

The Commission staff almost never conducts field investigations of stations' EEO programs. Instead, it relies on "self-reporting," which is often self serving and fraudulent. Frequently, only accidental discovery of fraudulent reports results in a complaint.

Bilingual investigations are often helpful in rooting out EEO misconduct. However, the NAACP can never emphasize enough that licensee or franchisee control of all of the paperwork in a Bilingual investigation is a formula for the concealment of wrongdoing. Placing the burden of production and proof on a citizen group -- which only has access to Form 395 and Form 396 -- almost guarantees that a hearing case will seldom be made out. See Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392, 397 (D.C. Cir. 1975) ("[i]t would be peculiar to require, as a precondition for a hearing, that the petitioner fully establish...what it is the very purpose of the hearing to inquire into"); Stone v. FCC, 466 F.2d 316, rehearing denied, 466 F.2d 331 (D.C. Cir. 1972) (petition cannot be rejected simply because petitioners lack access to internal station information).

Since Bilingual investigations began to be routinely designated in 1987, experience has shown a need to expand the scope of these investigations in several respects. Under the current procedure, all of the paper flow is controlled by the applicant itself. It has exclusive access to the recruitment, hiring, promotion and termination data. Even in the absence of written data, it has access to individuals, such as current and former general managers, personnel directors, comptrollers, office managers and major department heads, who have personal knowledge and recollection of the facts.

Too often, a licensee or franchisee can entirely escape serious sanctions, or a hearing, by claiming it didn't know it had to keep written EEO records. On occasion, licensees' serendipitous claims that they didn't know they had to keep EEO records are little more than thinly veiled fraud, propounded in the hope that the absence of written documentation will discourage the Commission from pursuing the matter to its rightful conclusion.<sup>5/</sup>

While the Commission always rejects this serendipitous claim of ignorance and sometimes issues forfeitures for these "recordkeeping" violations, it never takes the next logical step, which is to interview those with personal knowledge so as to reconstruct the missing records. In a station which has had few minority employees or applicants, it would be quite rare for a modest, nonintrusive interview with the general manager and the personnel director not to yield evidence of the station's actual minority recruitment, hiring and promotion practices.

Particularly egregious cases, developed first on paper, should be followed up with field audits of the type used already (albeit uncommonly) in cable EEO regulation. These audits should be conducted with far more regularity for cable systems. This procedure will reduce the chance that a challenged licensee or franchisee will distort the record with paper filings it knows nobody will look behind.

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<sup>5/</sup> Sometimes -- such as where a licensee has already been through a Bilingual investigation -- a claim of poor recordkeeping may be made to conceal deliberate destruction of inculpatory documents. Such behavior smacks of serious abuse of process, being comparable to the fabrication or suppression of evidence. WWOR-TV, Inc., 7 FCC Rcd 636, 641 ¶40 (1992) (fabrication of evidence); Dorothy O. Schulze and Deborah Brigham, 6 FCC Rcd 4218 ¶2 (1991) (advising non-parties against attending depositions).

It would be most unfortunate if the Commission feels itself unwilling to undertake the slight effort to conduct these interviews. Nonetheless, there is an alternative means to develop this evidence, which is to allow petitioners to deny limited predesignation discovery. Discovery in EEO cases involves no reinvention of the wheel: in every EEO case brought under Title VII or 42 U.S.C. §1981, defendants must submit to full discovery so that the plaintiff can be in a meaningful position to respond to a denial of discriminatory intent, or a defense of business justification. See, e.g., Ward's Cove Packing Co. v. Atonio, 109 S.Ct 2114, 2124 (1989). Bilingual II did not hold that the Commission cannot authorize predesignation discovery; it merely reaffirmed that the Commission has discretion to assign to itself, rather than to private attorneys general, the task of investigating EEO complaints. See also Bilingual Bicultural Coalition on the Mass Media v. FCC, 492 F.2d 656 (D.C. Cir. 1974) ("Bilingual I") (encouraging the Commission to allow petitioners to deny to conduct predesignation discovery).

C. Absence of Midterm EEO Review

There is no midterm EEO review of broadcast station performance. The legislation implemented by this docket will change that for television stations.

It is a mystery why the NPRM did not propose midterm EEO review for radio stations. Most EEO noncompliance is found in the radio industry. Because radio license terms are longer than those for TV or CARS licenses, midterm review of radio stations is even more important than for TV or cable.

Exclusion of radio from serious EEO scrutiny cannot be rationally justified. As the Second Circuit has held, the Commission may not exempt two-thirds of its licensees from EEO scrutiny simply because they have fewer than 15 employees. Office of Communication of the United Church of Christ v. FCC, 566 F.2d 529, 533 (2d Cir. 1977) ("UCC III").

The Commission need not wait until a Further NPRM is issued before instituting a program of midterm review of radio EEO compliance. All broadcast licensees are on notice of the type of regulatory program envisioned in the NPRM. For jurisdictional purposes, it is sufficient that the Commission would not be going off on an tangent in applying television rules proposed in the NPRM to radio as well. See NBMC v. FCC, supra, 822 F.2d 277 (upholding Commission's decision to apply new FM engineering rules to all FMs even though the scope of licensees included in the notice of proposed rulemaking was only a relatively small class of FMs.)

Midterm review is especially critical to compensate for the 1982 extension of TV and radio license terms to five and seven years respectively. Currently, when a Bilingual investigation commences, the licensee need only supply three years of EEO records. The earlier two (TV) or four (radio) years of minorities' ruined careers are washed out completely. Even blatant discrimination during those years would go uncovered and unpunished. Those years are akin to a 700 mile long superhighway with a sign posted saying "no state troopers for the next 400 miles."

The NPRM suggests that midterm review should only encompass a licensee's hiring profiles and not the implementation of its EEO program. See NPRM at 2 ¶7. That proposal contradicts longstanding Commission practice which emphasizes EEO procedures, and deemphasizes a showing of what might be only token hiring, as the best guarantee of equal opportunity. Broadcast EEO, supra, 2 FCC Rcd at 3967, 3973-3974 ¶¶44-50. It also contradicts the express language of the Cable Act, which requires the Commission to conduct a midterm review of "employment practices." Cable Act of 1992, §22(f). No rational reading of the words "employment practices" supports the conclusion that Congress meant "statistics" and not the actual acts and omissions attendant to implementation of an EEO program.

The NPRM also suggests that midterm review should carry no sanctions and should be nothing more than a "warning" without regulatory consequences, either when it is conducted or at renewal, assignment or transfer time. NPRM at 3 ¶10. Under this reading, if a citizen group filed a petition for an early renewal application giving rise to a Bilingual investigation, sanctions would obtain; but if the Commission conducted the same midterm review on its own motion, sanctions would not obtain. If the NPRM were followed, and if serious wrongdoing were found in a midterm review, then on the occasion of the next renewal, the Commission would have to ignore that wrongdoing and would even have to ignore the licensee's own refusal to remedy that wrongdoing.

That would be unfortunate. An agency should never deprive itself of the power to act on the fruits of its own investigations. The Commission should give teeth to midterm EEO reviews, and in doing so should explicitly overrule Equal Employment Violations, 56 RR2d 445, 447 (1984) (refusing to consider midterm petitions to deny not making out a prima facie case of discrimination).

If the Commission finds wrongdoing in its midterm EEO reviews, it already has power to act then and there. See Leflore Broadcasting Company, 36 FCC2d 101 (1972) (in which the Commission designated cases for early renewals.) The Commission should make it known that it will not hesitate to call in a renewal early if serious misconduct is found.<sup>7/</sup>

D. Abstention from Review of Group Owners

In considering whether any renewal application or certification should be granted, the Commission should reject no significant evidence. One piece of evidence is whether other stations or cable systems under common ownership also violate the EEO rules.

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<sup>7/</sup> The NAACP is quite troubled by data in the comments of the Office of Communication of the United Church of Christ, filed yesterday, suggesting that the filing of false written EEO annual certifications by cable systems is the norm. An applicant which files false reports is unqualified, per se, from being a Commission licensee or franchisee. Every one of the cable systems found to have falsified their written certifications should have their franchises and CARS licenses revoked forthwith! The industry should be put on notice that any false reports will result in a revocation of operating authority in compliance with longstanding precedent that false reports are per se disqualifying.

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A few group broadcasters and MSOs have, regrettably, exhibited a pattern of EEO violations at several of their facilities. Since EEO certifications or renewals of licenses of those facilities usually do not occur simultaneously, the EEO record of any one facility usually is not considered in conjunction with a ruling on the EEO record of another. Yet the mere coincidence that a group owner's or MSO's certifications or renewals do not occur simultaneously is no excuse for failure to scrutinize the group's or MSO's conduct as a group or MSO. See Florida Renewals, 2 FCC Rcd 1930, 1935 n. 17 (1988), affirmed but criticized in pertinent part sub nom. Tallahassee NAACP v. FCC, 870 F.2d 704, 710 (D.C. Cir. 1988) ("Tallahassee").

Unfortunately, the Commission has completely failed to investigate complaints of systematic EEO noncompliance by group owners. See, e.g., Federal Broadcasting System, Inc., 59 FCC2d 356, 371 (1976) (designating an EEO issue against a station where there was an individual complainant, but refusing to do so against a sister station 65 miles away because of the absence of an individual complainant. Both stations used explicitly sex-segregated job application forms asking men their announcing credentials and women their typing credentials).

At times, the Commission's reluctance to examine group owner and MSO noncompliance has been supported by irrational explanations amounting to little more than "we've always done it this way." Group ownership and MSOs have growing importance, owing to deregulation of the national broadcast ownership limits and of

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the local duopoly rule,<sup>8/</sup> and to growing horizontal concentration in the cable business. The Commission should respond with heightened scrutiny of group owners and MSOs.

The Commission's failure to come to grips with group owners' and MSOs' systematic EEO practices represents a significant gap in Commission EEO enforcement. It is also inefficient and expensive, since atomized review of group owners and MSOs' EEO performance requires duplication of effort in evaluating often identical practices by a group's or MSO's facilities.

On occasion, the Commission reviews evidence of violations at commonly owned facilities. See KSDK, Inc., 93 FCC2d 893 (1983) and Scripps Howard Broadcasting Co., 67 FCC2d 1553 (1978) (invoking acceptability of commonly owned stations' EEO performance to support decisions absolving licensees of EEO culpability); Georgia State Board of Education, 70 FCC2d 948, 967 (1979) (considering EEO practices of public TV stations owned by the same licensee); cf. Letter to Paul Fiddick (Heritage Media Corporation) (Chief, EEO Branch, June 5, 1992) ("Fiddick") (initiating Bilingual investigation of several commonly owned stations being sold.) Yet the Commission has never clearly enunciated its intention to consider EEO violations at commonly owned facilities either in evaluating a licensee's or MSO's intent or in fashioning remedies. That is unfortunate, since a group owner's or MSO's misconduct at several facilities is enormously probative of whether any one violation is an inevitable result of deliberate company policy.

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<sup>8/</sup> The Commission should revise broadcast Forms 395 and 396 to accommodate, and require, combined reports from local combinations of three or four co-owned stations. Since this would involve no change in policy, it can be accomplished by a ministerial order issued without notice and comment.

There is a simple, straightforward way to implement a review of group owners' and MSOs' EEO performance. Where a group or MSO systematically violates the EEO rules, its facilities may be designated for hearing, as discussed further infra at 52-53. If no hearing is warranted, or if a hearing results in a forfeiture as opposed to nonrenewal or revocation, the Commission may include in the upward adjustment criteria for forfeitures a factor representing prior violations by commonly owned facilities. See Standards for Assessing Forfeitures, 6 FCC Rcd 4695, 4700 (1991) (subsequent history omitted) ("Forfeitures Policy Statement"). A somewhat similar factor (upward adjustment criterion #5, "prior violations of same or other requirements") carries a 40-70% upward adjustment. Id. Therefore, it would be consistent for the weight of an adjustment for violations by commonly owned facilities also to be 40-70%.

**E. Refusal to Scrutinize  
Marketwide EEO Practices**

In the past, the Commission entirely eschewed even educational or informational review of systematic marketwide EEO noncompliance. That is a mistake which this Commission should correct.

Broadcasting and cablecasting are insular industries in which normative behavior within a community often defines and mediates the behavior of any one company. Thus, some communities have strong traditions of outstanding EEO compliance by their licensees (eg. Seattle, Washington, D.C.) and some have strong traditions of discrimination (eg. Salt Lake City, Las Vegas, Grand Rapids).

Affirmative action -- or the lack of same -- is quite frequently the result of marketwide action or consensus. The Commission explicitly recognized this when it began collecting Form 395 data. Nondiscrimination in Broadcast Employment, 18 FCC2d 240, 243 (1969) (pointing out the need to obtain a statistical profile of the industry as a whole). Thus, market-distorting mob psychology may inhibit minority advancement. While discrimination is practiced by individual licensees against individual job applicants and employees, affirmative action may be practiced -- or abstained from -- by individual stations or by a market collectively.

In most local markets, broadcasting trade associations or ad clubs exchange resumes or engage in promotional activities aimed at attracting minorities into broadcasting. They collectively organize seminars, internships, scholarships, recruitment tours, job banks, and community service efforts with local minority organizations. These marketwide endeavors promote the Commission's affirmative action goals as articulated in subsections (b) and (c) of the broadcast EEO rule, 47 CFR §73.2080(b) and (c), quite apart from the actions of individual stations.

Similarly, by abstaining from these activities or by focusing industrywide recruitment efforts on nonminority sources exclusively, the marketwide, collective efforts of broadcasters may work to the detriment of the Commission's affirmative action goals. In some markets, there have been almost no marketwide initiatives aimed at affirmative action. In a few markets, compliance with affirmative action rules is not considered appropriate behavior in nonminority business circles.

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The collective apathy and indifference of broadcasters may create a climate and culture of minimalistic EEO compliance. Such a climate and culture can impede the serious compliance efforts of any individual licensee in two ways not visible to the Commission through a station by station application processing.

First, market distortions caused by marketplace social pressures and norms, enforced by racist advertisers and competitors, may force some stations to eschew contact with minority organizations or to generally avoid hiring minorities.

Second, a poor marketwide EEO climate and culture may mark a community, in the eyes of the highly mobile state and national minority broadcast workforce, as a poor place for minorities to work. Minorities may legitimately fear that if they should ever be terminated by a station in such a community, they may not find another job in the market and might have to uproot their families (often for a second time) to seek employment elsewhere. If nearly all of the stations in a market are weak EEO performers, there is little incentive for minorities with broadcasting skills to relocate to the community.

In refusing to investigate allegations of marketwide violations, the Commission has irrationally and unfairly erected procedural hurdles which could not be overcome with 100 years of litigation.<sup>2/</sup>

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<sup>2/</sup> In the 1970s and 1980's, the Commission was asked on at least six occasions to conduct marketwide EEO investigations.

(fn. 9 continued on p. 33)

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An example is found in Lanser Broadcasting Corporation, 7 FCC Rcd 4254, 4255 ¶¶6-7 (1992) ("Lanser") which denied an NAACP request for a marketwide inquiry, pursuant to §403 of the Act, to determine why all but one radio station in Grand Rapids appeared to be violating the broadcast EEO rule.

The Commission's stated reason for denying the §403 investigation was that no case had been made of "overt discrimination by licensees." Lanser, supra, 7 FCC Rcd at 4255 ¶7.10/ However, Section 403 can be used for purposes other than

2/ (continued from p. 32)

In Community Coalition for Media Change (1971 San Francisco Renewals), 34 FCC2d 183 (1972), the Commission acknowledged that it had §403 authority to undertake a marketwide investigation, but declined only because the petitioner had not supplied sufficient background data. In North and South Carolina Renewals, 45 FCC2d 1063 (1973), and in Florida Renewals, 44 FCC2d 735 (1974), the Commission declined to conduct formal statewide investigations based in part on the insufficiency of the evidence, but it still examined statewide data and set out this data in its decisions. In Philadelphia Renewals, 53 FCC2d 104 (1975) (Commissioner Hooks dissenting as to the majority's decision not to conduct a §403 investigation), the Commission declined to hold a marketwide investigation in part because the data supplied by the petitioner covered only the first four years of Form 395 reporting by licensees, and the petitioner did not show that the Philadelphia media's alleged nonperformance was unique.

In Chicago Renewals, 89 FCC2d 1031, 1034 (1982), the Commission denied the Chicago Latino Committee on the Media's request for a marketwide inquiry, citing North and South Carolina Renewals, Florida Renewals and Philadelphia Renewals. Finally, in Richey Airways, Inc., 53 RR2d 330, 338 n. 20 (1983) the Commission summarily denied NBMC's request for marketwide inquiries in three markets, citing Chicago Renewals.

10/ This appears to suggest that most of the stations in a market would have to be overtly discriminating before the Commission would see if the market itself is behaving abnormally. That suggestion implies that the Commission has no interest in EEO performance by stations performing only barely within the rules but suboptimally, or in stations which violate the rules but not to the point that their licenses would be in jeopardy. The Commission's regulatory powers surely include prophylaxis and prevention as well as punishment.

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enforcement. It can be used to inquire into "any question may arise under any of the provisions of this Act." One such "provision of this Act" is Section 303(g), directing the Commission to "[s]tudy new uses for radio...and generally encourage the larger and more effective use of radio in the public interest."

Proof that every station in a market discriminates is a ridiculously high predicate to a marketwide inquiry. Without discovery, such proof cannot be obtained in a hundred years.<sup>11/</sup>

In some markets, overt violations of the affirmative action provisions of the rules by several stations can occasionally be shown in petitions to deny. When that type of evidence is received, it would ill serve the public interest if the Commission threw it away. If abnormal distortions of the marketplace are a root cause of suboptimal EEO behavior, the Commission must learn how these forces operate so as to avoid the futile exercise of sanctioning one station at a time in a vacuum.

A marketwide inquiry can provide a valuable learning opportunity both for the Commission and the licensees. These investigations need not be cumbersome, costly, or intimidating. The 1962 Chicago and Omaha television programming investigations

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<sup>11/</sup> In 58 years, the Commission has only found that one station has engaged in overt discrimination. See *Catoctin Broadcasting Corp. of New York v. FCC*, 4 FCC Rcd 2553 (1989), *recon denied*, 4 FCC Rcd 6312 (1989), *aff'd per curiam* by Memorandum, No. 89-1552 (released December 18, 1990) ("*Catoctin*"). To persuade the Commission to undertake a marketwide inquiry, a petitioner to deny would have to make out and prove *Catoctin* type cases against most of the stations in a market. Given the Commission's institutional reluctance to hold hearings which could enable citizen complainants to prove discrimination (see pp. 52-53 *infra*), the sun will set in the east before a petitioner to deny could meet this test.

provided an excellent example. These were a simple public hearing, conducted without subpoenas by a visiting Commissioner, who then prepared a report. The purpose was nonadversarial. The hearing

served a good and useful purpose and was well worthwhile. In the opinion of the Presiding Commissioner, the inquiry proved to be of mutual benefit to the public, to the broadcasters, and to the Commission, in that it established an avenue of communication for that part of the public which chose to be vocal. As a result of the hearing, the Presiding Commissioner believed that the public, the industry, and the Commission have learned much and must, therefore, have greater respect each for the other's problems and views.

The Presiding Commissioner recommended that the Commission should, on a limited basis, from time to time, engage in further such inquiries in typical test markets of different kinds...In this conclusion a majority of the Commission is in agreement. We believe that by holding inquiries in such typical test markets, the Commission will gain much greater insight into the public interest problems associated with the particular kind of market. This in turn will enable us to better discharge our functions with respect to rule making, process, and all aspects of policy formulation.

In short, if we are to carry out the Congressional desire "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission" (FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138), this type of inquiry is a most appropriate tool. In addition, the inquiry will, of course, be beneficial to the stations and listening public in the particular areas, affording as it does an excellent forum for the exchange of views calculated to aid the broadcaster in making his judgment as to the needs and interests of the area.

Omaha TV Inquiry, 35 FCC 422 (1962). The subject matter (local programming) was far more controversial than EEO. See 47 U.S.C. §326.

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Furthermore, unlike the regulatory regime in effect in 1962, the subject matter at issue here is now the only nonstructural means of meeting the objectives of Section 303(g) (not to mention Section 309) of the Act in the context of broadcast renewals. See pp. 11-12 supra. With minority employment in decline, the Commission must eschew no avenue by which it can learn why its EEO enforcement efforts are not always successful and what might be done to improve them.

**F. Interminable Delay in Resolving EEO Cases**

The EEO Branch is so underfunded and understaffed that its review of a renewal petition to deny requires three years -- the same time required throughout most of the 1970s.<sup>12/</sup> Indeed, the length of time between complaint and sanction is so long that one applicant recently moved for rescission of a forfeiture because it was issued after the three year statute of limitations for forfeitures. Midwest Management, Inc. (WNTA(AM)/WKMQ-FM, Rockford and Winnebago, IL) Response to Notice of Apparent Liability, filed October 21, 1992. The NAL was contained in Champaign, Illinois Renewals, 7 FCC Rcd 7170, 7174 ¶28 ("Champaign").

The only solution to this time-honored issue of "justice delayed, justice denied" is to train and detail to the EEO Branch the most competent and sensitive staff available elsewhere in the Commission, at least until the backlog is cleared up.

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<sup>12/</sup> By 1976, when the time required for review of petitions to deny began to exceed three years, Chairman Wiley inaugurated "Petition to Deny Day" on the Commission's calendar, hoping to expedite matters. Dick Shiben, then Chief of the Renewal and Transfer Division of the Broadcast Bureau, inadvertently and memorably announced the chairman's initiative as "Deny the Petition Day."

VI. INADEQUATE, STATIC OR MEANINGLESS  
STANDARDS OF PERFORMANCE AND PROOF

A. Failure to shrink the  
Zone Of Reasonableness

As far back as 1975, the Commission acknowledged that the zone of reasonableness may contract over time. Mission Central Co., 56 FCC2d 782 (1975) ("Mission Central"). The Courts agree. Los Angeles Women's Coalition for Better Broadcasting v. FCC, 584 F.2d 1089 (D.C. Cir. 1978) ("Los Angeles Women's Coalition") (remanding a case in which the FCC had rejected petitions to deny against three Los Angeles TV stations alleging underrepresentation of women. The stations operated at about 70% of parity for female employment.)

However, the Commission has completely ignored Mission Central and Los Angeles Women's Coalition, having left the zone of reasonableness static since 1980. The Commission thus created the misimpression among many broadcasters that the zone of reasonableness is a floor above which compliance is assumed. There is much truth to this misimpression, because the Commission staff conducts no serious EEO review of a broadcaster or cable system operating above 50% of parity for minorities.

If broadcasters are ever to be brought toward 100% of parity and toward equal opportunity, the zone of reasonableness must shrink. As the nation's tolerance level for discrimination decreases, and as broadcasters learn not to discriminate, the zone of reasonableness must shrink too.

In 1977, then Commissioner Lee informally suggested 80% of parity as an appropriate new benchmark. That seems even more reasonable now, 16 years later.

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**B. Irrational Failure to  
Accept Statistical Evidence**

The Commission has refused to recognize and accept basic statistical tests used to analyze EEO noncompliance in cases before every other EEO enforcement agency in the United States. See Pasco Pinellas Broadcasting Company (WLVU-AM-FM, Dunedin/Holiday, Florida) ("WLVU"), FCC 92-575 (released January 14, 1993) at 2 ¶10. The only rationale given for this is that the Commission is not the EEOC. Id. That is irrational, since every other EEO enforcement agency in the country has adopted the statistical methods commonly used in EEOC cases.<sup>13/</sup>

The Commission has had it backward. Statistical evidence should be more important at the FCC than at the EEOC, since the FCC has a responsibility to protect the public interest while the EEOC's primary responsibility is to protect private discrimination victims. Patterns of noncompliance, such as those revealed by statistics, should go right to the heart of the Commission's affirmative duty under §309 of the Act to find that a licensee or

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<sup>13/</sup> In order to determine whether a hiring record makes out a statistical prima facie case of discrimination, it is necessary to determine the probability that the selection of a particular number of minorities out of all total selections could not have occurred by chance. See Hazelwood School District v. U.S., 433 U.S. 299 (1977). This calculation is done using the hypergeometric distribution (sampling without replacement). It is closely approximated by the binomial distribution. The level of statistical significance for a prima facie case of discrimination was 0.05 in Hazelwood. However, most professional statisticians would use the 0.025 level, recognizing that we are applying a one-tailed test in evaluating possible discrimination. Wishing to be conservative as possible in evaluating the data submitted by licensees, the NAACP has used the 0.025 level as its benchmark for a prima facie showing of discrimination in FCC EEO cases.

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franchisee has the requisite character to remain one. See Alabama Educational Television Commission, 50 FCC2d 491, 493 (1974) (in which the Commission acknowledged that even without direct evidence of intentional discrimination, "[a] policy of discrimination may be inferred from conduct and practices which display a pattern of underrepresentation of minorities from a broadcast licensee's overall programming" (emphasis supplied)).

Statistical proof is especially helpful when it provides an objective basis to decide when a single minority hire is mere tokenism and when it should be taken to be material evidence of compliance. Too often, the hiring of one minority -- even a secretary,<sup>14/</sup> even a parttime person<sup>15/</sup> -- immunizes a licensee's entire five or seven year record of EEO noncompliance. The Commission should encourage, but not require, the use of statistical tools in litigating EEO cases.

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<sup>14/</sup> Little credit can be awarded for employing a secretary. Secretaries have dignity, and the low-pay status of a secretary is not the reason a station should receive no EEO mitigation credit for employing one. The reason no such credit is deserved is that a secretary does not influence program content. See NAACP v. FCC, supra, 425 U.S. at 670 n. 7 (FCC's EEO rule is justified because of potential influence of minority and female employees on programming of broadcast stations). See Nondiscrimination in Broadcasting, supra, 13 FCC2d at 771, citing with approval the statement by the Department of Justice that "[b]ecause 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."

<sup>15/</sup> Parttime minority employment is routinely considered in mitigation. Century Broadcasting Corp., 40 RR2d 1019 (1977) (short term renewal).

C. Refusal to Consider Evidence of Misconduct Occurring in Previous Renewal Terms

At times, and as bizarre as it sounds, the Commission has ignored overwhelming statistical evidence precisely because that evidence showed that noncompliance did not stop with one license term.. For example, in Champaign, supra, 7 FCC Rcd at 7171 n. 6, the Commission rejected the NAACP's uncontested allegation that during the fifteen year period planning 1975-1989, a licensee reported the employment of no full time minorities in eight years and no top four category fulltime minorities in twelve years, and reported no fulltime Black employees since 1980. The Champaign Commission held that the Commission's policy was to disregard this type of data. Id.

That is irrational. Sometimes an applicant has barely escaped sanctions in earlier years, but has developed a record which suggests discriminatory intent when examined over a period of more years than are encompassed within one license term. This can happen, for example, when a licensee had a low annual employee turnover rate, so that the effects of discriminatory practices would only reveal themselves over a period of more than one license term. That is the case at many radio and television stations.

In such cases, the Commission should not hesitate to allow evidence of prior license terms' EEO nonperformance to determine whether the current license term's record is part of a longstanding pattern and practice.

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While a licensee cannot be retroactively sanctioned for misconduct in previous renewal terms, a renewal does not act as an expungement order causing one renewal term's misconduct to vanish as evidence of a pattern reaching into successive renewal terms. Nothing about a license renewal prevents the Commission from subsequently noticing facts of record about a licensee's performance during the license term in question. NBMC v. FCC, supra (Commission directed to examine noncompliance in current license term in light of noncompliance in previous license term); BHA Enterprises, Inc., 31 RR2d 1373, 1404 (ALJ 1974) (reaching back four renewal terms to prove a "continuing pattern of conduct of this licensee over the years which was violative of the Act and regulations...which calls for the imposition of the sanction of revocation of the licenses").

In two recent cases, the Bureau staff has moved positively in the direction of considering multi-license term statistical data. See Price Broadcasting Company (Chief, Mass Media Bureau, released May 18, 1992) ("Price") (reporting the results of a Bilingual investigation based on charges of intentional discrimination during current and previous renewal terms); Fiddick, supra (to the same effect, but initiating Bilingual inquiry where the allegations did not refer to named victims but simply built a statistical case). Price and Fiddick should be elevated to the status of full Commission policy.

D. **Refusal to Consider  
Discrimination Allegations**

It is ironic, but true, that a civil rights enforcement office has deliberately refused to consider allegations of discrimination against named victims. This anomaly in Commission regulatory history, which would be amusing if it weren't so troubling, should be put to rest immediately.

The Commission has created a unique Catch-22 which makes it virtually impossible to bring a discrimination case. When granting an application in the face of overwhelming statistical evidence of discrimination, the Commission typically relies on the absence of any individual complaint of discrimination.<sup>16/</sup> See, e.g., South Carolina Renewals, supra, 5 FCC Rcd at 1708 ¶38.

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<sup>16/</sup> The absence of such complaints should surprise no one. In a small industry, the act of filing an EEO complaint is commonly viewed by management as a sign that an applicant or employee is not a team player or is a troublemaker. That is especially true if the complaint is not resolved in the applicant's or employee's favor. Such a person frequently has to leave the industry entirely, or leave town and work in another broadcast market, because management will "blackball" the person from further media employment.

The fact that retaliation is unlawful is largely irrelevant: it is seldom caught unless a brave witness with inside information comes forward. The NAACP -- again and again -- receives calls from aggrieved persons telling us to look at a particular station but pleading "don't use my name or I'll lose my job." The NAACP receives more calls like that than it receives complaints of discrimination. Yet the Commission has done nothing to protect retaliation victims. See Field Communications Corp., 68 FCC2d 817, 819 n. 4 (1978) (Commission would not consider a citizen group's affidavit that a Black employee was a victim of discrimination but feared retaliation if she came forward. The Commission felt it was enough that the EEOC's Rules protect her against retaliation.) It would behoove the agency to adopt rules to protect complainants which parallel the EEOC's anti-retaliation rules.

On the other hand, the Commission will not investigate a discrimination allegation until it becomes a final order. New York Times Broadcasting Service, 63 FCC2d 695, 700 (1977) (taking note of a 6th Circuit finding that the licensee discriminated against a female employee, but refusing to act until proceedings on remand were concluded); see also NBC, 62 FCC2d 582 (1977) (Commissioners Hooks and Fogarty dissenting). At times, this forbearance from regulation is taken to extremes. See, e.g., WAVY Television, Inc., 53 RR2d 655, 658 (1983) (ignoring discrimination complaints by eleven Black employees, and issuing a full term renewal without conditions.)

The "final order" rule, as applied to discrimination cases, all but immunizes every discriminator from Commission review. It should come as no surprise that the Commission has never reviewed a final order in a discrimination case. It is usually far cheaper for a discriminator to wear down through delay, or pay off a discrimination victim to avoid Commission scrutiny and strong risk of loss of license if the plaintiff's case has merit. Such cases typically require at least seven years to litigate through the federal courts -- a time period which well exceeds the three or four years the most valuable stations usually remain in the same hands before being sold.

One such case, involving WSM-AM-FM in Nashville, began in 1973. See WSM, Inc., 66 FCC2d 994, 1006-1008 ¶¶29-32 (1977); see particularly n. 19 (dating complaints to 1973). The Title VII and §1981 litigation concluded in 1989 with final court orders of discrimination against three Black victims. Unfortunately, the

stations had by then changed hands three times. Is it any surprise that the Commission did nothing, knowing it could not unscramble three successive assignments of the licenses to reach the original discriminator?

The Commission will not even look at a case which has become final if finality occurred through a private settlement. See Malrite, supra (Commission did not even mention settlement of EEO complaint against applicant's co-owned TV station, and it renewed the license without conditions). This can only create the misimpression that a licensee or franchisee faced with a Title VII complaint can purchase a license renewal or certification by paying off the private complainant. In comparative hearings and other areas of regulation, the Commission never allows private parties, through settlement, to substitute their judgment of the public interest for the Commission's judgment. See WWOR-TV, Inc., 6 FCC Rcd 1524 (1991) and California Broadcasting Corp., 6 FCC Rcd 283 (1991) (rejecting settlements). Even in EEO cases not involving charges of individual acts of discrimination, the Commission has long held to that view. See Lin Texas Broadcasting Corp., 55 FCC2d 604 (1975) (the absence, or withdrawal, of a complaint "does not relieve the Commission of its statutory duty to determine that a grant of the [renewal] application would serve the public interest.")

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Indeed, the only cases in which the Commission held licensees accountable for individual acts of discrimination came about only because the licensees were exempt from Title VII's 15-employee jurisdictional threshold. See Catocin, supra (five employees); Leflore Broadcasting Co., 65 FCC2d 556 (1977), aff'd, Leflore Broadcasting Co. v. FCC, 636 F.2d 454 (D.C. Cir. 1980) (seven employees); Federal Broadcasting System, Inc., 59 FCC2d 356 (1976) (11 employees). Under the FCC/EEOC Memorandum of Understanding, 70 FCC2d 2320, 2331 §III(a) (1978), the Commission is required to investigate such cases, since the EEOC cannot do so. This anomaly in the law sends the message that licensees and cable systems may discriminate at will as long as they have more than 15 employees.

This Catch-22 should end immediately. The Commission should announce that when a discrimination complainant or plaintiff, including one settling her private litigation,<sup>17/</sup> has made out a prima facie case of discrimination, the Commission will hold a hearing on whether the licensee or franchisee has the requisite character to continue to hold any Commission authorizations.

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<sup>17/</sup> Settling parties might be expected to scuttle the Commission's independent public interest examination of the once-active complaint by having a judge vacate any adverse findings. However, that should not prevent the Commission from making use of the underlying evidence to develop its own findings. See Shawn Phalen, 7 FCC Rcd 7638, 7639-7640 ¶13 (1992).

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**B. Refusal to Recognize Discriminatory Intent**

The Commission has much too readily refused to find discriminatory intent even when it trips over it. For example, licensees regularly defend their EEO nonperformance with racist theories of minorities' unwillingness to commute short distances, minorities' unwillingness to work for low pay, minority organizations' unwillingness to refer applicants, or minorities' hesitation about working for "country/western" formatted stations. Sexist theories abound in the industry too, although the Commission seldom does anything about it. See, eg., KEZE Radio, 44 RR2d 1527 (1978), ("[y]our explanation for the station's difficulty in retaining female employees is not entirely satisfactory. Men do not experience pregnancy; however, they also marry, divorce and have 'other personal problems.'") Yet the Commission did not even see fit to issue a short term renewal in that case.

Racist stereotypes embedded in EEO defenses are uniformly rejected by the Commission, as they should be. See, eg., WXBM-FM, Inc., 6 FCC Rcd 4782, 4784 ¶15 (1991) (rejecting licensee's claim that Blacks won't drive 13 miles to work). However, in no case has the Commission called these stereotypes what they really are -- proof of discriminatory intent showing that the licensee or franchisee lacks the requisite character to hold a Commission authorization.