

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

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FEDERAL COMMUNICATIONS COMMISSION

In re:

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

TO THE COMMISSION

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**FURTHER COMMENTS OF THE MINORITY
MEDIA AND TELECOMMUNICATIONS COUNCIL**

The Minority Media and Telecommunications Council ("MMTC")^{1/} respectfully offers these suggested revisions to the Commission's broadcast EEO enforcement procedures. These comments are offered to update the record and assist the Commission in fulfilling its EEO enforcement responsibilities. Leave to file them is respectfully requested.

Several of our suggestions are the result of introspection and consultation with industry leaders, including representatives of the National Association of Broadcasters. Our attempt to seek common ground with industry leadership was predicated on our recognition that most of the broadcasting industry supports outreach and diversity in the workplace, while perhaps disagreeing on the scope and manner of the FCC's EEO enforcement program. MMTC has confidence in the FCC's ability, through the rulemaking process, to harmonize any differences between industry and civil rights leadership.

^{1/} MMTC, founded in 1986, is the association of attorneys, scholars, engineers and economists which assists the civil rights community in communications policy matters. The proposals herein are those of MMTC itself and do not necessarily represent the views of any particular member of MMTC or its Board.

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Our June 14, 1994 Comments and our July 1, 1994 Reply Comments in this proceeding^{2/} recommended a variety of means to strengthen the Commission's EEO enforcement jurisprudence. Our goal was to encourage the Commission to adopt the tools with which it could effectively banish discrimination from an industry so essential to the democratic process. Our recommendations included:

- expansion of EEO review beyond the hiring process, to cover promotions, retention, training, working conditions, compensation and termination [Comments at 17-221
- revisions to job categories on Form 395 to more closely reflect job responsibilities [Comments at 301
- more aggressive use of Bilingual ^{3/} investigations, particularly where minority or female employment is decreasing rapidly [Comments at 40-451.

We strongly encourage the Commission to adopt all of the recommendations we presented last year. In addition, we ask the Commission to focus on two questions not addressed in our filings last year:

- (1) can paperwork burdens, especially on small broadcasters, be reduced in such a way that the effectiveness of stations' EEO efforts is not impaired and may actually improve?
- (2) can the enforcement process be made more efficient and conservative of limited Commission resources without impairing its effectiveness?

^{2/} Joining in our Comments were the League of United Latin American Citizens, the NAACP, the National Bar Association and the Office of Communication of the United Church of Christ.

^{3/} After Bilingual Bicultural Coalition on the Media v. FCC, 595 F.2d 621 (D.C. Cir. 1978) ("Bilingual").

As a civil rights organization, MMTC is especially receptive to these issues. In our experience, the long term effectiveness of any remedial or diversity-promoting initiative depends on industry confidence and support. It must not only be fair, it must avoid even the appearance of unfairness.^{4/}

I. **INCREASING THE COST-EFFECTIVENESS
OF COMMISSION EEO ENFORCEMENT**

MMTC opposes any unnecessary paperwork which might attend EEO compliance. Such burdens diminish licensees' support for diversity, and waste resources better applied to creative efforts to promote diversity. Neither EEO complainants nor licensees benefit from unnecessary paperwork requirements, which retard the administrative process and postpone the date on which a licensee accused of EEO noncompliance is either vindicated or is directed to correct its errors and omissions.

Limited federal enforcement resources must be applied in the most cost-effective way. In MMTC's experience, small stations are seldom cost-effective targets for the closest EEO scrutiny, for two reasons.

^{4/} These questions are not motivated by Adarand Constructors, Inc. v. Peña, 115 S.Ct. 2097 (1995). Strict scrutiny does not apply to a targeted recruitment program like the EEO Rule, which does not require licensees to use race in making a hiring decision, does not involve quotas, set-asides, or even a suggestion that anyone but the most qualified person be hired. As Assistant Attorney General Walter Dellinger has written, "[m]ere outreach and recruitment efforts . . . typically should not be subject to Adarand standards. Indeed, post-[City of Richmond v. Croson], 488 U.S. 469 (1989)] cases indicate that such efforts are considered race neutral means of increasing minority opportunity. In some sense, of course, the targeting of minorities through outreach and recruitment campaigns involves race-conscious action. But the objective there is to expand the pool of applicants or bidders to include minorities, not to use race or ethnicity in the actual decision. If the government does not use racial or ethnic classifications in selecting persons from the expanded pool, Adarand ordinarily would be inapplicable." Memorandum from Walter Dellinger, Esq., Assistant Attorney General, to all Agency General Counsels (June 28, 1995) at 7 (fns. omitted).

First, small stations appropriately tend to reserve the majority of their staff positions for long-term employees, such as the owners and their family members. Thus, they tend to have relatively little job turnover.

Second, with growing industry consolidation, most small stations now face uncommon competitive pressure, resulting in layoffs and reducing hiring opportunities.

We therefore propose four means by which regulatory burdens on small stations can be reduced, thereby permitting the Commission to redirect its EEO enforcement efforts more cost-effectively.

A. **Clarification of Recordkeeping Requirements**

When a licensee's EEO record throughout the license term suggests noncompliance, the Commission's staff generally sends it a letter asking for three years of data on its recruitment efforts and applicant flow. These initial letters, sent to approximately 4% of broadcast renewal applicants, are colloquially known as "**Bilingual** letters." In rare cases, insufficient responses to initial **Bilingual** letters lead to further letters. However, in the vast majority of cases, a licensee's responses to an initial **Bilingual** letter provide sufficient information for the Commission to determine whether corrective steps are necessary.

Although the Commission has routinely sent **Bilingual** letters to licensees for many years, the volume and style of data submitted in response to the letters is remarkably varied. Many stations fail to keep records which are sufficient to provide the Commission's staff with enough information to evaluate the stations' performance. Others submit so much data that it is often difficult for the Commission's staff and EEO complainants to wade through it to find the critical material.

Small stations would especially benefit from a restatement of the Commission's recordkeeping expectations. The Commission can achieve this by adopting two standardized tables:

- (1) a running recruitment table to be used by station employees who perform recruitment and hiring functions; and
- (2) a table summarizing the status of current employees.

These tables would not need to be submitted with a renewal applications. Moreover, a station could choose not to maintain such tables as part of its day-to-day recordkeeping, opting instead to reconstruct the data if it ever receives a Bilingual letter. However, the production of these tables would be deemed a complete response to an initial Bilingual letter.

Here is a suitable format for a running recruitment table:

<u>Job Title</u>	395-B Job <u>Classification</u>	Full or Part- <u>Time</u>	Date Position <u>Filled</u>	Referral Sources Contacted */	Number, Race and Sex of Referrals from each <u>source</u>	Number, Referral Source, Race and Gender of Each <u>Interviewee **/</u>
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*/ Indicate which are minority and/or female.

**/ Indicate which was the successful candidate.

Here is a table summarizing current employees' status:

<u>Job Title</u>	395-B Job <u>Classification</u>	<u>Gender</u>	<u>Race</u>	<u>Pay (rank only)</u>
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B. Revisions to the Standard Bilingual Letter

The standard initials/ Bilingual letter can be revised as follows.

5/ On occasion, the Commission's staff is not convinced that the information supplied by a licensee in response to an initial Bilingual letter puts to rest any question of whether the licensee engaged in intentional discrimination or committed other major violations of the EEO Rule. In such instances, the staff commonly sends a **followup** letter or letters. These letters, which are rare, are appropriate and are tailored to the facts of particular cases.

A standard question in an initial Bilingual letter seeks "the number, referral source, gender and race or national origin (e.g. Hispanic) of persons who applied as well as those persons who were interviewed." Examination of Bilingual responses reveals that the definition of an "applicant" is unclear to many licensees. Some stations consider an unsolicited letter and resume to constitute a job application; others do not consider a person to be an applicant unless he or she fills out a written application form; still others consider only interviewees to be applicants. Many licensees responding to Bilingual investigations incur substantial time and resource expenditures preparing voluminous information about persons who mail in resumes. This information -- which may not even permit an identification of the subject's race or referral source -- is of little value in evaluating an EEO program's effectiveness.

The ultimate purpose of targeted recruitment is to place qualified minorities and women in a position to personally present their qualifications for competitive consideration with other qualified applicants. That happens in the interviewing process. The Commission's EEO program is not aimed at the collection of a stack of resumes; these are meaningless unless the candidates are interviewed.

Therefore, the applicant-identifying question in the standard initial Bilingual letter should be more narrowly focused to read "the number, referral source, gender and race or national origin (e.g. Hispanic) of persons who were interviewed", deleting the ambiguous reference to "persons who applied."

C. Alternative EEO Efforts Showings

usually, for an EEO program to be effective, it must be triggered by the occasion of each hiring opportunity. In general, a set-aside of some vacancies for traditional word-of-mouth recruitment has the practical effect of preventing minorities and women from having an opportunity to be considered.

However, if a licensee is rather small, efforts tailored to each vacancy might occasionally not be the most effective approach. A small station typically must fill job openings faster than a large station, because a small station has less flexibility to reassign or detail other employees to cover a departed employee's workload while the station seeks a replacement. Consequently, **some** small stations have found it ineffective to rely exclusively on contacts with recruitment sources whenever openings occur, because many recruitment sources cannot refer qualified applicants rapidly enough to generate applicants before the small station's short hiring window has closed.

Bearing this in mind, some small stations might find it advantageous to be given the option of selecting an alternative to recruitment-source contacts for every job opening: intensive, personal participation in structured recruitment events, such as job fairs, through which they can build a file of resumes, accessible immediately when a vacancy presents itself.

To fulfill the goals of the EEO Rule, such a resume file must be constructed to enhance the likelihood that a racially integrated pool of men and women will be considered when positions become available. Therefore, small stations which have found it ineffective to make recruitment-source contacts for every job

opening should have the option of using intensive alternative measures to identify those qualified minority and female job candidates who expect to remain in the hiring market for a reasonable period of time, or who expect to enter the hiring market later (e.g., upon graduation from school or upon the termination of their present employment).

To be genuine and effective, these efforts must involve station managers' personal contact with potential job candidates. For example, managers might attend minority and female recruitment-oriented job fairs sponsored by state or local broadcasters' associations or community organizations, or they might undertake recruiting visits to high schools, colleges, universities and broadcasting schools.^{6/}

For some small broadcasters, systematic personal contacts with a variety of potential applicants may be a more effective and far less burdensome way to attract minority and female applicants and diversify their workforces than efforts targeted to each vacancy. Given the persistence of minority and female underrepresentation in broadcasting, an experiment along these lines would be worthwhile if it has potential to promote diversity.

Consequently, MMTC urges the Commission to revise Form 396 and Form 396-A to allow a renewal applicant which has had fifteen

^{6/} Stations can seldom build such an integrated resume file with such artificial devices as stilted form letters, written to minority and women's organizations. Such letters typically say "we have no jobs open presently, but we're an equal opportunity employer and we welcome referrals at any time." Few minority and women's organizations find it worth their time to provide their clientele with these blanket, impersonal, and often nongenuine letters. In some industries, such letters are code for "our lawyers told us we have to send you this to appear nondiscriminatory, but we fully intend to continue to discriminate."

or fewer fulltime employees on each of its previous three Form 395's and which has fifteen or fewer fulltime employees at the time it files its renewal application, or an applicant for new facilities, assignment, or transfer which proposes to employ fewer than fifteen fulltime persons, to choose any of three options:

- Option 1: contacting recruitment sources whenever a position is available and not to be filled by a promotion from within (as all licensees are expected to do now);
- Option 2: management-level in-person participation in at least three recruiting initiatives every year which are each geared specifically to identifying qualified minority or female job candidates for current or subsequent vacancies; or
- Option 3: the licensee combines the procedures in Option 1 and Option 2 (appropriate where the licensee voluntarily wishes to provide especially aggressive targeted recruitment, as most television stations and many large radio stations do; or where the licensee knows that it must be particularly aggressive because, e.g., it is recovering from EEO conditions or it has succeeded an earlier licensee which had been unsuccessful in recruiting minorities or women.) 7/

To permit licensees to take advantage of these procedures immediately, the Commission should issue a public notice inviting licensees to file a notification selecting one of these options. Those not selecting an option will be assumed to be continuing to proceed according to Option 1, by tying their recruitment efforts to each job vacancy. When licensees file their renewal

7/ An illustration of the manner in which these options could be implemented for stations with ten or fewer employees is presented in Exhibit 1, infra, Q. 12. An expanded format could be used for stations with between eleven and fifteen employees.

applications, their performance for the EEO reporting year would be evaluated according to the option they have preselected.&/

D. EEO Compliance Certifications

Stations having ten or fewer employees generally have fewer hiring opportunities and a considerably lower employee turnover rate than larger stations. Consequently, it would conserve these stations' and the Commission's resources to allow these small stations to file a "short form" 396 when their licenses are renewed. Such a form ("Form 396-EZ") would be analogous to the IRS' Form 1040-EZ for simple tax returns.

These stations would not be relieved of their affirmative action compliance responsibilities, but could certify on Form 396-EZ to the principal nondiscrimination and targeted recruitment tasks expected of them. They would also identify the organizations they use to recruit minority and female job candidates whenever a job is open, or the structured recruiting activities they personally attend (as described on p. 9 supra). The information on Form 396-EZ, combined with the annual employment data which would still be reported on Form 395, would provide members of the public with sufficient information to determine whether these stations are complying with all sections of the EEO Rule. Stations eligible to use such a form would be those which reported ten or fewer

g/ There is little chance that a licensee whose most recent EEO program promised recruitment efforts geared to each job vacancy -- but which failed to perform as promised -- might escape EEO accountability by precertifying an "Option 2" EEO program. If a licensee intended to disregard its EEO responsibilities, it is most unlikely that it would have undertaken any of the intensive, in-person recruiting characterized by Option 2. Furthermore, most small stations which perform as per either Option 1 or Option 2 are very likely to have had success in recruiting minority and female applicants and in hiring them. Thus, no escape from accountability would attend the immediate applicability of the Option 2 procedure.

fulltime employees on each of their three previous Form 395's and which have ten or fewer fulltime employees when they file their renewal applications. A suggested Form 396-EZ is appended as Exhibit 1.

II. ~~AN INCENTIVE FOR SUPERIOR EEO PERFORMANCE~~

Until it was repealed by Congress this April, the tax certificate program provided capital gains relief to licensees which sold stations to minorities. This program was an outstanding example of a market-stimulating incentive, rewarding broadcasters who took steps to integrate the business. The program was first proposed by the NAB in 1977. MMTC had been among its most vigorous proponents.

A similar incentive-based approach might be attempted for EEO as well. Broadcasters whose EEO performance has been above reproach -- and that includes the majority of established broadcasters -- should, upon their request, be rewarded by relief from a previous licensee's short term renewal for EEO noncompliance.^{9/} There is case precedent for this relief.^{10/}

^{9/} Such renewals typically involve EEO reporting conditions as well. These reporting conditions, which are seldom onerous, should survive the sale of a station because even the most well-intentioned successor licensee sometimes has difficulty overcoming and replacing the anti-EEO business culture it has inherited.

^{10/} In Turner Communications Corp., 47 RR2d 513 (1980), the Commission approved the assignment of a television station to Group W. Relying on Group W's superior EEO record at all of its stations, the Commission deleted the condition that Turner's short-term renewal be passed on to Group W. The Commission's action enabled the sale to go forward in harmony with a provision in the asset purchase agreement that a closing need not occur unless the seller could deliver the buyer a full term renewal.

This concept is appropriate because a short-term renewal is aimed more at specific rather than general deterrence. Thus, it is usually of little enforcement value when applied to a successor licensee whose past EEO track record demonstrates that it does not require specific deterrence.

Elimination of inherited short-term renewals would reduce a station purchaser's anticipated regulatory risks and its projected operating costs. Knowing that this incentive is available to them, EEO-positive broadcasters would become relatively more likely to replace EEO-negative licensees and thus promote job opportunity.

Moreover, companies wishing to embark on a round of station purchases would work hard to sustain outstanding reputations for equal opportunity in order to become or to remain eligible to enjoy this short-term renewal relief incentive.

There is an additional benefit to this incentive option: with fewer short-term renewals to supervise, the Commission's EEO staff would be able to focus its limited resources more effectively.

It is especially critical now that the Commission use incentives like this one to promote an EEO-positive climate in the industry. A wave of mergers and acquisitions is in its early stages, and fears of adverse labor market consequences for minorities and women are understandably pervasive.^{11/}

^{11/} We refer here to the "last hired, first fired" regimen which frequently attends corporate consolidations and which disproportionately impacts those, such as minorities and women, who may have the least seniority in a company.

This incentive approach would benefit the industry, minorities and women by reducing the scope and burden of regulation. It is a rare example of deregulation likely to be opposed by no one and endorsed by all parties to the EEO debate.

III. **A ZERO TOLERANCE POLICY FOR DISCRIMINATION**

The credibility of the Commission's EEO program -- especially if it is revised to afford more flexibility for some licensees -- depends profoundly on the Commission's willingness to leave no stone unturned to uncover intentional discriminators and remove them from the broadcast business.

Members of the public seldom possess information sufficient to demonstrate that a licensee has discriminated intentionally. Most discriminators are careful to conceal their intentions. In a closely-knit industry, few individuals are brave enough to come forward and complain -- if they even know that they've been victims of discrimination. Indeed, every case designated for hearing on EEO grounds has been designated largely because the licensee was found to have misrepresented facts in response to a petition to deny or a Bilingual letter.

Certainly, misrepresentations may indeed reveal discriminatory intent. However, the Commission sends the wrong signal to the industry when it permits sophisticated, truth-telling discriminators to escape scrutiny while only those discriminators who lie about it are held accountable.

EEO complainants should not be required to prove discrimination beyond a reasonable doubt just in order to be awarded a hearing. The Commission should be able to infer the possibility of discrimination when presented with several pieces of

evidence -- besides bald misrepresentations -- which collectively strongly suggest the possibility of discriminatory intent. These might include:

- almost no employment of members of a community's dominant minority group throughout most of the license term;
- virtually no EEO recruitment activity, even though such activity was promised in a previous Form 396 and even though the station is situated in a community where EEO recruitment should not be difficult or burdensome;

the invocation of stereotypes to explain away the absence of minority applicants or employees; e.g. that minorities won't work for low pay; that they won't work in a particular format or prefer "their own" type of music 12/; or that minorities won't commute reasonable distances to work (especially in reverse, from cities to suburbs, where traffic is not heavy). Only at a hearing can it be determined whether these types of statements reflect discriminatory intent.

To add credibility to its enforcement program and to justify the four elements of relief sought in Section I of this Petition for Rulemaking, the Commission must adopt a policy of zero tolerance for discrimination. Just as the Commission must not burden EEO compliers with unnecessary paperwork, it must not burden the general public and minority and female broadcast professionals with discriminating licensees.

Respectfully submitted,

by David Honig

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**DRAFT OF "FORM 396-EZ" FOR RENEWAL APPLICATIONS
OF STATIONS WITH TEN OR FEWER EMPLOYEES**

Name of Licensee: _____

Address: _____

Telephone Number: () _____

Station(s) Calls: _____

Community of License: _____

Service(s) AM FM TV Combination (specify)

Name and Title of
Person Responsible
for EEO Compliance _____

[Insert Instructions Here]

1. Number of **Fulltime** Employees on Form 395 for 1993 _____

2. Number of **Fulltime** Employees on Form 395 for 1994 _____

3. Number of **Fulltime** Employees on Form 395 for 1995 _____

4. Number of **Fulltime** Employees as of today _____

NOTE: If you reported more than ten employees in response to any of questions 1-4, you cannot use Form 396-EZ and should instead file Form 396. If you currently employ fewer than five **fulltime** employees, you do not need to file Form 396 or Form 396-EZ.

5. It is our policy to provide employment opportunity to all qualified individuals without regard to their race, color, religion, national origin **or sex** in all personnel actions including recruitment, evaluation, selection, promotion, compensation, training and termination. _____

6. It is our policy to promote the realization of equal employment opportunity through a positive, continuing program of specific practices designed to ensure the full realization of **equal** employment opportunity without regard to race color, religion, national origin or sex. _____

7. It is the responsibility of all persons making employment decisions with respect to the recruitment, evaluation, selection, promotion, compensation, training and termination of employees to ensure that our policy and program is **adhered to and** that no person is discriminated against in employment because of race, color, religion, national origin or sex. _____

8. We post notices informing applicants and employees that the station is an equal opportunity employer and that they **have** the right to notify an appropriate **local**, State, or Federal agency if they believe they have been the **victims** of discrimination. _____

9. Our station's employment application form contains a notice informing prospective employees that discrimination because of race, color, religion, national origin or sex is prohibited and that they **may** notify the appropriate local, State, or federal agency if they believe they have been the victims of discrimination. _____

10. We encourage employees to refer qualified minority and women candidates for existing and future job openings. _____

11. Minority group representation in the available labor force is less than five percent, and we do not choose to file EEO program information for minority groups. _____

12. Answer either (a), (b), or both:

(a) Whenever a position is available and not to be filled by promotion from within, we contact a variety of institutions and organizations likely to refer minority and women **candidates**. (**Examples** include educational institutions such as area schools and colleges with high minority and female enrollments, minority and women's organizations, state employment services or agencies, and media with particular interest to minorities and women.) During the past twelve months, these included: _____

Name of Recruiting Source

Contact Person

- (b) A management-level employee personally attends at least three events each year designed to facilitate the recruitment of minorities and women for media employment. (Examples are minority and female recruitment-oriented job fairs sponsored by state or local broadcasters' associations or community organizations, and recruiting visits to high schools, colleges, universities and broadcasting schools.) During the past twelve months, these included:

<u>Name of Event</u>	<u>Contact Person</u>	<u>Date</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

13. During the license term, were any complaints filed before any body having competent jurisdiction under federal, state, territorial or local law, alleging unlawful discrimination in the employment practices of the station? (Examples of bodies having such jurisdiction include the Equal Employment Opportunity Commission (EEOC), state and local equal opportunity or human relations commissions, or other appropriate agencies.)

NOTE: If the answer to Question 13 is Yes, please attach an explanation, identifying the persons involved, the date of filing, the court or agency, the file number (if any), and the disposition or current status of the matter.

14. (Optional): You may also provide other information that you believe would allow the FCC to more completely evaluate your efforts in providing equal opportunity in employment at your station. You may include a description of any training programs designed to enable minorities and women to compete in the broadcast employment market; any problems the station has experienced in assuring equal employment opportunity or in attracting qualified minority and women candidates for employment or promotion; and any efforts the station has undertaken or will undertake to promote equal opportunity in employment and to encourage applications from minorities and women.

I certify to the best of my knowledge, information and belief that all statements contained in this report are true and correct.

[Signature, Title, Date, and Name of Respondent]