

ADVISORY COMMITTEE ON DIVERSITY FOR COMMUNICATIONS IN THE DIGITAL AGE
RECOMMENDATIONS TO FEDERAL COMMUNICATIONS COMMISSION

PREFERENCE FOR OVERCOMING DISADVANTAGE

The FCC Advisory Committee on Diversity For Communications In The Digital Age (the “Advisory Committee”) has been considering how the FCC should enhance its pool of qualified applicants for licenses to provide various kinds of communications services to the public. After exploring a number of options for advancing this goal, the Advisory Committee urges the FCC to incorporate in a notice of proposed rulemaking a proposal to amend its Designated Entity rules, 47 C.F.R. § 1.2110, which currently provide for preferences for small businesses and rural telephone companies that bid for FCC licenses.¹ The Advisory Committee recommends that the FCC design, adopt, and implement an additional, new preference program for individuals who have faced substantial disadvantages and overcome those disadvantages.²

This new preference would enable otherwise-qualified persons or entities who have overcome substantial disadvantage to compete on comparable footing with other would-be applicants for FCC licenses. It would thereby expand the pool of well-qualified applicants for FCC licenses. In the case of FCC licenses to provide broadcast services to the public, the preference program would have the additional benefit of enabling applicants who otherwise might not be able to

¹ In addition to the Designated Entity rules, there exists another bidding credit for “new entrants” which applies specifically to broadcast license auctions. *See* 47 C.F.R. § 73.5007. As a modification to the Designated Entity rules, the Advisory Committee’s recommendation is intended to reach all licenses subject to competitive bidding, including broadcast.

² These recommendations use “overcome” and “overcoming” interchangeably. As discussed below, preference applicants will demonstrate that they have overcome disadvantage sufficiently for purposes of the preference by showing meaningful success in a professional, educational, or other related context in the face of substantial disadvantage. See discussion *infra* at 6-7. There is no need otherwise to resolve the abstract question of the point at which a disadvantage, whether historical or ongoing, is fully and finally overcome.

obtain FCC licenses to compete in auctions for broadcast licenses and if successful, contribute to viewpoint diversity.

I. THE CORE CONCEPT OF THE PROPOSED PREFERENCE FOR OVERCOMING DISADVANTAGE

The preference for overcoming disadvantage would facilitate entry into the telecommunications and broadcasting markets by individuals and companies who have overcome substantial disadvantage. The FCC rules currently limit designated entities who receive bidding credits to small businesses and rural telephone companies. Under the proposed recommendations, the FCC would expand the pool of designated entities to include those qualified applicants who have overcome substantial disadvantage. In some respects, the proposed program is analogous to programs employed by educational institutions in their admissions process insofar as (1) it recognizes that merit is multi-faceted and (2) it would make applicant-by-applicant determinations of “disadvantage” qualifications on the premise that perseverance, resourcefulness, and hard work in struggling to overcome disadvantage are predictive of success. However, unlike in the educational context, the Commission would not undertake a review of the candidate’s full file of attributes; the program would focus only on whether a candidate has overcome substantial disadvantage.

II. DESCRIPTION OF PROPOSED PREFERENCE PROGRAM

Below we briefly describe the components of the proposed preference for overcoming disadvantage. The FCC should launch a rulemaking proceeding that would further refine these components.

A. Goals of the Program

The preference program would assist the FCC in achieving the following goals:

- *Ensuring a Fair Opportunity:* The proposed preference would provide a fair opportunity to those who have faced and overcome substantial disadvantage by ensuring that their unique strengths are represented in the application process. Without such a program, qualified applicants with these traits might be

underrepresented and undervalued among applicants seeking FCC licenses. By expanding the pool of applicants to include these qualified – but underrepresented and undervalued – license applicants, the preference program would ensure these applicants have a fair opportunity to bid for licenses.

- *Selecting Highly Qualified Applicants:* Because of their perseverance and resourcefulness, individuals who have achieved success in the face of substantial disadvantage are especially well-equipped to overcome future challenges in providing communications services to the public.³ If the program is adopted, the outcome of auctions would continue to be determined by the winning bid, but, by expanding the pool of applicants who have demonstrated perseverance and resourcefulness in the face of disadvantage, the program would further the goal of selecting highly qualified applicants.
- *Expanding Participation and Competition:* The program would promote a more competitive and diverse marketplace by awarding preferences to applicants who have overcome substantial disadvantages. Because such applicants are less likely to be incumbent licensees, the program would expand the FCC’s applicant pool. Moreover, the program may inspire and incentivize others to overcome disadvantages to become successful entrepreneurs as FCC licensees or otherwise.
- *Promoting Diversity of Viewpoint:* In the broadcast context, the program would promote diversity of viewpoint because it would assist participants who have overcome a variety of disadvantages in obtaining broadcast licenses. Their experiences in facing and overcoming such disadvantages may provide them with insights and perspectives that otherwise would be underrepresented in broadcast station ownership.⁴

B. Disadvantages That Might Justify Award of a Preference

The proposed program would afford designated entity status to qualified applicants who have overcome substantial disadvantage. The criteria for evaluating applicants – which should be refined with input in the rulemaking process – would be designed to provide a preference to qualified

³ See Angela L. Duckworth *et al*, *Grit: Perseverance and Passion for Long-Term Goals*, 92 J. OF PERSONALITY & SOC. PSYCHOL. 1087–1101 (2007), available at <http://www.sas.upenn.edu/~duckwort/images/Grit%20JPSP.pdf> (finding that “grit” is a better predictor of success than IQ score or conscientiousness); see also *id.* at 1090 & Tbl. 1 (noting that individuals who “overcome setbacks to conquer an important challenge” and/or who are not discouraged by setbacks demonstrate perseverance of effort).

⁴ See *In re Promoting Diversification of Ownership in the Broadcast Services*, Notice of Proposed Rulemaking, MB Docket No. 07-294, FCC 07-217, at para. 5 (March 5, 2008), (noting FCC goal of “facilitat[ing] ownership diversity and new entry in the broadcasting industry”).

applicants who (1) have experienced a disadvantage (2) that had a substantial negative impact on their entry into or advancement in the professional world or other comparable context and (3) that they have substantially overcome. The following is a non-exhaustive list of disadvantages which, if substantial, would likely qualify an individual for a preference:

- Physical disabilities or psychological disorders that rendered professional or business advancement substantially more difficult than for most individuals;
- Physical or emotional trauma suffered in connection with military service;
- Unequal access to institutions of higher education, including due to physical limitations, psychological disorders, substantial economic disadvantage, natural or human disaster, or as a result of discrimination;
- Unequal access to credit, including due to physical limitations, psychological disorders, substantial economic disadvantage, natural or human disaster, or as a result of discrimination;
- Unequal treatment in hiring, promotions, and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment, or unequal treatment in other business opportunities;
- Exclusion without cause from business or professional organizations or from social and professional associations with students or teachers;
- Retaliatory or discriminatory behavior by an employer or an educational institution;
or
- Social patterns or pressures which have discouraged the individual from pursuing education or business opportunities or which have made pursuing such opportunities more difficult.

The determination would look at all relevant evidence in evaluating whether an applicant had suffered substantial disadvantage and would be based on an individualized evaluation. The program would differ from federal and state programs that use across-the-board features, such as gender, to create a presumption of disadvantage. Accordingly, a female applicant would be permitted to demonstrate that she suffered a qualifying disadvantage in connection with gender discrimination in the workplace. But the applicant would also need to show that the experience substantially reduced

her opportunities for advancement in the workplace or otherwise impacted negatively her professional or educational prospects but that she had achieved professional successes notwithstanding this disadvantage. No applicant would be entitled to or presumed entitled to the preference by virtue of being a woman. Further, a male applicant could also establish substantial disadvantage by making a similar showing in connection with gender-based discrimination.

Importantly, a qualifying disadvantage would have to be “substantial.” The definition of what constitutes a substantial disadvantage would be addressed in the rulemaking and would be further refined on a case-by-case basis. To the extent possible, it is desirable to reduce subjectivity and achieve consistency among individualized determinations.

C. Efforts That Would Constitute “Overcoming” a Disadvantage

The preference for overcoming disadvantage would be designed in part to select highly qualified applicants who have demonstrated perseverance, resourcefulness, and other traits predictive of a successful licensee. Accordingly, the preference would be limited to those individuals who have endured *and, at least partially, overcome* a disadvantage. Individuals who qualify for the preference will be able to show that they have entered into and advanced in the professional world in the face of substantial disadvantages. This requirement does not contemplate that successful applicants necessarily will have fully and finally overcome the disadvantages they faced. In many cases, the disadvantage will continue to burden the applicant, such as where an individual suffers a physical handicap or is being excluded from important professional opportunities. Further, eligible applicants often will still be in the process of overcoming the disadvantage. They nonetheless will be able to show they have “overcome” their disadvantages for purposes of being entitled to the preference so long as they can show that they have entered into or made some advancement in the professional world or a comparable context.

The degree of success required to show that a disadvantage has been sufficiently overcome would be further refined in a rulemaking and case-by-case determinations.

D. What It Would Mean to Be “Qualified”

Another important aspect of the program is that applicants who show that they have overcome substantial disadvantage would still have to demonstrate to the Commission that they are qualified to be licensees. Through the application and auction process, which is described in more detail below, the FCC would undertake review of whether the preference applicant is qualified, just as it does for other applicants, including designated entities. The applicant would still have to be financially and legally qualified. Thus, the FCC would still review an applicant’s qualifications on the basis of information solicited in the applicable FCC application forms as to whether the applicant previously had an FCC station authorization, license, or construction permit revoked; been convicted of a felony by any state or federal court; or been finally adjudged by a court of unlawfully monopolizing or attempting to monopolize radio communication, directly or indirectly, through control of manufacture or sale of radio apparatus, exclusive traffic arrangement, or any other means or unfair methods of competition. In short, a candidate who qualifies for a preference for overcoming disadvantage still must demonstrate that it possesses all of the qualifications required of any other applicant, whether or not a preference applicant.

* * *

An FCC rulemaking proceeding would also determine under what circumstances not to grant a preference to individuals who have overcome disadvantage but who now have very substantial assets and wealth and/or ready access to capital. Those individuals who have considerable financial resources and are already able to participate in FCC auctions should not be awarded the preference because they do not need it. A critical purpose of the program, after all, is to assist applicants who otherwise would be underrepresented and undervalued in the application process. Designing the

program so that the small group of individuals with sufficient resources is not entitled to the preference would better serve this purpose and is also consistent with the Commission's longstanding goal of promoting the ability of new entrants to compete for licenses. Of course, only those individuals with very substantial assets and wealth and/or ready access to capital would be deemed ineligible for the preference—a degree of wealth that would be determined best through the rulemaking process. The Commission might also consider whether different levels of wealth or access to different levels of capital should be taken into account in granting the preference for different kinds of auctions. Thus, an applicant who has overcome disadvantage and has achieved a certain level of financial success might not be entitled to a preference for a small radio station license, yet might be eligible for a preference in an auction for a much more valuable station license.⁵

In addition to the above proposal, there may be additional design elements that the FCC might adopt to protect against the possibility that individuals who do not need the preference to bid successfully in FCC auctions could take advantage of the preference. This issue should be addressed in the rulemaking.

III. SUGGESTED ADMINISTRATION OF THE PROGRAM

In considering procedures for administering the preference program, one might start by examining the procedures used to administer the two existing preference programs – the small business and rural telephone company preferences. An FCC rulemaking should flesh out similarities and differences and would refine and resolve some of the issues identified below.

⁵ It might be challenging to implement this concept in the context of the pre-certification option, discussed below at page 9, but these challenges could be evaluated in the rulemaking process.

The small business and rural telephone company preferences, to which would be added the proposed preference for overcoming disadvantage, are administered within the context of the FCC's existing auction procedures. In that auction process, the FCC's first step is to propose, ask for comment on, and then adopt service rules for the service in which licenses are to be auctioned. This is a necessary first step because it enables interested parties to comment on the appropriate service rules, assess those rules in determining whether they wish to participate in the auction, and develop a business plan and raise funding for participation in that particular auction. The FCC's next step is to set a deadline for filing applications in which applicants set forth their qualifications, including the qualifications of those that seek to participate as designated entities and receive bidding credits – as either small businesses or rural telephone companies. The FCC then reviews these applications, determining which qualify to participate in the auction, which do not, and which will qualify if the applicants promptly make minor corrections to their applications. The FCC next conducts the auction; after the auction is concluded, losing bidders are given the opportunity to file petitions to deny (which occurs frequently) against the winning bidder. Petitioners can argue that the winning bidder is not qualified to be a licensee or, if the winning bidder claims to be a designated entity, that the winning bidder is not qualified for a small business or rural telephone company preference. The final step is for the FCC to rule on the petitions – it can either uphold the grant or rescind it and re-auction the license in question.

If the preference for overcoming disadvantage were treated like the other two existing preferences, preference applicants would make a showing that they qualify for an overcoming disadvantage preference in the applicable FCC application forms, where they would also demonstrate that they are otherwise qualified. The Commission, in this pre-auction stage, would evaluate the applications and find applicants qualified or not qualified for the preference, as

appropriate. (There could be some minor adjustments to this process to account for the less mechanistic assessments involved in qualifying for an overcoming disadvantage preference, as compared to those employed for the two existing preference programs for small business and rural telephone companies.)⁶ Then, if an applicant who has been granted a preference wins the auction, its basic qualifications and preference eligibility would be subject to challenge in petitions to deny filed by losing bidders.

An alternative approach would be for the FCC to “pre-qualify” would-be applicants for preferences outside the context of any particular auction. Such “pre-qualified” preference applicants could then apply in whatever auctions are of interest to them without the need to show entitlement to the preference again during a particular auction process. However, consistent with the FCC’s existing auction procedures, they would still have to demonstrate with respect to a particular auction that they have the basic qualifications to be a licensee. In the post-auction, petition-to-deny stage of the process, winning bidders who have pre-qualified for the preference could be challenged only on the grounds that they lack the basic qualifications of a licensee. They could not be challenged in connection with preference eligibility, which the Commission will have already determined in the pre-certification process. The pre-qualification option would avoid delaying auctions while Commission staff evaluate applicants’ qualifications for the preference and would enable preference entities, prior to an auction, to raise funds and develop business plans based on their having qualified for the preference.

Another set of issues is who would determine applicants’ qualifications to be awarded a preference and what processes would the FCC use for this purpose. Options include (1) establishing

⁶ Under either this approach or the alternative approach discussed below, the Commission should examine further the showing it would require of applicants to qualify for the preference.

a special cadre of FCC officials to evaluate each applicant’s qualifications for the preference, (2) designing a modified ALJ procedure for this purpose, and (3) assigning the function to the FCC Bureau that exercises oversight over the service in question.⁷ Given the FCC’s familiarity with its procedures and resources, it would be particularly appropriate for the FCC to tee up this set of issues in the notice of proposed rulemaking.

An additional set of implementation issues concerns the applicability of this program to corporations and other business entities. Specifically, if the applicant is a corporation, can it seek a preference for overcoming disadvantage based on the experience of a principal and how substantial must that principal’s role be in the corporate applicant—in terms of ownership and management—to entitle it to a preference?

The overcoming disadvantage principle might also be considered as a factor in waiver cases. Such a concept would entail a different set of implementation issues.

IV. SUMMARY OF WHY THE PROGRAM WOULD MEET LEGAL TESTS

The recommendations have been designed to satisfy applicable legal standards, including the Equal Protection Clause of the Constitution and the Administrative Procedure Act (“APA”). Because the program would not award preferences on the basis of an applicant’s ethnicity or gender, the program would be subject to rational basis review under the Equal Protection Clause.⁸ Under the program, a qualified applicant who experienced and overcame substantial disadvantage in

⁷ This last option would not be suitable if the process for reviewing an entity’s qualifications for the preference took place prior to and separately from any particular auction. Additionally, although there is a risk that this option could lead to different standards within different communications services, such a risk could be mitigated by information exchanges and coordination among FCC bureaus.

⁸ Cf. *Nguyen v. INS*, 533 U.S. 53, 60-61 (2001) (applying “intermediate scrutiny” to a federal law which used gender-based classifications); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that the more onerous “strict scrutiny” standard applies to federal programs which use racial classifications).

connection with racial or gender discrimination could obtain a preference. However, an individual's ethnicity or gender would never create a presumption that he or she faced a substantial disadvantage. Instead, each applicant's qualifications for the preference would be assessed *individually*—on the basis of an *individualized* showing of having achieved professional successes notwithstanding substantial disadvantages.⁹ Further, applicants of any ethnicity or gender could show that they have suffered and overcome substantial disadvantages, including substantial disadvantage caused by discrimination, as well as types of disadvantages wholly unrelated to discrimination.¹⁰ Constitutional Equal Protection principles should not be interpreted to diminish the ability of the FCC to enact the proposed program to further its goals of ensuring applicants a fair opportunity to participate in auctions, selecting highly qualified applicants, expanding participation and competition in auctions, and expanding the diversity of broadcast viewpoints.¹¹

⁹ The Supreme Court has repeatedly emphasized the importance of individual assessments. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 555 U.S. 701, 743 (2007) (criticizing the dissenting justices for believing that “individualized scrutiny is simply beside the point” in school assignments); *Gratz v. Bollinger*, 539 U.S. 244, 276 (2003) (striking down public university’s pro-diversity admissions policy where the admissions review “d[id] not provide for a meaningful individualized review of applicants”); *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (“At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.” (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting))).

¹⁰ Justice Scalia has signaled that he would uphold a preference based on experience of discrimination so long as the category of persons permitted to show discrimination is not limited by ethnicity. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526-27 (1989) (Scalia, J., concurring in the judgment) (“Nothing prevents [a government entity] from according a contracting preference to identified victims of discrimination. While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified on the basis of their race.”).

¹¹ The preference program would be proposed by the FCC to further the policy objectives listed in Section II.A. “Racial motivation” would not be an object of the program. An analysis of permissible race-related motivations is thus besides the point. Compare *id.* at 507 (O’Connor, J.) (suggesting that the government should have considered “race-neutral means to increase minority business participation in city contracting”) and *Parents Involved in Cmty. Sch.*, 551 U.S. at 789-790 (Kennedy, J. concurring in part) (suggesting that “individual racial classifications” may be considered legitimate in some circumstances -- *i.e.* “only if they are a last resort to achieve a compelling interest”) with *Hunter v. Underwood*, 471 U.S. 222 (1985) (finding unconstitutional a disenfranchisement measure “where both impermissible racial motivation [a “but-for” motivation for the enactment] and racially discriminatory impact [were] demonstrated”).

The program, if properly implemented, also would be consistent with the APA. Under the APA, courts follow two steps to determine whether agency actions are “arbitrary and capricious.”¹² First, they determine whether the agency has considered the relevant factors involved in its decision.¹³ Second, they determine whether the agency has articulated a rational connection between the facts found and the choice made.¹⁴ To satisfy the APA, the FCC’s record in this proceeding must support the conclusion that the overcoming disadvantage preference program will serve the public interest and is a rational way to further the worthy objectives discussed above.¹⁵ The agency need only supply a reasoned basis for the action it has chosen. Based on the record to be developed in its rulemaking proceeding, the FCC should be able rationally to conclude that those who have overcome substantial disadvantages and are otherwise qualified to be licensees would make good licensees and that according designated entity status to them and awarding them bidding credits are an appropriate means to promote their participation in the FCC’s applicant pool.

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Based on these recommendations, the Advisory Committee urges the FCC to design, adopt, and implement a preference program for individuals that have faced substantial disadvantages and have overcome those disadvantages, at least in part.

¹² See 5 U.S.C. § 706(2)(A).

¹³ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Tripoli Rocketry Ass’n v. BATFE*, 437 F.3d 75, 81 (D.C. Cir. 2006) (quoting *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005)); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 758 (6th Cir. 1995).

¹⁴ See *Tripoli Rocketry Ass’n*, 437 F.3d at 81; *Cincinnati Bell*, 69 F.3d at 758; *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1165 (D.C. Cir. 1987) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

¹⁵ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasizing that the arbitrary and capricious test is a “narrow” and limited form of review); *Niobrara River Ranch, L.L.C. v. Huber*, 373 F.3d 881, 884 (8th Cir. 2004) (“Our scope of review is narrow, and we may not substitute our judgment for that of the [agency].” (internal citations and quotation marks omitted)); *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 888 (4th Cir. 1983) (upholding dairy regulations under arbitrary and capricious test despite “harsh” results which would have caused the court, acting in the agency’s place, to have “searched long for a more humane alternative”);