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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEB 17 1993

In the Matter of)
)
Implementation of Section 22)
of the Cable Television)
Consumer Protection and)
Competition Act of 1992:)
Equal Employment Opportunities)
)
Petition for Further Rulemaking)
on Equal Employment Opportunities)
in Cable Television and)
Broadcasting)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 92-261

RM-_____

TO THE COMMISSION

**COMMENTS AND PETITION FOR FURTHER
RULEMAKING OF THE NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF COLORED PEOPLE**

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SUMMARY

With 40 years of broadcast EEO experience behind it, the NAACP urges the Commission to adopt 30 specific reforms to strengthen broadcast and cable EEO enforcement. While some are germane to this proceeding, others are propounded as a petition for further rulemaking.

Among the most significant NAACP recommendations are:

- Strengthening the EEO Program form (Form 396) so that it includes data on the racial composition of the hiring pool and the nature of recruitment contacts made for each job opening. The broadcast Form 396 should seek information already collected for cable systems, including headquarters compliance data and a report on efforts to do business with minority vendors.
- Facilitating public review of cable EEO on a system by system basis.
- Broadcast EEO investigations conducted by the Commission's staff on its own motion.
- EEO investigations which include interviews with likely discrimination victims.
- Review of the EEO performance of group owners and of local markets.
- Far more expeditious resolution of EEO cases, which now require three years before a Commission decision issues.
- Narrowing of the "zone of reasonableness" to 80% of parity.
- Acceptance of statistical tests used routinely in Title VII litigation.
- Independent review of strong discrimination allegations before issuance of a final EEOC or judicial order.
- Far more routine hearing designations of EEO cases, including affirmative action cases.
- Much stronger forfeitures, and creative sanctions including goals and timetables and positive incentives to reward compliance.

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**COMMENTS AND PETITION FOR FURTHER
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The National Association for the Advancement of Colored People ("NAACP") respectfully submits these Comments on the Commission's NPRM, FCC 92-539 (released January 5, 1993). To the extent that the Commission deems any of the NAACP's recommendations to be beyond the scope of this docket, the NAACP respectfully requests the Commission to assign those recommendations a rulemaking number or numbers and to solicit further public comment pursuant to 47 CFR §1.403. See Settlement Agreements (MM Docket No. 90-263), 6 FCC Rcd 2901, 2903 ¶18 (1991) (treating civil rights organizations' comments as proposals for further rulemaking).

I. **THE NAACP'S INTEREST IN MASS MEDIA EEO**

With 2200 branches, college chapters and youth councils, and with nearly 500,000 dues paying members in every state and several foreign countries, the NAACP is the largest civil rights organization in the United States. Since 1955, it has participated in hundreds of rulemaking proceedings and cases at the Commission, many of which bear its name.

The NAACP has a particularly intense interest in this docket because of the NAACP's special role in mass media EEO enforcement. Its Florida State Conference began challenging broadcast station license renewals in 1966; that initiative was expanded nationally in 1981. The strength and vibrancy of the FCC's EEO enforcement program today is due in large part to the aggressive role the NAACP's Executive Director, Dr. Benjamin L. Hooks, as the first Black FCC Commissioner, serving from 1972 to 1977. Cases which were developed by the NAACP have comprised virtually all of the litigation program supervised by the FCC's EEO staff.

II. THE COMMISSION'S CURRENT EEO REGULATORY PROGRAM IN CONTEXT

The Federal Communications Commission is the only federal administrative agency which requires its licensees and franchisees to practice affirmative action. This unique policy, developed in 1969, applies to radio and television and community antenna relay service (CARS) license renewal, transfer and assignment applications.

Widespread race discrimination by radio and television stations in Florida -- and a 1966 complaint by the Florida State Conference of the NAACP -- first motivated the Commission to make nondiscrimination a condition of FCC licensing. In 1967, the Office of Communication of the United Church of Christ and other UCC bodies petitioned the Commission to adopt what became its EEO rule. Thirty five organizations, including the NAACP, filed supportive comments. Only one, the National Association of

Broadcasters (NAB), opposed the petition. Commissioners Cox and Johnson formally proposed an EEO enforcement program in Florida Renewals, 7 FCC2d 122 (1967).

Until about the middle 1970's, the Commission openly tolerated and ratified discriminatory actions by its licensees. It routinely provided broadcast licenses to colleges and universities which were totally segregated (e.g., WBKY-FM, University of Kentucky, licensed in 1941; WUNC-FM, University of North Carolina, licensed in 1952; KUT-FM, University of Texas, licensed in 1957, among many others). In this way, the Commission endorsed and facilitated segregated broadcast education, thereby giving Whites a substantial headstart in access to broadcast employment.

Southland Television Co., 10 RR 699 (decided 1955, reported 1957), recon denied, 20 FCC 159 (1955) illustrates the Commission's racial policies at mid-century. The Commission had before it a Shreveport TV station applicant who owned segregated movie theatres. This man had built his movie theatres without balconies to circumvent a Louisiana law which allowing the admission of Blacks as long as they sat in the balconies. He even owned a segregated drive-in theater; all the other drive-ins were integrated (at least as to admission, although not as to the occupants of the automobiles). The Commission held that it lacked evidence that "any Louisiana theatres admit Negroes to the first floor" of theatres, nor any evidence that "such admission would be legal under the laws of that state." Id., 10 RR2d at 750. Thus did the Commission give full faith and credit to state segregation laws and to broadcasters' deliberate efforts to evade even the weakest state laws permitting some integration.

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When faced with broadcast cases arising out of the civil rights movement, the FCC's decisions reflected the timidity and insensitivity of the national administration. In Broward County Broadcasting, 1 RR2d 294, 296 (1963), the Commission set for hearing the license of a small Florida station which proposed to address a small portion of its programming to the Black community. The reason: local White citizens had complained that the station was licensed to an all-White town which didn't need that type of music. When the station dropped the programming, the Commission quietly dropped the charges.

Two years later, in The Columbus Broadcasting Company, Inc., 40 FCC 641 (1965), the Commission was faced with a radio licensee who had used his station to help incite the riot which took place at the University of Mississippi when James Meredith attempted to enroll. The Commission merely admonished the station.

The federal courts soon became impatient with the FCC's racist policies. In the landmark case of Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) ("UCC I") the Court of Appeals ordered the Commission to hold a hearing on the license renewal of a Jackson, Mississippi station, WLBT-TV, which only broadcast the White Citizens Council/Ku Klux Klan viewpoint on racial matters, and which went so far as to censor its own NBC network news feeds with a "Sorry, Cable Trouble" sign when NAACP General Counsel Thurgood Marshall was being interviewed. This case was highly significant because it upheld, for the first time, the principle that individual citizens, because of their investment in television and radio receivers, have standing to challenge television and radio licenses.

After a very one-sided hearing in which the Commission renewed WLBT-TV's license again, the Court ordered the Commission to deny the license renewal. The Court has never before or since taken such an action, but this time it held the administrative record to be "beyond repair." Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) ("UCC II").

The FCC's new antidiscrimination policy was applied haltingly and sporadically at first. In Chapman Television and Radio Co., 24 FCC2d 282 (1970), the Commission had before it an applicant for Birmingham, Alabama TV Channel 21. That applicant, a man who owned part of the stock in a Birmingham cemetery, had participated in the cemetery's decision to exclude Blacks. The cemetery's policy came to light when the cemetery turned away the body of a Black Vietnam war hero. Yet the Commission found "extenuating circumstances" in the applicant's claim that the cemetery would have been sued by White cemetery plot owners.^{1/} The Commission ordered a hearing only into why the applicant had covered the matter up, not into whether a practicing segregationist had the moral character to be a federal licensee. Even the cover-up allegations were thrown out by the Hearing Examiner, who held that "in today's climate it is not at all an oddity for political leadership to appear to buckle before irresponsible and only half true racism charges." Chapman Radio and Television Co., 21 RR2d 887, 895 (Examiner 1971).

^{1/} This was a classic red herring: twenty-two years earlier, the Supreme Court had ruled that restrictive covenants were unenforcable. Hurd v. Hodge, 334 U.S. 24 (1948).

Chapman was not an anachronism. Long before minorities owned or applied for broadcast licenses, the Commission openly discriminated on the basis of national origin. In 1938, in what would now be seen as a clear violation of the First Amendment, the Commission rejected the only applicant for a radio license, holding that "the need for equitable distribution of [radio] facilities throughout the country is too great to grant broadcast station licenses for the purpose of rendering service to such a limited group [of speakers of foreign languages] ... the emphasis placed by this applicant upon making available his facilities to restricted groups of the public does not indicate that the service of the proposed station would be in the public interest." Voice of Detroit, Inc., 6 FCC 363, 372-73 (1938). See also Chicago Broadcasting Ass'n., 3 FCC 277, 280 (1936), Voice of Brooklyn, 8 FCC 230, 248 (1940).

These pre-World War II cases may reflect a certain anti-Semitism (inasmuch as the programming was largely intended for Jewish immigrants who had fled Germany and Poland). It surely reflected a climate in which none but WASPs could hope for access to the airwaves.

The Kerner Report (1968) recognized the mass media's failure to foster interracial communications. The report charged racism in the media with helping cause the 1960s' civil disturbances. Most significant was the Report's findings of lack of sensitivity of the White press:

The media report and write from the standpoint of a white man's world. The ills of the ghetto, the difficulties of life there, the Negro's burning sense of grievance, are seldom conveyed. Slightings and indignities are part of the Negro's daily life, and many of them come from what he calls the "white press" - a press that repeatedly, if unconsciously, reflects the biases, the paternalism, the indifference of white America. This may be understandable, but it is not excusable in an institution that has the mission to inform the whole of our society.

Id. at 203.

Citing the Kerner findings, the Commission recognized a nexus between EEO and program service and held that discrimination in broadcasting is unlawful. Nondiscrimination in Broadcasting, 13 FCC2d 766 (1968) ("Nondiscrimination in Broadcasting"). The Commission mailed Chapter 15 of Kerner Report to every broadcast licensee. In deciding that its own EEO rule was needed to regulate broadcasters, even though the EEOC has been created to enforce Title VII, the Commission cited with approval this statement by the Department of Justice:

Because of the enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees. The provision of equal opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries.

Nondiscrimination in Broadcasting, supra, 13 FCC2d at 771.

Statistics are less of a factor in FCC EEO litigation than they were in the early days of FCC EEO regulation. In 1987, the FCC announced that it will review the EEO performance of licensees, even though they might operate above the statistical processing criteria, if their EEO programs are deficient. Broadcast EEO, 2 FCC Rcd 3967, 3973-3974 ¶¶44-50 (1987) ("Broadcast EEO"). Thus, a broadcaster with a meaningful EEO program will usually receive a routine license renewal even if the program has been unsuccessful in producing minority employees. Yet there are limits to the Commission's willingness to look the other way when an EEO program produces no results. A broadcaster may fail to use minority organizations, schools and media to publicize job openings as long as its use of nonminority job referral sources produces minority job candidates. However, if an EEO program which does not propose minority recruitment sources is not successful, the license may be in jeopardy. South Carolina Renewals, 5 FCC Rcd 1704, 1710 n. 8 (1990).

The heart of broadcast EEO enforcement at the Commission is the license renewal, transfer and assignment process. The information available to members of the public wishing to scrutinize an applicant's performance consists of its annual employment reports (Form 395) and the EEO Program associated with its license renewal, assignment or transfer application (Form 396).

Petitions to deny, filed pursuant to 47 CFR §73.3584, are initially reviewed by the EEO Branch of the FCC's Mass Media Bureau. If the staff cannot make an affirmative finding that a grant of the application would serve the public interest, it must

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refer the application to the full Commission. See 47 CFR 50.283. Thereupon, the Commission generally must set the application for hearing. See 47 U.S.C. §309.

The Cable EEO rules, in their present form, were adopted in response to the Cable Communications Policy Act of 1984. Cable EEO, 102 FCC2d 562, 58 RR2d 1572 (1985). Those rules provide essentially the same substantive EEO requirements applicable to broadcasting, with some enhancements -- notably the requirement that cablecasters make efforts to transact business with minority and female entrepreneurs (47 CFR §76.75(e) (implementing 47 U.S.C. §554(d)(2)(E)) and EEO enforcement at headquarters units (see 47 CFR §76.71(c)).

Cable EEO enforcement is largely conducted without the public involvement characteristic of broadcast EEO enforcement. Complaints, similar to a petition to deny, may be filed against the renewal of CARS licenses or other auxiliary services used by cable companies. 47 CFR §76.7. Since the Cable EEO rules were adopted in 1985, there has been no reported case involving a public complaint. Not one cable system has been sanctioned for an EEO violation, and only one cable MSO headquarters has been sanctioned. Prime Cable (NAL), 4 FCC Rcd 1696 (1989) and Prime Cable (Forfeiture Order), 5 FCC Rcd 4590 (1990) ("Prime") (issuing an \$18,000 fine for three successive years during which the unit "did not evaluate its turnover against the availability of minorities and women; the unit did not have a program to ensure that promotions were made in a non-discriminatory manner; the unit did not encourage minority and female entrepreneurs to conduct business with all parts of its operation; and the unit did not analyze the

results of its EEO efforts.") It should be noted that Prime Cable has nearly 700,000 subscribers. Broadcasting/Cable Marketplace 1992, p. C-16 At market rates just for basic cable (approximately \$25 per month), just 60 subscribers' one-year revenues from basic service would have been needed to pay this fine.

The past twelve years have witnessed an unfortunate backpedaling and abstention to regulate in mass media EEO. Twenty-four years after the adoption of the broadcast EEO rule and 20 years after adoption of former 47 CFR §76.311, the original cable EEO rule, extensive discrimination still goes uncorrected. Even repeated noncompliance with the rules is subject only to very minor sanctions or admonishments.

This is unfortunate because of the special place EEO has assumed, especially in broadcast regulation. While the Commission must protect media employees and job applicants victimized by discrimination, Commission EEO regulation should do more than simply duplicate Title VII protections and EEOC procedures. It should also insure that the diversity of programming services provided by the mass media will serve the public interest. NAACP v. FCC, 425 U.S. 662, 670 n. 7 (1976).

Since its last systematic look at broadcast EEO, the Commission has extensively deregulated in every other substantive area: postcard renewals, ascertainment and program content percentage standards, the Fairness Doctrine, five year TV and seven year radio renewals, the duopoly rule, the Top 50 Policy, the 7-7-7 and the 12-12-12 rule, the Mickey Leland (14-14-14) rule, most distress sales (for want of stations placed in hearing), most comparative hearings for new facilities, the AM clear channel eligibility criteria favoring minority ownership.

Every one of these unfortunate regulatory decisions either benefitted large broadcasters at the expense of small ones, benefitted nonminority broadcasters at the expense of minority broadcasters, benefitted incumbent licensees at the expense of newcomers, or benefitted the industry generally at the expense of the listeners and viewers.

After wholesale deregulation, the only remaining public interest protection -- indeed, the only remaining objective standard by which the Commission may make the affirmative public interest finding required for renewal, assignment and transfer applications by Section 309 of the Act -- is EEO compliance. EEO -- by default -- is not only the most important factor at renewal, assignment and transfer time, it is virtually the only one. Indeed, the Commission's reliance on EEO and minority ownership to meet its obligation under Section 315 of the Communications Act to promote diversity has become so profound that the Commission generally invokes its EEO and minority ownership policies as a shield whenever it deregulates in another area.^{2/} Along with

2/ In Deregulation of Radio 73 FCC2d 457, 482 (1979) (notice of proposed rulemaking), the Commission reassured the public that "[e]fforts to promote minority ownership and EEO are underway and promise to bring about a more demographically representative radio industry." In adopting its ultimate rules in Deregulation of Radio, 84 FCC2d 968, 1036, recon. granted in part, 87 FCC2d 797 (1981) aff'd in pertinent part sub nom. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983), the Commission held that "it may well be that structural regulations such as minority ownership programs and EEO rules that specifically address the needs of these groups is preferable to conduct regulations that are inflexible and often unresponsive to the real wants and needs of the public." It explicitly concluded that the minority ownership policies and EEO rules, rather than direct regulation of broadcast content, were the preferable means to achieve diversification. Id. at 977.

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minority ownership, EEO compliance is the thin straw upon which the Commission relies to insure that listeners and viewers receive a diverse palette of information.^{2/}

Yet accompanying the relatively heightened importance of EEO compliance in our system of regulation is a decline in minority employment in broadcasting -- for the first time in history. FCC

2/ (continued from p. 11)

See also Amendment of §73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations), 75 FCC2d 587, 599 (1979) (separate statement of Chairman Ferris), aff'd sub nom. NAACP v. FCC, 682 F.2d 993 (D.C. Cir. 1982); Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments, Second Report and Order, 101 FCC2d 638, recon. denied, 59 Rad. Reg. 2d (P&F) 1221 (1985), aff'd sub nom. NBMC v. FCC, 822 F.2d 277 (2d Cir. 1987); Deletion of AM Acceptance Criteria in §73.37(e) of the Commission's Rules, 102 FCC2d 548, 558 (1985), recon. denied, 4 FCC Rcd 5218 (1989); Nighttime Operations on Canadian, Mexican and Bahamian Clear Channels, 3 FCC Rcd 3597 (1988), recon. denied, 4 FCC Rcd 4711 (1989); cf. Revision of Radio Rules and Policies (Report and Order) (MM Docket 91-140), 7 FCC Rcd 2755, 2769-2770 ¶¶26-29 (1992) (relying on minority ownership policies to further diversification goals, even as the Commission deleted one of those policies, the Mickey Leland Rule.)

The courts have approved the Commission's reliance on minority ownership and EEO as preferred means of addressing diversification goals. NAACP v. FCC, supra, 682 F.2d at 1004 (D.C. Cir. 1982) (holding that the Commission "has not improperly exercised its discretion by relying on [its minority ownership, employment and programming policies] rather than the Top-Fifty Policy, to advance minority goals.")

3/ Under deregulation, if one station in a market is thought to be serving minorities, no other station in the market is required to do so, and other stations may elect to serve nonminorities exclusively. Id. at 991. This was a very dramatic change from the regulatory structure which had been in place for at least a generation. Compare En Banc Programming Inquiry, 44 FCC 2303, 2314 (1960) and Public Service Responsibility of Broadcast Licensees 15 (March 7, 1946) (the "Blue Book") (each station is expected to serve minority groups). Thus, one station's EEO compliance may have the effect of forcing an entire listener target group of nonminorities to do without an integrated, minority issue-sensitive staff at the station which has set out to meet their needs to the exclusion of the needs of others.

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EEO Branch, 1991 Broadcast EEO Trend Report, June 8, 1992 ("1991 Trend Report").

These changed circumstances cry out for a top to bottom strengthening and reform of the Commission's EEO regulatory regime. EEO regulation needs teeth. It no longer suffices to respond to noncompliance with trivial fines. See Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992) (subsequent history omitted) ("Bechtel") (Commission must reassess previous regulatory policies and the assumptions underlying them in light of subsequent events and fundamentally changed circumstances).

Most important -- as discussed infra at 52-53, the time has come to decide that a deliberate and substantial EEO violation, standing alone and even absent proof of overt discrimination or misrepresentation, may require a hearing.

Notwithstanding the relatively greater importance of EEO in its regulatory scheme, the Commission has treaded water in EEO enforcement for twelve years. There have been no major innovations, and no hearings except in the most outrageous cases. Progress has come largely as a result of court decisions striking down abysmal and indefensible Commission practices. See, e.g., Beaumont NAACP v. FCC, 854 F.2d 501 (D.C. Cir. 1988) ("Beaumont") (the Commission must hold a hearing when a licensee offers conflicting sets of explanations for the departures of most of its stations' minority employees); NBMC v. FCC, 775 F.2d 342 (D.C. Cir. 1985) ("NBMC") (the Commission must investigate further when a licensee ignored the EEO rule over two consecutive license terms; the Commission cannot consider post-term EEO improvements when the license term record reflected systematic noncompliance).

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III. THE COMMISSION'S PROPOSALS IN THIS DOCKET

Regrettably and not surprisingly, EEO regulation is viewed by most broadcasters and nearly all cablecasters as a low priority concern. Nor do victims of discrimination look to the Commission to protect their rights. This NPRM will do nothing to change that.

Written in the last days of the most EEO-insensitive administration in recent memory at the Commission, this NPRM skirts the periphery of the genuine issues in EEO enforcement. It focuses on none of the critical issues not foreclosed by Congress. Congress intended the Cable Act EEO requirements to expand EEO enforcement, rather than serving as ministerial trim to the previous Commission's seriously flawed enforcement effort. The Cable Act should establish the starting point, not the terminal point, for dramatic Commission expansion of its EEO enforcement program.

Since 1976, there has been no rulemaking proceeding aimed at a thorough review of EEO policy, practice and procedure. See Nondiscrimination in Broadcasting, 60 FCC2d 226 (1976) (Commissioner Hooks dissenting), reversed sub nom. Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 533 (2d Cir. 1977) ("UCC III"). The instant proceeding, while well intentioned, is virtually meaningless in terms of EEO enforcement, since it does not venture beyond the relatively minor EEO jurisdictional touch-ups in the Cable Act.

Apart from ministerial amendments to the cable rules, the NPRM specifically proposes only the following.

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1. A midterm review of television stations' employment practices. NPRM at 2 ¶5. However, this review would not include EEO program implementation. It would focus only on hiring profiles relative to the Commission's internal EEO processing guidelines. Id. at 3 ¶7. The Commission further proposes that noncompliance uncovered by this midterm review would have no impact on a subsequent renewal. Id. at 3 ¶10.
2. Expansion of cable EEO reporting to include job titles and an expansion of nine job categories to 15. Id. at 3 ¶¶11-16.
3. An increase in the penalty for a cable EEO violation from \$200 to \$500 for each violation. Id. at 3 ¶11.

Outlined below are the major deficiencies in current Commission EEO enforcement practice, along with the NAACP's recommendations designed to bring Commission EEO enforcement up to national civil rights standards. Except where specifically noted below, the NAACP's recommendations should be seen as alternatives and supplements to those contained in the NPRM.

The NAACP looks forward to the new Commission's serious attention to these recommendations, which derive from nearly 40 years of advocacy experience in broadcasting. See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29 (1983) (Commission must consider and respond to alternative proposals in rulemaking proceedings).

IV. IMPEDIMENTS TO PUBLIC PARTICIPATION

A. Inadequacy of Form 396 as an Enforcement Tool

The data available to the public on Form 396 is woefully inadequate. Even though the NAACP has developed some expertise at reading between the lines of EEO Programs and ascertaining which programs are genuine, several holes in Form 396 prevent a more meaningful review.

As a result, there have been several occasions in which a discriminator has passed muster because it concealed its illegal actions in the guise of a safe-looking Form 396. Some of the holes in Form 396 are:

- (1) Failure to require any identification of the racial composition of the hiring pool -- an essential element of any objective analysis of the success or failure of an EEO program. Presently, Form 396 only requires a listing of the number of minorities and women referred by each source. That information is of limited value. Six minorities out of 20 referrals yields a pool from which minorities have a chance to be hired, while six minorities out of 200 referrals is a pool in which minorities will scarcely be noticed. To obtain meaningful hiring pool data, the Commission can expand the job referral reporting section of Form 396 to include a breakdown of the race and sex of all applicants referred by particular sources.
- (2) Failure to require proof that affirmative recruitment efforts were undertaken for each job vacancy. The omission of this simple step figures in almost every EEO case litigated before the Commission in the past sixteen years, including cases involving very large, sophisticated licensees. See, e.g., Malrite Communications Group, Inc. (WHK/WMMS, Cleveland, Ohio), FCC 92-564 (released January 14, 1993) ("Malrite") at 3 ¶13; Sande Broadcasting Co., 58 FCC2d 139 (1976) (short term renewal issued largely because licensee conducted EEO recruitment efforts in filling only three of seven vacancies). Apparently, the Commission still doesn't have the industry's attention on this point, inasmuch as many stations still rely on the old-boy network for the jobs that really count, such as senior managers, salespersons and news reporters. To get the industry's attention, an "each job vacancy" recruitment requirement should be written into the rules.

- (3) Failure to require proof that minority-sensitive sources, including but not necessarily limited to minority organizations, were contacted for each job vacancy. Broadcasters may rely exclusively on nonminority sources for minority referrals unless those sources are nonproductive. South Carolina Renewals, 5 FCC Rcd 1704, 1710 n. 8 (1990). That holding should be repealed, for the formulation in South Carolina has it exactly backward. The use of nonminority sources, such as a daily newspaper, may result in some minority referrals, but inevitably those sources contribute to a hiring pool in which the minority applicants are swamped. Instead of focusing on how broadcasters can maintain minimal compliance, the Commission should be focusing on how to maximize minority referrals. It should rule that broadcasters must rely on minority organizations, individuals, media or educational institutions, and in addition are encouraged to contact nonminority sources likely to refer minority candidates.
- (4) Failure to specify what kind of contact is made with recruitment sources. The NAACP has encountered applicants who report job opportunities by telephone to nonminority sources, but recruit minority applicants with a Jim Crow mailing list, complete with cynical return cards to cover the applicant at renewal time. These mailings typically pious mouthings that the station is an "equal opportunity employer with no openings at this time." It is little surprise that minority professional organizations send few job notices under such an obviously source-segregated, impersonal solicitation which often seems designed to minimize the possibility that the licensee or franchisee will actually have to have personal contact with minorities in the community.
- (5) Failure to provide recruitment, hiring and promotion data by race and sex in the form used on Form 395. On Form 396, "minorities" are aggregated as though they are fungible. That is not the law. See City of Richmond v. J.A. Croson Co., 109 S.Ct. 706 (1989), holding that minority groups each have different experiences and histories and cannot be thoughtlessly lumped together in connection with race-conscious adjudication. As discussed at 49-51 infra, the Commission should devote the same diligence to enforcing the hiring and promotion portions of the EEO rules as it devotes to enforcing the recruitment portion of the rules.

- (6) Failure to require reports of EEO sanctions at co-owned facilities in other communities. Without this information, the Commission and the public cannot determine whether a group owner systematically disregards EEO obligations. See pp. 27-30 infra. This information is critical for enforcement regardless of whether violations at other facilities are viewed as evidence of a pattern or practice meriting enhanced sanctions short of disqualification, or are viewed as evidence of intentional, systematic noncompliance meriting disqualification.
- (7) In the case of broadcasting, failure to provide information on EEO compliance at a headquarters unit. These reports are required for cable, and enforcement follows those reports. 47 CFR §76.71(c); see Prime, supra. Only Form 395 is required for broadcast headquarters. Broadcast EEO, supra, 2 FCC Rcd at 3970 ¶23.
- (8) In the case of broadcasting, failure to seek information on broadcast stations' use of minority and female entrepreneurs. That information has been required of cable operators since 1985. 47 CFR §76.76(e)(1). There is no logical reason why cable operators, but not broadcasters, should develop normal business contacts with minorities and women. Apart from developing minority and female economic power, these contacts often lead to the type of shared-interest networking which evolves into increased employment of minorities and women by the licensee.

B. User-Unfriendly Cable EEO Procedures

It is no accident that essentially no EEO complaints have been filed against cable systems, while thousands have been filed against broadcasters. Cable owners are not born equal opportunity angels. Compared to the broadcast renewal process, the cable renewal process is rather user-unfriendly.

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CARS renewals are not filed by MSO, and system names often do not identify an MSO. The Commission allows an MSO to file its annual certifications all at once. Cable EEO, supra, 58 RR2d at 1599, 1603 ¶¶105-122. However, this procedure is optional and apparently is not widely used. The procedure should be made mandatory. Unlike broadcasting, cable ownership is highly concentrated, and EEO policies of MSOs are typically set at the top, not at the local level. Therefore, meaningful cable EEO review must concentrate on systematic violators among MSOs. Simultaneous CARS renewals for all an MSO's systems would do much to enable the public to review EEO performance companywide.

V. INADEQUACY OF INVESTIGATORY PROCEDURES

A. Abstention from Investigations
on the Commission's Own Motion

The Commission has come to rely almost exclusively on NAACP complaints before it investigates broadcast EEO violations. Since 1988, the NAACP has challenged an average of fifty license renewal applications per year. The Commission has investigated essentially all of these complaints. During that same time period, the Commission, on its own motion, has initiated only three EEO investigations resulting in sanctions. NAACP complaints are almost always deemed meritorious, which honors the NAACP but does not address the EEO deficiencies of the vast majority of licensees who

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are not the subject of NAACP complaints.^{4/} The Commission's crabbed EEO regulatory agenda has regrettably focused on punishment of the three percent driving over 100 miles per hour while drunk, with little thought given to some of the remaining 97% who drive over 80 miles per hour while sober.

B. Weaknesses in Bilingual Investigations

Full investigation of complaints alleging static or declining minority employment and ineffective EEO programs has been required since 1978, as a result of Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621 (D.C. Cir. 1978) ("Bilingual II"). Citizen group petitioners to deny were to be given an opportunity to respond to a licensee's answers to interrogatories propounded to licensees by the FCC staff. Id. at 634. Bilingual II is the leading broadcast EEO case, and EEO investigations are commonly referred to by communications lawyers as "Bilingual investigations."

^{4/} The NAACP's resources have not permitted it to examine EEO compliance as to women. One unfortunate side effect of the absence of cases brought on the staff's own motion is that for several years, no licensee has been sanctioned for violating the EEO rules as to women. In 1992, for example, the Commission decided EEO cases involving 50 broadcast stations; 47 of these had been brought by the NAACP. While noncompliance was commonly found, with licensees receiving admonishments or sanctions in 44 of the cases, not one case involved women.

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Not until 1987, when Chairman Patrick took office, did the Commission begin conducting these investigations in response to petitions to deny, as Bilingual II had required.^{5/} Regrettably, most Bilingual investigations are rudimentary and leave much to be desired.

As presently conducted, Bilingual investigations are typically paper processes which ignore the most important factor in an EEO case -- potential victims of discrimination, especially those who may not know they were victims or who might be too frightened to come forward without Commission protection.

In 1988, the D.C. Circuit warned the Commission that a Bilingual investigation was patently insufficient when it included no contact with the Black former employees of a station which had terminated essentially all of them. Beaumont, supra, 854 F.2d at 505.

Yet since that time, as far as the public record shows, not once has the Commission sought out employees or former employees of any broadcast station or cable system to independently verify allegations of discrimination. Not once has a general manager or owner of a licensee or franchisee been interviewed -- even on the telephone -- in an EEO investigation. In any other law enforcement body, this would be a scandal.

^{5/} In the first four years of Mark Fowler's chairmanship, the Commission performed exactly one EEO investigation (involving female employment at a South Dakota radio station). It had done over 200 investigations in the four years before his chairmanship. After he left the agency, the pace of investigations speeded manifold. Since November, 1988, the FCC has opened up over 300 broadcast EEO investigations.