

Re: A Pilot Program for Developing the Overcoming Disadvantage Preference

In 2010, the Commission’s Advisory Committee on Diversity for Communications in the Digital Age issued a proposal recommending that the Commission adopt an “Overcoming Disadvantage Preference” or “ODP.” The purpose of the proposal is to provide a bidding credit at spectrum auctions to “individuals who have faced substantial disadvantages and overcame those disadvantages.” Proposal at 1. The proposal included a list of eight disabilities, from “physical disabilities” to social pressures that “have discouraged the individual from pursuing education or business opportunities.” *Id.* at 5-6.

The proposal emphasized that the ODP should be defined and administered in a race- and gender-neutral manner. It also acknowledged that a number of practical issues needed to be worked out, including how to determine who should receive a credit.

In 2014, the Commission raised a number of issues concerning the proposed ODP and sought comment “regarding the feasibility of adopting an ODP standard.” *2014 Quadrennial R&O, Further Notice of Proposed Rulemaking and Report and Order*, 29 FCC Rcd 4371, 4506-7 ¶ 300 (Apr. 15, 2014). The Commission took no other action with respect to the ODP proposal.

In *Prometheus III*, the Third Circuit expressed considerable interest in the ODP proposal. Slip Op. 28-30. The court did not order the Commission to adopt the ODP, but did indicate that the Commission should either adopt such a preference or issue a final order so that “aggrieved parties will be able to seek judicial review.” *Id.* at 33.

In response to the Third Circuit’s decision, the Commission should adopt a pilot program implementing an ODP. As explained below, a pilot program can be used to obtain answers to the Commission’s many practical questions. After explaining our proposal for a pilot program below, we address the specific issues the Commission raised in 2014. We are prepared to submit further information and/or support as necessary.

The Pilot Program. As an initial matter, designing an ODP program is simple compared to designing the sort of complex auction procedures the Commission has developed. A Commission that can design and conduct spectrum auctions can also design and implement an ODP program. That said, there are a number of issues to consider. Below, we sketch out a proposal. This proposal is not intended to delineate exactly how ODPs should be awarded; there are no doubt

many adjustments that could be made to the proposal to make it more effective and easier to administer.

The Commission should proceed by means of a pilot program because the experience is likely to provide useful information about how to structure the program. We propose that the Commission use a framework similar to that government agencies use to make awards or hiring decisions. That is, rather than determining whether every applicant qualifies for a preference, during the pilot program, the Commission should select a limited number of applicants to receive a preference. We suggest that the preference should be a 50-percent bidding credit for a radio station license in the next auction for such licenses. We suggest 50 percent, which is double the credit often awarded to very small businesses. As explained below, we would limit applications in the pilot program to applicants that would qualify as very small businesses, and propose a 50-percent bidding credit to attract applicants and recognize that successful applicants will be both very small businesses and persons who overcame a significant disadvantage.

The application. Applicants should be required to submit written applications explaining why they should be chosen to receive an ODP. The “Open Government Awards” program, described at www.opengovpartnership.org, may be used as a model. In that program, candidates are required to explain, in 250 words or less, the program they developed to advance government transparency. They then have 450 words to describe the impact of their program, followed by 200 words to explain why it will be sustained. Then, in 150 words or less, candidates make their “pitch” for why they should receive an award. The applications for an ODP may allow for more explanation, but we would encourage the Commission to limit the length of applications to make the program administrable. The Commission should not let the perfect become the enemy of the good.

With respect to the ODP pilot program, applicants should be required to concisely explain how they overcame or are in the process of overcoming a disadvantage. Candidates should be directed to consider the list of disadvantages discussed in the 2010 Advisory Committee proposal, but should not necessarily limit themselves to the precise examples listed by the Committee.

Candidates should also be required to attach a resume and briefly explain why they are qualified to control a license to operate a radio station. This involves a balance because as discussed in the 2010 Advisory Committee proposal, it is important that the preference be awarded to persons who have overcome disadvantages to an extent that they can successfully run a business.

In addition, applicants should indicate that they understand that they are bound by other rules the Commission adopts. Those rules should include compliance with the construction requirements applicable to other winning bidders;

the standards concerning how long a party must hold a license or lose its preference that are applicable to other winning bidders; and the control standards applicable to other winning bidders. And, as noted above, the applicant should be required to qualify as a very small business under the Commission's rules.

The selection. We propose that a committee of five anonymous government employees grade the applications and select a limited number, perhaps ten, for further consideration prior to selecting the winning candidates. We propose that three applicants should receive preferences in the pilot program, assuming there are three qualified applicants.

At the first stage of the selection process, we propose that a candidate's qualification to control a license should count for 33 percent of the grade given by the anonymous evaluators, with the caveat that an applicant found not to be qualified will not receive further consideration. The remaining 67 percent will be awarded based on the severity of the disadvantage the applicant overcame and the extent to which the applicant has succeeded despite the disadvantage. Of course, candidates who do not agree to be bound by the Commission's rules would not be selected.

There necessarily is considerable subjectivity concerning determinations of the severity of a disadvantage and a person's degree of success in overcoming it. However, making routine personnel decisions and selecting award winners also involve subjective decisions. A goal of the pilot program should be for the evaluators to consider, after making awards, how to channel the discretion of the evaluators. Perhaps the 33 percent of the award relating to qualifications and the 67 percent for overcoming disadvantages can be usefully subdivided.

After the five anonymous evaluators give their grades, the top ten applicants (if there are that many) should be permitted to make oral presentations, of perhaps 30 minutes, to the committee. We suggest that, after hearing all the presentations, the committee should simply choose the three best candidates without engaging in any numerical grading.

The issues highlighted in the Commission's 2014 Order. This proposal responds to the eight questions set out in Paragraph 300 of the Commission's 2014 Order as follows:

1. Whether the proposed ODP standard would be subject to heightened constitutional scrutiny.

Strict scrutiny should not apply because the preference would be awarded in a race- and gender-neutral manner. It may be that members of minority groups and

women will be more likely than others to obtain a preference, but that would only be because they tend to face more disadvantages.

In *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (June 25, 2015), the Supreme Court held that, “When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.” That reasoning is applicable to the ODP as well. As noted above, it is possible that the ODP will increase participation in broadcasting by members of minority groups and women as well, but “mere awareness” of race and gender should not trigger strict scrutiny.

The ODP is an example of the sort of remedial measure expressly approved in *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (Jan. 23, 1989) (plurality opinion), where the plurality concluded that communities should seek “to eliminate racial disparities through race-neutral means.” Of course, eliminating racial disparities requires some awareness of race. Justice Scalia, concurring in *Croson*, hypothesized (and approved of) a preference that is similar in this respect to the ODP by stating that nothing prevents “a contracting preference to identified victims of discrimination” because “even though 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.” *Id.* at 526-27.

Similarly, in the Court’s recent decision in *Fisher v. University of Texas*, No. 14-981 (June 23, 2016), the Court upheld the University’s express consideration of race in making admission decisions. More pertinent to the ODP program, the petitioner did not even challenge Texas’s decision to admit students graduating in the top ten percent of their high school class—but rather argued that the race-neutral Top Ten Percent Plan approach should be expanded to increase minority enrollment. Slip op. 16. The ODP program would be less race-conscious than the Top Ten Percent Plan. While that Plan “cannot be understood apart from its basic purpose, which is to boost minority enrollment,” the ODP should increase participation in broadcasting by very small businesses—one of the groups identified by Congress as warranting special attention to ensure that they are not shut out of opportunities to obtain spectrum licenses. 47 U.S.C. § 309(j)(4)(C). And even if the ODP does not increase participation by members of minority groups and women, it will increase participation by persons who have overcome disadvantages—a goal that surely advances the public interest. *See id.*

Finally, for decades, critics of affirmative action plans have argued that poor white Appalachians are as deserving of preferences as many members of minority groups and that affluent members of minority groups are not deserving. The ODP is available to poor white Appalachians and to qualified applicants of any race.

2. What social or economic disadvantages should be cognizable under an ODP standard?

As discussed above, applicants should be directed to consider the eight examples provided by Commission's Advisory Committee. In addition, applicants who have overcome significant disadvantage should be encouraged to apply even if their experience does not fall into one of the examples. And, as previously noted, a goal of the pilot program should be to refine the list of social or economic disadvantages that are cognizable.

3. How the Commission could validate claims of eligibility for ODP status.

As described above, in the pilot program, the Commission should structure the application process in a way that is similar to the process government agencies use to make awards or hire personnel. Thus, applicants would be judged in comparison to each other. That should make the pilot program easier to administer because it is often easier to judge which applicants are better than others than to judge applicants against a purely objective set of criteria. However, as also noted above, successful applicants would need to meet basic qualifications for holding a spectrum license.

4. Whether applicants should bear the burden of proving specifically that they would contribute to diversity as a result of having overcome certain.

No. The best way for the Commission to promote diversity is to open broadcast ownership to currently under-represented persons.

5. How the Commission could measure the overcoming of a disadvantage if an applicant is a widely held corporation rather than an entity with a single disadvantaged majority shareholder or a small number of control persons.

For the pilot program at least, we recommend limiting applicants to a single disadvantaged shareholder or a small number of persons with control.

6. How the Commission could evaluate the effectiveness of the use of an ODP standard.

First, if applicants are limited to persons who qualify as very small businesses, the program by definition should increase the number of small businesses—one of the groups listed in Section 309(j)(4)(C). In addition, the Commission should use the pilot program to gauge the likely effect of a broader program on broadcast ownership by members of minority groups and women. In that connection, it would

be useful to consider not only which applicants were chosen in the pilot program, but also whether other applicants were well-qualified. Noting the race and gender of such applicants should not raise substantial legal issues. If the pilot program does not appear to have the capability of increasing the number of members of minority groups and women in broadcasting, that would be useful to know because race- and gender-neutral alternatives should be used before turning to other alternatives. On the other hand, if the pilot program suggests that the ODP is likely to increase participation in broadcasting by members of minority groups and women, that advances Congress's goals in Section 309(j)(4)(C) without raising substantial legal issues—such a result would be no more suspect than studies documenting that the Texas Top Ten Percent Plan increases the percentage of minority students at the University of Texas.

7. Whether the Commission would possess sufficient resources to conduct individualized reviews.

As discussed above, the pilot program is designed to be relatively easy to administer and assist in determining how to design a broader program in a way that is easy to administer. But in this connection, the Commission should consider the resources that have been devoted to designing and conducting auctions. When giving the Commission auction authority, Congress simultaneously instructed the Commission to ensure that spectrum licenses were distributed broadly. We are sure that an ODP program would consume only a fraction of the resources that have been devoted to the design and administration of auctions.

8. How the Commission could fully evaluate the potential diversity contributions of individual applicants without running afoul of First Amendment values.

The selection committee through its individual evaluators will not consider the substantive messages likely to be found in the content that candidates propose to provide. Although it is likely that more diverse ownership will lead to more diverse programming, as the Advisory Committee stated, we do not believe it would be wise to require applicants to show that they will provide different content or viewpoints than other broadcasters. For that reason, the proposal presents no substantial First Amendment issues. However, the Commission or private parties could analyze the diversity contributions of ODP winners as part of an ongoing evaluation process.