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RECEIVED
JUN 28 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

June 28, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Implementation Of The Commission's
Equal Employment Opportunity Rules
(MM Docket No. 94-34)

Dear Mr. Caton:

Submitted herewith for filing, on behalf of our client, NewCity Communications, Inc., are an original and nine (9) copies of its Reply Comments in the above-referenced rulemaking proceeding.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

By: Irving Gastfreund

Enclosure

DOC. 12105981

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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JUN 28 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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In the Matter of	)	
	)	
Implementation of Commission's Equal Employment Opportunity Rules	)	MM Docket No. 94-34
	)	
	)	

TO: The Commission

REPLY COMMENTS OF NEWCITY COMMUNICATIONS, INC.

Irving Gastfreund, Esq.

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Counsel for NewCity Communications, Inc.

June 28, 1994

DOC #12105986

BEFORE THE

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WASHINGTON, D.C. 20554

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OFFICE OF SECRETARY

In the Matter of	)	
	)	
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	)	
	)	

TO: The Commission

REPLY COMMENTS OF NEWCITY COMMUNICATIONS, INC.

NEWCITY COMMUNICATIONS, INC. ("NCI"), by its attorneys, pursuant to Section 1.415 of the Commission's Rules, hereby submits its instant Reply Comments in response to the Commission's Notice of Inquiry in the above-captioned proceeding (FCC 94-103, released April 21, 1994) (hereinafter "Notice").[1] In support whereof, it is shown as follows:

I. Interest of NewCity In This Proceeding

NewCity, through subsidiaries, is the entity controlling the respective licensees of the following commercial radio stations:

1. WEZN(FM), Bridgeport, Connecticut;
2. WJZF(FM), La Grange, Georgia;
3. WZZK(AM) and WZZK-FM, Birmingham, Alabama;

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[1] By Order Granting Motion For Extension Of Time To File Comments, DA 94-495 (Mass Media Bureau released May 16, 1994), the time for filing reply comments in this proceeding was extended to and including June 28, 1994.

4. WODL(FM), Birmingham, Alabama;

5. KRMG(AM) and KWEN(FM), Tulsa, Oklahoma;

6. WDBO(AM) and WWKA(FM), Orlando, Florida;

7. WSYR(AM) and WYYY(FM), Syracuse, New York;

8. WBBS(FM), Fulton, New York; and

9. KKYX(AM) and KCYY(FM), San Antonio, Texas

In addition, through subsidiaries, NewCity provides programming as a time broker, pursuant to time brokerage agreements, to the following radio stations:

1. KDIL(AM), Terrell Hills, Texas; and

2. WCFB(FM), Daytona Beach, Florida

As the ultimate parent of a number of commercial radio stations, NewCity is clearly affected by any changes in the Commission's Equal Employment Opportunity ("EEO") rules and policies. NewCity thus has a significant interest in the outcome of this proceeding, and its instant comments will therefore materially affect the Commission in its decisionmaking in this proceeding.

II. Introduction

In its Notice, the Commission sought comment on a broad range of issues concerning its EEO rules, policies and practices. Among these issues are the following:

a. Whether the Commission's EEO rules and policies should be modified for small market broadcasters in light of the difficulties that small market stations have in attracting and retaining minority employees;

b. Whether the Commission should eliminate the requirement for documentation of part-time hires, or, alternatively, what consideration

should be given to part-time hires in light of the Commission's focus on full-time hires and employment;

c. Whether broadcasters should be required to encourage minority and female entrepreneurs "to conduct business with all parts of" station operations;[2]

d. Whether the Commission should modify its EEO enforcement policies in the areas of promotion and retention of female and minority employees;

e. Whether the Commission should encourage joint recruitment efforts by station licensees in particular cities or areas;

f. What are the costs and benefits of the Commission's EEO rules and policies and how might such burdens be reduced without causing a decrease in the effectiveness in those rules and policies;

g. Whether the Commission's EEO Program Report (FCC Form 396) should be revised in order to elicit more information on the promotion of part-time station employees to full-time status, as well as on the recruitment and hiring efforts of licensees during the 12-month period before the filing of license renewal applications; and

h. Whether the Commission's broadcast Annual Employment Report (FCC Form 395-B) should be expanded to seek information on 15 job categories, as Congress has mandated for cable television, rather than the current nine job categories.

NewCity fully supports the public interest objectives which form the basis for the Commission's existing EEO rules and policies, viz., to promote program diversity and to enhance access by minorities and women to increase employment opportunities in the broadcast industry. Notice, ¶1. Non-discrimination in hiring and promotion and the fostering of equal employment opportunities for minorities and women are laudable and important policies. However, NewCity is concerned that many of the proposals which the Commission

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2 Notice ¶23.

is now considering in connection with expansion of broadcast licensee obligations in the EEO area, as well as the new requirements adopted in the Commission's February 1994 EEO Policy Statement,[3] do not materially advance the goal of increasing representation of qualified women and minority group members at all levels of the broadcasting industry, but, rather, serve to elevate process over results. Indeed, these requirements and proposals dramatically increase the paperwork burden on broadcasters, and, accordingly, may well serve to diminish the resources that are available for meaningful affirmative action efforts.

As shown by the National Association of Broadcasters ("NAB") in its Comments in this proceeding, the record of hiring of minorities and women in the broadcasting industry dispels the notion that the broadcasting industry has somehow been lax in its efforts to provide equal employment opportunities for minorities and women. As shown by NAB, not only is the broadcasting industry as a whole hiring minorities and women above the Commission's EEO processing guidelines, but, also, the industry's hiring practices generally reflect the composition of the national labor force. Accordingly, radical changes in the Commission's EEO rules and policies and enforcement thereof are unwarranted.

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3 Standards For Assessing Forfeitures For Violations Of The Broadcast EEO Rules, 9 FCC Rcd 929 (1994) (hereinafter "EEO Policy Statement").

III. Recent Commission EEO Policies Have Placed An Undue Emphasis On Procedures And Processes And Have Given Too Little Recognition To Results Of Licensee EEO Efforts

NewCity is concerned that the numerical standards adopted by the Commission in its EEO Policy Statement to evaluate the adequacy of a station's EEO recruiting efforts, coupled with the additional recordkeeping proposals articulated in the Commission's Notice, mark a shift toward a system where the process of EEO compliance is more important than the results, and where penalties may be imposed on a station which has in fact met or exceeded the Commission's hiring guidelines. It is apparent from some of the Commission's recent decisions implementing the new guidelines in the new EEO Policy Statement that this concern is not unwarranted. For example, in San Luis Obispo Limited Partnership, 9 FCC Rcd 894, 899-900 (1994), a licensee was fined $25,000 and was given only a short-term license renewal, coupled with EEO reporting conditions, even though the licensee had not discriminated and even though the licensee had hired minorities at a rate equal to 100 percent of minority representation in the station's county. These sanctions were imposed only because the licensee did not meet the numerical benchmark that the Commission established in the EEO Policy Statement (a benchmark established after the license term in question and applied by the Commission retroactively to that license term) for licensees' hiring processes; specifically, the licensee did not recruit so as to actually attract minorities for at least 66 percent of its hiring opportunities. Id.

On March 3, 1994, NAB filed its Petition For Reconsideration of the EEO Policy Statement; that Petition For Reconsideration presents a number of reasons why the EEO Policy Statement is unfair and inappropriate. NewCity supports NAB's Petition For Reconsideration and specifically endorses one of the primary points made in NAB's Petition viz., a licensee which has met or surpassed the Commission's EEO processing guidelines has obviously engaged in sufficient efforts to attract qualified women and minorities, and there is therefore no rational basis to penalize such a license for not meeting FCC-imposed requirements that relate to the process for expanding the pool of potential minority and women applicants. By relegating a licensee's actual hiring results to the status of merely a mitigating factor for assessing forfeiture for EEO rule violations, the Commission has made the results merely a secondary function of its EEO requirements, and, in this regard, the Commission has clearly lost sight of the forest for its trees. NewCity respectfully urges the Commission to refocus its EEO enforcement efforts where they belong: on the actual results of a licensee's recruitment efforts, and not on the process employed by the licensee in achieving those results.

As noted above, the substantive standards embodied in the Commission's EEO Policy Statement were adopted at the beginning of 1994 but have been applied retroactively to justify imposition of sanctions on broadcast licensees. NewCity finds this fact particularly disturbing.

Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, requires administrative agencies to follow prescribed notice and public comment procedures prior to adopting substantive rules. Section 553(b) provides that "general statements of policy" are exempt from these requirements. 5 U.S.C. § 553(b)(A). This exception is available only for policy statements which (a) act prospectively -- i.e., the agency may not treat the policy as if it has a present, binding effect; and (b) genuinely leave the agency and its decision-makers free to exercise discretion in determining whether to follow or not follow the policy statement. See American Bus Association v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980). The Commission's EEO Policy Statement fails to comply with either requirement.

First, as noted above, the EEO Policy Statement has been applied, and is being applied, retroactively. The decisions in which the EEO Policy Statement has been invoked thus far[4] have each involved licensees whose renewal applications covered license terms which ended well before the EEO Policy Statement was adopted, and, indeed, which largely predated the effective date of the increased forfeiture authority granted to the Commission which prompted the issuance of the EEO Policy Statement.[5] Thus, broadcasters have been subjected to severe penalties for actions during license terms that began years before the EEO Policy Statement was issued. In such circumstances, imposition of sanctions based upon

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4 See, e.g., Roy H. Park Broadcasting of Washington, Inc., et al., 9 FCC Rcd 860 (1994); North County Broadcasting Corporation, 9 FCC Rcd 871 (1994); Stauffer Communications, Inc., 9 FCC Rcd 879 (1994); San Luis Obispo Limited Partnership, 9 FCC Rcd 894 (1994); The Lutheran Church/Missouri Synod, 9 FCC Rcd 914 (1994); Eagle Radio, Inc., 9 FCC Rcd 836 (1994).

5 Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (1989).

departure from substantive standards which were never previously articulated, and which thus could not have been known to broadcast licensees at the time of their actions, not only conflicts with the fundamental dictates of due process, it also precludes any characterization of the EEO Policy Statement as a document which has only prospective applicability, and, as such, the EEO Policy Statement is not exempt from the notice and public comment procedures mandated in 5 U.S.C. § 553 (b). Furthermore, the Commission's invocation of the EEO Policy Statement in its recent enforcement rulings makes it clear that the Commission is treating the EEO Policy Statement as having binding force of law per se; in short, the Commission has thus far not treated the EEO Policy Statement as a mere "general statement of policy" which the agency and its staff are free to follow or not follow.

Based on all the foregoing, NewCity respectfully requests that the Commission rescind its EEO Policy Statement. The guidelines and benchmarks set forth in the EEO Policy Statement simply do not measure the EEO efforts of a licensee in any realistic terms, and, even worse, can be applied so as to completely discount tangible efforts of licensees which have in good faith consistently implemented an effective EEO program -- with effectiveness being measured in terms of hiring results, rather than based on the processes followed to achieve those results.

IV. Other Issues Raised In The Commission's Notice

A. Part-Time Employees

As the Commission is no doubt aware, compliance with its EEO rules and policies can very well be an expensive undertaking, particularly when one considers the costs of advertising, telephone, supplies, staff resources, etc., to conduct required EEO outreach for any single job vacancy. Although such expenditures may be justified in the case of a full-time employee who would have long-term prospects of employment at a station, such expenditures are unnecessarily burdensome in the case of part-time employees.

NewCity respectfully suggests that the Commission's EEO enforcement policy discontinue detailed scrutiny of part-time and temporary broadcast station employment, particularly with respect to requiring affirmative outreach efforts for each part-time or temporary position which is filled. The focus of the Commission should be on full-time non-temporary employees. This approach would be in keeping with the realities of broadcast station operations and would avoid needless and burdensome EEO outreach efforts for even the most temporary, part-time positions. Radio broadcast operations are generally small businesses. By forcing radio broadcasters to employ EEO outreach efforts for part-time and temporary employees, the Commission would be unnecessarily burdening broadcast licensees without any countervailing public interest benefits. In this connection, the Commission should take note of the high turnover rate among part-time employees at radio stations, as well as the likely delays in filling vacancies that would result if broadcast licensees were

forced to utilize EEO outreach efforts for part-time or temporary employees. These delays could significantly adversely impact on radio station operations, particularly those of small market broadcasters.

B. Use Of Minority And Female Businesses

The Notice seeks comment on whether broadcast licensees should be required to encourage minority and female entrepreneurs to conduct business with "all parts" of a station's operations. Such proposals go far beyond the overriding goal underlying the Commission's EEO rules and policies (i.e., to promote program diversity).[6] Moreover, the Commission itself has rejected adoption of policies which are not directly related to the employment practices of licensees at their stations:

> "[i]t is our intention not to alter the broadcasters' current EEO obligations, and particularly to avoid areas not directly related to the employment practices of the station .... Our concern in the matter of broadcast EEO policy is directly primarily at a broadcast licensee's efforts and practices in recruiting, hiring and promoting within its own station(s)."
>
> Equal Employment Opportunity In The Broadcast Radio And Television Services, 2 FCC Rcd 3967, 3969 ¶15 (1987).

This approach is as valid today as it was seven years ago. The Supreme Court long ago held that the Commission does not have generalized, all-encompassing regulatory authority over the business operations of its licensees:

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6 Notice at ¶ 1.

> "The Commission is given no supervisory control of programs, of business management or of policy."
>
> FCC v. Sanders Bros. Radio Station, 309 U.S. 474, 475 (1940).

Expansion of the Commission's current broadcast EEO rules and policies to encompass such matters as minority/female contracting would represent an unwarranted intrusion on licensee business practices, without any jurisdictional basis for such action. Congress itself has already considered and rejected imposition of broadcast minority/female contracting requirements, and has limited such requirements to the cable industry. See H.R. Conf. Rep. No. 862, 102d. Cong., 2d Sess. 96-97 (1992). Under such circumstances, the Commission should not revisit the matter, particularly since such contracting proposals are irrelevant to equal opportunity in hiring and employment and are unrelated to enhancing programming diversity on broadcast stations.

Furthermore, as noted above, radio broadcasters are generally small businesses. For many years, a large percentage of the radio stations within any given market have been unprofitable or barely profitable. Of necessity, most radio stations have very few administrative personnel. Under these circumstances, if the Commission were to require radio station licensees to undertake minority and female contracting obligations, significant additional financial and resource burdens would be placed on radio broadcasters -- burdens that most broadcasters are simply unable to absorb. In this regard, radio stations generally do not employ "purchasing agents", buyers, etc., that may be found in much larger business organizations. Moreover, most radio stations are generally not engaged in purchasing large volumes of materials, supplies and services from any given vendor. New City respectfully

suggests that the Commission maintain its EEO focus on the results of licensee outreach efforts with respect to minorities and women and eschew unwarranted extensions of its jurisdiction.

C. Joint Recruitment Efforts

The Commission is to be applauded for its recognition, in the Notice, that joint recruitment efforts by broadcasters are to be encouraged. Notice, ¶25. Unfortunately, a number of the Commission's enforcement orders in the EEO area have tended to downplay the significance of joint recruitment efforts by broadcasters. In this regard, such joint recruitment efforts have often been referred to as merely "general" sources of employee referrals rather than minority-specific referral sources. See, e.g., Midland Broadcasters, Inc., et al., 9 FCC Rcd 2091 (1994). While joint recruitment efforts (e.g., recruitment clearing houses under the auspices of state broadcaster associations, the NAB, job fairs, etc.) cannot specifically target minorities and women, it is clear that one of their specific functions is to help broadcasters achieve greater employment opportunities for minorities and women. Unfortunately, the Commission has not recognized the importance of such joint recruitment efforts. Indeed, the Commission's staff has informally taken the position that a broadcaster cannot rely on referrals from state broadcaster associations in lieu of its own individualized recruitment efforts by direct contacts with minority and women's organizations.

By denigrating the importance of joint recruitment efforts, the Commission has provided a disincentive for their use. The Commission should allow broadcasters who use

such joint recruitment efforts to claim individual station credit for the results of the group effort. Thus, for example, if a state broadcasters association has a job referral service, and if a licensee utilizes such a service and obtains minority and female referrals from the association, those referrals should be given as much credit in assessing the licensee's EEO efforts as if the licensee itself had obtained them directly from minority-specific and female-specific referral sources.

D. Commission Letters Of Inquiry Regarding Recruitment For The Entire License Term

NewCity respectfully submits that the Commission should retain its current practice of limiting EEO letters of inquiry to a three-year retrospective, rather than extending the period to the full seven-year license term. In the event that a licensee responding to an EEO letter of inquiry believes that a three-year period does not accurately represent its EEO program implementation, it should be left to the licensee to volunteer additional information about its recruitment efforts during other years of its past license term. If the Commission were to change its EEO letter of inquiry procedure to require responses from licensees concerning the entire seven-year license term, it is probable that most licensees would not have detailed records concerning EEO outreach efforts for the first four years of a license term, in light of the Commission's existing policy of focusing solely on the last three years of a license term. Hence, if the Commission were to change its focus to a seven-year perspective, the effect of such a change would be an unfair retroactive impact on licensees, who would no doubt be penalized for inadequate recordkeeping with respect to the first four years of their license terms. The established three-year inquiry period has thus far enabled the Commission to

make informed decisions concerning licensee EEO outreach efforts, and, therefore, there is no public interest need to expand the time period covered by EEO letters of inquiry.

V. Conclusion

NewCity respectfully urges the Commission to focus on the results that a broadcaster achieves in assuring equal employment opportunity, rather than on the process used to arrive at such results. The Commission should carefully tailor its EEO rules and policies to provide relief for broadcasters -- particularly small market broadcasters and small broadcasters in other markets -- from the ever-increasing recordkeeping burden imposed by the Commission's EEO rules and policies. Small market broadcasters as well as small broadcasters (e.g., those with fewer than 15 full-time employees) in markets with a labor force of less than 10 percent minorities, should be relieved of detailed recordkeeping requirements if they have had no history of discrimination. The additional recordkeeping and reporting requirements contemplated by the proposals set forth in the Commission's Notice in this proceeding would provide little public interest benefit but would dramatically increase the paperwork burden on all licensees. By adopting the suggestions contained in these Reply

Comments, the Commission would materially assist broadcast licensees in fulfilling their equal employment opportunity obligations.

Respectfully submitted,

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June 28, 1994