

#### IV. Conclusions

49. As a result of our consideration of the comments and reply comments received in this proceeding and an analysis of the Commission's statutory obligations, we have come to the following conclusions regarding potential radiofrequency (RF) radiation hazards from FCC-regulated operations and facilities. Although the Commission has neither the expertise nor the authority to develop its own health and safety standards, we are required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§4321 *et seq.* (1976), to consider whether Commission actions will significantly affect the quality of the human environment, 42 U.S.C. §4332(2)(c). For this reason, we are today amending our rules implementing NEPA to provide for assessment under our environmental rules of applications for construction permits or licenses to transmit, including renewals and modifications thereof, which would result in non-compliance with applicable health and safety standards for exposure to RF radiation. Our concern is that any significant impact on the human environment with respect to RF radiation should be taken into account as a part of Commission procedures for approving transmitting facilities and operations.

50. We had originally proposed to evaluate exposure of the population at large on the basis of the advisory guidelines issued by the Occupational Safety and Health Administration (OSHA) for exposure of workers to RF radiation. However, the OSHA radiation protection guide was based on a non-government exposure standard which has since been revised in light of current knowledge of the biological effects of RF radiation. The revised standard is written to apply to both workers *and* the general public. Several respondents in this proceeding urged us to use this widely recognized RF exposure standard, issued in 1982 by the American National Standards Institute (ANSI), as an interim guideline. Some respondents, including the EPA, expressed concern over our original proposal to use a standard that may not offer sufficient protection for the public with regard to radiation exposure. Additionally, the Office of Management and Budget has encouraged government use of voluntary, non-government standards whenever possible.

51. We believe the fact that there are currently no mandatory federal standards for exposure of the public to RF radiation does not excuse us from our obligations under NEPA to evaluate FCC actions for significant environmental impact. Therefore, we have modified our original proposal by adding a provision for using the revised ANSI standard as a processing guideline for human exposure to RF radiation. The ANSI standard will be the triggering mechanism for environmental assessment in all situations where our rule amendment applies.

52. We believe that applications for transmitting facilities which are in compliance with applicable health and safety standards for RF radiation would not ordinarily have a significant effect on the environment and thus would not fall within our NEPA analytical processes, at least with regard to RF radiation. On the other hand, applications for facilities that are not in compliance with applicable health and safety standards for RF radiation will require a more thorough analysis of their environmental impact.<sup>34</sup> The amendment to our rules that we are making today will assure that analysis. In our view then, our statutory obligations under NEPA with respect to RF radiation will have been satisfied.

53. Therefore, we are today adding a new paragraph (d) to Subpart I of Part 1 of the Commission's Rules (*see* Appendix 1).<sup>35</sup> Under this rule, a narrative environmental statement and processing under our NEPA rules will be required for initial and renewal licensing applications or for applications seeking modifications of existing facilities for the services and facilities listed below if the operation in question would not comply with applicable guidelines for exposure of workers or the general public to radiofrequency radiation. This rule change uses noncompliance with guidelines issued by a widely recognized, non-government organization as the processing trigger for invoking our environmental processing procedures.

54. The rule amendment we are adopting today will initially only apply to actions taken by the Commission with respect to the following facilities authorized by the FCC Rules and Regulations: (1) broadcast facilities authorized under Part 73; (2) broadcast facilities authorized under Part 74

<sup>34</sup> It should also be noted that under the Commission's present rules implementing NEPA, the Commission may, on its own motion or on the motion of an interested person, decide that the preparation of an environmental impact statement is warranted. 47 C.F.R. §1.1305(c) (1977). *See also* 47 C.F.R. §1.1313(b)(2) with regard to staff responsibility for preparing a draft environmental impact statement.

<sup>35</sup> The final language of the rule we are issuing has been modified from the text of the proposed rule in several respects, all of which, we believe, are within the scope of our original NPRM. We have modified the proposed rule so that it will only apply to certain services and have added a note to that effect. We have clarified the introductory clause to make clear that we are adding to the "major actions" listed in paragraph (a) and to the provisions of paragraph (c) of Section 1.1305 of the Commission's NEPA rules. We have deleted the proposed paragraph dealing with *emission* standards for RF radiation since the only applicable standard would be the one established for microwave ovens by the Food and Drug Administration, and no evidence has been presented that microwave ovens constitute a hazard to the public from RF radiation. We have added language to clarify the applicability of this rule to license renewals and modifications of existing facilities, as fully explained in para. 29-31, *supra*. We have revised the language in paragraph (d) to incorporate by reference into our NEPA processing rules the ANSI standard, C95.1-1982. Finally, we have deleted reference to federal standards or guidelines in order to allow for flexibility in our consideration of the applicability of such standards or guidelines to our statutory obligations under NEPA.

(Subparts A and G only); (3) satellite-earth stations authorized under Part 25; and (4) experimental facilities authorized under Part 5. Based on information received to date in this proceeding, we believe that there is sufficient evidence that transmitting facilities in these categories could possibly create situations in which applicable safety standards for exposure to RF radiation might be exceeded. Because facilities in the above categories may operate with relatively high power levels or may be located in or near accessible areas, such facilities will be subject to this rule amendment and possible NEPA processing.

55. Maximum power limitations for broadcast facilities authorized under Part 73 range from 50 kilowatts (AM radio) to over 5 megawatts (UHF television). Also, for applicable Part 74 facilities there are no limitations on maximum power under Subpart A (experimental broadcast stations), and under Subpart G (low power television) no maximum for effective radiated power is stipulated. Therefore, these various broadcast facilities may operate with effective radiated powers (ERP) of thousands to millions of watts. Since broadcast transmitters are sometimes located in areas that are accessible to workers or the general public, and broadcast stations generally transmit over major portions of a 24 hour day, it is possible that such transmitters could cause exposures in excess of safety standards. Moreover, comments filed previously in this proceeding presented evidence that it is possible for some broadcast facilities to create conditions that might lead to significant human exposure to RF radiation.<sup>36</sup>

56. Transmitting satellite-earth stations authorized under Part 25 of the FCC Rules and Regulations operate with very high ERPs. However, the high degree of directionality of the transmitted beam makes excessive exposure unlikely. Our experience over the past several years in this area and on-site measurements have demonstrated that normal design and operating practice make it highly unlikely that workers or the general public would be exposed to excessive levels of RF radiation from these facilities. Nevertheless, we believe it necessary to subject these facilities to the provisions of this rule because of the high amounts of RF energy involved. Similarly, experimental facilities authorized under Part 5 may operate with relatively high power levels, and, therefore, will be subject to this rule amendment.

57. It should be noted at this point that we have already been reviewing radiation hazards of land based satellite-earth stations as part of our domestic satellite-earth station licensing process since our 1972 *Memorandum Opinion and Order* in Docket No. 16495.<sup>37</sup> Since the rule

<sup>36</sup> See NPRM, note 1, *supra*, at para. 19, 39-43, 95-96.

<sup>37</sup> See *In the Matter of Establishment of Domestic Communications-Satellite Facilities by Non-Government Entities*, 38 F.C.C. 2d 665, 700-704 (1972).

amendment we adopt today will be applicable to satellite-earth stations authorized under Part 25 of the FCC Rules, it will supersede the 1972 action.

58. With regard to other categories of FCC-regulated operations and facilities, because of relatively low operating power levels, intermittent use, or relative inaccessibility, it appears unlikely that they would cause exposure in excess of safety standards during routine use. Therefore, we are today also issuing a *Further Notice of Proposed Rule Making*<sup>38</sup> in which we propose to exclude from the provisions of this rule other transmitting facilities and sources which are not included in the categories listed above. Through this *Further Notice* we are soliciting information, comments, opinions, and suggestions relevant to the legitimacy of this proposed categorical exclusion. Comments received in response to this *Further Notice* will be used to determine whether further revisions are necessary at this time in the FCC's rules with respect to this issue and whether there are other RF sources and transmitting facilities which should be subject to this rule amendment. As discussed in note 34, *supra*, even though we are proposing to exclude a large number of Commission actions from consideration under this rule, the Commission "on its own motion or on motion of any interested person, may determine that the environmental consequences of a particular action are such as to warrant preparation of an environmental impact statement." See § 1.1305(c) of the FCC Rules and Regulations.

59. In our *Further Notice* we are also proposing the inclusion of shipboard-satellite earth stations, authorized under Part 83, Subpart AA, of the FCC Rules and Regulations, in the category of facilities to which our rule amendment would apply. We believe that, because of the relatively high effective radiated power of ship-satellite earth stations, and because of the questions regarding safety raised by the ROU, an environmental analysis of some of these transmitters may be necessary. Even though the transmitted beams from these antennas are highly directional, there may be reason to be concerned over the possibility of excessive exposure. However, we point out that at this time the inclusion of these facilities is only a proposal, and we believe that a complete record in support of this action is needed. We invite comment on this proposal.

60. Regarding paperwork burden, it should be noted that most applicable FCC forms already incorporate, or will be modified to incorporate, a short provision inquiring as to whether the application would constitute a major action under our NEPA rules. This check-off procedure will still be applicable with regard to the amended rule. Moreover, we believe that the overwhelming majority of applications to the Commission

<sup>38</sup> *Further Notice of Proposed Rule Making*, Gen. Docket 79-144, Fed. Reg. (1985)

will not be subject to environmental impact analysis as provided for in our NEPA rules and by this amendment.

61. While we are aware of the adoption of standards in this area by local and state authorities, we do not believe it is necessary at this time to resolve the issue of federal preemption of state and local RF radiation standards. Should non-federal standards be adopted, adversely affecting a licensee's ability to engage in Commission-authorized activities, the Commission will not hesitate to consider this matter at that time.

62. In summary, because of the requirements of the National Environmental Policy Act, we are adopting an amendment to Part 1 of our rules which will enable the Commission to consider whether its actions will significantly affect "the quality of the human environment" with respect to human exposure to radiofrequency radiation. At the present time we will rely on provisions of the ANSI RF radiation standard as a processing guideline to evaluate applications under our environmental processing rules. We believe that our use of the widely recognized ANSI standard will, at this time, best meet our obligations under NEPA for environmental analysis of exposure to RF radiation.

#### V. Regulatory Flexibility Act Final Analysis <sup>39</sup>

##### A. Reason for action

The Commission has considered comments received in response to its *Notice of Proposed Rule Making* in Docket 79-144. The comments received generally support the view that a clarification of Commission responsibilities is required to avoid confusion among those entities regulated by the Commission regarding their own responsibilities with respect to potential hazards of radiofrequency (RF) radiation. Furthermore, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.* (1976), requires the Commission to consider whether the facilities and operations it licenses or authorizes will significantly affect "the quality of the human environment." For these reasons, we are amending our rules implementing NEPA to address situations involving non-compliance with standards for exposure to RF radiation.

##### B. The objective

The Commission is amending its rules implementing NEPA in order to clarify its policy with regard to potential hazards from RF radiation emitted by transmitting facilities that we license or authorize and to comply with our legal obligations under NEPA.

<sup>39</sup> This analysis is made pursuant to the provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. §603.

##### C. Legal basis

This action is based on the obligations imposed on the Commission by NEPA, *supra*, and is in furtherance of §§ 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 303(r) (1978). These provisions permit the Commission to make rules and regulations not inconsistent with other existing laws, "as may be necessary in the execution of its functions," and "to carry out the provisions of" the Communications Act.

##### D. Description, potential impact and number of small entities affected

It is expected that there will be no significant impact on most small entities that the FCC regulates. Small entities that may be in violation of present or future health and safety standards for RF radiation could be affected because of corrective actions that might be necessary to bring them into compliance. However, we believe that the great majority of the facilities licensed or authorized by the Commission will be in compliance with the indicated radiation guidelines.

##### E. Recording, recordkeeping, and other compliance requirements

No specific record-keeping requirements are contained in the new rules. Certain applicants for construction permits, licenses, renewals, and facility modifications may be expected to show compliance with an RF radiation exposure standard. "Major actions," as defined under our NEPA rules, will include facilities not in compliance with provisions of standard C95.1-1982 recommended by the American National Standards Institute. Applicants for construction permits, licenses to transmit or renewals thereof, or modifications to existing facilities must notify the Commission when the operation in question would not comply with the provisions of the guidelines indicated in Section 1.1305(d) and indicate what corrective measures or precautions will be taken to assure compliance. Such notice can be provided through applicable FCC forms which already incorporate, or will be modified to incorporate, a short provision inquiring as to whether particular applications constitute a "major action" under our NEPA rules.

##### F. Federal rules which overlap, duplicate, or conflict with these rules

There are none of which we are aware. This action is designed to bring our rules into compliance with the provisions of NEPA, as well as to inform our regulatees what the Commission expects of them with regard to RF radiation exposure. We are pointing to existing or future standards and regulations which may apply to our regulatees, and no overlap or duplication is foreseen.

G. Any significant alternative minimizing impact on small entities and consistent with the stated objective

Because of our legal obligations under NEPA, we believe it necessary to amend our rules to address the environmental impact of RF radiation emitted from transmitting facilities we authorize. We see no reasonable alternative to this action, and the new rule appears to offer the most logical approach to assure compliance with applicable standards. There are alternative ways of addressing this issue. For example, we might have considered adopting our own radiation standards independent of those set by other agencies. Such standards could conceivably have less impact (or more) on small entities. However, we believe that we have neither the expertise nor the authority to set health and safety standards, and we choose to defer to other agencies or a qualified non-government organization in establishing safe levels for RF radiation. We might also have chosen to take no action at all. However, this would be inadvisable for at least two reasons. First, we are legally obligated under NEPA to determine whether Commission "major actions" significantly affect "the quality of the human environment." Secondly, we believe that our regulatees desire and expect us to clarify our mutual responsibilities in this important area of growing public concern.

VI. Ordering Clauses

ACCORDINGLY, IT IS ORDERED that, effective October 1, 1985, Part 1 of the Commission's Rules and Regulations, 47 C.F.R. Part 1, IS AMENDED as set forth in Appendix 1, and that the amendment will be applicable to applications filed on or after this effective date. This action is taken pursuant to the provisions of Sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 303(r), and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553.

Further information on this matter may be obtained by contacting Dr. Robert Cleveland, Office of Science and Technology, (202) 632-7040, or Mr. Stephen Klitzman, Office of General Counsel, (202) 632-6405.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, Secretary

Appendix 1

Subpart 1, Part 1, Chapter 1 of Title 47 of the Code of Federal Regulations is amended by adding a new paragraph (d) to Section 1.1305 to read as follows:

Section 1.1305 Major actions

(d) In addition to the actions listed in paragraph (a) and to the provisions of paragraph (c) of this section, and notwithstanding the provisions of paragraph (b) of this section, Commission actions granting construction permits, licenses to transmit or renewals thereof, or Commission actions authorizing modifications in existing facilities, will be treated as major actions if the facility or operation in question would result in exposure of workers or the general public to levels of radiofrequency radiation in excess of the "Radio Frequency Protection Guides" recommended in "American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz," (ANSI C95.1-1982), issued by the American National Standards Institute (ANSI), 1430 Broadway, New York, New York 10018, and copyright 1982 by the Institute of Electrical and Electronics Engineers, Inc., 345 East 47th Street, New York, New York 10017.

Note: The provisions of paragraph (d) shall only apply to facilities and services licensed or authorized under Parts 5, 25, 73, and 74 (Subparts A and G only) of the FCC Rules and Regulations.

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Federal Communications Commission

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equal opportunities to all other candi-  
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ties. Such licensee shall have no power  
of censorship over the material broad-  
cast by any such candidate. appear-  
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on any: (i) Bona fide newscast; (ii)  
bona fide news interview; (iii) bona  
fide news documentary (if the appear-  
ance of the candidate is incidental to  
the presentation of the subject or sub-  
jects covered by the news documenta-  
ry); or (iv) on-the-spot coverage of  
bona fide news events (including, but  
not limited to political conventions  
and activities incidental thereto) shall  
not be deemed to be use of a broad-  
casting station. (Section 315(a) of the  
Communications Act.)

(2) Section 312(a)(7) of the Commu-  
nications Act provides that the Com-  
mission may revoke any station license  
or construction permit for willful or  
repeated failure to allow reasonable  
access to, or to permit purchase of,  
reasonable amounts of time for the  
use of a broadcasting station by a le-  
gally qualified candidate for Federal  
elective office on behalf of his candi-  
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(h) *Political broadcasting primer.* A  
detailed study of these rules regarding  
broadcasts by candidates for Federal  
and non-Federal public office is avail-  
able in the FCC public notice of July  
20, 1978, "The Law of Political Broad-  
casting and Cablecasting." Copies may  
be obtained from the FCC upon re-  
quest.

(Secs. 4, 5, 303, 48 Stat., as amended, 1066,  
1068, 1082 (47 U.S.C. 154, 155, 303))

[43 FR 32795, July 28, 1978, as amended at  
43 FR 45856, Oct. 4, 1978; 43 FR 55769, Nov.  
29, 1978; 45 FR 26066, Apr. 17, 1980; 45 FR  
28141, Apr. 28, 1980]

§ 73.2080 Equal employment opportuni-  
ties.

(a) *General EEO policy.* Equal op-  
portunity in employment shall be af-  
forded by all licensees or permittees of  
commercially or noncommercially op-  
erated AM, FM, TV, or international  
broadcast stations (as defined in this  
part) to all qualified persons, and no  
person shall be discriminated against  
in employment by such stations be-  
cause of race, color, religion, national  
origin, or sex.

(b) *EEO program.* Each broadcast  
station shall establish, maintain, and  
carry out a positive continuing pro-  
gram of specific practices designed to  
ensure equal opportunity in every  
aspect of station employment policy  
and practice. Under the terms of its  
program, a station shall:

(1) Define the responsibility of each  
level of management to ensure a posi-  
tive application and vigorous enforce-  
ment of its policy of equal opportuni-  
ty, and establish a procedure to review  
and control managerial and superviso-  
ry performance;

(2) Inform its employees and recog-  
nized employee organizations of the  
positive equal employment opportuni-  
ty policy and program and enlist their  
cooperation;

(3) Communicate its equal employ-  
ment opportunity policy and program  
and its employment needs to sources  
of qualified applicants without regard  
to race, color, religion, national origin,  
or sex, and solicit their recruitment as-  
sistance on a continuing basis;

(4) Conduct a continuing program to  
exclude all unlawful forms of preju-  
dice or discrimination based upon race,  
color, religion, national origin, or sex  
from its personnel policies and prac-  
tices and working conditions; and

(5) Conduct a continuing review of  
job structure and employment prac-  
tices and adopt positive recruitment,  
job design, and other measures needed  
to ensure genuine equality of opportu-  
nity to participate fully in all organi-  
zational units, occupations, and levels  
of responsibility.

(c) *EEO program requirements.* A  
broadcast station's equal employment  
opportunity program should reason-  
ably address itself to the specific areas  
set forth below, to the extent possible,  
and to the extent that they are appro-  
priate in terms of the station's size, lo-  
cation, etc.:

(1) Disseminate its equal opportuni-  
ty program to job applicants and em-  
ployees. For example, this require-  
ment may be met by:

(i) Posting notices in the station's  
office and other places of employ-  
ment, informing employees, and appli-  
cants for employment, of their equal  
employment opportunity rights.  
Where it is appropriate, such equal

§ 73.3500

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employment opportunity notices should be posted in languages other than English;

(ii) Placing a notice in bold type on the employment application informing prospective employees that discrimination because of race, color, religion, national origin, or sex is prohibited;

(iii) Seeking the cooperation of labor unions, if represented at the station, in the implementation of its EEO program and the inclusion of non-discrimination provisions in union contracts;

(iv) Utilizing media for recruitment purposes in a manner that will contain no indication, either explicit or implicit, of a preference for one sex over another and that can be reasonably expected to reach minorities and women.

(2) Use minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants, to supply referrals whenever job vacancies are available in its operation. For example, this requirement may be met by:

(i) Placing employment advertisements in media that have significant circulation among minorities residing and/or working in the recruiting area;

(ii) Recruiting through schools and colleges, including those located in the station's local area, with significant minority-group enrollments;

(iii) Contacting, both orally and in writing, minority and human relations organizations, leaders, and spokesmen and spokeswomen to encourage referral of qualified minority or female applicants;

(iv) Encouraging current employees to refer minority or female applicants;

(v) Making known to recruitment sources in the employer's immediate area that qualified minority members and females are being sought for consideration whenever you hire and that all candidates will be considered on a nondiscriminatory basis.

(3) Evaluate its employment profile and job turnover against the availability of minorities and women in its recruitment area. For example, this requirement may be met by:

(i) Comparing the composition of the relevant labor area with composition of the station's workforce;

(ii) Where there is underrepresentation of either minorities and/or women, examining the company's personnel policies and practices to assure that they do not inadvertently screen out any group and take appropriate action where necessary. Data on representation of minorities and women in the available labor force are generally available on a metropolitan statistical area (MSA) or county basis.

(4) Undertake to offer promotions of qualified minorities and women in a nondiscriminatory fashion to positions of greater responsibility. For example, this requirement may be met by:

(i) Instructing those who make decisions on placement and promotion that qualified minority employees and females are to be considered without discrimination, and that job areas in which there is little or no minority or female representation should be reviewed;

(ii) Giving qualified minority and female employees equal opportunity for positions which lead to higher positions. Inquiring as to the interest and skills of all lower paid employees with respect to any of the higher paid positions.

(5) Analyze its efforts to recruit, hire, and promote minorities and women and address any difficulties encountered in implementing its equal employment opportunity program. For example, this requirement may be met by:

(i) Avoiding use of selection techniques or tests that have the effect of discriminating against qualified minority groups or females;

(ii) Reviewing seniority practices to ensure that such practices are nondiscriminatory;

(iii) Examining rates of pay and fringe benefits for employees having the same duties, and eliminating any inequities based upon race or sex discrimination.

[52 FR 26684, July 16, 1987]

§ 73.3500 Application and report forms.

Following are the FCC broadcast application and report forms, listed by number.

Form number	
301	Application for Changes in
301-A	Application for cast Station
302	Application for
303-S	Application for commercial and FM and TV
306	Application for Foreign Broadcast
309	Application for Changes in Broadcast
310	Application for Broadcast
311	Application for Expansion
313	Application for Broadcast
313-R	Application for License (S)
314	Application for Broadcast
315	Application for of Corpora
316	Application for Broadcast
323	Ownership Re
323-E	Ownership R
330-L	Application for Station Lic
330-P	Application for Changes in Response
330-R	Application for Fixed Stat and Low
340	Application for Changes in Broadcast
345	Application for or FM Tran or License
346	Application for Changes in TV Booster
347	Application for TV Booste
348	Application for Translator
349-L	Application for
349-P	Application for Changes in
395-B	Annual Empl
396	Broadcast Ec
396-A	Broadcast E
701	Application for or to Repl

[44 FR 38486, July



# PUBLIC NOTICE

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January 28, 1986

## FURTHER GUIDANCE FOR BROADCASTERS REGARDING RADIOFREQUENCY RADIATION AND THE ENVIRONMENT

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. Sections 4321-4361, requires all federal agencies to ensure that the environment is given appropriate consideration in agency decision-making. In a Report and Order in General Docket No. 79-144, 100 F.C.C. 2d 543 (1985), the Commission decided that human exposure to radiofrequency (RF) radiation was a proper environmental concern of this agency and specified that the guideline for determining the significance of such exposure will be the "Radio Frequency Protection Guides" adopted in 1982 by the American National Standards Institute (ANSI C95.1 - 1982). As of January 1, 1986, all applications for new facilities, modifications to existing facilities, and renewals must contain either a specific indication that the RF radiation of the particular facility or operation will not have a significant environmental impact or an environmental assessment which will serve as the basis for further Commission action. <sup>1/</sup> See Part 1, Subpart I of the Commission's rules for specific regulations regarding environmental matters.

Most broadcasting facilities produce high RF radiation levels at one or more locations near their antennas. That, in itself, does not mean that the facilities significantly affect the quality of the human environment. Each situation must be examined separately to decide whether humans are or could be exposed to high RF radiation. Paragraph 37 of the Report and Order points out that accessibility is a key factor in making such a determination. As a general principle, if areas of high RF radiation levels are publicly marked and if access to such areas is impeded or highly improbable (remoteness and natural barriers may be pertinent) then it may be presumed that the facilities producing the RF radiation do not significantly affect the quality of the human environment and do not require the filing of an environmental assessment.

<sup>1/</sup> In applications for new and modified facilities the requirement for a specific indication is satisfied by answering the question on the form regarding environmental matters. An environmental assessment is the narrative statement described in Section 1.1311 and elsewhere in the Commission's rules.

(over)

(F) High RF levels are produced in offices, studios, workshops, parking lots or other areas used regularly by station employees

- The applicant must submit an environmental assessment. The circumstances may require a modification of the facilities to reduce exposure or the application may be denied. This situation is essentially the same as (E). We have included it to emphasize the point that station employees as well as the general public must be protected from high RF levels. Legal releases signed by employees willing to accept high exposure levels are not acceptable and may not be used in lieu of corrective measures.

(G) High RF levels are produced in areas where intermittent maintenance and repair work must be performed by station employees or others

- ANSI guidelines also apply to workers engaged in maintenance and repair. As long as these workers will be protected from exposure to levels exceeding ANSI guidelines, no environmental assessment is needed. Unless requested by the Commission, information about the manner in which such activities are protected need not be filed. If protection is not to be provided, the applicant must submit an environmental assessment. The circumstances may require corrective action to reduce exposure or the application may be denied. Legal releases signed by workers willing to accept high exposure levels are not acceptable and may not be used in lieu of corrective measures.

The foregoing also applies to high RF levels created in whole or in part by reradiation.

A convenient rule to apply to all situations involving RF radiation is the following:

- (1) Do not create high RF levels where people are or could reasonably be expected to be present

and

- (2) Prevent people from entering areas in which high RF levels are necessarily present.

Fencing and warning signs may be sufficient in many cases to protect the general public. Unusual circumstances, the presence of multiple sources of radiation, and operational needs will require more elaborate measures.



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212 750-6050

MARCO A. GRANBERG  
DIRECTOR, NEW YORK OFFICE

April 4, 1989

Mr. Tom Lauher  
Station KFUO  
85 Founders Lane  
St. Louis, MO 63105

Dear Tom:

Enclosed as we discussed last week are copies of decisions concerning restrictions upon employment imposed by FCC licensees based upon religious affiliation.

The key ruling in this area is the FCC's May 3, 1972 letter to Trygve J. Anderson concerning employment practices by Kings Garden, Inc. The Commission there determined that for certain limited employment categories it is possible for broadcasters to restrict employment to those of a particular religious affiliation. This limited category consists of persons who are "hired to espouse a particular religious philosophy over the air".

In carving out this limited exemption to its non-discrimination requirements, the Commission clearly held that no discrimination in employment would be permitted with respect to "persons whose work is not connected with the espousal of the licensee's religious views". The Commission gave the employment category of salespeople as an example of an employee category with respect to which no religious restrictions could be applied.

The Commission's letter ruling was upheld by the United States Court of Appeals for the District of Columbia Circuit in 1974. A copy of the court's opinion is enclosed herewith.

In its decision, the court delineated the permissible scope of the religious affiliation exemption, holding that a religious affiliation requirement could be established only with respect to

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Mr. Tom Lauher  
April 4, 1989  
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employees "whose work is connected with the espousal of the licensee's religious views". This is a slightly different formulation of the rule than that earlier articulated by the Commission. Under the court's formulation, religious requirements may be imposed not only with respect to employees who themselves espouse religious views, but also with respect to those whose work is connected with the espousal of such views.

The court declined to issue a "laundry list" of employment categories with respect to which a religious affiliation requirement could be imposed, determining instead that the general policy should be particularized by the FCC on a case-by-case basis. Generally, though, the court held, that in delineating the appropriate employment categories, the Commission should "fix upon the nexus between the employment position in question and the religious content of the programs aired by the sectarian licensee". Specifically, said the court, "[w]here a job position has no substantial connection with program content, or where the connection is with a program having no religious dimension", discrimination will not be permitted.

We have found very few cases where the Commission has had occasion to determine the permissibility of employment requirements going to religious affiliation. The one decision which seems pertinent, decided in 1973, concerns the National Religious Broadcasters, Inc., and is enclosed herewith. There, the FCC was asked to elaborate further on employment categories with respect to which a religious affiliation requirement could be imposed. The Commission stated that "writers and research assistants hired for the preparation of programs espousing the licensee's religious views" constitute one such category. Similarly, those hired to answer religious questions on a call-in program would constitute another. The Commission concluded, however, that announcers, as a general category, would not be exempt from the nondiscrimination rules, because there is no reason why an announcer must be of a particular faith in order to introduce a program or insert news, commercial announcements, or station identifications during or adjacent to any program.

We have consulted with staff at the EEO Branch of the FCC's Mass Media Bureau on this question as well. The staff confirm that the general guidelines described

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above, although articulated some time ago, are still in force, and would be the guidelines relied upon by the Commission if a discrimination complaint were filed against a sectarian licensee on religious affiliation grounds.

In sum, while a religious affiliation requirement may be permissible in certain circumstances, it is clear that the FCC and the courts are likely to restrict such limitations to very narrow situations where the employee is directly connected with the production of programming which espouses a religious viewpoint. Given the undeveloped nature of the FCC's requirements in this area and the fact that the FCC enforces its employment requirements fairly rigorously, if, during the process of revising employment guidelines for its broadcast stations, the Lutheran Church/Missouri Synod so desires, we shall be happy to confer with you further in an effort to develop guidelines acceptable to the FCC.

Please let me know if I can provide you any further information.

Sincerely yours,

*Marcia Cranberg*  
Marcia Cranberg

Enclosures

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F.C.C. 72-387

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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In Re Complaint by  
TRYGVE J. ANDERSON, CONCERNING EMPLOY-  
MENT PRACTICES BY KINGS GARDEN, INC.,  
RADIO STATION KGDN AND KBIQ-FM, ED-  
MONDS, WASH.

MAY 3, 1972.

GENTLEMEN: This is in reference to: (a) the letter of July 19, 1971, of Mr. Trygve J. Anderson alleging discriminatory hiring practices by stations KGDN (AM) and KBIQ-FM, Edmonds, Washington, both of which are licensed to you; and (b) your responses to that letter filed September 20 and October 12, 1971.

In his letter, Mr. Anderson states that in seeking employment at your stations, he was asked: "Are you a Christian?", "How do you know you are a Christian?", "Is your spouse a Christian?", and "Give a testimony." Mr. Anderson further states that, "Such questions obviously have no bearing on a person's ability to handle a job in broadcasting, and could only be used to discriminate against potential employees because of their religious beliefs." Mr. Anderson requests, therefore, that your stations be required to delete all requests for religious preferences and beliefs from their employment applications. Mr. Anderson sought a job with you as an announcer or newscaster.

Mr. Anderson's letter raises a question as to compliance with Sections 73.123 and 73.301 of the Commission's Rules, which prohibit licensee employment policies that discriminate on the basis of race, color, religion, national origin or sex. In your response, you indicate that 73 percent of Station KGDN's programming is "inspirational," and that Station KBIQ-FM's format is primarily "good music," which serves as a vehicle for the hourly airing of "brief essays stimulating a desire for higher moral and spiritual values." You state that you are a Christian religious organization with a mission to "share Christ." Since Stations KGDN and KBIQ-FM are a part of your overall program, you assert that it is necessary to inquire of prospective employees whether they subscribe to your objectives. You deny, however, that your inquiries violate the Commission's rules.

In support of your position, you state that our nondiscrimination rules were based on the Civil Rights Act of 1964. That Act exempts from its provisions religious corporations "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation . . . of its religious activities. . . ." 42 U.S.C. 2000e-1. You also quote 42 U.S.C. 2000e-2(e),



ment of your future hiring practices and policies with respect to the requirements of Sections 73.125 and 73.301, as interpreted by this letter.

Commissioner Bartley not participating; Commissioner Reid absent.

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By DIRECTION OF THE COMMISSION.

BEN F. WAPLE, Secretary.

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The KING'S GARDEN, INC., Petitioner  
v.  
FEDERAL COMMUNICATIONS COM-  
MISSION and United States of  
America, Respondents  
No. 73-1896.

United States Court of Appeals,  
District of Columbia Circuit.

Argued Jan. 11, 1974.

Decided May 6, 1974.

*est. Am. v. F.C.C.*

Radio station licensee, which was a nonprofit religious organization, filed petition for review of order of the Federal Communications Commission determining that licensee was discriminating on religious grounds in its employment practices. The Court of Appeals, J. Skelly Wright, Circuit Judge, held that exemption of all activities of any religious corporation, association, educational institution or society from Civil Rights Act ban on religious discrimination in employment was irrelevant to Federal Communications Commission's regulation of broadcast licensees under the Communications Act, and that Commission's rules which exempted employment connected with espousal of a licensee's religious views from Commission's antibias regulations but which required enforcement of antibias regulations with respect to job positions having no substantial connection with program content or positions connected with programs having no religious dimension did not violate licensee's rights under the First Amendment or the Communications Act.

Affirmed.

Bazelon, Chief Judge, concurred specially and filed opinion.

1. Constitutional Law ⇌84

Laws must have a secular purpose and a primary effect which neither advances nor inhibits religion. U.S.C.A. Const. Amend. 1.

2. Constitutional Law ⇌84

First Amendment demands "neutrality" of treatment between religious and nonreligious groups. U.S.C.A. Const. Amend. 1.

3. Constitutional Law ⇌84

Free exercise clause precludes governmental interference with ecclesiastical hierarchies, church administration and appointment of clergy. U.S.C.A. Const. Amend. 1.

4. Constitutional Law ⇌84, 90.1(1)

Guarantees of free exercise of religion, free speech and free press combine to provide a religious group the right to choose on sectarian grounds those who will advocate, defend or explain the group's beliefs or way of life, either to its own members or to the world at large. Civil Rights Act of 1964, §§ 701 et seq., 702, 703, as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-1, 2000e-2; Communications Act of 1934, §§ 1 et seq., 303, 307, 309(a), 47 U.S.C.A. §§ 151 et seq., 303, 307, 309(a); U.S.C.A. Const. Amend. 1.

5. Civil Rights ⇌2

Constitutional Law ⇌84, 211

Civil Rights Act provision exempting all activities of any religious corporation, association, educational institution or society from ban on religious discrimination in employment shelters myriad activities which have not the slightest claim to protection under constitutional guarantees of free exercise of religion, free speech and free press and the provision appears to be violative of the establishment clause and to deny equal protection. Civil Rights Act of 1964, §§ 701 et seq., 702, 703, as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-1, 2000e-2; U.S.C.A. Const. Amends. 1, 5.

6. Constitutional Law ⇌48(1)

Statutes should be construed so as to avoid rather than aggravate constitutional difficulties.

7. Civil Rights ⇌13.7

Telecommunications ⇌384

Exemption in Civil Rights Act of all activities of any religious corporation.

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association, educational institution or society from ban against religious discrimination in employment immunizes religious organizations only from ban contained in the Civil Rights Act and does not abrogate antibias rules promulgated by the Federal Communications Commission under the Communications Act with respect to religious organizations which own broadcast licenses. Civil Rights Act of 1964, §§ 701 et seq., 702, 703, as amended, 42 U.S.C.A. §§ 2000e et seq., 2000-1, 2000-2; Communications Act of 1934, §§ 1 et seq., 303, 307, 309(a), 47 U.S.C.A. §§ 151 et seq., 303, 307, 309(a).

#### 8. Telecommunications ⇐438

Religious sect has no constitutional right to convert a licensed communications franchise to a church, and a religious group which buys and operates a licensed radio or television station takes its franchise burdened by enforceable public obligations. Communications Act of 1934, §§ 1 et seq., 303, 307, 309(a), 47 U.S.C.A. §§ 151 et seq., 303, 307, 309(a); U.S.C.A.Const. Amend. 1.

#### 9. Constitutional Law ⇐84

Rules of Federal Communications Commission exempting employment connected with the espousal of a sectarian broadcast licensee's religious views from the Commission's regulations precluding employment discrimination on the basis of religion but requiring enforcement of the antibias regulations with respect to job positions having no substantial connection with program content or positions connected with programs having no religious dimension did not violate right to freedom of religious expression

\* Of the United States District Court for the District of Massachusetts, sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

1. This controversy arose when a job applicant at one of King's Garden's stations complained to the FCC that he was asked questions such as "Are you a Christian?", "Is your spouse a Christian?", and the like. The Commission forwarded the complaint to King's Garden on Aug. 2, 1971 (Record at p. 2). King's Garden responded by claiming

of broadcast licensee, which was a non-profit religious organization. Communications Act of 1934, §§ 1 et seq., 303, 307, 309(a), 47 U.S.C.A. § 151 et seq., 303, 307, 309(a); U.S.C.A.Const. Amend. 1.

Morton L. Berfield, Washington, D. C., with whom Lewis I. Cohen, Washington, D. C., was on the brief, for petitioner.

John E. Ingle, Counsel, F. C. C., with whom John W. Pettit, Gen. Counsel, and Joseph A. Marino, Associate Gen. Counsel, F. C. C., were on the brief, for respondent.

Melvin L. Wulf, New York City, and Joseph Remcho, San Francisco, Cal., filed a brief on behalf of American Civil Liberties Union et al. as amici curiae.

Before BAZELON, Chief Judge, WRIGHT, Circuit Judge, and WYZANSKI,\* Senior District Judge.

J. SKELLY WRIGHT, Circuit Judge:

Petitioner is a non-profit, interdenominational, religious, and charitable organization. Its activities include a number of ministries whose basic goal is to "share Christ world wide" (Record at p. 15). Petitioner is also the licensee of Radio Stations KBIQ-FM and KGDN in Edmonds, Washington. In these proceedings it seeks review of an order of the Federal Communications Commission which found that it was discriminating on religious grounds in its employment practices and directed it to submit to the Commission a statement of its future hiring practices and policies.<sup>1</sup> Petitioner relies upon a 1972

the statutory and constitutional right to discriminate on religious grounds with respect to all positions of employment at its radio stations (Record at p. 15). The Commission ruled on May 3, 1972 that only "those persons hired to espouse a particular religious philosophy over the air should be exempt from the non-discrimination rules." In Re Complaint by Anderson, 34 FCC2d 937, 938 (1972). This position was reaffirmed after enactment of the 1972 exemption to the Civil Rights Act mentioned in text. See In the Matter of King's Garden, Inc., 38

amendment to Title VII of the 1964 Civil Rights Act which exempts all activities of any "religious corporation, association, educational institution, or society" from the Act's ban on religious discrimination in employment.<sup>2</sup> (Hereinafter the 1972 exemption.) Before 1972 only the "religious activities" of such organizations had been exempted.<sup>3</sup> Petitioner would require the Federal Communications Commission to engraft the 1972 exemption on to the Commission's own rules against sectarian employment practices, promulgated under the "public interest" standard of the Communications Act.<sup>4</sup> The Commission already ex-

empts employment "connected with the espousal of the licensee's religious views."<sup>5</sup> Petitioner contends that a sectarian licensee, like itself, must be allowed to discriminate on religious grounds in all of its employment practices.

We affirm the Commission rulings. The 1972 exemption is of very doubtful constitutionality, and Congress has given absolutely no indication that it wished to impose the exemption upon the FCC. Under these circumstances the Commission is fully justified in finding that the exemption does not control its "public interest" mandate under

FCC2d 339 (1972). The question in this case is whether the Commission's qualified exemption facially conforms to relevant statutes and the Constitution. We do not deal with application of the exemption to any particular job position at King's Garden. It should be noted that King's Garden has requested institution of rule-making proceedings on the Commission's exemption policy. This issue is not before us.

2. The exemption is in § 3 of the Equal Employment Opportunities Act of 1972, Pub.L. 92-261, 86 Stat. 103, 42 U.S.C. § 2000e-1 (Supp. II 1972), amending § 702 of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, former 42 U.S.C. § 2000e-1. The 1972 exemption reads, in pertinent part:

This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

The general ban on religious discrimination in employment is at 42 U.S.C. § 2000e-2 (1970).

3. Section 702 of the 1964 Civil Rights Act read, in pertinent part:

This subchapter shall not apply . . . to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities . . .

4. The regulations bar employment discrimination by broadcast licensees "because of race, color, religion, national origin or sex." 47 C.F.R. §§ 73.125(a), 73.301(a), 73.599(a), 73.680(a), 73.793(a) (Oct. 1, 1973). The

Communications Act of 1934, 48 Stat. 1064 *et seq.*, 47 U.S.C. § 151 *et seq.* (1970), mandates the Commission to regulate broadcast licensees "as public convenience, interest, or necessity requires." *E.g.*, 47 U.S.C. §§ 303, 307, 309(a). The Commission traces its authority to promulgate fair employment rules to the "public interest" standard of its enabling act and to the related fact that broadcasters are "public trustees" with special obligations. *See Non-Discrimination in Employment Practices: Notice of Proposed Rule Making*, 13 FCC2d 766, 769-770 (1968), and *Non-Discrimination in Employment Practices*, 18 FCC2d 240, 241 (1969). The Communications Act does not itself expressly grant the FCC authority to regulate the employment practices of licensees, but the Commission has noted that employment practices have an obvious, if indirect, impact on programming—over which the FCC does have express authority. *See Non-Discrimination in Employment Practices: Notice of Proposed Rule Making*, *supra*, 13 FCC2d at 770. King's Garden does not deny that the Commission has independent statutory authority to regulate the employment practices of licensees, and contends only that this authority cannot be exercised contrary to the Constitution or to the "national policy" established by the religious exemption in § 3 of the Equal Employment Opportunities Act of 1972. Brief for petitioner at 18. The Commission has stated that any change in its anti-bias rules should be accomplished through formal rule-making and should be adopted only "upon a public interest finding under the Communications Act" (Record at p. 83).

5. *See In Re Complaint by Anderson*, *supra* note 1, 34 FCC2d at 938, and *In Re Request of National Religious Broadcasters, Inc.*, 43 FCC2d 451 (1973).

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the Communications Act. The limited exemption which the FCC currently recognizes to its own anti-bias rules adequately protects a sectarian licensee's rights under the Communications Act and the First Amendment. Accordingly we uphold the Commission's regulatory scheme as facially sound, while recognizing that its future application will require continuing judicial scrutiny.

## I

The sponsors of the 1972 exemption were chiefly concerned to preserve the statutory power of sectarian schools and colleges to discriminate on religious

grounds in the hiring of all of their employees.<sup>6</sup> But the exemption's simple and unqualified terms obviously accomplish far more than this. In covering all of the "activities" of any "religious corporation, association, educational institution, or society," the exemption immunizes virtually every endeavor undertaken by a religious organization. If a religious sect should own and operate a trucking firm, a chain of motels, a race track, a telephone company, a railroad, a fried chicken franchise, or a professional football team, the enterprise could limit employment to members of the sect without infringing the Civil Rights Act.<sup>7</sup>

6. Section 702 of the 1964 Civil Rights Act (Pub.L. 88-352, 78 Stat. 255, former 42 U.S.C. § 2000e-1) had exempted "educational institution[s]" from all of the Act's employment discrimination rules. Early versions of the legislation which became the Equal Employment Opportunities Act of 1972 deleted this blanket exemption for educational institutions and proposed to add "religious educational institution[s]" to the list of religious organizations which § 702 had exempted as to religious discrimination in "religious activities." See § 3 of S. 2515, 92nd Cong., 1st Sess., Sept. 14, 1971. Senator Allen objected that

[u]nder the provisions of the bill, there would be nothing to prevent an atheist being forced upon a religious school to teach some subject other than theology. Legislative History of the Equal Opportunity Act of 1972 844 (Nov. 1972). To remedy this evil the Senators proposed striking the word "religious" from the term "religious activities" used in the provision exempting religious organizations from the ban on sectarian hiring practices. Amendment 809 to S. 2515, Legislative History, *supra*, at 789. The Senate adopted the Ervin-Allen amendment, *id.* at 1667, and the House also accepted it after a Joint Conference on the 1972 Act, *id.* at 1813-1814. This amendment broadened the exemption as to religious educational institutions—but also, of course, as to all other religious organizations listed in the exemption. In giving concrete examples of the workings of their amendment, however, both Senator Allen and Senator Ervin invariably adverted to its effect on religious educational institutions. *Id.* at 846, 848-852. The effect on other religious organizations went undiscussed, except for two very general comments by Senator Ervin:

Our amendment would strike out the word "religious" and remove religious institu-

tions in all respects from the subjugation to the EEOC.

*Id.* at 848.

In other words, this amendment is to take the political hands of Caesar off of the institutions of God, where they have no place to be.

*Id.* at 1645.

7. See note 9 *infra*. It might be argued, in an attempt to read the exemption narrowly, that a commercial enterprise established by a religious sect is not an "activity" of the sect. This does not, however, seem a very fruitful line of argument. If a sect owns and operates an enterprise, on what ground could it be held to be other than an "activity" of the sect? Use of some technical ground—such as separate incorporation of the commercial enterprise—would not narrow the exemption in practice, for religious groups would simply avoid the technicality, e.g., avoid separate incorporation, in setting up their commercial enterprises. To effect a substantive narrowing of the exemption the courts would have to attempt to divide a sect's various undertakings into "secular" and "religious" categories, but it is precisely this categorization which Congress repudiated in 1972.

While it is not uncommon for courts to come very close to rewriting statutes so as to save their constitutionality, the 1972 exemption is a poor candidate for such a salvage operation. The scope of a religious exemption is an issue raising very delicate questions of public policy. While it is reasonably clear that the 1972 exemption violates the Establishment Clause, it is far less clear exactly how much, or in what way, the exemption should be narrowed to avoid First Amendment objections. There may well be a considerable range of permissible alternatives. As a matter of institutional compe-

If owned and operated by a nonreligious organization, the enterprise could not use sectarian criteria in hiring, except where the particular job position carried a "bona fide occupational qualification" of a religious character.<sup>8</sup>

[1] In creating this gross distinction between the rules facing religious and non-religious entrepreneurs, Congress placed itself on collision course with the Establishment Clause. Laws in this country must have a secular purpose and a "primary effect" which neither advances nor inhibits religion. Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 770 (1972); Leno v. American Telephone & Telegraph Co., 295 U.S. 295, 37 L.Ed.2d 948 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971); Walz v. Tax Commission, 397 U.S. 664, 669, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970).

[I]t is now firmly established that a law may be one "respecting an establishment of religion" even though its consequence is not to promote a "state religion." \* \* \* and even though it does not aid one religion more than another but merely benefits all religions alike. \* \* \*

Nyquist, supra, 413 U.S. at 771.

A given law might not establish a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment \* \* \*.

Lemon v. Kurtzman, supra, 403 U.S. at 612 (emphasis in original). We cannot conceive what secular purpose is served by the unbounded exemption enacted in 1972. As for "primary effect," the exemption invites religious groups, and them alone, to impress a test of faith on job categories, and indeed whole enter-

prise and constitutional authority, it is for the Congress, not the courts, to choose among these. See, in this regard, 26 U.S.C. §§ 501(c)(3), 502, 511, & 512 (1970), where Congress has shown considerable ingenuity in constructing a very complicated exemption from the income tax laws for certain religious corporations.

8. 42 U.S.C. § 2000e-2(e)(1). The "qualification" must be "reasonably necessary to

prises, having nothing to do with the exercise of religion.

It is true that most of the Establishment Clause cases recently before the Supreme Court have involved state subsidies or tax preferences for religious groups. But in drafting the Clause the Founders were taking equally keen aim at all non-financial "sponsorship" of religious organizations by government. Lemon v. Kurtzman, supra, 403 U.S. at 612; Walz v. Tax Commission, supra, 397 U.S. at 668. And sponsorship is what this exemption accomplishes. It is a mere formula for concentrating and extending the worldly influence of the religious sects having the wealth and inclination to buy up pieces of the secular economy.<sup>9</sup>

[2] It was not, of course, constitutionally required that Congress prohibit religious discrimination in private sector employment. But this having been done, by the Civil Rights Act, the wholesale exemption for religious organizations alone can only be seen as a special preference. Compare Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967). The First Amendment demands "neutrality" of treatment between religious and non-religious groups. Nyquist, supra, 413 U.S. at 792-793. As Mr. Justice Harlan once noted:

Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerry manders. \* \* \*

Walz v. Tax Commission, supra, 397 U.S. at 696 (concurring opinion).

the normal operation of that particular business or enterprise."

9. The wealth and inclination exist, apparently, in many American religious groups. See A. Balk, The Religion Business 8-11 (1968); D. Robertson, Should Churches Be Taxed? 139-170 (1968); M. Larson & C. Lowell, Praise the Lord for Tax Exemption 193-246 (1969).

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Because the two religion guarantees often seem to tug in opposite directions, "neutrality" is a notoriously difficult concept.

A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.

\* \* \* The Court must not ignore the danger that an exemption from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise. \* \* \*  
 Wisconsin v. Yoder, 406 U.S. 205, 220-221, 92 S.Ct. 1526, 1536, 32 L.Ed.2d 15 (1972). See also Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). In this matter of exemptions the First Amendment strings a "tight rope" between the two religion guarantees, *Walz v. Tax Commission, supra*, 397 U.S. at 672, and we must see to it that Congress does not slip off.

[3, 4] From 1964 to 1972 Congress had, in our view, a firm purchase on the tightrope. The exemption then granted by the Civil Rights Act to the religious activities of religious organizations was itself required by the First Amendment. The Free Exercise Clause precludes governmental interference with ecclesiastical hierarchies, church administration, and appointment of clergy. See *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 80 S.Ct. 1037, 4 L.Ed.2d 1140 (1960); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952); *McClure v. Salvation Army*, 5 Cir., 460 F.2d 553 (1972). In addition, the guarantees of Free Exercise, Free Speech, and Free Press no doubt combine to provide a religious group the right to choose on sectarian grounds those who will advocate, defend, or explain the

group's beliefs or way of life, either to its own members or to the world at large. See *Tucker v. Texas*, 326 U.S. 517, 66 S.Ct. 274, 90 L.Ed. 274 (1946); *Follett v. McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943); *Jamison v. Texas*, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); *Founding Church of Scientology v. United States*, 133 U.S. App.D.C. 229, 409 F.2d 1146, cert. denied, 396 U.S. 963, 90 S.Ct. 434, 24 L.Ed.2d 427 (1969); *Anti-Defamation League of B'nai B'rith v. FCC*, 131 U.S. App.D.C. 146, 403 F.2d 169 (1968), cert. denied, 394 U.S. 930, 89 S.Ct. 1190, 22 L.Ed.2d 459 (1969). Compare *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Mitchell v. Pilgrim Holiness Church Corp.*, 7 Cir., 210 F.2d 879, cert. denied, 347 U.S. 1013, 74 S.Ct. 867, 98 L.Ed. 1136 (1954).

[5] But the 1972 exemption now shelters myriad "activities" which have not the slightest claim to protection under the Free Exercise, Free Speech, or Free Press guarantees. It is arguable that Congress may, without violating the Establishment Clause, expand a religious exemption somewhat beyond the minimal boundaries created by the several First Amendment liberties. See *Walz v. Tax Commission, supra* (property tax exemption for buildings and land used "exclusively for religious, educational or charitable purposes" and "not operating for profit"); *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952) ("released time" exemption from school attendance requirement for students wishing to take religious instruction). See also *Sherbert v. Verner, supra*, 374 U.S. at 422-423 (dissenting opinion of Mr. Justice Harlan). But these isolated decisions create no precedent for the unlimited 1972 exemption. In *Zorach, supra*, the Court carefully confined its ruling to the facts of the case. In *Walz, supra*, the Court stressed the peculiar historical role of property tax exemp-

tions for places of worship, 397 U.S. at 676-678, noted that the tax exemption extended to the non-profit activities of many secular organizations so that the statutory classification was not strictly a "religious" one. *id.* at 673, and carefully refrained from stating or implying that the state could exempt church-owned property used for non-religious, commercial purposes. (The Court has yet to address this last question. See *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972); *cf. Gibbons v. District of Columbia*, 116 U.S. 404, 408, 6 S.Ct. 427, 29 L.Ed. 680 (1886).)

By contrast, no historical tradition supports the 1972 exemption, *see Nyquist, supra*, 413 U.S. at 791-792. That exemption obviously creates a classification of a strictly religious character, *id.* And the exemption's benefits clearly extend to the non-religious, commercial enterprises of sectarian organizations.<sup>10</sup> It is conceivable that there are "many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all-embracing secularism." *Sherbert v. Verner, supra*, 374 U.S. at 422 (dissenting opinion of Mr. Justice Harlan). But it hardly follows that the state may favor religious groups when they themselves *choose* to be submerged, for profit or power, in the "all-embracing secularism" of the corporate economy.

In addition to being vulnerable on First Amendment grounds, the 1972 exemption appears unconstitutional on Fifth Amendment grounds as well. To the extent that the non-religious commercial enterprises of religious organizations directly compete with those of

non-religious organizations, the 1972 exemption forces the Government to discriminate between business rivals in applying the Civil Rights Act's constraints upon sectarian hiring. The criterion of discrimination—*i.e.* the religious or nonreligious character of the owning or operating group—not only lacks a rational connection with any permissible legislative purpose, but is also inherently suspect. Such invidious discrimination violates the equal protection of the laws guaranteed by the Due Process Clause. *Compare Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1947).

## II

[6] The FCC's own rules against sectarian hiring, promulgated under the Communications Act, exempt employment "connected with the espousal of the licensee's religious views."<sup>11</sup> Petitioner finds in this formula insufficient compliance with the "national policy" established by the 1972 exemption to the Civil Rights Act. But it is very dangerous indeed to inflate a constitutionally doubtful statute into a "national policy" having force beyond the statute's literal command. The customary, and more prudent, course is to construe statutes so as to avoid, rather than aggravate, constitutional difficulties. *See United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971). This course is open to us in the present case. Neither the express terms nor the legislative history of the 1972 exemption indicate that Congress intended the FCC to carve a like exemption into its own anti-bias rules. A definitive resolution of the constitutional issues raised by the 1972 exemption can

<sup>10</sup> In *Wals v. Tax Commission*, 397 U.S. 664, 90 S.Ct. 1408, 25 L.Ed.2d 697 (1970), the Court also noted that a tax exemption for property used for religious purposes had the virtue of minimizing "entanglement" between churches and state authorities. *id.* at 674. But this rationale was obviously not intended to sanction every exemption from general laws granted to the "activities" of a religious organization. If it were, no "reli-

gious" exemption would ever raise an Establishment Clause issue; the Court has never adopted such a simpleminded rule. *See Wisconsin v. Yoder*, 406 U.S. 205, 220-221, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), and *Lemon v. Kurtzman*, 403 U.S. 602, 614, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

<sup>11</sup> *See note 5 supra*.

therefore be deferred to a case where they are squarely raised.

[7] While the key term in the 1972 exemption—"activities"—is concededly broad enough to cover broadcasting franchises operated by religious organizations, this means only that these sectarian franchises are immune from the ban on religiously discriminatory hiring contained in the Civil Rights Act. It does not necessarily follow that Congress intended to abrogate the FCC's own anti-bias rules. Not only have these rules always been promulgated under the Communications Act, rather than the Civil Rights Act, but the rules have also, from their inception, gone beyond the commands contained in the Civil Rights Act. For instance, the FCC demands that its licensees take strong affirmative steps to hire members of minority groups<sup>12</sup>; and the FCC's rules apply to every broadcaster—even those too small to fall within the coverage of the civil rights statutes.<sup>13</sup> The Commission's extensive rules, and limited religious exemption, were in full force when Congress debated the 1972 exemption from the Civil Rights Act, but the legislative history makes absolutely no mention of them, of the FCC, or of the Communications Act. In this context we adhere to the

venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. \* \* \*

12. On affirmative action, see 47 C.F.R. §§ 73.125(b), 73.301(b), 73.599(b), 73.680(b), & 73.793(b). These rules are patterned on those used by the Civil Service Commission in hiring federal employees. See *Non-Discrimination in Employment Practices*, *supra* note 4, 18 FCC2d at 243. Even stronger affirmative measures apparently may be required by the Commission in particular instances. *Id.* at 244.

13. The fair employment standards in the civil rights statutes apply only to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L. Ed.2d 371 (1969) (footnote omitted). This principle has particular application to the FCC, for the Commission's mandate "to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive.'" *id.* at 380. See also *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90, 73 S.Ct. 998, 97 L.Ed. 1470 (1953); *National Broadcasting Co. v. United States*, 319 U.S. 190, 218-219, 63 S.Ct. 997, 87 L.Ed. 1344 (1943); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-138, 60 S.Ct. 437, 84 L.Ed. 656 (1940).

An agency should, of course, always examine new legislation to determine its relevance, if any, to the agency's mandate. See *McLean Trucking Co. v. United States*, 321 U.S. 67, 80, 64 S.Ct. 370, 88 L.Ed. 544 (1944). *Cf.* *City of Pittsburgh v. FPC*, 99 U.S.App.D.C. 113, 237 F.2d 741 (1956); *Mansfield Journal Co. v. FCC*, 86 U.S.App.D.C. 102, 107, 180 F.2d 28, 33 (1950). But, having done this, the Commission was justified in finding the 1972 exemption irrelevant to its regulation of broadcast licensees under the Communications Act.

Congress' obvious purpose in enacting the 1972 exemption was to constrain the power of the Equal Employment Opportunities Commission (EEOC) to regulate *private* religious entities. At the time the exemption was debated the civil rights statute to which it is expressly addressed applied only to private sector employers.<sup>14</sup> The exemption's sponsors were chiefly interested in the employ-

14. The statute now covers "governments, governmental agencies, [and] political subdivisions," 42 U.S.C. § 2000e (Supp. II 1972), as well as private employers, but these public bodies were added by § 2(1) of the Equal Employment Opportunities Act of 1972, the same legislation which added the Allen-Ervin exemption for all of the "activities" of "religious" organizations. The legislative history of that exemption nowhere indicates that Congress gave any consideration to the possibility that a "religious" organization might also be a public or quasi-public body. The literal terms of the exemption do cover sectarian radio and television stations, but this

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ment rights of wholly private educational institutions.<sup>15</sup> Even in their most sweeping statements the sponsors spoke of immunizing only those activities which had traditionally been free of all government regulation:

Our amendment would strike out the word "religious" and remove religious institutions in all respects from subjugation to the EEOC.

In other words, this amendment is to take the political hands of Caesar off of the institutions of God, where they have no place to be.<sup>16</sup>

As Congress is fully aware, broadcasting under the Communications Act is not an altogether private industry. Federally licensed broadcasters are "public trustees." *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 117, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973). For decades Congress has authorized and encouraged the FCC to regulate the broadcast industry in ways which the First Amendment would clearly foreclose in the case of wholly private organs of communication. *Red Lion, supra*, 395 U.S. at 386-401. Unlike a religious newspaper, a sectarian radio or television station must, as King's Garden readily concedes, adhere to the "fairness" and "personal attack" doctrines and produce some programs of general community interest. We have no evidence that Congress wished in 1972 to upset this well established doctrine that licensed broadcasters must meet FCC-imposed obligations inapplicable to the private sector generally. King's Garden wishes us to assume that Congress now regards sectarian broadcasters as regulable "public trustees" so far as programming is concerned but as "institutions of God" untouchable by "the hands of Caesar" so far as employment practices are concerned. We would

is an undeliberated consequence of broad draftsmanship. It can hardly be invoked to show that Congress wished the FCC to desist from all regulation of the sectarian hiring practices of sectarian licenses.

require a sentence or two of pertinent legislative history before crediting Congress with so bizarre a notion.

III

The question remains whether the FCC's anti-bias rules violate King's Garden's rights under the First Amendment and the Communications Act. It is to protect these rights that the Commission exempts from the ban on sectarian hiring "the employment of persons whose work is \* \* \* connected with the espousal of the licensee's religious views." This general policy is to be particularized on a case-by-case basis:

[As t]here are [job] categories \* \* \* which may be defined differently by each licensee, we do not believe that it is advisable to issue a general declaratory ruling \* \* \*. We have only general information and we are dealing with an area where First Amendment rights are often involved. We believe it would be preferable, therefore, to have specific factual settings presented to us before issuing rulings. \* \* \*<sup>17</sup>

The challenge here is to the facial adequacy of the exemption. Application of the general exemption policy to a particular job position may raise additional problems, but they are not presently before us.

King's Garden argues that the FCC's exemption is so narrow as to abridge the sect's right of religious association, under the Free Exercise Clause, and its right, under the First Amendment generally, to broadcast religious views of its choice.

[8] The premise of the first argument is that King's Garden's radio station is an integral part of the sect's "missionary" structure. From this premise King's Garden concludes that

15. See note 6 *supra*.

16. *Id.*

17. In *Re Request of National Religious Broadcasters, Inc.*, *supra* note 5, 43 FCC2d at 452.

the Commission's fair employment rules tamper unconstitutionally with the sect's hierarchy, membership policy, and administration. The conclusion is based on the recognized doctrine, noted earlier, that the internal affairs of a church are immune from public regulation under the Free Exercise Clause. But the argument's premise is defective. A religious sect has no constitutional right to convert a licensed communications franchise into a church. A religious group, like any other, may buy and operate a licensed radio or television station. See *Noe v. FCC*, 104 U.S.App.D.C. 221, 260 F.2d 739 (1958), cert. denied, 359 U.S. 924, 79 S.Ct. 607, 3 L.Ed.2d 627 (1959). But, like any other group, a religious sect takes its franchise "burdened by enforceable public obligations." *Office of Communication of United Church of Christ v. FCC*, 123 U.S.App.D.C. 328, 337, 359 F.2d 994, 1003 (1966).

[9] King's Garden relies heavily on *Wisconsin v. Yoder*, *supra*, which recognized that a public obligation of a seemingly neutral and secular character—i.e. the duty to send one's children to a secondary school—may violate the religious associational rights of particular individuals by forcing them "to perform acts undeniably at odds with fundamental tenets of their religious beliefs" so that they must "either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region." 406 U.S. at 218. The case is inapposite. Wisconsin's school attendance law intruded upon the traditional way of life of a religious sect by imposing an inescapable duty, backed by criminal penalties, on every parent of secondary school age children. By contrast, King's Garden confronts the FCC's rules only because the sect has sought out the temporary privilege of holding a broadcasting license. See *Red Lion*, *supra*, 395 U.S. at 386-401, and *National Broadcasting Co.*, *supra*, 319 U.S. at 227. The FCC's rules merely condition King's Garden's ability to extend its activities by use of "a limited and valuable part of the public do-

main." *United Church of Christ*, *supra*, 123 U.S.App.D.C. at 337, 359 F.2d at 1003. There are, concededly, constitutional limits on the conditions which the FCC may impose. But the Constitution does not obligate the FCC to relinquish its regulatory mandate so that religious sects may merge their licensed franchises completely into their ecclesiastical structures.

King's Garden's second claim—that the FCC's exemption is too narrow to guarantee the sect's right to broadcast religious views of its choice—proceeds on somewhat firmer ground. While the constitutional dimensions of a broadcaster's speech and press rights have never been clearly delineated, the Supreme Court has recently emphasized that Congress, in enacting the Communications Act, intended licensees to have many of the liberties of private journalistic entities. *Columbia Broadcasting System*, *supra*, 412 U.S. at 109-111 and 124-125. Consequently, it may well be that, after it has met its "fairness doctrine" and "personal attack doctrine" obligations and produced some programs of general community interest, King's Garden has the right to give a sectarian tone or perspective to all of its other programming. This right would be infringed if the Commission, in applying its exemption, were to find no "espousal" of "religious views" in a type of programming which King's Garden considered a significant expression of its sectarian viewpoint.

But this argument is premature. It requires us to speculate that the FCC will apply the terms "espousal" and "religious views" in a cramped and dogmatic fashion. The contrary speculation is equally plausible. In applying its exemption, the Commission may well pay close and sensitive attention to the sincerely held convictions of the sectarian licensees under examination. See *Wisconsin v. Yoder*, *supra*, 406 U.S. at 209-219, and *Fowler v. Rhode Island*, 345 U.S. 67, 69, 73 S.Ct. 526, 97 L.Ed. 828 (1953). To date the Commission has done nothing more than announce that