

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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

**REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

Respectfully submitted,

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## EXECUTIVE SUMMARY

Only a few commenters support the expanded recordkeeping and reporting requirements discussed in the Commission's *Notice of Inquiry*. More overwhelming is the record supporting an easing of the burden on small market broadcasters and small broadcasters in other markets. The Commission should work toward making the process less onerous on those broadcasters in particular.

NAB opposes additional investigative mechanisms into licensees' post-employment practices, such as tracking of promotions and the use of random audits. There is no indication that such investigation would yield any benefit in promoting employment among women and minorities in upper-four jobs. Further, procedures already in place at other, expert agencies — federal and state — provide adequate avenues to uncover any possible discrimination. The proposed procedures are not compatible with the Commission's regulatory mission.

The Commission should also refrain from applying processing guidelines to part-time hires. The nature of part-time employment would make unworkable the application of parity tests. Along that line, there is no need to raise the parity levels, nor give them heightened application to officials and managers positions. The track record of minority and female employment in the industry warrants against such drastic changes. Refocusing the processing guidelines on dominant minorities runs counter to the Commission's goal of equal employment opportunity for *all* groups.

The strides made by the industry in equality of employment opportunities indicate that additional recordkeeping and enforcement are unnecessary.

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**REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters ("NAB") hereby submits its Reply Comments in the above-captioned proceeding. The purpose of the *Notice of Inquiry* ("*Notice*")<sup>1</sup> is to determine the effectiveness of the Commission's EEO rules for broadcast, cable and multichannel video programming distributors, with an eye toward changes which may be implemented outright or recommended to Congress, which has statutorily limited the changes which the Commission can make to its EEO rules.<sup>2</sup>

The overwhelming majority of Comments support NAB's position that the *Notice's* proposed reporting, recordkeeping and enforcement changes are unwarranted, that small market broadcasters and small broadcasters need relief from the financial and administrative burden that increased EEO reporting requirements would cause, and that extension of EEO requirements to licensees' business relationships with minority and

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<sup>1</sup> *Notice of Inquiry* in MM Docket No. 94-34, 9 FCC Rcd. 2047 (1994).

<sup>2</sup> *See* 47 U.S.C. § 334.

female entrepreneurs is unnecessary.<sup>3</sup> In these Reply Comments, NAB responds to those few commenters who would have the Commission needlessly spend more of its — and licensees' — resources in further recordkeeping, reporting and investigation. Because broadcasters are approaching parity in the hiring of women and minorities in key positions, the additional reporting requirements discussed in the *Notice* and suggested by a few commenters would serve little purpose and would provide little benefit to the Commission and the public. NAB therefore urges the Commission to refrain from burdening licensees with the additional enforcement measures suggested by those commenters.<sup>4</sup>

**I. ADDITIONAL INVESTIGATION INTO LICENSEES' POST-EMPLOYMENT PRACTICES IS UNWARRANTED, AND WOULD REQUIRE THE COMMISSION TO CONDUCT EEO PROCEDURES BETTER HANDLED BY OTHER AGENCIES.**

In an effort to make a case for additional post-employment EEO scrutiny by the Commission, the Joint Commenters attempt to conjure up discrimination in job placement and assignment among broadcast licensees. Their argument focuses on a practice known as “ghettoization,” where minorities and women may work only in certain

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<sup>3</sup> In fact, only one set of comments — filed by the League of United Latin American Citizens, the Minority Media and Telecommunications Council, the National Association for the Advancement of Colored People, the National Bar Association, and the Office of Communications of the United Church of Christ (hereinafter collectively referred to as the “Joint Commenters”) — opposed relief for small and small market broadcasters. *See* Comments of Joint Commenters at 15. Their position is overwhelmingly rebutted by NAB’s Comments, at 16-20, and other commenters. *See, e.g.*, Comments of Fairfield Communications at 5; Comments of Licensees of Ninety-Eight Broadcast Stations at 14-17; Comments of Dow, Lohnes & Albertson at 8-11; Comments of Texas Association of Broadcasters at 14-16; Comments of KTIB-AM.

<sup>4</sup> NAB generally opposes all the proposals made by Joint Commenters in their filing. However, we will respond only to selected proposals in these Reply Comments.

jobs but not others. For support, the Joint Commenters cite cases from the 1970s,<sup>5</sup> including one in which the licensee's EEO program had characterized certain types of jobs as "suitable" or "feasible" for minority applicants.<sup>6</sup>

However, the basis for the Joint Commenters' argument is antiquated. There is no indication whatsoever that such practices presently occur, if at all, with any frequency. In fact, a comparison of employment in 1981 and 1992 (the period surveyed by the Joint Commenters) shows quite the opposite.<sup>7</sup> During that period, the number of Officials and Managers in the industry declined by two percent (from 32,171 in 1981 to 31,609 in 1992). Yet, the number of female Officials and Managers *increased* by almost 25 percent (from 8,595 to 10,696). For minorities, the number of Officials and Managers rose by 33.4 percent (from 2,954 to 3,943). Similar results were achieved in the other upper-four categories. Professional employment dropped 1.4 percent overall, but the number of female professionals climbed 18.7 percent and minority professionals jumped 22.5 percent. Technician employment dropped 11.9 percent overall, but the number of female technicians rose 13.8 percent and minority technicians climbed 13.4 percent. The lone upper-four category gaining in employment was sales workers, which increased 26 percent overall. Female and minority employment in the category nearly tripled the overall increase, up 70.3 percent and 72.8 percent, respectively.

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<sup>5</sup> Comments of Joint Commenters at 19.

<sup>6</sup> *Rust Communications Group, Inc.*, 53 F.C.C.2d 355 (1975).

<sup>7</sup> The employment totals in the following discussion are based a comparison of the FCC's 1981 Employment Report (FCC Press Release dated January 5, 1982) and its 1992 Employment Report (*Public Notice* dated July 6, 1993).

Just as important is the comparison of office/clerical employment. While female and minority employment in this category still outpaces labor force availability (89.2 percent and 29.6 percent, respectively), the percentage of office and clerical workers to overall female and minority employment has dropped dramatically. In 1981, there were 20,748 females and 5,819 minorities employed in broadcast office and clerical jobs, or 39.2 percent of female and 24.9 percent of minority employment in the industry.<sup>8</sup> For 1992, however, the figures had dropped to 16,743 females and 5,556 minorities; 28.5 percent of female and 20.6 percent of minority employment in the industry.

Obviously, the “ghettoization” theorized by the Joint Commenters is not a factor about which the Commission should be overly concerned. Considering the drop in broadcast employment, broadcasters are taking giant strides in movement toward full parity in all the upper-four job categories. The Commission should recognize that fact and find ways to encourage broadcasters to continue along that highway, rather than detour them with unnecessary additional reporting requirements and other measures.

In that vein, NAB urges the Joint Commenters to work with broadcasters in finding additional sources of minority and female applicants. One of the common complaints among broadcasters, particularly small market broadcasters, is that local minority organizations rarely respond to stations’ job opening announcements, let alone provide referrals.<sup>9</sup> Moreover, the EEO data profile cards essentially required by the

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<sup>8</sup> Moreover, for females, employment in that category was 65.6 percent the size of female employment in all upper-four categories combined. For minorities, employment in the Office/Clerical category was 36 percent the size of minority employment in all upper-four categories combined. By 1992, those figures had dropped to 40.4 percent for females and 27.1 percent for minorities.

<sup>9</sup> See, e.g., Comments of The Woodfin Group at 2; Comments of KTEM Radio at 5.

Commission for tracking referral sources used by applicants may actually be deterring minorities from applying for broadcast positions.<sup>10</sup> Broadcasters and the Joint Commenters have a common goal — to increase employment opportunities for minorities and women. By working together, rather than as adversaries, that goal can be achieved.

Moreover, the Commission should reject the Joint Commenters' suggestion that, whenever a discrimination complainant has made a *prima facie* case against a licensee, the Commission hold a hearing on the licensee's character, even if the complainant and the licensee reach a settlement on the private litigation.<sup>11</sup> Such a policy would unfairly prejudice the defendant licensee by essentially presuming the licensee guilty until proven innocent. A *prima facie* case is not a summary judgment. Quite the opposite, it means that there is a sufficient case to take to a jury. Were the Commission to initiate a hearing at that point, the licensee would be forced to present rebutting evidence twice — once in court and again at the Commission. Such a Commission policy would also run counter to the general public policy favoring settlement over litigation.

The Joint Commenters' proposal is specious and would merely result in inefficient use of Commission resources. The better alternative is the Commission's current practice of only considering only final adjudications against a licensee.<sup>12</sup>

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<sup>10</sup> "Stations' interpretations of the position the FCC has placed them in may be doing more harm than good. It only took one Asian-American reporter, who'd worked for several years in a top five market, getting a couple of those [EEO data profile] cards before she stopped sending them back." "Leaving A Bad Taste," *Radio Only*, June 1994, at 23.

<sup>11</sup> Comments of Joint Commenters at 44.

<sup>12</sup> NAB also supports the proposal advanced in the Comments of Licensees of Ninety-Eight Broadcast Stations, at 12-14, to eliminate the practice of holding the buyer of a station responsible for EEO violations committed by the seller.

Another enforcement proposal advanced by the Joint Commenters is the use of random EEO audits for a “deterrent effect” on licensees.<sup>13</sup> The Joint Commenters liken such a random audit to an inspection by Field Operations Bureau (“FOB”) personnel in that those in compliance would have nothing to fear from an on-site audit, while those not in compliance would be prodded into making improvements. In reality, on-site audits bear little resemblance to FOB inspections, which generally involve ensuring that certain documentation is in place and that equipment and facilities are properly maintained.<sup>14</sup> Most of these determinations can be made with relatively quick visual checks.

A random EEO audit, on the other hand, would entail compilation and analysis of mounds of recruitment and employment records. The purpose of the audit would be to delve into every aspect of the licensee’s employment process. Such an audit would be very similar to the political programming audits conducted by the Commission after the 1990 and 1992 primaries. There, the Commission not only examined information contained in the political file, but also any political and commercial rate cards used during the subject election period, commercial invoices, program logs and statements from the licensees regarding their pricing structures and methods of calculating lowest unit charges for candidates.<sup>15</sup> Furthermore, unlike FOB inspections which usually result in an on-the-spot determination of compliance, analysis of the information gathered during a random EEO audit would be more like that which occurred during the political audits, which

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<sup>13</sup> Comments of Joint Commenters at 45-46.

<sup>14</sup> See Broadcast Service Checklist, Bulletin FOB-18, April 1993.

<sup>15</sup> See FCC News Release, “FCC Conducts Political Programming Audit,” July 16, 1990.

occupied two months of Commission staff time<sup>16</sup> and many more months of analysis. In the meantime, the licensee would be uncertain as to whether its EEO program should continue as previously conducted or if major changes should be made.

The Commission may have had little alternative to on-site audits to determine compliance with the political rules, since licensees file no annual report regarding political broadcasting. Such is not the case for EEO. Moreover, because 96 percent of licensees pass Commission EEO scrutiny, random audits would be largely a waste of Commission and licensee resources. The Commission should reject the notion.

No licensee is perfect. If the Commission were to dig long enough and hard enough, it could probably find *something* wrong with any licensee's operation. However, the rooting out of any and all discrimination is not the Commission's function. There are other agencies — federal and state — with the jurisdiction, resources and expertise to better deal with uncovering employment discrimination. In that regard, the Commission has deferred to those agencies, and should continue to do so.<sup>17</sup>

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<sup>16</sup> See, e.g., *Public Notice*, "Political Programming Audit," September 7, 1990.

<sup>17</sup> In this same vein, the United Cerebral Palsy Associations ("UCPA") urge the Commission to require licensees to report the extent to which they recruit and employ disabled applicants. Under the reporting policy, licensees would also report whether they have made job accommodations for persons with disabilities. UCPA Comments at 2. Although NAB fully supports the goal of the Americans with Disabilities Act ("ADA"), we believe the proposed requirement is outside the realm of the Commission's EEO focus and would, in effect, extend the ADA beyond the parameters established by Congress. Presently the ADA applies to employers with 25 or more employees; as of July 26, 1994, the threshold drops to 15 employees. Were the Commission to adopt the UCPA proposal, it would implement a job accommodation policy that Congress did not envision. To make these changes in the reporting regulations would unnecessarily increase the administrative and financial burden for licensees, as well as the Commission, at a time when resources are already scarce. As to UCPA's suggestion that licensees be required to list where they have posted job notices and whether they have been the subject of an EEOC complaint, these questions are currently contained in parts II and VII of Form 396.

**II. THE COMMISSION SHOULD REFRAIN FROM NEEDLESSLY ADDING TO THE PAPERWORK BURDEN SHOULDERED BY BROADCAST LICENSEES.**

Some commenters have urged the Commission to expand the amount of employment-related paperwork required of licensees. For example, the Joint Commenters would not only have licensees report the detailed information discussed in the *Notice* but also give a breakdown, by race and sex, of *all* applicants referred by particular sources<sup>18</sup> and the *kind* of contact made with each recruitment source.<sup>19</sup> The apparent purpose of the former is to obtain “meaningful hiring pool data,” while the latter is meant to ferret out supposed “old-boy networks” and “Jim Crow” mailing lists, which the Joint Commenters allege are in place but provide no documentation to support the allegations.<sup>20</sup>

Such additional recordkeeping would harness licensees with a needless paperwork burden and pointlessly waste Commission resources in evaluating the information. Whether there are six minority applicants in an applicant pool of 20 or 200, as discussed by the Joint Commenters, is irrelevant. The fact of the matter is that any individual — including a minority — cannot be forced to apply to a given station. Licensees can only make reasonable efforts to seek out minorities and women. A licensee should hardly be penalized if only six minorities apply for a position as a result of those efforts, no matter how many non-minorities may apply. The suggestion by the Joint Commenters is a non sequitor and should not even be considered by the Commission.

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<sup>18</sup> Comments of Joint Commenters at 31.

<sup>19</sup> *Id.* at 32.

<sup>20</sup> *Id.*

The proposal that licensees report the kind of contact made with each source is equally absurd. The Joint Commenters base their suggestion on “encounters” with licensees who allegedly recruit for job openings by informing minorities that there are no openings at the station. Again, the Joint Commenters give no substantiation to support these claims. Without documentation of the present existence of these practices, or the extent to which these practices may currently exist, the Commission should not go forward with the Joint Commenters’ proposal. The additional burden on licensees’ and Commission resources concomitant with this proposal demands proof that substantial benefit would result from its implementation.

Rather than impose more recordkeeping and reporting requirements that would only further the confusion and complexity of the system, as well as place even greater emphasis on the process aspect of the EEO program, the Commission is urged to simplify and clarify the procedure. A procedure that is “user friendly” for broadcasters would also be favorable for all parties because emphasis would be placed on results, namely the hiring of minorities and women, and the recordkeeping and administrative burdens would be reduced, a benefit for broadcasters and the Commission alike.

### **III. PROPOSED CHANGES TO THE APPLICATION AND EXTENT OF PROCESSING GUIDELINES ARE UNWARRANTED.**

The vast majority of commenters oppose any additional EEO requirements. In fact, only two parties — the Joint Commenters and the National Hispanic Media Coalition (“NHMC”) — specifically propose radical expansion of many of the Commission’s EEO procedures. Generally, they focus on treatment of part-time hires

similar to that for fulltime employees, a heightened threshold for parity tests and refocusing of the processing guidelines. NAB opposes these proposals.

**A. Imposing Additional Reporting And Recordkeeping Requirements On Part-Time Hires Would Be Counterproductive.**

The Joint Commenters suggest that, as a *quid pro quo* for licensees' using part-time employees as a mitigating factor for a shortfall in the "numbers" for fulltime employees, the Commission "recognize that a failure to hire even parttime minorities cuts in favor of designation for hearing."<sup>21</sup> Moreover, the Joint Commenters would require that licensees provide wage and tax records for proof that the part-time employee is not really an independent contractor.

Again, the logic of the Joint Commenters' argument is flawed. First, the Commission's focus is and should be on fulltime employment. As noted in our initial Comments and elsewhere,<sup>22</sup> programming is the nexus for the Commission's EEO jurisdiction, and part-timers rarely make substantive programming decisions. The make-up of a licensee's part-time staff, therefore, is of little import to the Commission's EEO mission. A hearing designation on the basis of failure to hire minorities for part-time positions would be regulatory overkill.

Second, whether a part-time worker is an employee or an independent contractor is essentially irrelevant. Individuals work part-time generally as a means of supplementing their income, either their own income or their spouse's. Part-time

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<sup>21</sup> Comments of Joint Commenters at 16.

<sup>22</sup> See NAB Comments at 5-8. See also Comments of Licensees of Ninety-Eight Broadcast Stations at 8-9; Joint Comments of Named State Broadcasters Associations at 28-29.

“employees” are usually free to hold other positions, even at other broadcast stations. The nature of part-time employment, therefore, is very much like that of an independent contractor. Requiring licensees to prove the “employee” status of a part-time worker would be of little real benefit to the Commission.

NHMC proposes that the processing guidelines for fulltime employees be applied to *all* part-time employees because, they assert, many stations hire part-time employees in an effort to economize.<sup>23</sup> Expansion of the guidelines to part-time hires would be largely unworkable because part-time positions are generally filled on a short-term basis or with very little notice. Since licensee employment profile data is based on one pay period in the first calendar quarter of the year, application of the processing guidelines to part-time employment would be disingenuous. Imposing processing guidelines on part-time hires would be counterproductive and a disincentive to hiring part-time employees.

If the Commission were to find it necessary to expand some recordkeeping for part-time employment, it should only do so for positions which involve substantial hours worked. Typically, Congress extends eligibility for federal benefits programs to employees who work approximately 25 hours per week.<sup>24</sup> The Commission should not require recordkeeping below that threshold.

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<sup>23</sup> NHMC Comments at 3.

<sup>24</sup> The Family and Medical Leave Act of 1993, for example, defines an “eligible employee” as one who has worked a minimum of 1,250 hours during the 12-month period preceding his/her request for leave. *See* 29 U.S.C. § 2611(2)(A)(ii).

**B. The Parity Tests Should Not Be Raised.**

Both the Joint Commenters and NHMC propose increasing the percentage of parity guidelines. The Joint Commenters seek a 100 percent of parity rule,<sup>25</sup> while NHMC proposes a gradual increase from the current 50 percent to 80 percent by 1997.<sup>26</sup>

NAB believes that raising the parity benchmarks is unwarranted at this time. As noted in our Comments at 2-4, the broadcasting industry is employing women and minorities at above or well-above the "50 percent of parity" level overall and in the upper four job categories. Thus, contrary to NHMC's assertion, the 50 percent level has become more a floor than a ceiling. Raising the bar at this point is unnecessary.

If the Commission were to increase the benchmark, however, it should make the increase prospectively applicable beginning with a licensee's next renewal cycle. Because the processing guidelines are an integral part of the Commission's initial review of a licensee's EEO compliance, to raise the threshold in the middle of a renewal cycle would cause unnecessary confusion and uncertainty for both the Commission and licensees. If the Commission does increase the parity guidelines, the increase should be phased in gradually and at the beginning of a renewal cycle.

NHMC also suggests that processing guidelines be applied to dominant minorities as well as total minorities, in an effort to ensure that licensees are responsive to the minority group that is most populous in their area.<sup>27</sup> NAB believes that such a

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<sup>25</sup> Comments of Joint Commenters at 11.

<sup>26</sup> NHMC Comments at 3.

<sup>27</sup> *Id.* at 4.

requirement would truly make the processing guidelines a “quota” system, something which the Commission has eschewed. The goal of EEO is to ensure that all minorities, not just dominant minorities, have equal opportunity. Requiring licensees to hire according to the dominant minority in their market would give preference to one minority over another, placing licensees at a greater risk of litigation. The Commission already examines whether a licensee’s recruitment efforts are focused toward the dominant minority in its labor force. It should not extend the processing guidelines to the dominant minority as well.

**C. The Commission Need Not Focus on Officials and Managers.**

NHMC also suggests that the Commission focus its EEO oversight on the “Officials/Managers” job category.<sup>28</sup> NHMC asserts that too much emphasis is placed on the “Technicians” aspect of the upper four job categories, which, they state, has resulted in fewer management and ownership opportunities for minorities.

NAB finds unnecessary the change proposed by NHMC. As noted in our initial Comments at 3, the broadcasting industry is on a par with the nation as a whole in management opportunities for minorities. Moreover, Bureau of Labor Statistics data for 1992 indicate that the industry may be outpacing the rest of the nation. The Commission’s 1992 Employment Report shows that minorities constituted 12.5 percent of officials and managers in the broadcasting industry. Nationally, minorities accounted for only about nine percent of executive, administrative and managerial positions.<sup>29</sup> Thus, the

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<sup>28</sup> *Id.*

<sup>29</sup> See Bureau of Labor Statistics, *Employment and Earnings*, January 1993, at 220. According to BLS figures, whites occupied 13,438,000 of 14,767,000 executive, administrative and managerial positions. This means that minorities held only 1,329,000 of such positions, or approximately nine percent.

broadcasting industry is performing similar to or better than the rest of the nation in providing management-level opportunities for minorities.

This is not to say there should not be more management opportunities for minorities in the industry. However, the focus should not be on heightened scrutiny of licensee's employment efforts. Rather, the Commission should strive for more ownership opportunities for minorities by, among other things, broadening the distress sale and tax certificate policies.

#### IV. CONCLUSION

The comments filed in this proceeding provide little support for the added recordkeeping and reporting requirements discussed in the *Notice*. Generally, the EEO performance of the broadcasting industry is comparable to the nation's, and the presence of women and minorities in key positions is increasing despite a recent decline in broadcast employment. The data presented by NAB and others totally refutes the unsubstantiated allegations of widespread discrimination put forth by the Joint Commenters.

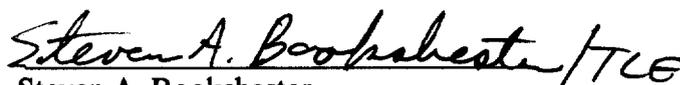
Most of the proposals advanced by the Joint Commenters would needlessly expend Commission and licensee resources. The benefits to be derived would be minimal, at best. The Commission should, therefore, reject them outright. Changes in the application and focus of the processing guidelines, proposed by the Joint Commenters and NHMC, are unwarranted and counterproductive.

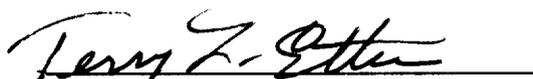
In the final analysis, the best way for the Commission to further the presence of women and minorities in upper-level broadcasting positions is to enhance their opportunities for ownership. That should be the Commission's focus.

Respectfully submitted,

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June 28, 1994

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I, Tina T. Butler, a legal secretary at the National Association of Broadcasters, do hereby certify that a true and correct copy of the foregoing "Reply Comments of the National Association of Broadcasters" were sent this 28th day of June, 1994, via first class mail, postage prepaid to each of the following:

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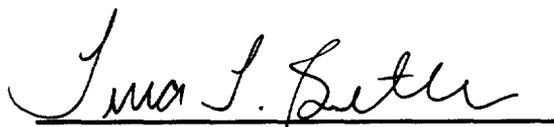
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