



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

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**MEDIA AND WIRELESS TELECOMMUNICATIONS BUREAUS SEEK COMMENT ON
RECOMMENDATION OF THE ADVISORY COMMITTEE ON DIVERSITY FOR
COMMUNICATIONS IN THE DIGITAL AGE FOR A NEW AUCTION PREFERENCE FOR
OVERCOMING DISADVANTAGE**

GN Docket No. 10-244

Comments Due: [40 days after publication in the Federal Register]

Reply Comments Due: [60 days after publication in the Federal Register]

On October 14, 2010, the Advisory Committee on Diversity for Communications in the Digital Age (the “Advisory Committee”) formally recommended that the Federal Communications Commission (“Commission”) undertake a notice of proposed rulemaking to consider how the Commission could design, adopt, and implement an additional new preference program in its competitive bidding process.¹ Under the proposed preference, persons or entities who have overcome substantial disadvantage would be eligible for a bidding credit. The Advisory Committee explains that the new preference “would expand the pool of designated entities to include those qualified applicants who have overcome substantial disadvantage,” noting that the proposed program is analogous in some respects to programs used by educational institutions in their admissions processes.² The text of the Advisory Committee’s Recommendation is attached to this Public Notice.

The Advisory Committee’s Recommendation acknowledges that a number of issues concerning the design and implementation of its proposal would need to be refined and resolved by the Commission in a future rulemaking proceeding.³ Accordingly, the Media and Wireless Telecommunications Bureaus seek information that will assist the Commission in considering whether to launch a proceeding to further examine the components of the recommended preference. The Bureaus seek comment on the proposal and are especially interested in comments on the following questions. Interested parties need not address all the questions presented, but are encouraged to respond to those about which they have particular knowledge or information.

¹ Recommendation on Preference for Overcoming Disadvantage, FCC Advisory Committee on Diversity for Communications in the Digital Age (October 14, 2010) available at <http://www.fcc.gov/DiversityFAC/meeting101410.html> (“Recommendation”).

² Recommendation at 2. See also *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 188 F. 3d 394 (1999) (discussing public university’s pro-diversity admissions policy).

³ See, e.g., Recommendation at 7.

Authority and Objectives

Sections 309(j)(3)(B) and (4)(D) of the Communications Act of 1934, as amended, direct the Commission respectively to seek to disseminate licenses among “a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women” and to “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.”⁴ Accordingly, as noted by the Advisory Committee in its Recommendation, the Commission has established a program to promote the involvement of statutorily-identified designated entities in the provision of spectrum-based services.⁵ The Commission’s primary method of promoting the participation of designated entities in competitive bidding for wireless services has been to award bidding credits – percentage discounts on winning bid amounts – to small business applicants.⁶ In the context of broadcast services, the Commission adopted a tiered new entrant bidding credit to promote the objectives of section 309(j) and further its long-standing commitment to the diversification of broadcast facility ownership.⁷ That bidding credit may be awarded to broadcast auction applicants with no, or very few, other media interests.⁸ As noted above, the Advisory Committee’s Recommendation would establish an additional preference for persons or entities that have overcome substantial disadvantage.

1. Would the proposed preference comply with the Communications Act and other relevant statutes? Does section 309(j)(4)(D) authorize the Commission to establish the proposed preference for individuals who have overcome substantial disadvantage? If not, are there other statutory provisions that afford sufficient authorization? Would the Commission need additional legal authority to implement this new preference?

2. The Commission has previously found that rural telephone companies and minority- and women-owned businesses that qualify as small businesses are able to take advantage of the provisions we have adopted for small businesses.⁹ Similarly, in the broadcast context, the Commission established its new entrant bidding credit, having found that a preference for new entrants would be the most appropriate way to implement the statutory provisions regarding opportunities for small, minority- and women-owned businesses based on then-available information on opportunities for designated entities to participate in the

⁴ See 47 U.S.C. §§ 309(j)(3)(B) and (4)(D).

⁵ See Recommendation at 1-2; see also 47 C.F.R. § 1.2110(a) (defining “designated entities” as “small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies.”)

⁶ See, e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2391-92 ¶¶ 241-44 (1994) (“*Competitive Bidding Second Report and Order*”). In so doing, the Commission establishes special small business size standards on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service. 47 C.F.R. § 1.2110(c)(1).

⁷ See 47 C.F.R. § 73.5007(a); see also Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, *First Report and Order*, 13 FCC Rcd 15920, 15994-95 ¶ 189 (1998) (“*Broadcast Competitive Bidding First Report and Order*”) (adopting new entrant bidding credit to implement statutory provisions regarding opportunities for small, minority-owned and women-owned businesses).

⁸ See 47 C.F.R. § 73.5007(a).

⁹ See Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15319 ¶ 48 (2000).

provision of broadcast services.¹⁰ We seek information to assess how individuals who have overcome substantial disadvantage have fared under our existing auction process and the designated entity benefits. Have persons who have overcome substantial disadvantages had difficulty in obtaining licenses under the existing process and designated entity programs? Do data exist that would demonstrate that individuals who have overcome substantial disadvantage are underrepresented in the Commission's auctions process? Is there evidence that persons who have overcome substantial disadvantage are more likely than others to utilize Commission licenses in the public interest, or do so to a greater extent? If no such data exist, what information could be developed to assess the need for the proposed bidding preference?

3. In establishing the existing small business bidding credit program, the Commission found that the preferences would allow designated entities to overcome barriers that have impeded these groups' participation in the telecommunications arena, including barriers related to access to capital.¹¹ The Advisory Committee's Recommendation notes that the proposed preference would provide fair opportunity to those who have overcome substantial disadvantage and that it would result in the introduction of new entrants having diverse viewpoints. How would this proposed preference provide additional opportunities to individuals and entities that differ from those available under our current bidding credit programs?

4. The Advisory Committee's Recommendation observes that the proposed overcoming disadvantage preference would be subject to a "rational basis" constitutional standard, and that any Commission rulemaking "must support the conclusion that the overcoming disadvantage preference program will serve the public interest and is a rational way to further" the program's public interest objectives.¹² What public or governmental interests would be served by establishing such a bidding preference? Commenters are specifically invited to provide information on what interests would be served under this program that are not being addressed with the Commission's existing bidding credit programs.

5. Are there additional constitutional issues raised by the Advisory Committee's Recommendation that the Commission should consider? If so, what are they? How might they be mitigated or eliminated?

Eligibility for Preference

6. The Advisory Committee's Recommendation supplies a non-exhaustive list of disadvantages that may have had a substantial negative impact on an individual's "entry into or advancement in the professional world or other comparable context" that might justify the award of a preference, such as physical disabilities or psychological disorders that have rendered professional or business advancement substantially more difficult.¹³ Are there other categories of disadvantages that should qualify an individual for preferences beyond those listed in the Recommendation? Should any of the proposed disadvantages not be included? Should any of the disadvantages take precedence over others? Should there be a point system to weigh the relative merit of different disadvantages? Should the Commission develop and publish an exclusive list of qualifying disadvantages, or should determinations about whether a substantial disadvantage is qualifying be made on a case-by-case basis?

¹⁰ See *Broadcast Competitive Bidding First Report and Order*, 13 FCC Rcd 15920, 15994-95 ¶ 189.

¹¹ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2389 ¶ 230.

¹² Recommendation at 10-12.

¹³ Recommendation at 4.

7. The Advisory Committee's Recommendation suggests that any disadvantage must be "substantial" in order to qualify an applicant for a preference.¹⁴ By what means should the Commission assess and/or quantify what experience would demonstrate "substantial" disadvantage?

8. What degree of success in overcoming a substantial disadvantage would an applicant have to demonstrate in order to evidence its eligibility for such a preference?¹⁵ How should applicants be required to document their successes in "substantially" or at least "partially" overcoming disadvantages? Should any successes documented be limited to the applicant's professional achievements, or should success in other contexts be considered by the Commission?

9. At what level of success, if any, should an applicant who has overcome substantial disadvantages become ineligible for the preference (e.g., by what measure of wealth or access to capital)?¹⁶ Should the Commission adopt different levels of preference based on a measure of wealth or access to capital? What criteria should be used to disqualify the applicant from eligibility for a bidding credit? If the Commission adopts an additional preference such as that recommended by the Advisory Committee, how should the Commission implement the statutory requirement to avoid unjust enrichment in the context of its bidding preference program?¹⁷

Administration

10. The Advisory Committee's Recommendation notes that any determination of an individual's or entity's eligibility for an overcoming disadvantage preference would require an examination of all relevant evidence and would be based on an individualized evaluation.¹⁸ The individualized reviews that would occur under the proposed program are subjective in a manner that distinguishes them from existing designated entity programs, which are based on objective criteria such as financial data. By what means could applicants demonstrate that they qualify for the preference? For example, should a narrative explanation suffice? If not, what information or documentation would be necessary to substantiate a claim? Should an applicant be permitted to certify its eligibility for this preference under penalty of perjury in its short-form application when it seeks to participate in an auction, similar to the way in which applicants may certify eligibility for new entrant and small business bidding credits? If so, what guidance can the Commission provide to potential applicants so that they can make a good faith certification of eligibility? The Recommendation suggests that an overcoming disadvantage preference might be applied differently for different services (e.g., a preference might apply only for more valuable licenses in a broadcast auction).¹⁹ Would the Commission have to tailor the preference for specific services in a rulemaking, similar to its existing practice of establishing the small business definitions on a service-by-service basis? The Advisory Committee recognized the importance of

¹⁴ Recommendation at 3-5.

¹⁵ Recommendation at 5-6.

¹⁶ Recommendation at 6-7.

¹⁷ Pursuant to a directive in section 309(j)(4)(E) of the Communications Act, the Commission has implemented rules to prevent unjust enrichment. Unjust enrichment provisions apply to a winning bidder that utilizes a bidding credit and subsequently loses its eligibility for such bidding credit or assigns or transfers the license or construction permit to an entity not qualifying for the same level of credit. 47 U.S.C. § 309(j)(4)(E). See 47 C.F.R. §§ 1.2111, 73.5007(c); see also *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2394-95 ¶¶ 258-265 (establishing unjust enrichment requirements).

¹⁸ Recommendation at 4.

¹⁹ Recommendation at 7.

reducing subjectivity and achieving consistency among individualized determinations. What standards could the Commission implement to achieve those goals?

11. The Advisory Committee's Recommendation suggests that a determination as to whether applicants have overcome disadvantages could be made within the existing short-form auction application review process.²⁰ What would be the administrative burden for the Commission to conduct individualized review for such a preference within the relatively short time frames allotted under the existing auctions short-form application process?²¹ If the Commission were to allocate additional time in the pre-auction process for such reviews, would the possible burdens on auction applicants be outweighed by the public interest benefits of the proposed preference?²²

12. As an alternative, the Recommendation suggests that applicants could pre-qualify for preferences and thus avoid subsequent petitions to deny their licenses targeted at their qualification for the preference.²³ Are there Administrative Procedure Act or other concerns for not allowing parties to file petitions challenging a proposed qualification? Is there a reason to treat this qualification differently than other qualifications that are subject to the petition to deny process? Does this raise issues with regard to the requirements of the Communications Act? If an applicant is found to be qualified prior to an auction but experiences a change of status during bidding, or after submitting a winning bid, should the individual remain eligible for the preference? Should a pre-qualification review strictly be limited to the overcoming of substantial disadvantage, or should it be a broader review of an applicant's license qualifications, provided that the pre-auction process is extended?

13. The Advisory Committee's Recommendation suggests three options for the management of qualification review: (1) establishing a "special cadre" of Commission officials to evaluate applicant qualifications; (2) designing a modified Administrative Law Judge procedure for this purpose; (3) assigning the function to the Commission's Bureau responsible for oversight of the service in question.²⁴ What are the relative advantages and disadvantages of each option? What aspects of the current process for review of auction applicant eligibility suggest that these additional options are necessary for the proposed preference program?

14. The Advisory Committee's Recommendation asks whether a corporation should be able to receive the proposed preference based on the qualifications of its principal.²⁵ What role should the

²⁰ Recommendation at 8-9.

²¹ Typically, the deadline for filing a short-form application to participate in an auction occurs 45-60 days prior to the start of bidding. After the deadline for filing, Commission staff reviews all timely-filed short-form applications and deems them accepted, incomplete, or rejected. The initial status of each applicant is announced in a public notice that is released approximately 30-40 days prior to the auction start date. That public notice provides a limited period in which an auction applicant may address deficiencies in its short-form application. After the deadline for resubmission of corrected applications and the submission of upfront payments, Commission staff then reviews the short-form applications and determines which applicants are qualified to participate in the auction. A public notice identifying the qualified bidders is typically released approximately 7 days prior to the start of bidding. Additional details on the pre-auction timeline are available on the Commission's website at: http://wireless.fcc.gov/auctions/default.htm?job=about_auctions&page=3.

²² See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2375-76 ¶¶ 162-63 (explaining benefits of streamlined auction application process). See, e.g., 47 C.F.R. § 1.2105(c)(1) (prohibition of certain communications).

²³ Recommendation at 9.

²⁴ Recommendation at 9-10.

²⁵ Recommendation at 10.

principal play in a corporation or other business entity to confer eligibility for the preference on the entity? For instance, should the principal be required to have majority equity ownership and a management role?

This matter shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules. See 47 C.F.R. §§ 1.1200, 1.1206. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required. See 47 C.F.R. § 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in section 1.1205(b) of the Commission’s rules, 47 C.F.R. § 1.1206(b).

All comments should refer to GN Docket No. 10-244. Comments may be filed using (1) the Commission’s Electronic Comment Filing System (ECFS), or (2) by filing paper copies.²⁶ Generally, only one copy of an electronic submission must be filed.

Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/cgb/ecfs/>. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, “get form.” A sample form and directions will be sent in reply.

Parties who choose to file by paper must file an original and four copies of each filing.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

The Commission’s contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 445 12th Street, SW, Room TW-A325, Washington, DC 20554. The filing hours at this location are Monday through Friday, 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Please dispose of any envelopes before entering the building.

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Additionally, filers are requested to send courtesy copies by email to the following Commission staff: Amy Brett, at amy.brett@fcc.gov and Sayuri Rajapakse, at sayuri.rajapakse@fcc.gov.

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²⁶ See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).