concerning full-time referrals, hires and promotions and EEO processing and review should as standard procedure focus on fulltime employment.[34/] The Commission already almost entirely discounts parttime employees in evaluating the effectiveness of licensees' EEO efforts, and continuing to impose extensive recruitment obligations with respect to parttime employees in such circumstances is counterproductive and inequitable.

However, stations which choose to use parttime employment as a vehicle for minority and female recruitment or training should be permitted to rely on such efforts and to have them considered in mitigation of EEO sanctions which might otherwise be imposed.[35/] Further, the Commission should also take account of situations in which a licensee hires an employee on a parttime basis in order to accommodate that employee's personal requirements (for example, in order to work while attending school).

34/ Relevant labor force statistics should also be limited to fulltime employees.

35/ A parttime employee's promotion to fulltime status would continue to be considered a promotion rather than a new hire for Commission EEO enforcement purposes.

Policies Concerning Use of Minority and Female Businesses; Promotions; Employee Retention; and On-Site Audits

The NOI seeks comment on possible additional Commission regulation with respect to broadcasters' use of minority- and female-owned businesses; policies concerning minority and female promotion and retention; and institution of on-site EEO audits.[36/] Such restrictions go far beyond the programming-based justification for Commission EEO regulations: the worth of the national goal of elimination of employment discrimination does not give the Commission unfettered authority to engage in direct regulation of its licensees' employment practices.[37/]

Both the courts and the Commission itself have repeatedly recognized that this agency's primary regulatory responsibilities do not include direct enforcement of laws concerning employment discrimination. The Supreme Court's mention in a footnote in NAACP v. FPC of the Commission's

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36/ Pursuant to the 1992 Cable Act, any such regulations would, of course, require Congressional sanction. Moreover, there is no apparent connection between such requirements and the Commission's programming-based justification for its EEO Rules. It should be noted, however, that many of DL&A's clients already make significant efforts to deal with minority- and female-owned contractors so that additional regulations in this regard are unnecessary.

37/ "The nobility of a goal or policy cannot justify usurpation, by the Commission or by us, of a power to pursue in whatever manner we think might 'work.'" Midwest Video Corporation v. FCC, No. 76-1496 (8th Cir. 1978), slip opinion at 32-33.

EEO regulations[38/] does not validate detailed FCC regulation of specific licensee employment practices, particularly those which do not affect ascertainment and responsive programming. The Court's mention was dicta only, as issues relating to the FCC's EEO regulations were not before it.[39/] Further, the dicta dealt only with the Commission's EEO regulations as they then existed, and in no way signal the high court's unrestricted approval of the agency's current more extensive enforcement activities.

Indeed, the Commission itself has recognized that its EEO regulatory authority is limited. In Golden West Broadcasters, 61 FCC 2d 274, 275 (1976), for example, it stated that "...we believe our authority to regulate broadcasters in the public interest does not require us to enforce employment law per se." Similarly, it noted in NBC, Inc., 58 FCC 2d 419, 421 (1976), that when acting "...in line with our 'public interest' obligation to provide for equal employment in broadcasting, the breadth of our 'public interest' determination must be taken from substantive provisions of our enabling statute." And in more recent EEO decisions, the Commission has reaffirmed that its EEO

38/ NAACP v. FPC, 425 U.S. 662, 670, n. 7 (1976).

39/ Indeed, the Court cites the Commission's common carrier and cable television EEO regulations.

responsibilities differ substantially from the type of Title VII regulation it now apparently contemplates.[40/]

The Supreme Court long ago affirmed that the Commission is not authorized to regulate its licensees' business operations: "[t]he Commission is given no supervisory control of programs, of business management or of policy."[41/] As the court has stated, "EEO enforcement is not the FCC's mission. Thus it had no obligation to promulgate EEO regulations."[42/]

Expansion of the Commission's current broadcast EEO regulation to encompass matters such as minority/female contracting, promotion and hiring and employee tenure would represent intrusion on the jurisdiction of, and would be wastefully duplicative of regulation by, agencies specifically charged with enforcing laws respecting equal employment opportunity. Congress has already considered and rejected imposition of broadcast minority/female contracting requirements, limiting such requirements to the cable industry. In such circumstances, the Commission should not revisit the matter, particularly since such contracting

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40/ See, e.g., San Luis Obispo Limited Partnership, FCC 94-21 (February 1, 1994).

41/ FCC v. Sanders Bros. Radio Station, 309 U.S. 474, 475 (1940).

42/ Office of Communication of United Church of Christ v. FCC, 560 F.2d 679 (2d Cir. 1977).

requirements are irrelevant to equal opportunity in employment and unrelated to enhancing the responsiveness of stations' ascertainment and programming efforts.

As noted by the court in NOW v. FCC, "[t]he Commission is...not charged directly with the enforcement of Title VII under its 'public interest' mandate. Congress, rather, centralized [that] responsibility in the EEOC."[43/] Moreover, in addition to the EEOC, numerous other federal, state and local agencies are specifically charged with EEO regulatory responsibilities. Among federal agencies, for example, requirements governing employment practices have been adopted by OFCC,[44/] the Department of Housing and Urban Development,[45/] and the Department of Health, Education and Welfare, whose regulations affect a number of noncommercial educational licensees.[46/] On the non-federal level, virtually all states and most large localities have Fair Employment Practices, Civil Rights or Human Rights laws. Noncommercial licensees which are educational institutions and other non-profit organizations are frequently subject to

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43/ NOW v. FCC, 555 F.2d 1002, 1017 (D.C. Cir. 1977), quoting NAACP v. FPC, supra.

44/ 41 C.F.R. §§ 60-1 - 60-5.30.

45/ 24 C.F.R. §§ 13-1 - 130.1100.

46/ See, e.g., 29 C.F.R. §§ 1602.30 - 1602.55; 45 C.F.R. § 70.4; 45 C.F.R. §§ 80.1-80.13.

extensive federal, state and local EEO regulations and requirements.

In such circumstances, the additional layer of regulation associated with more extensive Commission involvement in licensees' employment policies is clearly unnecessary.[47/] It would also be unwise.

The Commission has not acted on petitions for reconsideration of its 1987 EEO Report which were filed almost seven years ago. Its backlog of EEO-based renewal petitions to deny is years long. Given this morass, additional EEO-based regulatory responsibilities would be extraordinarily unfair to the Commission's obviously overburdened EEO staff as well as to licensees, which would be subject to still more regulatory delay. DL&A respectfully suggests that detailed EEO regulation be left to those agencies with primary enforcement jurisdiction and that the Commission concentrate its restricted resources on optimizing the effectiveness of its existing EEO rules.

Revision of the License Renewal Application

The NOI seeks comment on possible revision of its broadcast license renewal form to solicit additional detailed information concerning licensee recruitment

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47/ The Commission has long deferred to agencies with primary EEO jurisdiction. See, e.g., Pennsylvania Human Relations Commission, 26 RR 2d 207 (1972). More extensive Commission EEO regulation would be inconsistent with that recognition.

efforts.[48] DL&A urges the Commission to resist the impulse to further complicate the EEO regulatory process. As discussed above, the Commission's EEO Branch cannot now handle the burden of existing FCC regulation in this area. Adding new detail to EEO review would simply make matters worse.

Moreover, the NOI itself indicates that instances of EEO violations are relatively small. Nothing indicates that there is widespread EEO noncompliance which escapes the Commission's scrutiny, and indeed, the continuing level of careful EEO monitoring both by the staff and through the petition to deny process demonstrates that stations which inadequately fulfill their EEO obligations will be detected and sanctioned.

The proposed changes would do nothing more than to enhance the misplaced emphasis of the Commission's current EEO enforcement efforts on process rather than on results. If the EEO Rules' ultimate goal is enhancing minority and female employment, then stations that employ minorities and women at levels approaching parity with labor force representation have obtained the required objective. That such stations may have failed to retain certain records or have not contacted particular recruitment sources should not

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48/ As noted above, Congress would have to authorize any such revisions with respect to television renewal applications.

be permitted to obscure what should be the ultimate decisional fact: they have employed minorities and women in reasonable numbers.

A requirement that recruitment minutiae be submitted with license renewal applications would not add appreciably to the already high degree of effectiveness of the Commission's EEO enforcement program. It would, however, add materially to the burden of the Commission's staff and of those it regulates.[49/] DL&A urges the Commission to continue its present EEO program review practices.

Should the Commission nonetheless decide to seek authority to modify its broadcast renewal application form, DL&A specifically requests that the Commission fully define the terms which it employs. In particular, the Commission should define and distinguish the terms "referral," "applicant" and "interviewee." The Commission should, for example, clarify whether a person who submits a resume but is not asked to submit a formal application is a referral or an applicant. Similarly, it should specify the appropriate treatment of unsolicited resumes and job applications, as well as whether, and if so, how, licensees should seek

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49/ DL&A would further note that additional renewal application requirements the Commission apparently contemplates would conflict with federal policy underlying the Paperwork Reduction Act. 44 U.S.C. §§ 3500 et seq.

referral information from persons who submit unsolicited resumes to stations or in situations in which literally hundreds of resumes are submitted in response to a single published job advertisement. Finally, the Commission should define the term "promotion."

Amendment of Annual Employment Report

The same considerations which support retention of the Commission's current renewal application form also mandate retention of the current job categories on the FCC Form 395.[50/] The Commission has already considered and rejected proposals for their modification,[51/] and nothing in subsequent developments suggests a compelling reason to change that decision.

Congress' modification of the reporting categories for cable television systems does not mean that similar modifications are appropriate for licensees. Not only did Congress fail to make such modifications -- to the contrary, it expressly prohibited any changes in television EEO regulation -- the changes it made would simply result in

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50/ It should be noted that a change in the FCC Form 395-B employment categories would also require corresponding changes in the Commission's processing guidelines and enforcement procedures, which the Commission must articulate in order to afford notice of any new obligations which they may impose.

51/ Notice of Proposed Rule Making, Docket No. 21474, 42 Fed Reg. 60168 (Nov. 25, 1977); First Report and Order, Docket No. 21474, 70 FCC 2d 1466 (1979).

more detailed information concerning the "officials and managers" category. Further, as each position normally involves but a single individual, expansion of reporting categories would not contribute to a meaningful statistical analysis of a station's employment practices.[52/]

EEO Inquiry Letters

DL&A urges the Commission to retain the current practice of limiting EEO inquiry letters to three years. In the event that a licensee believes that this period does not afford a representative picture of its EEO Program implementation, it could volunteer additional information about other years. Similarly, should the Commission reasonably believe that three years' worth of recruitment detail is insufficient to enable it to reach an informed decision, it could seek additional detail in particular cases. However, the established three-year inquiry period apparently has enabled the Commission to reach adequate EEO decisions, and the Commission does not suggest a compelling need to generally expand the time period covered by its EEO inquiries.

52/ FCC review of minority and female employment with respect to such one-position job categories would also be inconsistent with the Commission's long-established policy of respecting licensees' job placement decisions. See, e.g., Southern Broadcasting Co., 34 RR 2d 331 (1975); Metromedia, Inc., 34 RR 2d 820 (1975); and its refusal to review minority and female employment on a per-job category basis. See, e.g., CBS, Inc., 37 RR 2d 972 (1976).

Conclusion

The general importance accorded equal employment opportunity should not be permitted to obscure the Commission's principal regulatory mission: the FCC is a communications regulatory agency, not an employment regulator. In such circumstances, deference to agencies with principal EEO regulatory responsibility is not only appropriate but consistent with regulatory efficiency. DL&A submits that the Commission's current broadcast EEO regulatory scheme stretches the legitimate limits of its jurisdiction.

DL&A therefore urges the Commission to concentrate on improving the effectiveness and efficiency of its existing EEO regulations rather than embarking on additional enforcement activities: it, too, should engage in affirmative action designed to assist licensees in fulfilling their commitment to equal employment opportunity.

Respectfully submitted,

DOW, LOHNES & ALBERTSON

By _____
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June 13, 1994

ATTACHMENT A

PETITION FOR RECONSIDERATION AND CLARIFICATION OF THE 1994 EEO POLICY STATEMENT

COPY

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

In the Matter of	)
	)
Standards for Assessing	)
Forfeitures for Violations	)
of the Broadcast EEO Rules	)

To the Commission:

PETITION FOR RECONSIDERATION AND CLARIFICATION

Kevin F. Reed
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March 3, 1994

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

In the Matter of	)
	)
Standards for Assessing	)
Forfeitures for Violations	)
of the Broadcast EEO Rules	)

SUMMARY OF ARGUMENT

DL&A supports the fundamental policies which support the Commission's EEO rules as well as its recent Policy Statement concerning those rules' enforcement. However, it submits that the Policy Statement is in practical effect a retroactive rule which should not have been adopted without the notice and comment rulemaking procedures required by the Administrative Procedure Act. The Policy Statement does not act prospectively, nor does its language and actual application reflect discretionary decision-making. As such, it fails to satisfy judicially-established requirements for APA-exempt general statements of policy.

Further, as a substantive change in the Commission's broadcast EEO rules, it is expressly prohibited by the 1992 Cable Act.

In the event the Commission nonetheless decides to retain the Policy Statement, it should reconsider and clarify it in the following respects:

-- Efforts. The Commission should clarify that the Policy Statement will be applied if a licensee fails to engage in EEO recruitment outreach efforts for at least 66% of its job vacancies, not if a licensee which conducts such efforts fails actually to receive minority or female applicants for 66% of those vacancies. Licensees cannot guarantee that their recruitment contacts will in fact result in minority or female referrals and it is unfair to impose sanctions in such circumstances, which are entirely beyond licensees' control.

-- Adequate Pool. The Commission should explain what it means by an "adequate pool of minority/female applicants or hires."

-- License Term. The Commission should clarify the time period over which licensees' employment practices will be reviewed and explain its future practices with respect to EEO inquiries in this regard.

-- Fulltime/Parttime Employment. The Commission should not disregard or discount parttime broadcast station employment, but should instead make it clear that both fulltime and parttime employment will be considered in evaluating licensees' compliance with its EEO rules.

-- Minority Representation. The Commission should increase to 10% the level of minority labor force representation which will trigger a downward adjustment.

-- "50/50" EEO Processing Guidelines. The Commission should explain the relationship between its established "50/50" EEO processing guidelines and the Policy Statement's new standards.

-- Self Assessment/Recordkeeping. The Commission should detail its expectations with respect to licensee self-assessment and recordkeeping.

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

In the Matter of	)
	)
Standards for Assessing	)
Forfeitures for Violations	)
of the Broadcast EEO Rules	)

To the Commission:

PETITION FOR RECONSIDERATION AND CLARIFICATION

The law firm of Dow, Lohnes & Albertson ["DL&A"][1/] petitions the Commission for reconsideration and clarification of its Policy Statement, which established guidelines for assessing forfeitures for violations of the Commission's EEO rules.[2/]

Introduction

DL&A and its clients support the fundamental policy goals of the Commission's EEO Rules. Non-discriminatory employment policies and practices are, properly, bedrock licensee obligations. The Policy Statement, however, represents a fundamental substantive

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1/ Dow, Lohnes & Albertson represents a number of clients which are broadcast licensees and which are therefore potentially affected by the provisions of the Policy Statement.

2/ Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules, Policy Statement, FCC 94-27 (February 1, 1994) ["Policy Statement"].

change in the Commission's EEO Rules which is expressly prohibited by Congress as well as inconsistent with established principles of administrative law. More than two decades after the Commission first adopted broadcast EEO rules, its Policy Statement announced guidelines for imposition of forfeitures for violations of those rules. More significantly, the focus of the Policy Statement's guidelines appears to deviate from what should be the ultimate objective of equal employment opportunity requirements: actual efforts to enhance employment opportunities for members of minority groups and women.

DL&A therefore respectfully suggests that the Commission must rescind the Policy Statement. At a minimum, it should clarify and reconsider its guidelines so as to align them more closely with the ultimate policy objectives of affirmative action requirements.

The Policy Statement Violates the Administrative Procedure Act

Section 553 of the Administrative Procedure Act requires agencies to follow prescribed notice and public comment procedures prior to adopting substantive rules. 5 U.S.C. § 553. Section 553(b) excepts "general statements of policy" from these requirements. 5 U.S.C. § 553(b)(A). This exception is available only for policy statements which (1) act prospectively -- that is, the agency may not treat the policy as if it has present, binding effect; and (2)

genuinely leave the agency and its decision-makers free to exercise discretion.[3] The Policy Statement fails to comply with either requirement.

First, the Policy Statement is being applied retroactively. The decisions in which it has been invoked thus far[4] all have involved licensees whose renewal applications covered license terms which ended well before the Policy Statement was adopted, and, indeed, which largely predated the effective date of the increased FCC forfeiture authority which prompted its issuance.[5] Licensees have been subjected to severe penalties for actions during license terms which began more than ten years before the Policy Statement was issued and more than three years before the Commission specifically articulated new (and now changed) requirements for EEO enforcement (which are

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3/ American Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980) [agency's policy did not qualify as a general statement of policy because it vested immediate rights and the agency regarded it as binding].

4/ North County Broadcasting Corporation, FCC 94-19 (February 1, 1994); Roy H. Park Broadcasting of Washington, Inc., FCC 94-18 (February 1, 1994); The Lutheran Church/Missouri Synod, FCC 94-23 (February 1, 1994); San Luis Obispo Limited Partnership, FCC 94-21 (February 1, 1994); Stauffer Communications, Inc., FCC 94-20 (February 1, 1994).

5/ Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (1989); see Policy Statement, Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), modified in part on recon., 7 FCC Rcd 5339 (1992), petition for review pending sub nom., USTA v. FCC, No. 92-1321 (D.C. Cir. July 30, 1992).

themselves subject to long-pending petitions for reconsideration).[6] In such circumstances, imposition of sanctions based upon departure from standards which were never previously articulated and thus could not have been known to licensees at the time of their actions not only conflicts with due process' bedrock requirement of full prior notice: it precludes the Policy Statement's characterization as a prospective document subject to Section 553(b)'s exemption.

As the United States Court of Appeals for the District of Columbia Circuit has said,

> A general statement of policy...does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future.[7]

Far from reflecting the Commission's tentative future intentions, the Policy Statement has a present, binding impact on licensees whose past actions are found to have violated its standards. Its abrupt departure from prior practice, with absolutely no prior notice to affected

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6/ Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, 2 FCC Rcd 3967 (1987) ["EEO Report"], petition for reconsideration pending.

7/ Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974) [footnote omitted].

licensees, violates established concepts of fairness and precludes its characterization as an APA-exempt policy statement.

Second, notwithstanding the Commission's protestations that it will apply the Policy Statement in a flexible matter, it is clear that it "...is in purpose [and] likely effect one that narrowly limits administrative discretion..." and as such must be treated as "a binding rule of substantive law." Guardian Federal Savings & Loan Ass'n v. Federal Savings & Loan Insurance Corp., 589 F.2d 658, 666-667 (D.C. Cir. 1978). The Policy Statement is phrased in imperatives: for example, "[e]vidence of this violation will include..."; "[e]fforts are evaluated..."; "EEO programs...will warrant a short-term renewal..." "[a]nalysis will focus on..."; "[s]hort term renewals will be assessed..." [emphases supplied].

The plain language of the Policy Statement thus does not suggest either discretion or flexibility.[8/] Rather, such mandatory, limiting language is a "powerful,

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8/ Indeed, the "formula like" tenor of the Policy Statement "define[s] a fairly tight framework to circumscribe the [agency's] statutorily broad power." See Batterton v. Marshall, 648 F.2d 694, 707 (D.C. Cir. 1980), citing Pinkus v. U.S. Board of Parole, 507 F.2d 1107 (D.C. Cir. 1974). For example, the Policy Statement's short term renewal provisions indicate that the Commission has chosen the information which will be considered relevant, thus channeling the decision maker toward considering only approved criteria.

even potentially dispositive, factor" which indicates that a purported policy actually operates as a substantive rule.[9] Certainly, the decisions which have implemented it thus far reflect its mechanical application rather than the discretionary weighing of unique considerations which is the hallmark of a true administrative policy statement.[10]

In short, the Policy Statement lacks both judicially-required indicia of administrative policy statements which are exempt from the APA's notice and comment requirements. It is not a mere statement of prospective policy or regulatory interpretation. Rather, it establishes new substantive EEO requirements which licensees' past practices must satisfy in order to avoid substantial forfeitures. The Policy Statement should, in consequence, be withdrawn.

9/ Community Nutrition Institute v. Young, 818 F.2d 943, 947 (D.C. Cir. 1987); see also McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317 (D.C. Cir. 1988).

10/ For example, the decisions reiterate the Policy Statement's standards essentially verbatim, and contain no indication why the 66% recruitment minimum was deemed an appropriate measure of compliance under the circumstances of each case. The Policy Statement, in other words, was given the practical force of a rule.

The Policy Statement Establishes New Substantive EEO Requirements and is Therefore Barred by the 1992 Cable Act

Section 334 of the 1992 Cable Act[11/] codified Section 73.2080 of the Commission's Rules as well as its broadcast EEO forms. In consequence, the Commission has expressly acknowledged that "[t]he 1992 Cable Act explicitly prohibits revisions to...the broadcast EEO Rule..."[12/] The Policy Statement effects a substantive revision to Section 73.2080.[13/] As such, it is clearly prohibited by the 1992 Cable Act.

Base Forfeiture Requirement

Not only is the Policy Statement without legal foundation: its terms are confusing and fail to provide adequate notice of the Commission's expectations with respect to EEO enforcement. Should the Commission retain

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11/ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ["1992 Cable Act"].

12/ Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order, FCC 93-334 (July 23, 1993) at n. 16 ["1993 EEO Report"].

13/ For example, the Policy Statement apparently contemplates specific forfeitures for licensees which are not able to attract minority or female applicants for at least 66% of available positions, and thus creates a new, extraregulatory framework for measuring compliance. No similar percentage requirements appear in Section 73.2080: indeed, that rule contains no indication that minority or female representation in individual applicant pools is even relevant to compliance.

the Policy Statement, DL&A strongly urges it to clarify its requirements as set forth below.

Efforts. The Policy Statement's guidelines prescribe a $12,500 base forfeiture for a "[f]ailure to recruit so as to attract an adequate pool of minority/female applicants or hires for at least 66% of all vacancies during the license term being reviewed." As written, it is unclear whether the Commission expects licensees to engage in EEO recruitment efforts for at least 66% of all vacancies, or whether it expects licensees' recruitment efforts to result in inclusion of minorities and women in the applicant pools for at least 66% of all job vacancies.[14/] DL&A respectfully submits that the former interpretation is the proper one.

Such an interpretation would be fully consistent with the Commission's recent emphasis on the importance of licensees' EEO outreach efforts. The Commission's 1987 EEO Report[15/] reoriented the Commission's EEO enforcement focus from statistical employment profile analyses to

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14/ The decisions applying the Policy Statement seem to indicate that the latter interpretation is being used. See n. 4, supra.

15/ Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, 2 FCC Rcd 3967 (1987) ["EEO Report"], petition for reconsideration pending

concentration on actual EEO efforts. As the Commission later explained its EEO Report,

> ...we have repeatedly emphasized the importance of recruiting qualified minorities and women. Recruitment efforts became more important when, in June 1987, the Commission adopted an efforts-oriented EEO program. The Commission believed that the principal element of a good EEO program was the effort undertaken to attract qualified minority and female applicants whenever vacancies occurred, rather than relying on a station's statistical profile.[16]

Subsequent Commission decisions repeatedly stressed the Commission's "primary concern" with licensees' efforts.[17] Indeed, Commission decisions imposing sanctions on or cautioning stations whose statistical employment profiles complied with applicable guidelines or which had actually hired large numbers of minorities but which lacked the

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16/ Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, FCC 89-44 (February 22, 1989), at par. 5. Although the Commission also noted the importance of self-evaluation, the EEO Report specifically indicated that self-evaluation was to be but one of a number of optional program elements ("...the rules plainly indicate that the specific program elements, including those relating to the station's self-evaluation of its EEO profile, are intended to serve only as examples of the types of activities that would fulfill the EEO requirements." EEO Report, 2 FCC Rcd at 3969), so that a failure to self-evaluate cannot, in and of itself, serve as the basis for sanctions.

17/ See, e.g., Michigan and Ohio Renewals, 3 FCC Rcd 6944 (1988) [...our primary concern is the broadcaster's efforts."]; 1993 EEO Report at par. 3 ["When reviewing a broadcaster's EEO compliance at renewal time, our primary focus is on the licensee's overall EEO efforts."]