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Summary

Time Warner Cable ("Time Warner") herein comments on the implementation of the EEO provisions in the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"). Initially, Time Warner supports the NPRM's proposal to collect employment data for the six new job categories in a separate new section of FCC Form 395-A. By maintaining the existing format modeled after the standard EEO-1 form, the Commission will be able to make ready comparisons with past reports and with employment reports filed by other industries.

Time Warner also supports the Commission's decision not to reexamine the definitions of the existing job categories, which have proven to be generally adequate, but believes the Commission should revise its proposed definition of "Corporate Officer" because it is too broad and imprecise. As an alternative, Time Warner proposes that the Commission adopt the definition of "officer" under federal securities law.

The NPRM is correct that the Cable Act's reference to "qualified" minorities and women does not require the Commission to adopt a new "competency-based" analysis. This statutory language does not refer to the Commission's analysis at all, but rather the way in which a cable operator is required to report information. Indeed, the Cable Act's legislative history makes clear that Congress did not intend to change the Commission's method of analysis.

Time Warner submits that the proposal to revise FCC Form 395-A, to require a detailed narrative concerning recruitment efforts to fill positions in the six new categories, would be overly burdensome. Moreover, this requirement would unfairly single out cable operators in comparison to the reporting requirements imposed on television broadcast licensees. The proposed narrative would also be entirely unnecessary because of the existing EEO reporting requirements and certification procedure.

The Commission should provide cable entities with statistical data for each of the new categories, to the maximum extent possible, for purposes of more meaningful self-assessment. In the past, the general nature of the standard EEO-1 job categories, and significant differences between the types of jobs found in the cable industry and overall labor force within a particular category, have skewed comparisons.

Finally, Time Warner is taking this opportunity to request that the Commission initiate negotiations towards reaching a Memorandum of Understanding with the U.S. Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP"), to minimize the burden of complying with two sets of overlapping federal EEO requirements on cable operators that also constitute federal contractors because of their service to federal installations.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission

Washington, D.C. 20554

In the Matter of)
)
Implementation of Section 22)
of the Cable Television Consumer) MM Docket No. 92-261
Protection and Competition Act)
of 1992)
)
Equal Employment Opportunities)
)
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)
To: The Commission

COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner") respectfully submits these comments in response to the Notice of Proposed Rule Making, FCC 92-539, released January 5, 1993 ("NPRM"), to implement the equal employment opportunity ("EEO") provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"). Time Warner is a division of Time Warner Entertainment Company, L.P. and the second-largest multiple cable system operator in the United States. Time Warner and its affiliates serve more than six million basic subscribers on over 200 systems.

As detailed herein, the Commission, in revising FCC Form 395-A and in adopting rules to implement the Cable Act's EEO requirements, should provide cable entities with as much guidance as possible, minimize the associated regulatory burdens, and utilize existing procedures as much as possible. Time Warner also proposes herein that the Commission take steps to address the redundant federal EEO requirement imposed upon cable operators that provide service to federal installations.

1. Modification of FCC Form 395-A.

Time Warner supports the NPRM's proposal to collect employment profile, recruitment, promotion and hiring data for the six new job categories in a separate new section of FCC Form 395-A. By maintaining the existing format of what is now Section V.A., modeled after the standard EEO-1 form, the Commission will be able to make ready comparisons with past reports and with employment reports filed by other industries, as the NPRM recognizes.¹ Furthermore, in order to provide cable operators with as much guidance as possible, the Commission's Report and Order in this proceeding should affirm that the six new categories fall within the existing Officials and Managers category in the standard EEO-1 format. This categorization is consistent with the statutory

¹NPRM at ¶13.

directive that the new categories reflect "principal decision-makers" with "supervisory authority."²

2. Definitions of Job Categories.

Time Warner supports the Commission's decision not to re-examine the definitions of the existing job categories at this time. As the NPRM observes, these definitions have proven to be generally adequate.³ The Commission should, however, revise its proposed definition of "Corporate Officer" as any "employee with official authorization to represent the company in a fiduciary capacity."⁴ The proposed definition is overly broad and imprecise, because any number of employees who are not commonly thought of as corporate officers may be authorized to act in a fiduciary capacity with respect to a particular matter at one time or another. For example, a staff attorney working in-house may act in a fiduciary capacity with respect to a particular lawsuit, negotiation, or proceeding, yet hold no office. The proposed definition would thus exceed the Cable Act's requirement that the Commission define the new job categories to include only "principal decision-makers" with "supervisory authority."

As an alternative, Time Warner proposes that the Commission adopt the definition of "officer" under federal securities law:

²47 U.S.C. Sec. 554(d)(3)(B); NPRM at ¶13.

³NPRM at ¶14.

⁴Id. at Appendix H (proposed Section 76.77(d)(1)).

a president, vice president, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, and any person routinely performing corresponding functions with respect to any organization whether incorporated or unincorporated.⁵

The SEC definition is specific enough to provide meaningful guidance to cable operators and encompass only those officials with true managerial functions.

3. Statutory Reference To "Qualified" Minorities And Women.

With regard to the annual employment reports filed by cable entities, the Cable Act states that the "Commission shall prescribe the method by which entities shall be required to compute and report the number of minorities and women in the job categories listed . . . in proportion to the total number of qualified minorities and women in the relevant labor market."⁶ The NPRM states the Commission's belief that this reference to "qualified" minorities and women does not require it to adopt a new "competency-based" analysis. Time Warner agrees.

Initially, the language quoted by the NPRM does not refer to the Commission's analysis at all, but rather the way in which a cable operator is required to report information. Indeed, with regard to the Commission's analysis, the legislative history of the Cable Act makes clear that "[t]he method for comparing the

⁵17 C.F.R. Sec. 230.405.

⁶47 U.S.C. Sec. 554(d)(3)(B).

composition of the cable operator's workforce with that of the relevant labor market has not been changed . . ."⁷

Nor could Congress have intended for the Commission to provide cable entities, or for cable entities to themselves calculate, data concerning the availability of "qualified" minorities and women rather than minorities and women generally. First, Congress would have announced such a radical break from current practices more clearly, and defined the meaning of "qualified." Second, even if such a subjective calculation could be made, it would be an intolerable burden on either the Commission or cable entity each year. Third, such an interpretation would render the statutory EEO provisions inconsistent. Pursuant to Section 634(d)(2) of the Communications Act, the FCC rules require a cable entity to evaluate its employment profile and job turnover against the availability of "minorities and women in its franchise area" without reference to their qualifications. The newly-amended Section 634(d)(3) requires that the annual employment reports enable the Commission "to evaluate the efforts of entities to comply with the provisions of paragraph (2) of this subsection."⁸ Finally, the provision of data for only a portion of the relevant labor force would be inconsistent

⁷House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong. 2d Sess. at 112.

⁸47 U.S.C. Sec. 554(d)(3)(B).

with the Commission's current processing guidelines, which Congress did not intend to alter.⁹

4. Submission of Recruitment Information.

Section 634(d)(3) of the Communications Act states that the annual employment report filed by cable entities "shall include information on hiring, promotion, and recruitment practices necessary for the Commission to evaluate the efforts of entities to comply with the provisions of paragraph (2) of this subsection."¹⁰ Section 634(d)(2) prescribes the contents of the FCC's EEO rules. Apparently pursuant to this provision, the NPRM proposes to revise FCC Form 395-A to require a cable entity to submit, every year, a detailed narrative explaining, for each position within the six new job categories filled by a new hire, the "specific recruitment efforts undertaken," including every recruitment source contacted; the number of referrals received, applicants received and applicants interviewed (indicating their sex and minority status); and the referral source of each successful candidate.¹¹

⁹Although Congress did not intend the FCC or cable entity to calculate data for "qualified" minorities or women in connection with the annual employment report, a cable entity, if subject to investigation, should clearly be able to demonstrate the impact on its recruitment efforts or work force of a lack of qualified candidates. See Cable Communications Policy Act Rules, 58 RR 2d 1572, 1594 (1985) ("Cable EEO Rules").

¹⁰47 U.S.C. Sec. 554(d)(3)(B).

¹¹NPRM at Appendix G.

Time Warner submits that the proposed narrative statement would be overly burdensome, unfair, and unnecessary. Initially, it would be burdensome to require a cable entity to detail, every year, virtually every step taken pursuant to its EEO program when a job opening arose in one of the new categories. The requirement would also single out cable entities unfairly. By comparison, television broadcasters need only submit, every five years with their renewal application, examples of media, educational institutions, and minority and women's organizations contacted, and the overall number of minorities and women referred by each example during the most recent year.¹² Moreover, although the Cable Act mandates a mid-term review of television broadcasters' "employment practices," the NPRM proposes to review only a station's employment profile.

Significantly, the proposed narrative would also be entirely unnecessary for the Commission to evaluate compliance with its EEO rules. Time Warner submits that the existing EEO reporting requirements and certification procedure will serve this statutory goal well.

First, Section III of existing Form 395-A requires a cable entity to report whether or not it takes a number of very specific steps necessary to comply with the FCC EEO rules. If an entity cannot answer any question "yes," it must provide a detailed written explanation. In adopting this procedure in

¹²NPRM at Appendix D (FCC Form 396).

1985, the Commission reasoned that it would "provide us with the necessary data to fulfill the certification requirement of the Cable Act without being overly burdensome on cable operators."¹³ The Commission rejected at that time a proposal that it require cable entities to submit detailed recruitment information, instead incorporating recruitment activity into the list of questions.¹⁴ To the extent these questions have proven inadequate -- and there is no evidence that they have -- additional items could be added to the form.

Furthermore, if the Commission finds that a cable entity's EEO record or practices do not satisfy FCC requirements in its annual review, it will request additional information.¹⁵ Finally, the Commission is required by law to investigate the employment practices of cable entities at least once every five years to determine their compliance with its EEO rules. During the year in which a cable entity comes under investigation, it must file a Supplemental Investigation Sheet, containing information "concerning the cable entity's EEO practices and its conformance with the EEO requirements of the Cable Act and Part 76 of our rules."¹⁶ If this investigation should reveal

¹³Cable EEO Rules, 58 RR 2d at 1589.

¹⁴Id.

¹⁵Id. at 1594.

¹⁶Id. at 1597.

substantial deviation from EEO requirements, the Commission may conduct an on-site audit of the cable entity's EEO practices.¹⁷

Time Warner submits that these existing, established, and familiar procedures would be the most appropriate means of addressing the statutory requirements with regard to the new job categories as well as the existing classifications.

5. Provision of Data for the New Job Categories.

The Commission currently provides cable entities with labor force data for each of the existing categories and for the overall labor force, to assist cable entities in their self-assessment. The NPRM seeks comment on whether the Commission must now provide similar data for each of the six new job categories. It proposes not to do so, but rather to incorporate the new categories into the "upper-four" evaluation.¹⁸

Section 634(d)(3) of the Communications Act, as amended, does not specifically direct cable entities to submit the number of minorities and women in the labor market for each category. Rather, it provides the Commission with discretion to prescribe the method by which entities compute and report the number of minorities and women in their work force in the job categories listed in proportion to their numbers in the relevant labor market.¹⁹

¹⁷Id. at 1597-98.

¹⁸NPRM at ¶16.

¹⁹47 U.S.C. Sec. 554(d)(3)(B).

Nevertheless, Time Warner submits that the Commission should provide cable entities with statistical data for each of the new categories, to the maximum extent possible, for purposes of more meaningful self-assessment. In the past, the general nature of the standard EEO-1 job categories, and significant differences between the types of jobs found in the cable industry and overall labor force within a particular category, have skewed comparisons. For example, within the Technicians category, the cable industry employs a significant number of electronic technicians, a field traditionally dominated by men. Within that same category, data for the overall labor market will reflect a wider variety of technical fields in which women have traditionally been better represented such as medical and scientific technicians. In the Sales Workers category, cable industry statistics reflect the difficulty in employing women to canvas neighborhoods at night, while the overall existing labor market data will reflect the prevalence of women in sales generally.

While the Commission need not and should not apply its processing guidelines (i.e., 50 or 25 percent parity) to particular job categories, the availability of information for six subcategories could help to explain any such statistical distortions within the overall Officials and Managers job category. By recognizing such distortions, the Commission's EEO analysis would better serve the Congressional purposes underlying

the expanded categories, to improve the Commission's ability to monitor employment trends and evaluate the effectiveness of its rules and enforcement practices.²⁰

The Commission could provide such data based on equivalent job classifications for which the Census Bureau maintains information. For example, the Census Bureau's 1990 Occupational Classification system included specific managerial categories such as "financial managers" and "supervisors and proprietors, sales occupations," as well as more general managerial positions.

6. Proposed Memorandum of Understanding.

Finally, Time Warner is taking this opportunity to make a proposal which, while not specifically related to issues raised in the NPRM, affects a number of cable system operators. Time Warner requests that the Commission initiate negotiations towards reaching a Memorandum of Understanding with the U.S. Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP"), to minimize the burden of complying with two sets of overlapping federal EEO requirements on cable operators that also constitute federal contractors.²¹

Under federal law, a cable operator that provides service to a military base or other federal installation is considered to be

²⁰NPRM at ¶12.

²¹To the extent necessary, Time Warner requests that this portion of its comments be considered a separate Petition for Rulemaking.

a federal contractor. OFCCP regulations require a nonconstruction government contractor such as a cable operator, with 50 or more employees and a contract for \$50,000 or more, to develop a written affirmative action compliance program within 120 days of commencement of a federal contract.²² This program must contain a breakdown of employees by job title, showing their gender, race and ethnic status; an analysis of job groups and whether minorities and women are underutilized in such groups; goals and timetables for addressing deficiencies; and procedures for disseminating the program and measuring its effectiveness.²³ This program must be updated, summarized in a prescribed form, and submitted to the OFCCP annually.²⁴ The OFCCP may request data from the contractor supporting its program.²⁵

The EEO regulations governing federal contractors impose a number of elements which overlap with Communications Act requirements: development of an affirmative action program, dissemination of policy, work force reporting requirements, analysis of work force and labor market data, and evaluation of the program's effectiveness. Accordingly, cable operators that also qualify as government contractors face duplicative

²²41 C.F.R. Secs. 60-1.40, 60-2.1. A cable operator that provides service through a cluster of systems is likely to fall within the minimum requirements.

²³41 C.F.R. Sec. 60-2.11-2.13.

²⁴41 C.F.R. Sec. 60-2.14.

²⁵41 C.F.R. Sec. 60-2.12(n).

regulatory burdens in implementing, administering and analyzing their EEO programs. Under these circumstances, Time Warner submits that a Memorandum of Understanding between the agencies could help to substantially eliminate such regulatory burdens, thus freeing personnel and resources to be concentrated on the operator's EEO program itself.

For example, the agencies might agree that the OFCCP filing requirements be waived for a cable operator subject to FCC EEO filing requirements. The OFCCP might also agree to allow the Commission primary responsibility for reviewing an operator's employment and compliance data each year. Such cooperation would conserve the resources not only of cable operators that are federal contractors, but of the federal agencies themselves.

The Commission has effectively used another such interagency agreement to conserve its resources. In 1978, it entered a Memorandum of Understanding with the Equal Employment Opportunity Commission ("EEOC") to create a joint system for processing EEO complaints to replace their intermittent and informal collaboration. Pursuant to their agreement, if the Commission receives a complaint falling within both agencies' jurisdiction, it will refer the matter to the EEOC for processing. If the EEOC receives such a complaint, it will process the matter pursuant to its normal procedures.²⁶

²⁶FCC-EEOC Memorandum of Understanding, 43 RR 2d 1505 (1978), review denied, NAB v. FCC, No. 78-2038, 46 RR 2d 1175 (D.C. Cir. 1979).

The OFCCP has also entered such an interagency agreement. In 1977, the United States Court of Appeals for the Fourth Circuit upheld provisions of a Memorandum of Understanding between the OFCCP and EEOC, pursuant to which the agencies agreed to exchange information concerning contractors' compliance with antidiscrimination laws, and complaints filed with the OFCCP were deemed to be filed with the EEOC.²⁷

7. Conclusion.

Time Warner respectfully requests that the Commission consider the comments made herein in order to provide cable entities with sufficient guidance, minimize regulatory burdens, and maximize the use of existing procedures in implementing the Cable Act's EEO provisions.

Respectfully submitted,

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²⁷Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663 (4th Cir. 1977), cert. denied, 435 U.S. 995 (1978).