

FEDERAL COMMUNICATIONS COMMISSION

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ADVISORY COMMITTEE ON DIVERSITY FOR  
COMMUNICATIONS IN THE DIGITAL AGE

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THURSDAY, OCTOBER 14, 2010

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The meeting convened in the FCC Meeting Room at 445 12th Street, S.W., Washington, D.C., at 2:00 p.m., Henry Rivera, Chairman, presiding.

COMMITTEE MEMBERS PRESENT:

HENRY RIVERA, Chairman, Emma Bowen Foundation  
for Minority Interests in Media

JAMES M. ASSEY, Jr., National Cable and  
Telecommunications Association

MARIA E. BRENNAN, American Women in Radio and  
Television

TONI COOK BUSH, Virgin Mobile\*

RALPH EVERETT, Joint Center for Political and  
Economic Studies\*

STEVE HILLARD, Council Tree Communications\*

DAVID HONIG, Minority Media and  
Telecommunications Council

RONALD JOHNSON, Ronson Network Services

JANE MAGO, National Association of

Broadcasters

JOAN MARSH, AT&T

KAREN K. NARASAKI, Asian American Justice  
Center

MELISSA NEWMAN, Qwest

SUSAN PATRICK, Patrick Communications\*

LISA PICKRUM, The RLJ Companies\*

ANDREW SCHWARTZMAN, Media Access Project

DIANE SUTTER, Shooting Star Broadcasting\*

CHARLES WARFIELD, Inner City Broadcasting\*

FCC STAFF PRESENT:

JAMILA BESS JOHNSON, Deputy Federal Officer

BARBARA KREISMAN, Designated Federal Officer

CAROLYN FLEMING WILLIAMS, Deputy Federal  
Officer

ELOISE GORE, Associate Bureau Chief,  
Media Bureau

ALSO PRESENT:

ALONZO BARBER, BET Holdings, Inc.\*

JONATHAN BLAKE, Covington & Burling

LIBBIE CANTER, Covington & Burling

ANDRE COPELIN, Verizon\*

JASON DAVIS, Covington & Burling

RAYMOND GUTIERREZ, Showtime\*

CHANELLE HARDY, National Urban League\*

DANIEL KAHN, Covington & Burling

JASON LAGRIA, Asian American Justice Center

ANNE LUCEY, CBS\*

JOAN MARSH, AT&T\*

LORETTA POLK, NCTA\*

HARRY WINGO, Google, Inc.\*

\*Participating via teleconference

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P-R-O-C-E-E-D-I-N-G-S

(2:03 p.m.)

MS. KREISMAN: Let me say good morning to everybody -- or afternoon, or whatever it is -- it's afternoon, I guess. And thank you all for coming out here in the rain. And it's nice to see you all again so very soon.

Today we have called a special Advisory Committee meeting to really focus in on one matter. And that's a very important matter. And that's the hardship waiver proposal of the Constitutional Law Issues Subcommittee. We've called this meeting because of the importance of this particular proposal and the discussion that it may provoke.

And with that, maybe we should find out who is on the phone, Henry?

CHAIRMAN RIVERA: Indeed.

MS. KREISMAN: Okay. Everybody on the phone, now tell me who you are.

1 MR. WINGO: This is Harry Wingo  
2 from Google.

3 MEMBER WARFIELD: Charles Warfield  
4 from ICBC.

5 MR. GUTIERREZ: This is Ray  
6 Gutierrez.

7 MEMBER SUTTER: Diane Sutter,  
8 Shooting Star Broadcasting.

9 MR. GUTIERREZ: This is Ray  
10 Gutierrez from Showtime Networks.

11 MEMBER EVERETT: Ralph Everett  
12 from the Joint Center for Political & Economic  
13 Studies.

14 MEMBER BUSH: Toni Bush.

15 MEMBER PATRICK: Susan Patrick.

16 MS. POLK: Loretta Polk from NCTA.

17 MS. HARDY: Chanelle Hardy,  
18 National Urban League.

19 MEMBER PICKRUM: Lisa Pickrum,  
20 RLJ.

21 MS. LUCEY: Anne Lucey, CBS Show  
22 Showtime.

1 MS. MARSH: Joan Marsh, AT&T.

2 MR. BARBER: Alonzo Barber, BET  
3 Networks.

4 MS. KREISMAN: Could you repeat  
5 that one more time?

6 MR. BARBER: Alonzo Barber from  
7 BET.

8 MS. MARSH: Joan Marsh, AT&T.

9 MR. COPELIN: Andre Copelin,  
10 Verizon.

11 MEMBER HILLARD: Steve Hillard  
12 from Council Tree.

13 MS. KREISMAN: Anyone else?

14 (No response.)

15 MS. KREISMAN: Thank you.

16 CHAIRMAN RIVERA: Want to tell  
17 them who is here?

18 MS. KREISMAN: Why don't we go  
19 around the room so the people on the phone  
20 know who is in the room.

21 Eloise Gore?

22 MS. GORE: Eloise Gore is in the

1 room.

2 (Laughter.)

3 MR. LAGRIA: Jason Lagria from the  
4 Asian American Justice Center.

5 MEMBER NARASAKI: Asian American  
6 Justice Center.

7 MEMBER NEWMAN: Melissa Newman,  
8 Qwest.

9 MEMBER JOHNSON: Ronald Johnson,  
10 Ronson Networks.

11 MEMBER MAGO: Jane Mago, NAB.

12 MEMBER SCHWARTZMAN: Andy  
13 Schwartzman, Media Access Project.

14 MR. KAHN: Daniel Kahn, Covington  
15 & Burlington.

16 MS. CANTER: Libbie Canter,  
17 Covington & Burling.

18 MR. DAVIS: Jason Davis, Covington  
19 & Burlington.

20 MR. BLAKE: Jon Blake, Covington &  
21 Burling.

22 MEMBER HONIG: David Honig, MMTTC.

1 MS. BESS JOHNSON: Jamila Bess-  
2 Johnson, FCC.

3 MS. KREISMAN: Barbara Kreisman,  
4 FCC.

5 CHAIRMAN RIVERA: And your humble  
6 Chairman, Henry Rivera.

7 So -- well, thank you. Let me add  
8 my welcome to Barbara's. And thank you,  
9 intrepid souls who braved today's rain.

10 Jim Assey's joined us from NTCA.  
11 Welcome, Jim, nice to see you, sir.

12 So as Barbara suggested, we -- or  
13 stated, we have a proposal from David Honig's  
14 Subcommittee on Constitutional Issues.

15 This would be a recommendation to  
16 the Commission to adopt a notice of proposed  
17 rulemaking and he's brought with him Jonathan  
18 Blake and Jonathan's great team from Covington  
19 who have put in countless hours working on  
20 this recommendation and discussing it with  
21 various folks in the Commission prior to  
22 bringing it to you here.

1                   From here, assuming that it is  
2                   adopted, then we will then take it up to the  
3                   Commissioners and brief them. And hopefully  
4                   we would get some movement on this  
5                   recommendation and the Commission would issue  
6                   the notice.

7                   So with those brief introductory  
8                   remarks, I will turn it over to David.

9                   MEMBER HONIG: Thank you, Henry,  
10                  very much.

11                  First I wanted to -- is it on?

12                  CHAIRMAN RIVERA: They'll cut it  
13                  on in a moment.

14                  MS. KREISMAN: Just give it a  
15                  moment. Just speak into it and just give it  
16                  one minute.

17                  MEMBER HONIG: First, I want to  
18                  thank the seven members of the Constitutional  
19                  Issues Subcommittee who worked very hard to  
20                  review and frame drafts of this recommendation  
21                  that is going to be presented today.

22                  On October 7th, the Subcommittee

1 met and approved it to be transmitted for the  
2 consideration of the full Committee at the  
3 meeting that we're having today. Jon Blake  
4 and his team from Covington put in herculean  
5 efforts to get this, we think, just right. It  
6 really takes off upon -- builds upon and  
7 improves upon the framework that over the last  
8 year and a half, the Diversity Committee  
9 developed under the rubric of full file  
10 review.

11 We think this is even better. And  
12 without further ado, I'll turn it over to Jon  
13 to present it to you.

14 MR. BLAKE: Thank you, Henry and  
15 David.

16 The -- you've already had Jason,  
17 Libbie, and Dan introduce themselves. So I  
18 don't have to do that. But they've done great  
19 work.

20 The core concept of our proposal,  
21 as David said, builds very heavily on the  
22 prior work of the Advisory Committee and of

1 the Constitutional Issues Subcommittee. And  
2 our role has been to shape, explain, and  
3 defend it in order to obtain the support of  
4 the FCC, hopefully all five Commissioners.  
5 And to make a difference.

6 And all of us feel, I know in our  
7 team and many in the firm who know about it,  
8 feel that it has been an honor to be asked to  
9 play this role. And I certainly feel that  
10 way. It has been a very cooperative  
11 enterprise with lots of people, including the  
12 people on the Committee and in outreaching to  
13 Commission staff people as well.

14 The basic concept is that the  
15 Commission has a preference program that  
16 covers licenses awarded by competitive  
17 bidding. And under the rules now, those  
18 preferences are to be awarded to small  
19 businesses and rural telcos. And those rules  
20 apply to both broadcast and non-broadcast  
21 licenses, any licenses that are subject to  
22 competitive bidding.

1                   Our proposal would create a new  
2 additional preference overcoming disadvantage.  
3 On page four of the draft proposal, we list  
4 disadvantages that would qualify. But it is  
5 not meant to be an exclusive list. We're not  
6 that omniscient and, you know, maybe the  
7 government isn't either. So there ought to be  
8 flexibility for people to come in and show  
9 additional grounds for receiving a preference  
10 on the basis of disadvantage.

11                   And that list shows some of the --  
12 people who are victims of natural disaster,  
13 physical handicaps, discrimination due to race  
14 or gender, and we've listed -- I don't know --  
15 five or six additional ones. Again, not an  
16 airtight set of categories.

17                   Whether somebody was entitled to a  
18 preference because of a disadvantage and on  
19 the grounds that they have overcome it or are  
20 overcoming it, would be done on an individual  
21 basis. There couldn't be any presumption  
22 based on one particular category. It would

1       have to be shown in the case of each  
2       individual.

3                 That is what builds off the idea  
4       that this Committee has developed over the  
5       course of two years, that it is just sort of  
6       a full file review examination of the  
7       qualifications of particular applicants as in  
8       the case most famously in college and graduate  
9       school applications in educational  
10      institutions. So that's the core concept that  
11      we would apply to overcoming disadvantage.

12                The document, and I'm not going to  
13      go through it in detail, pages two and three  
14      list the objectives that we believe are race  
15      neutral. As we've said, pages three and four  
16      give examples of disadvantages that would  
17      qualify.

18                Page five talks about efforts to  
19      overcome, because that would be part of the  
20      test. Applicants would have to be otherwise  
21      qualified. That's discussed on page six.

22                And there's the kind of oddball

1 issue of what happens if somebody is so  
2 wealthy that they don't need a bidding credit.  
3 And because one of the rationales for the  
4 program is that it will improve the applicant  
5 pool that the Commission gives licenses to,  
6 that -- who might otherwise be excluded or  
7 undervalued in the licensing process of the  
8 FCC, if somebody is already wealthy, then  
9 they're probably not being excluded. So  
10 that's sort of the rationale.

11 With respect to all of these  
12 issues that we address, we've tried to be  
13 helpful in terms of identifying the issues and  
14 making suggestions that we hope are  
15 constructive for the Commission. But it would  
16 have to be worked out in a notice of proposed  
17 rulemaking, in the rulemaking proceeding.

18 We thought that was a good idea  
19 because the Commission has its own ideas  
20 about, for example, how its processes might be  
21 adapted to evaluate applicants for a  
22 disadvantage preference.

1                   Then page seven through ten talks  
2 about some of the implementation issues, one  
3 of which is one I just mentioned. And the  
4 last section talks about why this proposal  
5 meets various legal standards.

6                   Then I think that sort of gives  
7 you the overview of what the proposal tries to  
8 do and why it looks, to us, as if it holds  
9 together quite solidly in terms of objectives  
10 and in terms of legal standards.

11                   And I think that's a point where  
12 we're happy to discuss or have questions.

13                   CHAIRMAN RIVERA: All right.  
14 Well, thank you, again, Jon, and to your team  
15 for all the great work here. It's obvious,  
16 given the presentation and the document that  
17 you all produced.

18                   Now are there any questions for  
19 Jon and his team? Andy?

20                   MEMBER SCHWARTZMAN: First, I want  
21 to express my appreciation for the work that  
22 was done. And it's something that I think is

1 a very constructive and farsighted plan. And  
2 had I not been unavoidably detained at the  
3 last minute, I would have said so at the  
4 Subcommittee meeting on Tuesday.

5 But my question is with respect to  
6 the legal analysis at the end of the memo,  
7 which I find very persuasive, but you don't  
8 discuss any countervailing arguments. I  
9 wonder if there are any cases or any circuits  
10 that might have any adverse precedent that  
11 might argue against adopting something like  
12 this.

13 MR. BLAKE: Well, as probably all  
14 of you know, this area of the law is very  
15 complicated. And you read Supreme Court  
16 decisions that it is a 5-4 decision. And  
17 there have been three judges who have left and  
18 --

19 PARTICIPANT: Excuse me. Those of  
20 us on the phone can't hear.

21 MR. BLAKE: Yes, I'm sorry. Is  
22 that better?

1 PARTICIPANT: It is. Thank you.

2 MR. BLAKE: I'm addressing myself  
3 to Andy instead of the microphone.

4 But -- and the other interesting  
5 thing is this is a pretty new concept. And we  
6 went through -- Dan went through and looked  
7 for all kinds of other government programs  
8 that we might be able to analogize to. And we  
9 did that at the request of the General  
10 Counsels Office.

11 And we gave it to them and said  
12 here, here's what you asked for. And they  
13 said well, this doesn't really help us very  
14 much because our program is so different. And  
15 so they said don't include it in the report.

16 So we think it works. It's a  
17 complicated area. But we think it doesn't go  
18 as far, it isn't as aggressive as some of  
19 those that -- some of the cases that have  
20 raised problems, including the ones that have  
21 won in the past.

22 And we think, as David just said,

1 we think it accomplishes a lot because it is  
2 targeted toward disadvantages. And that makes  
3 it kind of more -- we think it makes it less  
4 challengeable, less vulnerable. But we also  
5 think it accomplishes something in a discrete  
6 area that's valuable.

7 I want to add one other thing.

8 Erin Dozier, who I know is here, for you Jane,  
9 at the last meeting we had in June, raised a  
10 very important point about an hour and a half  
11 ago, which is -- it's better than an hour ago  
12 or an hour from not -- and that is that we  
13 reference a rule on page one. Our intention  
14 is that this would apply to both broadcasting  
15 and all other licenses that are subject to  
16 auction.

17 And she pointed out that there is  
18 a rule applying to broadcasting that maybe we  
19 ought to include or reference or propose to  
20 amend. In that 90-minute period we think we  
21 don't have to do that but we think it is  
22 desirable to go back and point it out.

1                   And we would love, you know, the  
2 rest of the afternoon to determine that there  
3 are no exceptions in the rule, you know,  
4 looking -- proving a negative in a way that  
5 would cause us to have to do something more  
6 than just explaining it covers across the  
7 board.

8                   And thanks, Erin.

9                   CHAIRMAN RIVERA: Other questions?  
10 Jane?

11                  MEMBER MAGO: Let me amplify that  
12 just a little bit if I can, which is that --  
13 I mean the intention of the proposal here,  
14 which I agree with everyone is extraordinarily  
15 well done and I really do congratulate the  
16 team on what was an exceptional effort on all  
17 of this, I think was to set this up for the  
18 Commission so that in the rulemaking  
19 proceeding, the Commission is going to be  
20 looking at it.

21                  And I know that the Commission  
22 will be trying to look at all the different

1 pieces and making sure that all the rules that  
2 might be effected here would be addressed in  
3 that rulemaking proceeding where there would  
4 be the opportunity for anyone else to comment  
5 and find some of the other pieces.

6 But it certainly was the intention  
7 of the Subcommittee and the group that this  
8 apply to all of the services and just want to  
9 make that very clear through all of this.

10 CHAIRMAN RIVERA: Thank you.

11 Any other questions for Jon or  
12 David? How about some -- anybody on the phone  
13 have anything they want to ask?

14 (No response.)

15 CHAIRMAN RIVERA: All right.

16 Hearing none, I'm going to assume that you are  
17 ready for the question. Is that an adequate  
18 assumption?

19 MS. KREISMAN: Could we have a  
20 clarification? Are we -- is the vote on the  
21 question of this proposal as possibly modified  
22 with the addition of the rules citation that

1 you are referring to?

2 MR. BLAKE: Right. It won't  
3 change it substantively. It's just --

4 PARTICIPANT: Can you repeat the  
5 clarification? It was hard to hear.

6 MR. BLAKE: The clarification --  
7 it already says it would apply to broadcasting  
8 and all other licenses subject to auction.  
9 The rules citation is to a general rule that  
10 we would presume applies to all services.  
11 There is a special rule for broadcasting,  
12 which we think is additive, and not a  
13 substitute.

14 So we don't want to say here is  
15 the fix, although I think I know what it is  
16 now, without going back and making sure that  
17 it is sufficient, covers all the bases, and I  
18 mean I would think the change might be at most  
19 a sentence. And maybe just another citation.

20 MS. KREISMAN: So is it fair to  
21 say that we're voting on the proposal, as  
22 distributed, plus the addition of a possible

1 sentence that would make it clear that it also  
2 applies to broadcast?

3 MEMBER MAGO: I would recommend it  
4 be with minor editorial privileges.

5 MR. BLAKE: Which this would fall  
6 into.

7 MEMBER MAGO: In the tradition of  
8 the Commission.

9 MS. KREISMAN: Perfect.

10 CHAIRMAN RIVERA: All right then.  
11 All in favor of the motion as stated say aye.

12 (Chorus of ayes.)

13 CHAIRMAN RIVERA: Opposed?

14 (No response.)

15 CHAIRMAN RIVERA: Motion carries.

16 MS. KREISMAN: Is there anything  
17 else anyone wants to talk about since you all  
18 came out in the rain?

19 (No response.)

20 CHAIRMAN RIVERA: We will -- just  
21 an administrative note -- we will meet again  
22 on December 2nd. That would be our last

1 meeting under this charter.

2 And I will let you know as soon as  
3 I hear anything about whether we're going to  
4 be rechartered or the Committee is going to be  
5 rechartered, and if so, how, when, and all  
6 that sort of thing. As of this time, I know  
7 nothing I'm sorry to tell you.

8 MEMBER SCHWARTZMAN: And should I  
9 assume that it is going to be 2:00 p.m. on the  
10 second?

11 MS. KREISMAN: Yes.

12 CHAIRMAN RIVERA: Yes, that's a  
13 valid assumption.

14 MS. KREISMAN: That is absolute --  
15 that's correct --

16 CHAIRMAN RIVERA: Thank you, Andy.

17 MS. KREISMAN: -- because I had to  
18 fight for the room on the second. And the  
19 combined federal campaign has it in the  
20 morning. And you might have to sit among  
21 cakes because I've heard they are very unhappy  
22 because I twisted their arm --

1                   CHAIRMAN RIVERA:  Oh, that would  
2                   be terrible.

3                   MS. KREISMAN:  -- to take the room  
4                   in the afternoon.

5                   (Laughter.)

6                   MEMBER NARASAKI:  Mr. Chair?

7                   CHAIRMAN RIVERA:  Yes?

8                   MEMBER NARASAKI:  Would it be --  
9                   would we be able to get a report from the  
10                  Commissioners' offices about where they have  
11                  taken all of our collective recommendations  
12                  with the statuses?

13                  CHAIRMAN RIVERA:  That's a very  
14                  good point.  And I'm not sure that we have --  
15                  well, I do know that the recommendations have  
16                  not risen to the level of the Commissioners'  
17                  offices.  My understanding is that they are  
18                  still at OCBO.

19                  And, David, I don't know.  Do you  
20                  want to -- David has been meeting with OCBO in  
21                  an attempt to move these forward.  Do you want  
22                  to report on where we are?

1                   MEMBER HONIG: Sure. Most of the  
2                   recommendations of the Diversity Committee,  
3                   those that specifically relate to Ownership  
4                   Diversity and equal employment opportunity,  
5                   have been organized along with other  
6                   recommendations made from public interest  
7                   groups, and particularly MMTC, into tranches  
8                   and in a big binder and presented to the  
9                   Chair. And then referred by him to OCBO in  
10                  March.

11                  And there have been two long  
12                  meetings with MMTC's staff and OCBO's staff to  
13                  go through these. They have been narrowed  
14                  down to some 72 recommendations, the Committee  
15                  having been rather prolific.

16                  And thus far, we're waiting for  
17                  word on the circulation of these items to the  
18                  bureaus, input from the bureaus, and then some  
19                  decisions will need to be made about what goes  
20                  up to the floor and in what form and which  
21                  tranches.

22                  Tom Reed and I are going to be

1 getting together every two weeks until we  
2 complete that process.

3 MS. KREISMAN: Actually Tom Reed  
4 gave a very extensive report during our last  
5 meeting, which was nearly a month ago, and  
6 that transcript you should be able to find on  
7 the website if you need to review it.

8 MEMBER NARASAKI: No, I was  
9 actually referring to December since that  
10 might be our last meeting.

11 MS. KREISMAN: Right. Nice to  
12 know.

13 MEMBER SUTTER: I also believe  
14 that Tom had planned to get us all a written  
15 update, which you stated that at the last  
16 meeting, to accomplish that very fact. So I  
17 think his plan is to do that prior to our last  
18 meeting.

19 CHAIRMAN RIVERA: Yes, well I've  
20 got my fingers crossed. I hope that's the  
21 case also, Diane. And we will -- I will ask  
22 Tom to come to the meeting on December 2nd and

1 make such a report if he is able to do that.

2 Anything else anybody wants to  
3 bring up?

4 (No response.)

5 CHAIRMAN RIVERA: By the way,  
6 Rosemary Harold has joined us from  
7 Commissioner McDowell's Office. Welcome,  
8 Rosemary. Always nice to see you.

9 All right then. We will be  
10 adjourned until December 2nd. Thank you  
11 again. Good work here.

12 Thank you again to the Covington  
13 team. Let's give them a hand. Great job.

14 (Applause.)

15 CHAIRMAN RIVERA: Bye-bye  
16 everyone.

17 (Whereupon, the above-entitled  
18 meeting was concluded at 2:24 p.m.)

19

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