FCC ADVISORY COMMITTEE ON DIVERSITY FOR COMMUNICATIONS IN THE DIGITAL AGE

REPORT AND RECOMMENDATION OF THE SUBCOMMITTEE ON ELIGIBLE ENTITIES

Approved by the Subcommittee on Eligible Entities, by Unanimous Vote, October 22, 2008

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EXECUTIVE SUMMARY

The Advisory Committee on Diversity for Communications in the Digital Age ("Diversity Committee") presents this Report and Recommendation to aid the Commission in developing a constitutionally defensible method of promoting racial and gender diversity in media and telecommunications ownership. The Diversity Committee prepared this Report and Recommendation in response to the Commission's request for assistance in arriving at a definition of entities ("eligible entities") which - because of the contributions they could make to diversity, competition or remedying the effects of past discrimination - might be entitled to special relief in specified FCC licensing or other administrative matters.[1]

Congress expects the Commission to advance minority and female ownership.[2] To attempt to respond to Congress' instructions in a race-neutral manner, the Commission adopted an eligible entity paradigm that is based on a small business definition.[3] However, 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.[4] A program that confers benefits on some applicants without advancing the Commission's minority ownership objectives would be ineffective and a waste of valuable resources.

To formulate an effective eligible entity paradigm, the Diversity Committee's Eligible Entities Subcommittee conducted an extensive literature review and held interviews with seven subject matter experts. It also reviewed existing Commission programs designed to promote

[1] Promoting Diversification of Ownership in the Broadcasting Services (Report & Order and Third Further Notice of Proposed Rulemaking) ("Broadcast Diversity Order"), 23 FCC Rcd 5922, 5950-52 ¶¶80-86 (2008).

[2] See n. 64 infra and accompanying discussion.

[3] Broadcast Diversity Order, 23 FCC Rcd at 5925-27 ¶¶6-9.

[4] See n. 12 infra and accompanying text.

diversity of ownership, including the designated entity and new entrant programs. While designated entity and new entrant programs appeared promising, it was difficult to accurately determine their effectiveness due to the Commission's inconsistent data collection in recent years.

The Subcommittee also looked outside the Commission to other government programs for paradigms that could be applied to media ownership. These included models for socially and economically disadvantaged businesses ("SDBs") and Full File Review ("FFR") – models upon which the Commission sought comment in the Broadcast Diversity Order.[5]

SDB-based programs have withstood judicial review in other industries when the government developed a record to examine the state of diversity in the industry and what accounts for the lack of diversity in that industry. These SDB-based programs were most often remedial in nature. A race-conscious and constitutionally sustainable SDB-based program would be the gold standard for promoting diversity.

The Commission's research on diversity in ownership and on how changes in law and policy affect the number of minorities and women who own media or telecommunications facilities was last conducted in 2000. There is some question as to whether these studies would be considered stale. Current case law suggests that Congress and the Commission may rely, to some measure, on institutional memory and previously developed evidence.[6] However, a

[5] Id. at 5950-51 ¶¶80-84 (SDBs) and at 5951-52 ¶85 (FFR).

[6] Rothe Dev. Corp. v. U.S. Dept. of Defense, 324 F. Supp. 2d 840, 851 (W.D. Tex 2004) ("Rothe IV"). On subsequent remand in 2007, the same Court held that disparity studies conducted from 1995 to 2002 were not stale for purposes of strict scrutiny review. The Court stated, "Although a governmental entity resisting strict scrutiny challenge cannot rely on old statistical data when new statistical data is available, it should be able to rely on the most recently available data so long as that data is reasonably up to date." Rothe Dev. Corp. v. U.S. Dept of Defense, 499 F. Supp. 2d 775, 839 (W.D. Tex 2007).

constitutionally sustainable SDB-based program would be bolstered significantly by updated disparity studies. When conducting such studies, the Commission should consider whether and how an applicant's deal size, desire to serve diverse, underserved communities, and plans to incubate SDBs could be factors in an SDB-based eligible entity paradigm.

The Subcommittee closely examined FFR, variations of which are used in university systems nationwide. While some FFR-based programs take race into account, the focus of FFR is on race-neutral characteristics that demonstrate each applicant's individual contribution to diversity. This diversity is most often derived from life experience, such as overcoming personal, social, or economic obstacles. The tenacity to overcome such obstacles is often predictive of success in a chosen field.

The Subcommittee identified four government interests that could be served by an SDB or FFR model: (1) promoting diversity, (2) preventing discrimination, (3) overcoming the present effects of past discrimination to the extent the government was at least a passive participant, and (4) promoting competition. The Subcommittee concludes that SDB-based programs or FFR-based programs would each result in increased diversity of ownership among minorities and women, and as such would help overcome the present effects of past discrimination to the extent that individual applicants that represent historically disadvantaged groups become successful Commission licensees. SDB-based programs or FFR-based programs – and especially SDB-based programs - would foster new and diverse groups of applicants and therefore promote competition, as contemplated by Sections 257 and 309(j) of the Communications Act.[7]

[7] 47 U.S.C. §§257 and 309(j).

While the Subcommittee explored most aspects of the eligible entity issue, there were a number of operational questions that could not be answered at this time. These questions, set out infra at 28-29, could be addressed in a further rulemaking proceeding.

SDB and FFR are both workable models that can be designed into programs that fit current communications licensing paradigms. Because of its race-neutrality, an FFR-based program can be implemented in the short-term, without waiting for the Commission to update the disparity studies and other research necessary to sustain the constitutionality of an SDB-based program.

Therefore, the Subcommittee recommends that the Commission take steps immediately to substitute Full File Review for the small business-based eligible entity paradigm currently in place until the Commission can adopt a constitutionally sustainable SDB-based program. The Commission could achieve this by issuing (1) a Second Report and Order, in the Broadcast Diversity docket,[8] that adopts the legal and policy recommendations in this Report, and (2) a Media Bureau request for notice and comment on the administrative issues discussed in or identified in this Report. In the meantime, the Commission should act promptly to update existing disparity and other studies necessary to sustain an SDB-based program.

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[8] MB Docket No. 07-294.

I. Existing Eligible Entity Paradigms Used To Promote Minority And Female Ownership

A. Small Businesses

In the Broadcast Diversity Order, the Commission adopted an eligible entity paradigm that is based on a small business definition.[9] The Small Business Administration (SBA) defines what would be considered a "small business" for numerous industries.[10] The SBA currently defines as a small business a television broadcasting station that has no more than $13 million in annual receipts and a radio broadcasting entity that has no more than $6.5 million in annual receipts.[11]

While the eligible entity definition adopted by the Commission in the Broadcast Diversity Order is race-neutral, it is so dilute in its impact on minority ownership that it would have virtually no impact. For example, minorities own 7.78% of commercial full power radio stations but only 8.5% of small business-owned commercial full power radio stations.[12] This means that even in the unlikely event that every commercial full power radio station owned by a large business were sold to a small business, minority ownership would increase less than one percentage point. Therefore, the Commission should revise the eligible entity definition so that it

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[9] Id.

[10] Id. at 5926 ¶7 (citing North American Industry Classification System (NAICS) code categories at 13 C.F.R. §121.201 (2008). The definition of small business for the radio industry is listed in NAICS code 515112, and the definition of a small business for the TV industry is listed in NAICS code 515120. Id. The SBA is currently reviewing its small business size standards and these amounts are subject to change. See Small Business Size Standards: Public Meetings on a Comprehensive Review of Small Business Size Standards, 73 Fed. Reg. 30, 440 (May 27, 2008).

[11] Id.

[12] See S. Derek Turner, Off the Dial: Female and Minority Radio Station Ownership in the United States, Free Press (June 2007) at 16 ("Off the Dial"); see also Broadcast Diversity Order, 23 FCC Rcd at 5927 ¶8.

is considerably less dilute in its impact on racial diversity than it is under the current small business paradigm.

B. Designated Entities and New Entrants

Section 309(j) of the Act authorizes the Commission to grant licenses through competitive bidding, or auctions.[13] As part of the wireless auction process, the Commission has created different classifications of license applications.[14] One such classification is designated entities. The Commission defines a designated entity as a small business,[15] and the Commission assumes that most minority and women-owned wireless businesses are small businesses. In response to Adarand Constructors, Inc. v. Peña,[16] the Commission deleted minority ownership as a qualifying factor for the designated entity program.[17] Designated entities may be awarded bidding credits,[18] and may be eligible to make installment payments.[19]

The Commission has also created a category of applicants known as "new entrants."[20] It created this category a decade ago in an effort to establish FM and television construction permit

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[13] 47 U.S.C. §309(j) (2008).

[14] Id. at §309(g).

[15] 47 C.F.R. §1.2110(a) (2008). Rural telephone companies are also included in this definition. Id.

[16] 515 U.S. 200 (1995).

[17] See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Sixth Report and Order, 11 FCC Rcd 136, 143 ¶11 (1995).

[18] Id. at §1.2110(f).

[19] Id. at §1.2110(g).

[20] The "new entrant" category arose after commenters questioned whether the Commission's designated entity program would withstand judicial review after Adarand. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Report and Order, 13 FCC Rcd 15920,

auction procedures that were consistent with Supreme Court decisions applying strict scrutiny to the government's use of race and gender in awarding benefits.[21]

There is no current data on the success of the designated entity or new entrant programs in advancing minority and female ownership. Therefore, the Subcommittee did not examine these programs in detail. The operation of the designated entity and new entrant programs are set out in Appendix 1 infra.

II. New Paradigms To Promote Minority And Female Ownership

A. Socially and Economically Disadvantaged Businesses (SDBs)

A race-conscious and constitutionally sustainable SDB-based program would be the gold standard for promoting diversity. In light of Adarand,[22] a race-conscious program such as one based on an SDB model would need to be validated with racial disparity and participation studies of the affected industry ("Adarand studies"). Before it could undertake narrowly tailored race-conscious measures, the Commission would need to conclude that other race-neutral steps previously undertaken have been inadequate to achieve Congress' objectives.[23] The Commission recently made considerable progress in this regard when it adopted 13 race-neutral proposals this past winter and set out 12 others for comment this year,[24] but because these new initiatives only took effect on July 15, 2008, the Commission has not yet had an opportunity to address whether,

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15994 ¶189 (1998) ("Competitive Bidding") (citing United States v. Virginia, 518 U.S. 515 (1996) and Adarand Constructors Inc. v. Peña, 515 U.S. 200 (1995)) ("Adarand")).

[21] See Competitive Bidding, 13 FCC Rcd at 15995 ¶188.

[22] 515 U.S. 200 (1995).

[23] See Parents Involved in Community Schools v. Seattle School District No. 1, 127 S.Ct. 2738 (2007) ("Parents"). But see Grutter v. Bollinger, 539 U.S. 306, 339 (2003) ("Grutter") (narrow tailoring requires "serious, *good faith* consideration of workable race-neutral alternatives that will achieve the diversity" state actor wants to achieve) (emphasis added)).

[24] See generally Broadcast Diversity Order, supra n. 1.

these new race-neutral initiatives have been successful enough to obviate the need for race-conscious initiatives.

During the Commission's remaining term, there is insufficient time to complete the disparity studies that would enable the Commission to formulate and adequately defend an SDB-based program. Therefore, in the short term, the adoption of an SDB-based program is unrealistic. The fruits of the Subcommittee's consideration of the SDB paradigm are presented in Appendix 2 hereto.

B. Full File Review (also known as Comprehensive Review)

The Broadcast Diversity Order contains a fairly extensive set of questions regarding the design of an FFR program.[25] This section of the Report undertakes to answer most of those questions.

1. Evolution and Moderate Success of Full File Review in Higher Education

Faced with a substantial decrease in minority enrollment in schools across the nation, Full File Review was conceived as an attempt to bring as many people as possible from different backgrounds into higher education.[26] While some FFR-based programs include race as a factor, FFR is generally designed to consider diversity attributes without factoring in racial identity.[27] FFR has shown some success at increasing minority admissions in state universities.[28] Since

[25] Id., 23 FCC Rcd at 5951-52 ¶85.

[26] See Daria Rothmayr, Direct Measures: An Alternative Form Of Affirmative Action, 7 Mich. J. Race & L. 1, 6 (2001); Kent Lollis, Associate Executive Director and Assistant to the President for Minority Affairs, Law School Admissions Council (interviewed by speakerphone on June 4, 2008). Full File Review is also referred to as "direct measures." Rothmayr at 6.

[27] Id.

[28] For example, after California state law schools implemented a full-file admissions policy, admissions of African American and Hispanic students rose from 1.9% and 7.2% respectively in 1997 to 4.7% and 11.9% respectively in 2003. See Eboni S. Nelson, What Price Grutter? We May Have Won the Battle, but Are We Losing the War? 32 J.C. & U.L. 1, 20-22 (2005).

FFR can be structured so that it does not rely on race or gender classifications, FFR could serve as an interim replacement for, or enhancement of, small business status as the eligible entity definition while the Commission is establishing and constitutionally validating an SDB-based program.

2. Key Elements of Full File Review

a. Race and Gender-Neutral in Theory, Design and Execution

Race-neutral decisions and well-defined goals are critical to the application of FFR. An FFR-based program should have goal statements and should ensure that the process works to advance those goals.[29] Applicants must know the objective standards they are judged against. Clear standards for qualifications are vital, and should address, inter alia, the nature, extent, and remoteness in time of disadvantages the applicant has faced, and the relative weight assigned to the existence of the disadvantage or to the applicant's efforts to overcome the disadvantage.

Under FFR, an individual applicant's race need not be considered.[30] Instead, FFR can be formulated to directly target "race-neutral characteristics and traits for which racial identity formerly was used as a proxy."[31] In formulating a race-neutral program, the Commission may use data regarding race and the racial impact of its regulations without triggering suspect classifications.[32] For example, a decision to implement a program that gives credit to applicants

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[29] Lollis, supra n. 26.

[30] See Rothmayr, supra n. 26, at 22.

[31] Id.

[32] See Parents, supra, 127 S.Ct. at 2792 (Justice Kennedy, concurring in part and concurring in the judgment) ("it is permissible to consider the racial makeup of schools"; school boards may draw "attendance zones with general recognition of the demographics of neighborhoods" and may engage in "tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race[.]")

who operate multilingual media outlets could be informed by its racial impact, but without triggering strict scrutiny.[33]

b. Success in Overcoming Disadvantage is Predictive of Success in a Challenging Environment

One premise of FFR is that an individual's success in overcoming any of several types of social (and perhaps economic) disadvantages is predictive of success in a challenging environment. A corollary is that such an individual is more likely than not to contribute to intellectual diversity in an academic or media environment. Thus, in implementing a program based on FFR, the Commission might take into account an applicant's experiences with discrimination, racial or otherwise, as well as the applicant's tenacity to overcome discrimination or other disadvantages.

Following City of Richmond v. J.A. Croson Co. ("Croson"), it would be "more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment."[34] FFR generally focuses on the characteristics exhibited by those who have experienced discrimination and overcoming disadvantage related to this discrimination. This applies to racial discrimination and discrimination based on gender, national origin, immigrant status, language, disability or age.

An applicant's tenacity and efforts to overcome discrimination and its present effects may

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[33] See Vialez v. New York City Housing Authority, 783 F. Supp. 109, 122 (S.D.N.Y. 1991) (rejecting plaintiff's claim that defendant's failure to provide forms written in Spanish violated her civil rights because "Language by itself does not identify members of a suspect class") (quoting Frontera v. Sindell, 522 F.2d 1215, 1219-20 (6th Cir. 1975) (dismissing plaintiff's class action claim which sought to restrain the defendant city from refusing to administer civil services exams in Spanish), and citing Carmona v. Sheffield, 475 F.2d 738, 739 (9th Cir. 1973) (rejecting plaintiff's assertion that the California Department of Human Resources' failure to make Spanish-speaking personnel available to determine the validity of plaintiff's claims was the direct cause of the plaintiff's having been denied benefits)).

[34] 488 U.S. 469, 514 (1989) (Stevens, J., concurring).

be predictive of success in the current media environment. An individual that has overcome discrimination, or who has overcome disadvantages such as the need to learn a second language, age, physical disabilities, poverty, geographic isolation or perhaps veterans status is likely to have the tenacity to succeed in a media or telecommunications business. This attribute of FFR is consistent with Justice Kennedy's observation in Parents, that "[r]ace may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered."[35] Consideration of an applicant's tenacity might be especially desirable to the Commission, which prefers to have spectrum used efficiently, prefers to have new entrants succeed in business, and prefers not to have to re-license spectrum in the wake of a business failure.[36]

3. Role of Full File Review in Advancing Important or Compelling Governmental Interests in Media and Telecommunications

If an FFR-based program is designed to be race-neutral, it would be reviewed constitutionally under the "rational basis" standard, which offers a federal agency considerable discretion. As it happens, at least four of the government interests that could be served by an FFR-based program are in fact, potentially compelling – thus easily surpassing rational basis while also adding value to an FFR program's credibility and effectiveness and acceptance. Those interests are: (1) promoting diversity; (2) preventing discrimination; (3) overcoming the present effects of past discrimination to the extent the government was at least passive participant; and (4) promoting competition. For management purposes even if not

[35] 127 S.Ct. at 2798.

[36] An applicant's individual efforts, not her success in overcoming obstacles, should be considered. To avoid an unintended social class bias in favor of wealthy persons, applicants should not be penalized for failing to overcome a disadvantage where the applicants did not have at their disposal the wherewithal to do so.

constitutionally compelled to do so, to design a successful program the Commission should clearly specify at the NPRM stage the interests the program would promote, as this is critical to the design and success of the program.[37]

a. Promoting Diversity in Media, and in Telecommunications to the Extent Telecommunications Enterprises are Performing Media Functions

In broadcasting and cable, the Commission uses structural methods, rather than direct content regulation, to promote diversity of viewpoints.[38] As part of its structural regulatory program, it strives to ensure that minorities and women are well represented in the ranks of media owners.

A close parallel to the Commission's goal of viewpoint diversity in media is the university's goal of intellectual diversity predicated on diversity of backgrounds that are intended to enrich the learning environment. In that context, the Supreme Court has found that "universities occupy a special niche in our constitutional tradition," and that "the robust exchange of ideas" is "of paramount importance."[39] In Grutter, the Court affirmed that diversity of backgrounds (a close analog to diversity of viewpoints) in the student body of a law school

[37] While the interests may overlap, there must be a distinct relationship between each interest and the program. For example, the Commission has a history of promoting diversity. Overcoming the effects of past discrimination would likely promote diversity; however, these are separate government interests. Thomas Henderson, Partner, Sprenger & Lang; former Director of Litigation, Lawyers Committee for Civil Rights Under Law (interviewed in person on April 10, 2008).

[38] For telecommunications companies, diversity of viewpoints would not be a compelling governmental interest except to the extent that a telecommunications company also provides media services.

[39] See Grutter, 539 U.S. at 329 (internal quotations and citations omitted).

can be a compelling governmental interest and, therefore, that a race-conscious program to promote diversity of backgrounds is appropriate if the program is narrowly tailored.[40]

Similarly, the Supreme Court has recognized the special role of the broadcast media in our society.[41] The pursuit of a "robust exchange of ideas" is as important in the broadcasting context as it is in the university context. As the Commission has recognized for decades, competition in the communications marketplace advances the exchange of ideas and diverse viewpoints.[42] In light of Grutter's endorsement of diversity in the educational context, it is plausible that the Court could find that diversity of viewpoints in the media is a compelling governmental interest.[43]

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[40] Id. at 343.

[41] See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("Red Lion") ("[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here"); FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978) ("Pacifica") ("the broadcast media have established a uniquely pervasive presence in the lives of all Americans"); Turner Broadcasting Corp. v. FCC, 520 U.S. 180, 195 (1997) ("Turner II") (broadcasting is "an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression") (citations omitted).

[42] See, e.g., Amendment of Section 73.3555 of the Commission's Rules, Broadcast Multiple Ownership Rules, 4 FCC Rcd 1723, 1724 ¶7 (1989) ("1989 Multiple Ownership Order") (stating that "[a]lthough one of the structural purposes underlying our multiple ownership rules is to encourage diversity in the ownership of broadcast stations, we have encouraged ownership diversity as a means of promoting diversity of program sources and viewpoints, not as an end in itself"); 2002 Biennial Regulatory Review, Report and Order, 18 FCC Rcd 13620, 13630 ¶30 (2003), aff'd in part and remanded in part, Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004), stay modified on rehearing, No. 03-3388 (3d Cir., September 3, 2004), cert. denied, 545 U.S. 1123 (2005).

[43] In Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 555-56, 600 (1990), the Court held that diversity in broadcasting should be evaluated under, and that it satisfied, intermediate scrutiny. Adarand overruled Metro Broadcasting only to the extent that Adarand held that the correct standard of review should be strict scrutiny. Although Grutter was decided in the context of school admissions, its application is not necessarily limited to the high education context. The Supreme Court stated therein "We first wish to dispel the notion that law school [diversity] argument has been foreclosed, either expressly or implicitly, by our affirmative action cases decided since [Regents of the University of California v. Bakke, 438 U.S. 265 (1978)] … some

i. The Commission Should Specify What Forms of Diversity it hopes to Advance through Full File Review

Diversity comes in a number of forms including viewpoint diversity, information diversity, source diversity, ownership diversity, and racial and gender diversity. The Commission has acknowledged the importance of diversity for decades. [44] Courts have agreed that diversity is in the public interest and have upheld the Commission's authority to promote diversity.[45] If the Commission relies on diversity as a rationale for an FFR-based program, the Commission should determine, on the record in a rulemaking proceeding, which forms of

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language in those opinions might be read to suggest that remedying past discrimination is the only permissible use of race-based governmental action, but we never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination." Grutter, 539 U.S. at 328).

[44] See, e.g., Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979, 981 (1978) ("1978 Minority Ownership Policy Statement") ("Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment."); 1989 Multiple Ownership Order, 4 FCC Rcd at 1724 ¶7 ("Although one of the structural purposes underlying our multiple ownership rules is to encourage diversity in the ownership of broadcast stations, we have encouraged ownership diversity as a means of promoting diversity of program sources and viewpoints, not as an end in itself"); 2002 Biennial Regulatory Review, Report and Order, 18 FCC Rcd 13620, 13630 ¶30 (2003), aff'd in part and remanded in part, Prometheus Radio Project v. FCC, supra n. 43 ("[O]ur rules should encourage diverse ownership precisely because it is likely to result in the expression of a wide range of diverse and antagonistic viewpoints.")

[45] See, e.g., FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 795 (1978) (affirming the Commission's authority "to conclude that the maximum benefit to the public interest would follow from allocation of broadcast licenses so as to promote diversification of the mass media as a whole") (internal quotations omitted); Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154, 1162 (D.C. Cir. 1992), citing id. at 794-795 (discussing the Commission's broad authority "to determine where the public interest lies in the regulation of broadcasting to foster diversity"); Fox Television Stations v. FCC, 280 F.3d. 1027, 1042-43 (D.C. Cir. 2002) (agreeing with the Commission that "protecting diversity is a permissible policy" objective, noting that "[i]n the context of the regulation of broadcasting, 'the public interest' has historically embraced diversity") (citation omitted).

diversity it seeks to promote through use of FFR and whether an FFR-based program would have a meaningful impact on diversity.[46]

One manner in which an FFR-based program could advance diversity in media is by taking into account the applicant's intention to meet unmet needs – e.g., to provide service addressing the problems, needs and interests the applicant ascertains to be vital to particular discrete or definable communities. Such a community could be defined by language (e.g. Chicagoans whose primary language is Chinese), by a media-poor geographic subset of a Section 307(b) community (e.g. Southside Chicago), by demography (e.g. low-income elderly citizens of Chicago) or by social characteristics (e.g. physically disabled persons). The commitment would be to ascertain and significantly address needs, rather than to provide specific content or specific programming. The Commission would need to ensure that the applicant does not define these needs so broadly that the commitment is meaningless, and that the applicant actually performs as promised.

ii. The Commission Should Determine Whether Giving Credit for an Applicant's Overcoming of Social and Economic Disadvantages Would Promote Diversity

As discussed above, an individual may have experienced and overcome disadvantages in various forms. One of the goals of FFR in the educational context is to admit a well-rounded class of students based on the premise that applicants who have overcome disadvantages are desirable due to the perspectives they bring to the campus and the classroom.[47] Thus, the

[46] As noted in Parents, the Commission may consider whether the beneficiaries of an FFR program are diverse. See Parents, supra n. 32 and accompanying discussion.

[47] Camille de Jorna, Associate Consultant on Legal Education, Office of the Consultant on Legal Education, Section of Legal Education and Admissions to the Bar, American Bar Association (interviewed by speakerphone on June 4, 2008).

Commission should consider how an applicant's efforts to overcome economic disadvantages are predictive of viewpoint diversity in the media.

iii. Comparison of Full File Review or a Similar Standard to an Eligible Entity or SDB Standard in Promoting Diversity

The standards for an FFR-based program and an SDB-based program are different.[48] Both programs look at under-inclusion in the industry and attempt to stimulate participation by underrepresented groups. While the ultimate result of both the SDB and FFR paradigms is a more diverse industry, they arrive at this diversity through different means. Traditionally, SDB-based programs are designed to overcome the present effects of past discrimination against minorities generally, without an applicant making a showing of individual discrimination. FFR-based programs focus on an individual's experience as part of a disadvantaged group, rather than on the group's experiences as a whole.

b. Preventing Discrimination

Under the Communications Act, the Commission is charged with regulating "communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex."[49] One method the Commission uses to prevent discrimination is the equal employment opportunity (EEO) rules. Despite numerous court challenges,[50] the Commission's goal of using

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[48] Henderson, supra n. 37; Lollis, supra n. 26.

[49] 47 U.S.C. §151 (2006) (emphasis added. The underscored language was added in the Telecommunications Act of 1996).

[50] See Lutheran Church/Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998), petition for rehearing denied, 154 F.3d 487, petition for rehearing en banc denied, 154 F.3d 494 (D.C. Cir. 1998) ("Lutheran Church"). The Commission then adopted new recruitment and outreach rules. Review of the Commission's Broadcast Equal Employment Opportunity Rules and Policies (R&O), 15 FCC Rcd 2329, recon. denied, 15 FCC Rcd 22548 (2000) ("2000 EEO Rules"). In MD/DC/DE Broadcasters Association v. FCC, 236 F.3d 13 (D.C. Cir. 2001), petition for

the EEO rules to prevent discrimination remains valid.[51] Chairman Martin acknowledged the Commission's obligation to prevent discrimination in the most recent EEO proceeding.[52] Commissioner Adelstein has also emphasized the agency's duty to take "affirmative steps" in this regard.[53]

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rehearing and rehearing en banc denied, 253 F.3d 732 (D.C. Cir. 2001), cert. denied sub nom., MMTC v. FCC, 534 U.S. 1113 (2002) ("MD/DC/DE Broadcasters") the recruitment and outreach portions of the 2000 EEO Rules were struck down, again on equal protection grounds. The Commission then issued the recruitment and outreach rules that are currently in effect. Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second R&O and Third NPRM, 17 FCC Rcd 24018 (2002) (reconsideration petitions pending) ("2002 EEO Rules").

[51] See NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976) (observing in dictum that the Commission's broadcast EEO rules "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of l934...to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups"). The 2002 EEO Rules, like the 2000 EEO Rules, were aimed at preventing discrimination. 2002 EEO Rules at 24039 ¶37 ("our policy is designed to prevent both intentional and unintentional discriminatory practices in the broadcast and MVPD industries, and to ensure equal opportunity in employment practices, including recruitment"); see also 2000 EEO Rules, 15 FCC Rcd at 2331 ¶2. Only the recruitment and outreach portions of the Commission's original 1969 EEO rules were struck down on equal protection grounds, not the agency's authority to prevent discrimination. See Lutheran Church and MD/DC/DE Broadcasters, supra n. 50.

[52] In 2004, Chairman Martin, who was at that time a commissioner, stated that "[e]very citizen should have the opportunity to advance professionally based on his or her own merit, regardless of race, religion, or sex. Discrimination in the workplace is anathema to this principle, and Congress has charged us with prohibiting such discrimination in the broadcast and cable industries." Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Third Report and Order and Fourth Notice of Proposed Rulemaking, 19 FCC Rcd 9973, 9992 (2004) (Separate Statement of Commissioner Kevin J. Martin).

[53] See Statement of Commissioner Jonathan S. Adelstein, En Banc Hearing and Conference On Overcoming Barriers To Communications Financing, July 29, 2008, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284164A1.pdf; see also Statement of Commissioner Jonathan S. Adelstein, Media Ownership Hearing, Chicago, IL, September 20, 2007, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-276765A1.pdf.

c. Overcoming the Present Effects of Past Discrimination in the Media and Telecommunications Industries

The Supreme Court has recognized that when the government becomes a passive participant by allowing racial discrimination to take effect, the government has a compelling interest in ensuring "that public dollars, drawn from the tax contributions of all citizens, do not finance the evil of private prejudice."[54] The plurality in Parents acknowledged the compelling government interest of overcoming the effects of past discrimination by the government.[55] Courts will analyze the government's evidence of actual discrimination, past or present, when reviewing government action designed to remedy past discrimination.[56] In recent years, courts have upheld such federal regulations in other industries where the law was justified by strong evidence compiled by the government that demonstrates decades of discrimination.[57]

It is well established that the Commission's actions over the span of nearly three generations qualify the agency as a passive participant in discrimination toward minorities in broadcasting or minorities seeking to enter broadcasting. The Commission rarely admonished discriminatory practices by its licensees,[58] and it refused to consider minority ownership in many

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[54] Croson, 488 U.S. at 492 (citing Norwood v. Harrison, 413 U.S. 455, 465 (1973)).

[55] See Parents, 127 S.Ct. at 2752 (citing Freeman v. Pitts, 503 U.S. 467, 494 (1992)).

[56] Id. at 2752 (race-conscious government action, after past discrimination is remedied, may only continue if justified on another basis); see also 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).

[57] See Sherbrooke Turf v. Minnesota Department of Transportation, 345 F.3d 964, 979 (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 v. Washington State Department of Transportation, 407 F.3d 983, 998 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006) (federal programs take on a compelling interest nationwide).

[58] See, inter alia, Southland Television Co., 10 RR 699, recon. denied, 20 FCC 159 (1955) (holding that the owner of segregated movie theaters had the character necessary to be issued a

television construction permit because state segregation laws were not inconsistent with the Communications Act); Broward County Broadcasting, 1 RR2d 294 (1963) (terminating trumped-up revocation proceeding when the licensee agreed to abandon its Black format, which was opposed by the government of the segregated Fort Lauderdale suburb to which the station was licensed); The Columbus Broadcasting Company, Inc., 40 FCC 641 (1965) (issuing only an admonishment in response to the FBI's well-documented allegation that a radio licensee helped incite the 1962 riot in which Whites tried to prevent James Meredith from integrating the University of Mississippi (two people were killed)); Lamar Life Broadcasting Co., 38 FCC 1143 (1965), reversed and remanded sub nom. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) ("UCC I"), accepting remand, 3 FCC2d 784 (1966); renewing license again, 14 FCC2d 495 (ALJ 1967); aff'd, 14 FCC2d 431 (1968); reversed and vacated sub nom. Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) ("UCC II") (in which the Commission ultimately had to be instructed by the D.C. Circuit to deny the license renewal application of a notorious discriminator); Ultravision Broadcasting Company, 1 FCC2d 545, 547 (1965) ("Ultravision") (adopting a grossly restrictive one-year-without-revenue financial qualification standard for construction permit applicants), repealed in Revision of Application for Construction Permit for Commercial Broadcast Station, 87 FCC2d 200, 201 (1981) because the Ultravision standard "conflicts with Commission policies favoring minority ownership and diversity because its stringency may inhibit potential applicants from seeking broadcast licenses"); Chapman Television and Radio Co., 24 FCC2d 282 (1970); on remand, 21 RR2d 887 (Examiner 1971) (holding that the co-owner of a segregated cemetery, who helped preserve the segregation policy and then covered it up, had the character to be a broadcast licensee); Evening Star Broadcasting Co., 24 FCC2d 735 (1970) and 27 FCC2d 316 (1971), aff'd sub nom. Stone v. FCC, 466 F.2d 316 (D.C. Cir. 1972) (holding that a television station's EEO record would be evaluated based on the demographics of its market, not its city of license (which happened to be the majority-Black District of Columbia)); NBMC, 61 FCC2d 1112 (1976) and Citizens Communications Center, 61 FCC2d 1095 (1976) (refusing, after an unexplained 3 1/2 year delay, to adopt any of 61 proposals to advance minority participation in the electronic mass media); NBC, Inc., 62 FCC2d 582 (1977) (Commissioners Hooks and Fogarty dissenting) (refusing to examine allegations of employment discrimination until a final order is issued in a civil lawsuit -- which broadcasters never allow to happen); Notice of Intent to Sell Broadcast Station, 43 RR2d 1, 3 n. 3 (1978) (rejecting Commissioner Hooks' proposal for a 45 days public notice period as a remedy for discrimination in station brokering because publicizing station sales might inconvenience some incumbent broadcasters); PTL of Heritage Village Church, Report No. 18597 (1982), recon. denied, 53 RR2d 824 (1983), appeal dismissed sub nom. NBMC v. FCC, 760 F.2d 1297 (D.C. Cir. 1985) (allowing wrongdoer to escape hearing and distress sale liability, thereby undermining the distress sale policy). Cases involving failure to enforce the EEO Rule are far too numerous to mention.

of its spectrum management decisions.[59] Throughout most of its existence, the Commission took few steps to remedy the effects of its past actions, and it often went out of its way to avoid taking remedial steps.[60]

[59] See Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments (Second R&O), 101 FCC2d 638, 647-49 (1985), recon. denied, 59 RR2d 1221, 1226-28 (1985), aff'd sub nom. NBMC v. FCC, 822 F.2d 277 (2d Cir. 1987) (diluting the previously available enhancement for minority ownership by authorizing a "daytimer preference" on the assumption that operating during daylight hours renders an applicant inherently as likely to promote diversity as minorities). Commissioner Rivera characterized the weight of the daytimer preference -- which incorporated a "substantial" local ownership credit -- as so heavy that "it will be almost impossible for any newcomer - minority or non-minority - to prevail against a qualifying daytimer." Id., 101 FCC2d at 653 (Dissenting Statement of Commissioner Henry M. Rivera); Deletion of AM Acceptance Criteria in Section 73.37(e) of the Commission's Rules (R&O), 102 FCC2d 548, 558 (1985), recon. denied, 4 FCC Rcd 5218 (1989) ("Clear Channels Repeal") (repealing the minority and noncommercial eligibility criteria in Clear Channels, holding that a "sounder approach" than eligibility criteria is to use distress sales and tax certificates to promote minority ownership). Only thirteen minority-owned stations had been created under this two-year old policy. Id. at 555. The tax certificate and distress sale policies did not conflict with the Clear Channels policy; rather, the three policies each promoted minority ownership in different ways, and none of them had generated any controversy. Thus, it was disingenuous to justify repealing one of the policies because the others were "sounder." The repeal of Clear Channels was a straight-out reduction of minority ownership efforts, with no countervailing benefits whatsoever. See also Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (R&O), 101 FCC2d 1, 6 (1985) ("Foreign Clear Channels"), recon. granted in part, 103 FCC2d 532 (1986), reversed in part sub nom. NBMC v. FCC, 791 F.2d 1016, 1022-23 (2d Cir. 1986), on remand, Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Further NPRM), 2 FCC Rcd 4884 (1987), Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Second R&O), 3 FCC Rcd 3597, 3599-3600 ¶¶19-23 (1988), recon. denied, 4 FCC Rcd 5102, 5103-5104 ¶¶16-20 (1989) (eliminating minority eligibility criteria on the Foreign Clears, on the theory that minorities can always apply to occupy other vacant spectrum). Dissenting in Foreign Clear Channels, 101 FCC2d at 30-31, Commissioner Rivera asserted that the Commission was:

> backing away from our commitment to encourage minority ownership and noncommercial use of [40 potential new stations] without any record basis for doing so....The key to this riddle of the reversal without reasons is that Section 73.37(e) helps minorities (among others). For that reason, the majority is unwilling to continue the existence of this rule section. It is reluctant to explain its motivation for rejecting Section 73.37(e)(2) because it would have an insurmountable task justifying that decision when the problem of underrepresentation of minorities in the broadcast industry is so far from being resolved (emphasis in original, citations omitted).

Granting licenses to applicants who have overcome social and economic disadvantage would help to remedy the present effects of past discrimination, including the discrimination made possible by the Commission's own passive participation, ratification or validation of previous behavior on the part of Commission licensees. Depending on how discrimination is defined, it is more than likely that the individuals who are socially and economically disadvantaged are also among the class of people who experienced government sponsored discrimination in the industry.

i. Comparison of a Full File Review or Similar Standard to an Eligible Entity or SDB Standard in Overcoming the Present Effects of Past Discrimination

The impact of FFR in communications is likely to be similar to FFR's impact in higher education. Although FFR has resulted in the enrollment of more minorities than had been admitted under sterile quantitative admissions criteria (grades and test scores, sometimes enhanced by consideration of athletic skills or legacy status), FFR has not brought about the same levels of enrollment as universities enjoyed when they used race-conscious admissions criteria.[61] It seems likely that FFR would produce similar results in FCC-regulated industries, yielding considerably more minority ownership than would be produced with a small business

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[60] The Commission turned a major corner by adopting minority ownership policies in 1978 and expanding them in 1982. See Atlass Communications, Inc., 61 FCC2d 995 (1976) (granting AM nighttime coverage waiver to promote minority ownership, and thereby reversing the policy followed in several earlier cases). See also Hagadone Capital Corp., 42 RR2d 632 (1978) (to promote minority ownership, Hawaiian AM station's nighttime authority petition was removed from the processing line and afforded expedited consideration). Thanks to Chairman Wiley's and Chairman Ferris' initiative, in 1978 the Commission adopted the distress sale policy and the former tax certificate policy. See 1978 Minority Ownership Policy Statement, supra n. 44; see also Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849 (1982).

[61] See Nelson, supra n. 28.

definition, but considerably less minority ownership than would be produced with an SDB definition.

d. Promoting Competition in the Media and Telecommunications Industries

Promoting competition should be considered a compelling government interest when the legislature has specifically charged an agency to enhance competition.[62] Congress has repeatedly expressed a government interest in promoting competition in the communications marketplace.[63] Sections 257 and 309(j) of the Act require the Commission to promote economic opportunity and competition when assigning licenses.[64]

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[62] See, e.g., Blount v. SEC, 61 F.3d 938, 945 (D.C. Cir. 1995), cert. denied, 517 U.S. 1119 (1996) ("Blount") (when there is a link between anti-competitive behavior and the agency's goal of promoting "just and equitable principles of trade," the agency may take actions designed to eliminate practices that undermine the integrity of the market). In Blount, Congress required the Securities Exchange Commission ("SEC") to create rules that would "remove impediments to and perfect the mechanism of a free and open market" and not allow "unfair discrimination" between securities brokers or dealers. Id. at 944 (citation omitted). The SEC found that certain practices created "artificial barriers to competition" and undermined "just and equitable" principles of trade. Id. at 945 (citation omitted). The D.C. Circuit agreed and found that the government had a "compelling interest" in preventing such obstacles to competition by "protecting underwriters of municipal bonds from unfair, corrupt market practices." Id. at 944.

[63] Congress has directed the Commission to encourage competition and eliminate market entry barriers. Specifically, it required the Commission to assess competition on a regular basis as part of the Commission's periodic review of media ownership. See Telecommunications Act of 1996, Pub. L. 104-104, §202(h), 110 Stat. 56, 111-12, codified at 47 U.S.C. §161 (mandating that the Commission review its ownership rules biennially to determine which rules are "necessary in the public interest as the result of competition"); see also Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, §629, 118 Stat. 3 (2004) (providing that such review shall henceforth be quadrennial).

[64] 47 U.S.C. §257(b) (stating "the Commission shall seek to promote the policies and purposes of this chapter favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity"); id. at §309(j)(3)(B) (stating the Commission's objective to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.")

Although the Commission has generally embraced Congress' mandate to promote competition,[65] there cannot be true competition until the historical entry barriers caused by past discrimination are remedied. It is well established that discrimination hinders competition.[66] Recognizing the promotion of a competitive communications marketplace as a compelling state interest is consistent with the Supreme Court's opinion in Grutter.[67] While the Commission can address these entry barriers as a means of overcoming the present effects of past discrimination as discussed above, the Commission also should eliminate the entry barriers because they are anticompetitive, irrespective of their root causes.

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[65] As a commissioner, Chairman Martin stated that "[a] more talented workforce leads to improved programming, which ultimately benefits all consumers. The program we adopt today therefore should promote not just diversity, but also true competition." Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second R&O and Third NPRM), 17 FCC Rcd 24018, 24129 (2002) (Separate Statement of Commissioner Kevin J. Martin).

[66] More than a decade ago, Andrew Brimmer concluded that discrimination against African Americans in the labor market resulted in a loss of over $240 billion dollars per year to the American economy. See Steven A. Ramirez, What We Teach When We Teach About Race: The Problem of Law and Pseudo-Economics, 54 J. Legal Educ. 365, 371 (2004) (citing Andrew F. Brimmer, The Economic Cost of Discrimination Against Black Americans, in Margaret C. Simms, ed., Economic Perspectives on Affirmative Action 11 (1995)). Brimmer's conclusions are still valid today, but the loss would now be equal to almost $400 billion per year. Id. at 373 (citing Lawrence B. Morse, Teaching Macroeconomics as if Race Mattered 7, at http://www.ncat.edu/~econdept/wp/morse-race.pdf). In reality, this amount is likely to be higher because Brimmer's conclusions only considered disparate treatment against African Americans, not discrimination against other minority groups, women, or the disabled community. Id. at 374. See generally Michael Ashley Stein, The Law and Economics of Disability Accommodations, 53 Duke L.J. 79 (2003) (discussing the costs of disability accommodations, including loss of human capital related to such accommodations).

[67] In Grutter, the Court upheld a race-conscious college admissions program and found that race was only one of many factors that the government considered, not the predominant factor, and that attaining a diverse student body was at the heart of the law school's institutional mission. 539 U.S. at 324, 329. The Court explained that "universities occupy a special niche in our constitutional tradition," and that "the robust exchange of ideas" is "of paramount importance." Id. at 329. Similarly, the Supreme Court has recognized the special role that broadcast media has in our society. See, e.g., Red Lion, Pacifica, and Turner II, supra n. 42.

In considering how to implement an FFR-based program, the Commission should examine how FFR might compare to an eligible entity or SDB-based program in promoting competition. The Commission should look at how granting licenses to applicants who have individually overcome social and economic disadvantages would help advance competition in FCC-regulated industries. The Commission should also consider whether these competitive benefits extend past local markets to (1) competition between regulated industries (e.g. broadcast, cable, satellite TV); and (2) international competition between similar industries.

4. Satisfaction of First, Fifth and Fourteenth Amendment Standards

A constitutionally sound FFR-based program should focus on efforts to overcome the disadvantage related to race or gender, not the specific disadvantage alone.[68] If an applicant has overlapping disadvantages, such as economic disadvantage and overcoming discrimination, a distinction must be drawn between how she overcame each of them.[69]

FFR is not race or gender-blind, since inevitably in a modest-sized universe someone at the Commission will know the applicant's race or gender. However, knowledge of the applicant's race or gender does not make the action race or gender-based. "Masking" the applicants to conceal their race or gender would not be necessary or effective.[70] Since applicants would not be masked, questions arise as to how reviewers of FFR applications may minimize racial or gender-based subjectivity in the application process. Clear guidelines, thorough training, and multiple reviewers for the same application would help avoid race or gender-conscious decisions.[71]

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[68] Matthew Berry, General Counsel, FCC (interviewed in person on March 19, 2008).

[69] Id.

[70] Id.

[71] Id.

Applications could be reviewed by a special master or administrative law judge (ALJ),[72] by Commission staff such as attorney advisors or non-lawyer application specialists, by outside independent review panels, or by specialized outside contractors.[73] Since applications would be seeking credit in a "singleton application" rather than a comparative context, the Commission might find it unnecessary to make administration of FFR more complex than is really necessary. In particular, the Commission might be more receptive to an FFR system administered by Commission staff, rather than by outside parties.[74] In recent years, the Commission has grown resistant to procedures that it deems time-intensive, and therefore the ALJ process is less than ideal.[75] Regardless of the reviewing party, the Commission is ultimately responsible for the final decision of whether or not it will grant any applicant a license. As such, for FFR, the selection of a reviewing office is not as important as avoiding race or gender-conscious decisions that could lead to judicial review.[76]

There is a distinction between promoting diverse viewpoints and promoting diverse content. First Amendment concerns would be raised if the agency were to promote content. The Commission should be able to avoid a constitutional challenge in this regard by ensuring that an

[72] Henry Geller, former General Counsel of the FCC and former Director of NTIA (interviewed June 23, 2008, by telephone, by the Subcommittee Chair).

[73] Kenneth Robinson, former Senior Policy Advisor to four NTIA Directors and to FCC Chairman Sikes (interviewed June 25, 2008 in person).

[74] Jane Mago, General Counsel, NAB; former General Counsel, FCC; former Designated Federal Officer (DFO) of the Advisory Committee (interviewed June 25, 2008 in person).

[75] Id.

[76] Berry, supra n. 68.

FFR-based program does not consider the content of programming but the potential to increase the diversity of voices in the media.[77]

5. Administration of Full File Review

In implementing any eligible entity paradigm, the Commission should strive to achieve these objectives:

- 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
- Minimal need for the Commissioners' involvement in overseeing the day-to-day operations of programs to which the eligible entity paradigm is applied.

a. Commission Consideration of an Applicant's Success in Overcoming Social Disadvantages Stemming from a Variety of Factors

Under FFR, social disadvantage may transcend ethnicity.[78] Many FFR-based programs look not at the obstacles themselves, but what resources the individual had at her disposal to overcome those obstacles.[79] Social disadvantage could include, but not be limited to:

• Racial discrimination	• Gender discrimination
• National origin discrimination	• Language
• Language discrimination	• Disability
• Disability discrimination	• Age (youth or senior citizen status)

[77] Id.

[78] Lollis, supra n. 26.

[79] de Jorna, supra n. 47.

• Age discrimination	• Veterans status
• Residence of business operation in an economically depressed community or region (e.g., location in a HUB Zone[80])	• Any other social disadvantages

b. Proximity in Time of the Overcoming of the Social Disadvantage

It is possible that once a disadvantage is overcome, it should no longer be considered a disadvantage to be relied upon in an FFR system.[81] On the other hand, an applicant need not be in the process of overcoming a disadvantage or have just recently overcome the disadvantage. Some disadvantages may be overcome, but the applicant does not forget these experiences and the strengths and knowledge an applicant derived from overcoming the disadvantage can last a very long time.[82]

c. Validation of Applicant Claims

Methods of validating claims would depend on what criteria examiners would consider and credit. No evaluation of social science credit can entirely eliminate subjectivity, but to minimize subjectivity, interviews of candidates by multiple reviewers would be more desirable than reliance on the applicants' paper submissions since such interviews could be designed to assess applicants' veracity. Agency staff, or an outside contractor, could handle these interviews.[83]

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[80] A HUB Zone, or Historically Underutilized Business Zone, is an area that, based on census data, is experiencing high unemployment, low income, and lack of investment by business concerns. See 15 U.S.C. §632(p)(4)(A)-(D).

[81] Henderson, supra n. 37.

[82] Lollis, supra n. 28.

[83] Mago, supra n. 74; Robinson, supra n. 73.

d. Pre-certification and Recertification

Allowing applicant to pre-certify for an eligible entity program based on FFR would be beneficial to the licensing process. Pre-certification would act as a "coin" that applicants could use to obtain financing and negotiate for the acquisition of an asset. This would be advantageous to entrepreneurs and new entrants who struggle to access capital and be considered by sellers for transactions. Among the issues the Commission should consider when crafting a pre-certification program are how frequently an applicant would need to be recertified, and whether the applicant would be subject to the same scope of inquiry as the initial certification.

e. Determinations of Ineligibility

If an applicant fails to receive FFR certification and requests review of his application, the review should be completed by an ALJ or special master.[84] Many agencies rely on ALJs for this type of review, and the Commission could as well.[85] Appointing the Chief ALJ to administer or oversee an FFR-based program would add credibility and stability to the process.[86] In the alternative, the agency could certify a third party to administer the system, similar to how the Federal Trade Commission (FTC) certifies third parties to ensure that website operators comply with FTC regulations for children's privacy.[87]

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[84] Id.

[85] Robinson, supra n. 73.

[86] Id.

[87] The Children's Online Privacy Protection Act (COPPA) requires that websites maintain certain online privacy protections for children. See Pub. L. 105–277, div. C, title XIII, §1302, 112 Stat. 2681 (1998) (codified at 15 U.S.C. §6501 et seq.). FTC rules establish the criteria for approval of third parties that will implement the "safe harbor" provisions of COPPA. See 16 C.F.R. §312.10. These third parties submit self-regulating guidelines and materials to the FTC for notice and comment and, if accepted, become approved administrators for the FTC. Id.

f. Evaluation of the Effectiveness and Integrity of the Program

The most effective way for the Commission to evaluate the effectiveness of the program would be to initiate a longitudinal set of studies of the program at regular intervals, and review the resulting data to ensure compliance with procedures set by the agency and compliance with law.

g. Additional Administrative Issues

While the Subcommittee explored various methods of reaching a constitutionally sustainable eligible entity definition that would improve the state of minority and female ownership, many questions remain. In addition to the steps the Subcommittee recommends herein, the Commission should also seek notice and comment on the following issues, so the Commission can craft an FFR model that could easily be applied to all Commission media or telecom licensing programs.

Assessment of Claims of Overcoming of Disadvantages

- How should the Commission assess whether an applicant has overcome social or economic disadvantages and whether granting the application would contribute to diversity, remediation or competition?

- Should an applicant bear the burden of proving specifically that it would contribute to diversity, remediation or competition as a result of having overcome disadvantages?

- How could the concept of FFR, which in the higher education context is used to compare candidates competing for a limited number of admissions slots, be applied in an administratively feasible manner to a situation where applicants would not be compared to each other but applicants instead would be evaluated one at a time to see if they meet a specified standard?

Ownership and Control Issues

- Must the tests of ownership structure for FFR purposes match the tests that are performed under the attribution rules? In particular, how should the Commission treat LMAs, JSAs, shared services agreements and options under FFR?

- How should the Commission measure the overcoming of a disadvantage when the applicant is a widely held corporation rather than one with a single majority shareholder or a small number of control persons? In particular, when the applicant is a company, which individuals would the Commission evaluate to determine if the company meets the relevant standard under FFR?

- Should the Commission authorize a "partial certification" for joint ventures that seek to avail themselves of Commission rules that lend themselves to partial credit? For example, if a certified applicant would be entitled to a year's extension to construct an unbuilt construction permit, should a joint venture 50% owned by a certified applicant be afforded a six-month extension?

- How can the Commission discourage gamesmanship and real parties in interest? Are random audits for genuineness desirable? Should the rules contain anti-trafficking provisions and should the Commission specify in advance a standard range of penalties for misconduct?

Contents and Evaluation of Applications

- Framing the application question seeking information on disadvantages so as to ensure clarity and minimize subjectivity (cf. the CFC application form as a model)

- Procedures, standing, and substantive standards for consideration of objections to the certification of an applicant; applicant appeals process when certification is denied; possible use of Administrative Law Judges.

III. The Commission Should Substitute the Full File Review Approach for the Eligible Entities Approach Until It Can Adopt an SDB Standard

The current small business-based eligible entity program is unacceptably dilute in its impact.[88] However, a race-conscious SDB-based program cannot yet be adopted, owing to the absence of up-to-date disparity studies that may be necessary to survive strict scrutiny. That leaves FFR as the most effective method of promoting racial and gender diversity in media and telecommunications ownership that is presently available to the Commission.

During the Commission's remaining term before a new administration takes office, there is insufficient time to complete the disparity studies that would enable the Commission to formulate and defend SDB-based programs. Therefore, the Subcommittee recommends that the

[88] See n. 12 supra and accompanying text.

Commission take steps immediately to substitute Full File Review for the small business-based eligible entity paradigm currently in place until the Commission can adopt constitutionally sustainable SDB-based programs. The Commission could achieve this by issuing (1) a Second Report and Order, in the Broadcast Diversity docket,[89] that adopts the legal and policy recommendations in this Report, and (2) a Media Bureau request for notice and comment on the administrative issues discussed in or identified in this Report. In the meantime, the Commission should act promptly to perform the disparity and other studies necessary to sustain an SDB-based program.[90]

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[89] MB Docket No. 07-294.

[90] The Committee acknowledges and deeply appreciates the assistance of Joycelyn James, Esq., the John W. Jones Fellow at the Minority Media and Telecommunications Council. Ms. James served as the Subcommittee's rapporteur and assisted the Subcommittee Chair, David Honig, with the preparation of this Report.

Appendix 1: Designated Entities and New Entrants

A. Current Standards for Qualifying and Deriving Benefits from the Designated Entity Program in Wireless Auctions

Section 309(j) of the Act authorizes the Commission to grant licenses through competitive bidding, or auctions.[91] As part of the wireless auction process, the Commission has created different classifications of license applications.[92] One such classification is designated entities. The Commission defines a designated entity as a small business,[93] and the Commission assumes that most minority and women-owned wireless businesses are small businesses. In response to Adarand Constructors, Inc. v. Peña,[94] the Commission deleted minority ownership as a qualifying factor for the designated entity program.[95] Designated entities may be awarded bidding credits,[96] and may be eligible to make installment payments.[97]

Eligibility for small business status is based on gross revenues of the applicant, its affiliates, controlling interests, and entities with which it has an attributable interest.[98] To qualify for designated entity status, minority and female applicants must have greater than 50 percent ownership interest in the entity, or greater than 50 percent voting interest for a corporation.[99] If

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[91] 47 U.S.C. §309(j) (2008).

[92] Id. at §309(g).

[93] 47 C.F.R. §1.2110(a) (2008). Rural telephone companies are also included in this definition. Id.

[94] 515 U.S. 200 (1995).

[95] See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Sixth Report and Order, 11 FCC Rcd 136, 143 ¶11 (1995).

[96] Id. at §1.2110(f).

[97] Id. at §1.2110(g).

[98] Id. at §1.2110(b)(1).

[99] Id. at §1.2110(c)(3).

the applicant is a partnership, each general partner must be a minority or a woman that owns at least 50 percent of the partnership equity.[100]

B. Commission Experience with New Entrant Criteria in FM and TV Auctions

The Commission has also created a category of applicants known as "new entrants."[101] It created this category a decade ago in an effort to establish procedures for auctioning FM and television construction permits that were consistent with Supreme Court decisions applying strict scrutiny to the government's use of race and gender in awarding benefits.[102] The new entrant bidding credit is tiered such that an applicant with no attributable interests in media or mass communications receives a 35 percent credit on its winning auction bid.[103] Applicants with an attributable interest in no more than three mass media facilities receive a 25 percent bidding credit.[104]

C. Impact of Designated Entity and New Entrant Licensing Programs on Minority and Female Ownership

The impact of the designated entity program is difficult to determine at this time. Public interest organizations and scholars have called into question the Commission's data collection

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[100] Id.

[101] The "new entrant" category arose after commenters questioned whether the Commission's designated entity program would withstand judicial review after Adarand. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Report and Order, 13 FCC Rcd 15920, 15994 ¶189 (1998) ("Competitive Bidding") (citing United States v. Virginia, 518 U.S. 515 (1996) and Adarand Constructors Inc. v. Peña, 515 U.S. 200 (1995)) ("Adarand")).

[102] See Competitive Bidding, 13 FCC Rcd at 15995 ¶188.

[103] See 47 C.F.R. §73.5007(a) (2008).

[104] Id.

methods.[105] In November 2004, the Commission auctioned 258 construction permits for FM stations.[106] Many of these winners were reported to have been new entrants in radio broadcasting.[107] However, it is unclear how many of these new entrants were minorities or women.

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[105] See, e.g., S. Derek Turner, Off the Dial: Female and Minority Radio Station Ownership in the United States, Free Press (June 2007) at 12-14 (identifying several serious deficiencies in the Commission's data collection and reporting). See also Philip M. Napoli and Joe Karaganis, Toward A Federal Data Agenda For Communications Policymaking, 16 CommLaw Conspectus 53, 56-57 (2007) (discussing poor data collection and maintenance by the Commission and the National Telecommunications and Information Administration (NTIA)).

[106] See FCC Announces Close to Unprecedented FM Auction, News Release, November 24, 2004 (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254665A1.pdf).

[107] Id.

Appendix 2: Socially and Economically Disadvantaged Businesses (SDBs)

As part of its review of eligible entity paradigms, the Subcommittee considered the desirability of designing Commission programs to afford opportunities to socially and economically disadvantaged businesses ("SDBs"). The Commission has sought comment on a proposal to define eligible entities as SDBs.[108] Since its inception in 2003, the Advisory Committee has advocated use of the SDB paradigm where constitutionally permissible.[109] The fruits of the Subcommittee's review of the SDB paradigm are presented below.

A. Application and Means of Satisfaction of Strict Scrutiny

A race-conscious and constitutionally sustainable SDB-based program would be the gold standard for promoting diversity. In light of Adarand Constructors v. Peña,[110] a race-conscious program such as one based on an SDB model would need to be validated by evidence of racial disparity and participation studies of the affected industry ("Adarand studies"). Before it could undertake narrowly tailored race-conscious measures, the Commission would also need to conclude that other good faith race-neutral steps had been taken and were inadequate.[111] The

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[108] See Promoting Diversification of Ownership in the Broadcasting Services (Report and Order and Third Further Notice of Proposed Rulemaking), MB Docket Nos. 07-294 et seq., 23 FCC Rcd 5922, 5950 ¶¶80-81 (2007) ("Broadcast Diversity Order").

[109] See, e.g., Advisory Committee on Diversity for Communications in the Digital Age, "Further Recommendation on a Tax Incentive Program" (April 25, 2006) (advocating "a Federal program that would use the deferral of Federal capital gains tax liability as an incentive to make available to socially and economically disadvantaged persons and businesses the opportunity to acquire assets necessary to enter the broadcasting and telecommunications marketplace be adopted as part of, or as a complement to, the new telecommunications legislation presently under consideration.")

[110] 515 U.S. 200 (1995).

[111] See Parents Involved in Community Schools v. Seattle School District No. 1, 127 S.Ct. 2738 (2007) ("Parents"). But see Grutter v. Bollinger, 539 U.S. 306, 339 (2003) ("Grutter") (narrow tailoring requires "serious, *good faith* consideration of workable race-neutral alternatives that will achieve the diversity" state actor wants to achieve) (emphasis added)).

Commission recently made considerable progress in this regard when it adopted 13 race-neutral proposals this past winter and set out 12 others for comment this year,[112] but because these new initiatives only took effect on July 15, 2008, the Commission has not yet had an opportunity to address whether, its race-neutral initiatives have been successful enough to obviate the need for race-conscious initiatives.

B. Steps the Commission has taken, and has yet to take, to Arrive at a Sustainable SDB Definition

The Commission published five Adarand studies in 2000, and it collected additional analysis and some evidence in its 2004 Section 257 Inquiry (MB Docket No. 04-228). However, there is some question as to whether the 2000 data would be considered stale. Current case law suggests that Congress and the Commission may rely, to some measure, on institutional memory and previously developed evidence.[113] Nonetheless, the Commission should move to refresh the record and conduct relevant new studies. These disparity studies could examine whether the low levels of minority and female ownership are due to discrimination in the industry, under-participation by minorities and women in media, or both.[114] New Adarand studies could also examine what happened to diversity when minority ownership initiatives such as the Tax Certificate Policy were adopted and what happened when these policies were eliminated.

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[112] See generally Broadcast Diversity Order, supra n. 1.

[113] Rothe Dev. Corp. v. U.S. Dept. of Defense, 324 F. Supp. 2d 840, 851 (W.D. Tex 2004) ("Rothe IV"). On subsequent remand in 2007, the same Court held that disparity studies conducted from 1995 to 2002 were not stale for purposes of strict scrutiny review. The Court stated, "Although a governmental entity resisting strict scrutiny challenge cannot rely on old statistical data when new statistical data is available, it should be able to rely on the most recently available data so long as that data is reasonably up to date." Rothe Dev. Corp. v. U.S. Dept of Defense, 499 F. Supp. 2d 775, 839 (W.D. Tex 2007).

[114] Thomas Henderson, Partner, Sprenger & Lang; former Director of Litigation, Lawyers Committee for Civil Rights Under Law (interviewed in person on April 10, 2008).

In its recent Broadcast Diversity Order, the Commission stated it will begin annual longitudinal studies of minority and female ownership in an effort to track ownership trends and build a current database as soon as it resolves data collection issues.[115] Gathering such information is crucial to establishing a sustainable eligible entity program. Having a clear picture of the current state of minority and female ownership would aid the Commission in determining the extent of the need to remedy past or current discrimination, and what measures the Commission should take to accomplish this goal. Such an assessment is vital since, as Justice Kennedy noted in Parents, once the "vestiges of prior segregation" are eliminated, the government must justify an SDB-based program on other grounds.[116] Additionally, maintaining current, accurate data would help the Commission determine whether its programs are effective and what other means, if any, the Commission should consider to further its goals.[117]

C. How Applicants Can Demonstrate Social and Economic Disadvantage

Under an SDB paradigm, the Commission would use race as one element of social disadvantage in considering whether to grant an application or a waiver. The administration of an SDB paradigm could be modeled after two similar programs in the areas of transportation and university admissions, both of which have survived strict scrutiny in federal courts.

Efforts to sustain SDB-type programs in the transportation industry have survived judicial review.[118] The transportation industry has successfully adopted a disadvantaged

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[115] Broadcast Diversity Order, 23 FCC Rcd at 5942 ¶¶51-53. The Commission sought comment on ways to collect more accurate information on the Annual Ownership Report, Form 323, including information regarding the race, gender, and ethnicity. Id. at 5954-55 ¶¶93-96.

[116] See Parents, 127 S.Ct. at 2755 n. 12.

[117] In Parents, Justice Kennedy noted that where the government's race-based program has minimal effect, the need for such a program is questionable. Id. at 2759-60.

[118] See, e.g., Sherbrooke Turf v. Minnesota Department of Transportation, 345 F.3d 964, 968 (8th Cir. 2003) cert. denied, 541 U.S. 1041 (2004) ("Sherbrooke Turf") (congressional findings

business enterprise ("DBE") program. In a DBE program, there is a rebuttable presumption that applicants qualify as socially disadvantaged if they have been or are at risk of being subjected to bias or prejudice as a member of a racial or ethnic group,[119] and are economically disadvantaged if they have diminished financing opportunities compared to others in the same field that face no disadvantage.[120] The program is flexible in that it allows for waivers and exemptions from the DBE requirements, the program has durational limits, the program's goals are tied to markets relevant to DBE participation, and the program minimizes race by making it a relevant, but not determinative factor.[121]

Although Grutter v. Bollinger[122] involved a program designed to advance diversity rather than one aimed at overcoming past discrimination, the Grutter court's treatment of the narrow tailoring of remedies is instructive. In Grutter, the Supreme Court upheld a university's program that allowed an applicant's race to be considered in the admissions process. The Court reviewed the University of Michigan School of Law's admissions program, which considered race as one of many factors in the admissions process. The university took into account all the ways an applicant could contribute to the educational environment, not solely the applicant's membership

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of past discrimination in government highway contracting were sufficient to support need for race-based remedial measures); Western States Paving v. Washington State Department of Transportation, 407 F.3d 983, 995 (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); Northern Contracting v. Illinois, 473 F.3d 715, 720-21 (7th Cir. 2007), reh'g. en banc denied, 2007 U.S. App. LEXIS 4162 (7th Cir. 2007).

[119] 15 U.S.C. §637(a)(5) (2008).

[120] Id. at §637(a)(6)(A).

[121] See Sherbrooke Turf, 345 F.3d at 972-73.

[122] 539 U.S. 306 (2003).

in a racial class.[123] The Court focused on the fact that the university's plan was flexible enough to allow the consideration of applicants as individuals, not generalized groups that identify with a particular race or ethnicity.[124] It concluded that an applicant's race may be considered so long as the final admissions decision is made on an individual basis as to each applicant, rather than being based on the applicant's membership in a racial class.[125]

The Commission could also consider whether an applicant's ability to overcome economic disadvantage should be a factor. Specifically, the Commission could consider whether business size or deal size is a proxy for economic disadvantage. Assuming the relevance of economic disadvantage, the Commission could further consider whether a certain company size or deal size should allow an applicant to be considered an eligible entity. The Commission should also inquire as to whether applicant size standards should be the same for all sizes of assets being acquired. Particularly, the Commission could consider whether it should tailor its assessment of the significance of an applicant's overcoming of disadvantages to the size of a proposed transaction, such that a medium sized applicant's overcoming of a disadvantage could be a material consideration in evaluating an application for a large acquisition but not a small acquisition.

The success of minority-owned applicants enhances the probability of success of all FCC-regulated companies by unlocking entrepreneurial, managerial and creative talent that otherwise would go to waste or be deployed in sub-optimal ways. Therefore, companies incubating SDBs might also deserve relief when such incubation provides the "benefit of an incentive for eligible

[123] Id. at 337.

[124] Id.

[125] Id. at 341.

entity financing."[126] For example, if a company (the "Incubating Company"), at its own risk and expense, assists an SDB by providing financing and transactional assistance without which the SDB could not expand into a new market, the Commission might see fit to reward the Incubating Company by affording it the same enhanced access to new licensing opportunities that the Commission affords to SDBs themselves.

D. Eligibility Credits Based Upon Primary Racial Populations Served

The Commission might also consider granting new licensing opportunities, or a higher place in a queue to obtain these opportunities, to applicants who serve or intend to serve a predominantly minority audience. Congress has permitted this in other contexts. For example, the Higher Education Act of 1965[127] specifically provides for grants to be made to historically black college because they "have contributed significantly to the effort to attain equal opportunity through postsecondary education for Black, low-income, and educationally disadvantaged Americans."[128] Similarly, the Commission could give credits to applicants that serve minority audiences and subscribers.

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[126] See Broadcast Diversity Order, 23 FCC Rcd at 5943 ¶56. Therein the Commission created "an incentive plan under which a company financing or incubating an eligible entity would be guaranteed a priority if it files for a duopoly simultaneously with other entity in a market that can support only one additional duopoly. This vested priority in a duopolization queue would reward the large broadcaster that had incubated or financed an eligible entity if it filed simultaneously for a duopoly with a non-incubating entity." Id. The Commission concluded that "in this situation, a general statement of policy that grants priority to entity funding or incubating eligible entity would promote ownership diversity." Id.

[127] See 20 U.S.C. §§1001-1155(2008).

[128] See 20 U.S.C. §1051(a)(1).