

THIRD CIRCUIT

1 If I can --

2 THE COURT: Can I ask you to turn, if  
3 you would, to the diversity order in '08.

4 What was the reasoning for why this  
5 was a separate order from the 2008 rule, order  
6 itself?

7 MR. LEWIS: I don't know that there  
8 was any express reasoning in either order. I think  
9 that the assumption was that both orders are quite  
10 extensive, they're fairly large orders and the  
11 diversity order is an extensive piece on its own.

12 This court in its prior decision said,  
13 used the words, considered the diversity proposals  
14 at the same time.

15 I think the Commission considered that  
16 seriously as being a timing consideration rather  
17 than the simple form of the docket. There were  
18 massive numbers of proposals in the diversity  
19 question with regard to a number of issues that had  
20 very specific proposals that had nothing really to  
21 do with the media ownership side. So --

22 THE COURT: The, and I think this only  
23 took about two pages in the 2004 opinion, and  
24 actually as I recall back then it was an issue that

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1 almost, I shouldn't say tag along, but it didn't  
2 seem to be as important -- or not important, as  
3 much consideration given to it as certainly is  
4 given to it now.

5 We had sent it back saying okay, you  
6 have put this new rule into, these new rules into  
7 place, you didn't give us reasoning, tell us why.  
8 We sent it back, and what you do is you reinstate  
9 the failed station solicitation rule. And I still  
10 don't see any reasoning.

11 Can you point me to any reasoning as  
12 to why you did that?

13 MR. LEWIS: Yes, I think the reasoning  
14 was -- well, this court had a specific criticism of  
15 the failed station.

16 THE COURT: We had a criticism of it.  
17 We didn't say -- I wrote it. I wasn't sure, I  
18 wouldn't have gone to Vegas and bet you were going  
19 to reinstate the failed station solicitation rule.

20 MR. LEWIS: Sometimes the Commission  
21 surprises, your Honor, but the Commission --

22 THE COURT: No joke.

23 MR. LEWIS: -- explained that. The,  
24 underlying its original withdrawal or elimination

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1 of the failed station solicitation rule was an  
2 assumption that there just simply wouldn't be  
3 out-of-market buyers for those stations. And it  
4 now concluded, on reflection, that that assumption  
5 was an inappropriate assumption.

6 THE COURT: But what that did -- first  
7 of all I'm not sure what the reasoning is, because  
8 I couldn't find any. And what it did is it focused  
9 on small businesses and not women and minorities.

10 So it says small businesses, including  
11 women and minorities, but it doesn't seem that  
12 you've really given a whole lot of thought as to  
13 these last two categories.

14 MR. LEWIS: Well, the women and  
15 minority question or the promotion of ownership of  
16 women and minorities is also reflected in the  
17 Commission's adoption of the AM sub cap rule.

18 The fact is the Commission in both  
19 cases looks to promoting, taking measures that can  
20 allow small businesses to enter, promotion of entry  
21 generally for small businesses on the assumption  
22 that businesses owned by women and minorities tend  
23 to be included in that category of small  
24 businesses.

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1                   The Commission's power to address  
2 race-conscious measures is obviously a matter of  
3 considerable constitutional doubt after the Adarand  
4 case. And the Commission struggles in the  
5 diversity order as well and

6                   THE COURT: When was the last Adarand  
7 study done?

8                   MR. LEWIS: I don't know the answer to  
9 that, your Honor, it's been a while. I think that  
10 there has been a call for further Adarand studies.

11                   THE COURT: I mean it's been like ten  
12 years or so, hadn't it?

13                   MR. LEWIS: And they're a considerable  
14 undertaking, I think, and I think that there have  
15 been recommendations for the Commission to do  
16 Adarand studies anew.

17                   But you put your finger on an  
18 entirely, I would say an entirely different  
19 problem, another controversial problem, but I don't  
20 think it has anything to do with -- well, I guess  
21 the simple point is without an Adarand study, that  
22 kind of study, I don't think somebody can take, an  
23 agency can take action under that prong of Adarand.

24                   THE COURT: Is anything going to be

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1 done in connection with the 2010 quadrennial review  
2 pertaining to further studies?

3 MR. LEWIS: I don't know. I certainly  
4 don't want to commit the Commission one way or the  
5 other to whether or not they would fold in the  
6 Adarand question there.

7 I do know the issue of ways in which  
8 to promote ownership of media businesses by women  
9 and minorities remains an issue in the 2010  
10 quadrennial. But --

11 THE COURT: It almost goes back full  
12 circle to where we started. Is this a particular  
13 area where we maybe should take you up on your  
14 formal request for a remand of at least this  
15 portion of the 2008 order -- this diversity order  
16 which accompanied the 2008 order?

17 MR. LEWIS: Well, I'm not quite sure I  
18 understand what parts going to -- you would have  
19 remand. I think our original suggestion was --

20 THE COURT: Well, possibly one of them  
21 would be that you reinstated the FSSR and I don't  
22 see any reasoning for it.

23 MR. LEWIS: And I guess the, that  
24 would be a question limited to the FSSR, though I

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1 will point out to your Honor we took the FSSR away,  
2 this court didn't like that, we reinstated it and  
3 now to be suggesting that --

4 THE COURT: Well, you took it away and  
5 there weren't any reasons given, so we said just  
6 give us reasons.

7 MR. LEWIS: Well, there were reasons,  
8 your Honor, it just was that they didn't discuss,  
9 this court's criticism in the last opinion, it was  
10 that they didn't discuss the impact on women and  
11 minorities.

12 THE COURT: Right. And also we  
13 dropped a footnote saying that the MMTC had about  
14 14 proposals. Those you did consider.

15 MR. LEWIS: Yes.

16 THE COURT: And you adopted about four  
17 of them, I think.

18 MR. LEWIS: And here I think the  
19 reason is the underlying basis, even for the FSSR,  
20 which underlay the original elimination of it,  
21 didn't seem to be appropriate. Had the --

22 THE COURT: I'm just saying from your  
23 perspective, what you said 16 months ago was that  
24 if you don't hold things in abeyance we suggest

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1 that you remand the 2008 order, might we, as to the  
2 diversity order, take you up on that, just remand  
3 it, you take it into account with regard to the  
4 2010 process and we go on.

5 MR. LEWIS: Well, I don't think  
6 there's any basis to remand the diversity order. I  
7 think that -- nobody really has -- I mean --

8 THE COURT: Well, one of them was that  
9 you're still, there's significant data that you  
10 don't have that you're in the process now of making  
11 a concerted effort to get.

12 MR. LEWIS: I don't understand any  
13 party to be challenging the diversity order on its  
14 merits, on the merits of the decisions of what, the  
15 decisions we took in that diversity order.

16 I also don't understand that there's  
17 really any --

18 THE COURT: I think the objection is  
19 that the diversity order is taking into account  
20 small businesses but not taking into account what  
21 you really need to do to make positive effects with  
22 respect to increased participation by women and  
23 minorities.

24 They're all going back to the Free

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1 Press information data that was given. One side  
2 reads it one way, one reads it the other, and it  
3 looks like there's not much change that's taken  
4 place over the last few years.

5 MR. LEWIS: Well, I don't think that's  
6 right. I think the diversity order did quite  
7 directly address the issue of whether or not the  
8 Commission could take race-conscious measures and  
9 cited Adarand as an obstacle to doing so.

10 I think it also explained that in  
11 taking these measures --

12 THE COURT: It's a balancing act. I  
13 mean you've got Adarand in '95, then '96 you've got  
14 what is it, 309(j) or something that says you are  
15 supposed to take into account, you've got three  
16 goals --

17 MR. LEWIS: Well, Adarand doesn't  
18 disappear because of 309(j), and indeed 309(j) has  
19 been limited --

20 THE COURT: But what I'm saying is,  
21 what you did, what Congress did in '96 was after  
22 Adarand came out. So they were obviously taking  
23 that into account. Maybe it makes life difficult  
24 for you.

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1 MR. LEWIS: Yes, it does, your Honor.

2 THE COURT: But if that's the case,  
3 why was the last Adarand study done ten years ago  
4 and not one year ago?

5 MR. LEWIS: One question is -- by the  
6 way, I do want to make sure your Honor understands,  
7 the diversity order explains that in focusing its  
8 attention on eligible entities, which are largely  
9 defined in terms of small businesses, it  
10 anticipated that that would remove obstacles to  
11 ownership by women and minorities, because as the  
12 D.C. Circuit recognized in the Omnipoint decision  
13 that ownership of -- women and minority owned  
14 businesses tend to be small businesses as well.

15 There's certainly work the Commission  
16 can still do in evaluating what further measures  
17 can be taken. But I don't think it's fair to say  
18 that the diversity order doesn't explain why the  
19 Commission addressed those proposals in terms of  
20 eligible entities. But I would --

21 THE COURT: Where in this diversity  
22 order did you analyze the effect of any of the  
23 rules promulgated in the 2008 accompanying order?

24 MR. LEWIS: Well, we didn't have --

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1 THE COURT: On minority and female  
2 ownership.

3 MR. LEWIS: Well, the orders were  
4 adopted at the same time. I guess it's fair to say  
5 that in the 2008 order itself, at various points  
6 the Commission explains, for example, why it's not  
7 going to tighten up the local radio rules. That  
8 was one argument that was made was that --

9 THE COURT: Where do you discuss the  
10 effects of the NBCO rule?

11 MR. LEWIS: The NBCO order --

12 THE COURT: I'm sorry, where in the  
13 diversity order do you discuss the effects of the  
14 NBCO rule?

15 MR. LEWIS: In footnote 202. In  
16 footnote 202 there was a proposal, as I understand,  
17 to, that the Citizen Petitioners had argued look,  
18 there are many minority owned businesses in the top  
19 20 markets. All you're going to do is allow them  
20 to be bought by newspapers, and that will have an  
21 adverse impact on minority ownership.

22 And the Commission explained look,  
23 we're not in the business of forbidding minority  
24 owners from selling --

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1 THE COURT: Footnote 202 is, in the  
2 diversity order says --

3 MR. LEWIS: No, not in the diversity  
4 order, your Honor, in the 2008 order.

5 THE COURT: Okay. I was going to say  
6 it says see 5 U.S.C. 604.

7 MR. LEWIS: I'm sorry?

8 THE COURT: It's just a cite to a  
9 federal statute.

10 MR. LEWIS: No. No. I think we're  
11 talking about two different orders.

12 THE COURT: Which order are you  
13 talking about?

14 MR. LEWIS: In the media ownership  
15 order, that is not the diversity order, JA-261.

16 THE COURT: So, okay. My question was  
17 where in the diversity order do you discuss the  
18 NBCO effect, rule, its effect on minorities and  
19 women? And you said --

20 MR. LEWIS: No, but it's in the NBCO  
21 rule discussion in the media ownership order,  
22 admittedly in a footnote. But this issue was  
23 raised in a specific way and the Commission  
24 specifically responded to it. It said --

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1 THE COURT: Footnote 202 says "Without  
2 submitting the relevant data MAP asserts that  
3 nearly half the television stations owned by people  
4 of color in the top 20 markets, and none is rated  
5 among the top four, thus MAPA argues that these  
6 stations will be acquisition targets and will have  
7 a negative impact on minority ownership. We note  
8 that our rule revisions will not force any owner to  
9 sell his or her station. Further, although we  
10 believe it is appropriate to adopt measures to  
11 encourage minority ownership, as we do in the  
12 diversity order that we adopt today, we do not  
13 think it is appropriate to deny minority owners the  
14 opportunity to sell their stations in accordance  
15 with otherwise applicable Commission rules."

16 MR. LEWIS: Right.

17 THE COURT: That's the extent of it.

18 MR. LEWIS: I'm sorry?

19 THE COURT: That's the whole footnote.

20 MR. LEWIS: Well, that was the  
21 objection and the specific response to it. The  
22 objection was you've -- to the extent you've  
23 loosened newspaper broadcast cross-ownership, all  
24 you've done is allowed the minority owners who own

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1 businesses that are subject to acquisition in the  
2 top 20 markets, to sell themselves out of the  
3 business, and then there will be fewer minority  
4 owners.

5 And the Commission basically said  
6 look, we're not going to recalibrate this rule just  
7 simply, and not lift it, simply to forbid minority  
8 owners to have the opportunity to sell their  
9 businesses.

10 That's not -- the Commission quite  
11 reasonably decided, however one wanted to promote  
12 minority ownership, it wasn't appropriate to lock  
13 existing minority owners into their businesses.

14 And that's the significance of  
15 footnote 202. But your Honor asked whether the  
16 Commission had addressed the impact on the actual  
17 ownership rules. That's one area where the  
18 Commission --

19 THE COURT: How about the duopoly  
20 rule?

21 MR. LEWIS: The television ownership  
22 rule?

23 THE COURT: Yes, the effect of the  
24 duopoly rule on women and minorities?

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1 MR. LEWIS: I think that it doesn't  
2 specifically address minority ownership. But the  
3 Commission quite clearly explained that the  
4 proposal presumably to promote minority ownership  
5 would be to tighten the cap, make, make these,  
6 divest these duopoly positions, free up stations  
7 that could perhaps be owned by minority and women-  
8 owned businesses.

9 And the Commission did specifically  
10 say, look, we think this calibration is correct for  
11 important reasons that would, it seems implicit in  
12 the order would not have changed whether the  
13 Commission had expressly said anything about  
14 minority ownership.

15 After all, to put this in context, the  
16 Commission had, it's not as if the issue escaped  
17 the Commission. There was a diversity order  
18 adopted on the very same day.

19 THE COURT: Let me, again coming back  
20 to maybe where we started. If there are problems  
21 in terms of, or at least speaking only for myself,  
22 perceived problems with respect to how you  
23 addressed women and minorities, the effect of the  
24 other rules on women and minorities when you

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1 adopted the diversity order, and you have a  
2 possible remedy which you had suggested 16 months  
3 ago, which is, okay, remand for purposes of  
4 considering, reconsidering, doesn't that get you  
5 out of Dodge? Isn't that the easy way out for you?

6 MR. LEWIS: Somehow I think I'm  
7 getting into Dodge. But let me say this.

8 THE COURT: I thought it was a  
9 softball.

10 MR. LEWIS: Our suggestion to the  
11 court that it remand the proceeding to the  
12 Commission was meant to avoid the very proceedings  
13 now that we've gone through - briefing and  
14 argument.

15 I don't think we meant to suggest that  
16 there was any infirmity in the media ownership  
17 order because the diversity order had been issued  
18 as a separate order rather than having, instead of  
19 a 200-page order --

20 THE COURT: And I'm not particularly  
21 -- I mean you dealt with it, you have a separate  
22 order, whether separate or included --

23 MR. LEWIS: It should be the  
24 Commission's discretion.

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1 THE COURT: I'm not here -- that  
2 doesn't bother me. The question is did you deal,  
3 did you give a rationale for why you went back to  
4 what previously existed, and with the new state of  
5 cross-ownership rules that you put into place in  
6 connection with 2008, where did you give a full  
7 analysis of its effect on women and minorities?

8 MR. LEWIS: Well, let me say this. It  
9 does seem to me that on the question of whether or  
10 not the Commission should have, did a full analysis  
11 or did an analysis of the impact of minority  
12 ownership, I think the Commission explained in the  
13 media ownership rules exactly why it made the  
14 choices it made. And it also had in front of it,  
15 in footnote 202, there are other places in the  
16 order as well that, where the Commission in the  
17 media ownership order where the Commission  
18 describes the impact on minority ownership, the  
19 FSSR, the AM sub caps, and the fact there was a  
20 diversity order that it had issued at the same  
21 time.

22 The Commission was well aware of the  
23 proposals to promote minority ownership. And the  
24 order makes, I think, as clear as possible that

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1 when the Commission was balancing competition,  
2 localism and diversity, diversity also including  
3 minority ownership, as it explained in the 2003  
4 order, that here is where it decided the  
5 calibrations should be.

6 And there is no argument that -- I  
7 don't think the Citizens Petitioners are making any  
8 argument that the newspaper broadcast cross-  
9 ownership rule at this point should be remanded  
10 because of the failure to discuss minority  
11 ownership.

12 But even if they are, even -- the fact  
13 is I think that media ownership rule, media  
14 ownership order sufficiently discusses that  
15 question as well, it's an embedded question.

16 THE COURT: But a lot of what was in  
17 the diversity order, including the definition of  
18 eligible entity, relates to small businesses as  
19 defined in the Small Business Act.

20 Where is there something that shows  
21 the connection of that, so if you do something  
22 positive with respect to small businesses the  
23 effect will be positive with regard to the  
24 increased participation of women and minorities?

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1 MR. LEWIS: I think the evidence is,  
2 which I don't think anybody disputes is on the  
3 whole women and minority owned businesses tend to  
4 be smaller businesses. And so -- and look, the  
5 overhang of Adarand is not chopped liver.

6 THE COURT: And maybe that's true, but  
7 the next step is okay, is there increased  
8 participation. And the Free Press data seemed to  
9 show that there really hasn't been any increased  
10 participation of women and minorities as a result  
11 of what went into place with respect to small  
12 businesses.

13 MR. LEWIS: But if there's more the  
14 Commission can do, then certainly in the 2010  
15 quadrennial it can address that.

16 THE COURT: All right.

17 MR. LEWIS: I don't think that the  
18 fact that it made quite clear how it would be  
19 making its cuts here, in light, and knowing full  
20 well about the various proposals to improve  
21 minority ownership, that that can be taken as the  
22 Commission ignoring the minority ownership issue.

23 This issue comes up both, is discussed  
24 both in the ownership order and in the diversity

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1 order, and the diversity order was issued at the  
2 same time as the ownership order.

3 This wasn't some issue where the  
4 Commission dropped the ball on.

5 THE COURT: I wasn't saying that. I'm  
6 just trying to -- my question is, when you have,  
7 you're dealing with small businesses, where does it  
8 come out that helping small businesses necessarily  
9 helps, positively, minorities?

10 MR. LEWIS: I think it comes from that  
11 general proposition of the evidence. But you're  
12 right, your Honor, that with improved evidence in  
13 the 323 data the Commission may be able to make  
14 even more refined decisions.

15 THE COURT: Okay. Thank you.

16 THE COURT: Mr. Lewis, thank you very  
17 much.

18 MR. LEWIS: Thank you.

19 THE COURT: Mr. Manishin.

20 MR. MANISHIN: Thank you, your Honor.

21 THE COURT: How are you.

22 MR. MANISHIN: Good morning.

23 THE COURT: Good morning.

24 MR. MANISHIN: I guess it's good