Effectiveness and Integrity of the Program

The Commission should initiate an annual longitudinal study of the program. The Commission should then review the resulting data to ensure compliance with procedures set by the agency and compliance with law, and to recalibrate the program periodically to ensure its continued integrity and effectiveness.

¹¹ This process is similar to the audit program currently used to monitor EEO compliance. See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Report & Order and Third Notice of Proposed Rulemaking, 17 FCC Rcd 24018, 24066-67 ¶¶155-156 (2002).

¹² See 47 C.F.R. § 1.17 (requiring truthful and accurate statements to the Commission).