ORIGINAL

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

APR 11 1996

In the Matter of	)	
	)	
Streamlining Broadcast EEO Rules and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines	)	MM Docket No. 96-16

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TO THE COMMISSION

PETITION FOR RECONSIDERATION AND CLARIFICATION

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SUMMARY

The organizations opposing the "EEO Streamlining" NPRM constitute the broadest coalition ever to participate in a proceeding before this agency. We are taking the extraordinary step of seeking a correction to the NPRM because -- with the greatest respect -- we believe that the Federal Communications Commission has profoundly breached its faith with minorities and women by issuing this distasteful and unseemly document. It is morally wrong, unlawful and unwise. And it is completely at odds with the Clinton administration's policy on affirmative action. The FCC has the sad distinction of being the only federal agency to propose a cutback in non-quota based, judicially unchallenged EEO enforcement.

EEO does not need to be "streamlined" unless it is to create policy of zero tolerance for discrimination. The "burdens" on broadcasters attendant to EEO compliance are negligible or nonexistent. Elimination of EEO enforcement on what likely would be a majority of America's broadcasting stations would cheapen the public airwaves and impose huge burdens on community groups, colleges and universities, minority and female broadcast professionals, and minority owned broadcasters, among others.

After the passage of the Telecommunications Act, EEO is the last remaining tool available to the FCC to promote diversity. Incredibly, the NPRM -- adopted just six hours after the Telecommunications Act was signed, does not even mention the Act or its enormous impact on opportunities for minorities and women.

Last month, it took the FCC just four days to assign a rulemaking number, and three weeks to issue a public notice, in response to a trade organization's objections to the use of the

Internet for non-tariffed long distance service. In doing so, FCC declared that "[w]hen petitions for rulemaking are filed with the Commission, a public notice is routinely issued shortly after the petition is filed." But for over three years, the FCC has failed even to provide the NAACP with the common courtesy of a rulemaking number -- much less a public notice -- in response to its many excellent proposals to improve EEO enforcement. Those proposals, amplified in 1994 by a broad coalition of civil rights and religious organizations, are nowhere even mentioned in the NPRM. Nonetheless, the NPRM did seek comment on a major law firm's proposal to eliminate the EEO Rule entirely. Does the FCC have one set of procedures for telephone companies and law firms, and another one for members of the public? Must the civil rights and religious organizations file their proposals a third time?

Upon his retirement, Commissioner Andrew C. Barrett said:

> I am departing...at a time when the Commission is reconsidering its EEO rules and provisions affecting minority telecommunications ownership. I would hope my colleagues will remember my concerns as the Commission renders decisions on these issues. */

The Commission would do its departed colleague and the public a great honor by simply promising to rule -- up or down -- on the civil rights and religious organizations' proposals to improve EEO enforcement. If the public is to have confidence in the FCC's fundamental fairness, the FCC should expressly manifest its desire to develop a full record on all material issues germane to EEO.

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*/ Commissioner Andrew Barrett Departs Commission, FCC Press Release, March 29, 1996.

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TO THE COMMISSION

PETITION FOR RECONSIDERATION AND CLARIFICATION

INTRODUCTION

The National Council of Churches, the Minority Media and Telecommunications Council, the American Hispanic Owned Radio Association, the Association of Black Owned Television Stations, the Black College Communications Association, Chinese for Affirmative Action, the Cultural Environment Movement, Fairness and Accuracy in Reporting, the Hispanic Association on Corporate Responsibility, the League of United Latin American Citizens, the Minority Business Enterprise Legal Defense and Education Fund, Inc., the National Association for the Advancement of Colored People, the National Association of Black Owned Broadcasters, the National Hispanic Media Coalition, the National Rainbow Coalition, the Office of Communication of the United Church of Christ, O.N.E. Inc., People for the American Way, Women in Communications, and the Women's Institute for Freedom of the Press respectfully request the Commission to reconsider and clarify the Order and NPRM, FCC 96-49 (released February 16, 1996) ("NPRM").

The NPRM was published in the Federal Register on March 12, 1996. Petitions for Reconsideration of "a final action" in a rulemaking proceeding are governed by 47 CFR §1.429. To the extent that the NPRM has the effect of rejecting the proposals discussed

at §VII(B) infra, it is a final order, reconsideration may be had pursuant to §1.429, and this Petition is timely filed. In other respects, this Petition is submitted pursuant to 47 CFR §1.1.

The Commission is fully authorized to reconsider and correct a flawed notice of proposed rulemaking. See, e.g., Reexamination of the Policy Statement on Comparative Broadcast Hearings, 7 FCC Rcd 3192 (General Counsel, 1992) (correcting a notice of proposed rulemaking and allowing additional time for comment where a nonminority individual's petition for rulemaking to create a "finder's preference" was assigned an RM number, but a minority ownership-promoting petition for rulemaking by the NAACP "inadvertently was not.")

This Petition challenges the basic assumption of the NPRM, which is that the Commission may eliminate unspecified and undocumented "burdens" on certain broadcasters without mentioning or calling for comment on the burdens its proposals would place on every other party to EEO regulation: minority broadcast station owners, Black colleges, discrimination victims, job referral sources, individual job applicants, petitioners to deny, broadcasters innocent of discrimination, and listeners and viewers.

We will save, for our commments, our many substantive objections to the proposals in the NPRM.[1/] The purpose of this

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1/ Among the NPRM's most egregious proposals are a virtual exemption for "small" stations, or, even worse -- "small market" stations which could be any size (id. at 11-12 ¶21), exempting stations based on raw numbers without regard to how they promote, train or treat their employees (id. at 13-14 ¶25); delegating EEO responsibility to virtually all-White, all male associations of broadcasters who lack any real EEO expertise (id. at 16 ¶32), and arbitrarily permitting exurban licensees to exclude urban dwellers in their own audiences from EEO recruitment (id. at 17-18 ¶35).

Petition is to seek the same procedural due process given to other litigants as a matter of right and as an embodiment of courtesy.

I. The NPRM Is Procedurally Flawed And Must Be Corrected

A. A Notice of Proposed Rulemaking must be corrected when it fails to take into account decisionally significant events

A final rule is only as valid as the notice of proposed rulemaking which gave it birth. Thus, when a notice of proposed rulemaking is basically flawed, the final rule is certain to be flawed as well.

Final rules will not be upheld if an agency "entirely failed to consider an important aspect of the problem[.]" Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29, 42 (1983) ("Motor Vehicle Manufacturers").[2/] An agency must tell the public about "an important aspect of the problem" in the notice of proposed rulemaking, since otherwise the public will lack adequate notice of the agency's intention to address the problem. As shown infra, the NPRM failed to consider many "important aspect[s] of the problem" including the impact of the Telecommunications Act on diversity and the burdens weak EEO enforcement will place on every affected party except EEO non-complying broadcasters.

2/ In Geller v. FCC, 610 F.2d 973, 974 (D.C. Cir. 1979), the D.C. Circuit held that an agency must reconsider a previous rule when the original purpose has been "fully exploited." Here, we have the exact obverse: a final rule flowing from this NPRM will be premature because the original purpose of the rule -- ending discrimination -- has not been fully exploited.

B. A Notice of Proposed Rulemaking should be corrected when it fails to provide an accurate and complete Initial Regulatory Flexibility Analysis

Errors in an Initial Regulatory Flexibility Analysis ("IRFA") are remediable on judicial review of the whole record, 5 U.S.C. §611. However, to avoid the need for such judicial review, the Commission should correct the NPRM now.

Section 603 of the Regulatory Flexibility Act of 1980 ("RFA") requires an agency to provide, inter alia, "where feasible, an estimate of the number of small entities to which the proposed rule will apply" and "significant alternatives to the proposed rule on small entities" such as "differing compliance or reporting requirements...that take into account the resources available to small entities[.]" Section 607 of the RFA states that "an agency may provide either a qualitifiable or numerical description of the effects of a proposed rule..., or more general descriptive statements if quantification is not practicable or reliable."

The IFRA accompanying the NPRM utterly fails to comply with these requirements. The IFRA states that the proposals in the NPRM "could affect all licensees, including those that qualify as small business entities" but nowhere mentions that the proposals in the NPRM could profoundly disadvantage a wide variety of non-licensees, including minority broadcast station owners, Black colleges, discrimination victims, job referral sources, individual job applicants, petitioners to deny, broadcasters innocent of discrimination, and broadcast listeners and viewers. See §V infra. The NPRM fails to mention the limited resources available to these parties in meeting the significant burdens most likely to

be imposed on them by a cutback in EEO enforcement. Unless corrected, these omissions fatally infect the NPRM.

C. A Notice of Proposed Rulemaking should be corrected when it will produce an incomplete or one-sided record

The NPRM is grossly one-sided. It assumes, without a shred of documentation, that broadcasters suffer such profound "burdens" complying with the FCC's already minimalistic EEO requirements that the requirements need to be thoroughly eviscerated. It ignores the burdens its proposals would place on every other affected party besides certain broadcasters. Its requests for comment deliberately narrow the scope of the proceeding by welcoming only those comments which agree with consistent with the Commission's predisposed view of the merits. NPRM at 10 ¶17 and 15 ¶30.

Agencies have some discretion to adopt rules based on less than perfect records, and to propose rules which are unwise or even unjust. In this instance, however, far too much is at stake for the FCC to be satisfied with a minimalistic, inattentive approach to the problem. After program deregulation, the elimination of ascertainment, the repeal of the Fairness Doctrine, the advent of "postcard renewals," the closing of proceedings for new facilities such as the progeny of Docket 80-90, the end of distress sales (for want of stations placed in distress), the repeal of the tax certificate policy, the suspension of the minority and female comparative hearing credits, and the multiple ownership liberalization in the Telecommunications Act, the EEO Rule is virtually the only remaining tool available to the Commission in order to promote diversity. As shown infra, the NPRM could not be more one-sided. It is written in such a way that broad public

comment from EEO supporters is expressly discouraged. Id. at 10 ¶17 and 15 ¶30. It fails to acknowledge the existence of dozens of long-pending proposals to improve EEO enforcement, much less seek comment on them. Thus, it anticipates a likely violation of the teaching of Motor Vehicle Manufacturers that an agency must consider alternative approaches timely presented to it, and it anticipates a violation of the closely related requirement that agencies must consider all relevant factors, see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) and Weyburn Broadcasting Limited Partnership v. FCC, 984 F.2d 1220, 1227-28 (D.C. Cir. 1993). Moreover, even where consideration of logical alternatives may be excused, it is certainly wise. See NCCB v. FCC, 597 F.2d 1095 (D.C. Cir. 1977).

These errors and omissions amount to a monumental breach of faith with minorities and women. If the public is to have confidence in the agency's fundamental fairness, the agency should correct the NPRM and expressly manifest its desire to develop a full record on all material issues germane to EEO.

II. The Commission Should State That A Purpose Of EEO Regulation Is Redressing The Present Effects Of Past Discrimination

In order to shape a policy and generate universal public understanding and acceptance of a policy, agencies should expressly articulate each of the purposes of the policy. As valuable as diversity may be as a justification for the EEO Rule, it is not, nor should it be, the only justification.

Certainly there is more than sufficient justification for adding the remedying of past discrimination to the many express purposes of the EEO Rule. Indeed, Congress has already found that

"the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40, 43 (1982).

There is no doubt but that the FCC's hands were filthy with the mud of discrimination for two generations. Until about the middle 1970's, the Commission openly tolerated and ratified intentional discrimination by its licensees. It routinely provided broadcast licenses to colleges and universities which were totally segregated (e.g., WBKY-FM, University of Kentucky, licensed in 1941; WUNC-FM, University of North Carolina, licensed in 1952; KUT-FM, University of Texas, licensed in 1957, among many others). In this way, the Commission endorsed and facilitated segregated broadcast education, thereby giving nonminorities a substantial headstart in access to broadcast employment.

Southland Television Co., 10 RR 699 (decided 1955, reported 1957), recon denied, 20 FCC 159 (1955) illustrates the Commission's racial policies at mid-century. The Commission had before it a Shreveport TV station applicant who owned segregated movie theatres. This man had built his movie theatres without balconies to circumvent a Louisiana law which allowing the admission of Blacks as long as they sat in the balconies. He even owned a segregated drive-in theater; all the other drive-ins were integrated (at least as to admission, although not as to the occupants of the automobiles). The Commission held that it lacked evidence that "any Louisiana theatres admit Negroes to the first

floor" of theatres, nor any evidence that "such admission would be legal under the laws of that state." Id., 10 RR2d at 750. Thus did the Commission give full faith and credit to state segregation laws and to broadcasters' deliberate efforts to evade even the weakest state laws permitting some integration.

When faced with broadcast cases arising out of the civil rights movement, the FCC's decisions reflected the timidity and insensitivity of the national administration. In Broward County Broadcasting, 1 RR2d 294, 296 (1963), the Commission set for hearing the license of a small Florida station which proposed to address a small portion of its programming to the Black community. The reason: local White citizens had complained that the station was licensed to an all-White town which didn't need that type of music. When the station dropped the programming, the Commission quietly dropped the charges.

Two years later, in The Columbus Broadcasting Company, Inc., 40 FCC 641 (1965), the Commission was faced with a radio licensee who had used his station to help incite the riot which took place at the University of Mississippi when James Meredith attempted to enroll. The Commission merely admonished the station.

The federal courts soon became impatient with the FCC's racist policies. In the landmark case of Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), the Court of Appeals ordered the Commission to hold a hearing on the license renewal of a Jackson, Mississippi station, WLBT-TV, which only broadcast the White Citizens Council/Ku Klux Klan viewpoint on racial matters, and which went so far as to censor its own NBC network news feeds with a "Sorry, Cable Trouble" sign when NAACP

General Counsel Thurgood Marshall was being interviewed. This case was highly significant because it upheld, for the first time, the principle that individual citizens, because of their investment in television and radio receivers, have standing to challenge television and radio licenses.

After a very one-sided hearing in which the Commission renewed WLBT-TV's license again, the Court ordered the Commission to deny the license renewal. The Court has never before or since taken such an action, but this time it held the administrative record to be "beyond repair." Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969).

Only then did the FCC begin to focus on how it had helped exclude minorities and women from broadcasting for so long. Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, 18 FCC2d 240 (1969). By then, unfortunately, the ownership and management structure of the industry was firmly entrenched in the hands of nonminority males, a condition which persists almost unchanged to this day and which continues to prevent minorities and women from having access to the mentoring, training and career development opportunities which would allow them to achieve their full potentials even if present-time intentional discrimination disappeared this afternoon. See p. 10 and n. 3 infra.

The NPRM correctly recognized the impact of EEO on minority ownership, id. at 3 ¶3. In addition, to insure the development of a full record and endow the program with every appropriate policy justification, the NPRM should be amended to reflect the partly remedial purpose of the EEO Rule.

III. The Commission Should Set A Goal Of Ending Discrimination In The Broadcasting Industry By A Date Certain

Rulemaking is basically social planning. When done well, it incorporates timetables for the achievement of measureable policy objectives. Now, a generation after adopting the EEO Rule, it is time for the Commission to declare a date certain by which it expects, intends and commits to cause race and sex discrimination in the broadcasting industry and the present effects of past discrimination to be thoroughly extinguished -- and thereby to declare a genuine victory and sunset the Rule.

Few would contend that that day has arrived now. In President Clinton's Affirmative Action Address, The Rotunda, Natinal Archives, July 19, 1995 ("Clinton Affirmative Action Address") at 8, the President notes -- in a statement which applies with great force to the broadcasting industry[3/] -- that

> in the nation's largest companies only six-tenths of one percent of senior management positions are held by African Americans, four-tenths of a percent by Hispanic Americans, three-tenths of a percent by Asian Americans; women hold between three and five percent of these positions. White males make up 43 percent of our work force, but hold 95 percent of these jobs.

The NPRM has framed the issue of the day as "minimiz[ing] any undue paperwork burdens for all broadcasters while maintaining

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3/ The Group Ownership Section of Broadcasting Yearbook 1995, lists approximately 700 American companies and over 1,000 broadcast executives. At most, seven executives (CEO or COO) in nonminority owned companies were minorities, and no more than 5-10% were women. This is apparent to every commissioner who has ever addressed the NAB or a state broadcasters' association. Thus, the networking ability of minorities and women for entry (taking into account such factors as access to country clubs, golf and tennis clubs, alumni groups, fraternal groups and family ties) isn't even close to the ability of White men.

effective industry EEO oversight." Id. at 10 ¶17.[4] Leaving aside the obvious question of whether the FCC's current EEO oversight is "effective" or not, it is manifest that "maintaining...EEO oversight" is not the same as a pro-active campaign to fully emancipate minorities and women from the evils of discrimination.

Set out below are the critical issues with which the Commission must grapple in order to put itself in the position to credibly announce a discrimination-termination date.

A. The Commission should consider whether reductions in nondiscrimination protections violate constitutional guarantees of due process and equal protection

The NPRM did not hesitate to include for public comment a malororous rulemaking proposal whose premise is that EEO enforcement inhibits opportunities of nonminority males to work in the broadcasting business. Id. at 8-9 ¶¶13-15 (discussing the

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4/ As we will demonstrate in our Comments, "[t]he notion that the current FCC EEO Rules materially "burden" broadcasters is so absurd it's insulting." Declaration of Eduardo Peña, past Director of Compliance of the EEOC (Exhibit 5 hereto) at 2. Mr. Peña explains that "[t]he "recordkeeping" required of broadcasters on applicant flow data must be done anyway in the course of any business. Once developed, the cost of storage is minimal. Furthermore, the very same information must be retained anyway in order to defend against an EEOC charge; thus, there's no incremental burden associated with maintaining this same data for FCC purposes."

Indeed, the EEO Rule is so "burdensome" that in 25 years, only ten licensees have been subject to designations for hearing on EEO grounds. As Chairman Hundt has pointed out, "[u]nsurprisingly, the Commission has for at least 15 years not taken away a single one of the approximately 1500 TV licenses or 10,000 radio licenses in this country for failure to serve the public interest." Hon. Reed E. Hundt, "A New Paradigm for Broadcast Regulation," delivered at the Conference for the Second Century of the University of Pittsburgh School of Law, September 21, 1995.

Haley, Bader & Potts Petition for Rulemaking). Although the NPRM's analysis of that proposal is correct, a far more timely question is whether the NPRM's proposed evisceration of the only meaningful protections against discrimination possessed by minorities and women in broadcasting would violate their Fifth and Fourteenth Amendment rights. Broadcasting today possesses essentially the same cultural, social and political significance held by elementary education when Brown v. Board of Education, 347 U.S. 483, 493 (1954) ("Brown") was decided. As in Brown, affirmative steps by the government are necessary in order to insure equitable access to what has become an essential public function. See Comments of the Minority Media and Telecommunications Council in MM Docket Nos. 94-149 and 91-140 (Minority and Female Mass Media Ownership), filed May 17, 1995 (incorporated by reference herein) at 6-21. Indeed, one's First Amendment freedoms lack potency without that access to the stream of mass communications.

As noted above, the EEO Rule now represents the only means of insuring the actualization of that right. See p. 5 supra. Moreover, as shown at §IV(B) infra, the abandonment of EEO enforcement authority is tantamount to throwing minorities and women to the wolves of discrimination, licensing broadcasters without any ability to ascertain whether they might be intentional discriminators.

By exercising its licensing power, the FCC affords broadcasters free use of billions of dollars worth of spectrum. By giving them this without knowing whether they discriminate, and by taking affirmative steps to remove the only tools private attorneys general can use to discover licensees possible discriminatory

behavior, the FCC will have affirmatively violated the due process and equal protection rights of minorities and women.

B. The Commission should seek comment on how it can enforce its nondiscrimination policy once recordkeeping and reporting requirements are eliminated for a large group of broadcasters

The FCC's only tools for evaluating possible discrimination by its licensees are Form 395 -- a simple head count of the staff by race and sex at an annual instant in time -- and Form 396, a modest and often not very illuminating report on what a broadcaster has done in the final year of its (now eight) year license term to recruit minority and female job applicants.

As weak as these tools are, the NPRM's proposal to reduce or eliminate the Form 396 filing requirement would leave members of the public completely blind in attempting to guess which licensees might be discriminating. No rational guess can be made based on numbers alone. Every plantation in antebellum Georgia "employed" Africans in very secure "jobs."

Thus, it should not be surprising to learn that every one of the ten EEO hearing designation orders issued by the FCC since 1971 resulted from facts derived from review of a Form 396. If there is another way members of the public might reasonably suspect who is and who is not discriminating besides referring to verifiable information on a Form 396, we cannot think of it.

We know that every commissioner genuinely wishes to avoid any evisceration of Section 2080(a) of the EEO Rule. Since the NPRM's proposals would have the obviously unintended effect of rendering Section 2080(a) virtually unforceable, the NPRM should be corrected -- indeed, reconsidered -- to address this most fundamental question of enforcement of core policies.

C. The Commission should propose a policy of zero tolerance for discrimination, and should seek comment on how to implement that policy with all deliberate speed

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 a Form 396 and 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, or of women, in meaningful capacities 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 or female applicants or employees; e.g. that minorities or women won't work for low pay; that minorities won't work in a particular format or prefer "their own" type of music; 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, the Commission must adopt a policy of zero tolerance for discrimination. Just as the Commission is concerned that it not burden EEO compliers with unnecessary paperwork, it must not burden the general public and minority and female broadcast professionals with discriminating licensees.

IV. The Commission Should Supplement The NPRM To Seek Comment On The Impact Of The Telecommunications Act Of 1996 And The Repeal of the Tax Certificate Policy On EEO Enforcement

A. In light of the elimination of structural regulation, particularly the local multiple ownership rules and the Tax Certificate Policy, the Commission should reconsider its apparent tentative conclusion that weaker EEO enforcement is appropriate

The NPRM asks commenters to provide it with "data that would support" its proposals to cut back on EEO enforcement "such as changes in broadcasting or the marketplace since the original rules were adopted." NPRM at 15 ¶30.

As noted at p. 5 supra, there have been profound deregulatory "changes in the broadcasting or the marketplace" since 1971, and

all of them have the effect of enhancing the importance of EEO as the Commission's only remaining tool with which to promote diversity. The most significant changes in the broadcasting environment were the repeal of the Tax Certificate Policy a year ago, and the signing of the Telecommunications Act by President Clinton the morning of February 8 of this year.

Despite the NPRM's refreshing recognition that "employment discrimination in the broadcast industry inhibits our efforts to diversity media ownership by impeding opportunities for minorities and women to learn the operating and management skills neessary to become media owners and entrepreneurs,"[5/] the NPRM contains not a word addressing the decline in the number of minority owned stations which has been by the death of tax certificates -- once the Commission's principal ownership incentive policy.

Further, it is astonishing that although the NPRM was adopted in a Commission meeting held six hours after President Clinton signed the Telecommunications Act, the NPRM never mentions the Act.

As shown below, the NPRM's failure to discuss and call for comment on these relevant factors renders the NPRM fatally flawed.

B. To avoid the possibility that most radio stations in many markets could become exempt from EEO reporting and affirmative action compliance, the Commission should seek comment on the desirability of EEO reporting by employment unit, rather than by licensee

The Telecommunications Act of 1996, permitting widespread industry consolidation, will surely cause great havoc in

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5/ NPRM at 3 ¶3.

the ranks of minority and women owned broadcasters.[6/] The NPRM should have addressed the impact on diversity caused by the dilution of the ranks of minority and women owners which will follow on the heels of this provision of the Act.

Moreover, the multiple ownership liberalization generated by the Act will have a more subtle, but even more direct impact on EEO enforcement: it will allow licensees to spread their allocation of employees in over a dozen stations (four AM-FM owned combinations and several LMA'd stations) in a series of separately filed Form

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6/ According to Radio Business Report, superduopolies and LMA's are already an enormous part of the industry, comprising 44% of Arbitron-rated stations. Nearly 10% are in superduopolies. ("Duopoly" means two or more same-service stations, e.g., AM-FM-FM or AM-AM-FM-FM; and "superduopoly" means three or more same-service stations, e.g., AM-FM-FM-FM or AM-AM-AM-AM-FM-FM-FM-FM.) In the top 50 markets, 50% of all commercial stations are involved in a duopoly or a superduopoly. There is at least one duopoly or superduopoly in every top 50 market. The figure is 49.3% for markets 51-100. The figure for 101-150 is 41% for duopoly and superduopoly, and 40.1% for 151-200. For 201-261, it's 33%. In some markets, the percentage of stations in these combinations exceeds 60% -- e.g., Seattle (74.4%); Orlando (72.0%); Wichita (72.7%); Lansing (80%); Detroit (62.5%); Dallas (60.5%); Charlotte (66.7%); Miami (60.5%). Tony Sanders and David Seyler, "Superduopoly now in 10% of rated markets; 44% of rated stations in duops/superduops or LMAs," Radio Business Report, April 8, 1996, p. 8).

The competitive pressure on small stations to merge or sell out is enormous. See Elizabeth Rathbun, "$8 billion bull loose in station market," Broadcasting and Cable, March 11, 1996, p. 40, 43 (quoting broker Gary Stevens as saying "I regret that [the radio business] is getting more institutionalized...[small owners are simply] out of luck" and quoting Steven Pruett, another broker, as saying that we can expect "major consolidation [to continue] for the next three to five years almost unabated.") Even large companies, such as U.S. Radio, the largest minority owned broadcaster with 18 stations, are finding it necessary to sell to much larger ones. Id. at 43. Infinity's purchase of Granum Holdings L.P.'s 12 stations in a $410 million deal is a typical example. As Granum President/CEO Herb McCord put it, "It's really become impossible for [Granum] to compete against the largely publicly traded radio companies for buying stations." Donna Petrozzello and Elizabeth Rathbun, "Radio's Mega-Week," Broadcasting and Cable, March 11, 1996, p. 5.

395s artificially covering AM-FM "units" which may not operate as units apart from the aggregate grouping of stations at all.7/ In this way, one or more licensees dominating a medium sized market can cause the majority of the stations in the market to appear to fall below the current five employee threshold for EEO reporting and affirmative action compliance. If that threshold is raised to ten or more people, there may be some markets in which virtually no stations will have EEO obligations, because a licensee may own or operate enough AM-FM combinations to permit it to allocate all of its employees to fictious AM-FM "units" each having too few "employees" to trigger EEO obligations. Thus, dozens of employees could be working at the same site under the same management, but lack any FCC EEO protection whatsoever.8/ Worst of all, because

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7/ See Interpretive Ruling Concerning FCC Form 395-B, DA 94-553 (Chief, Mass Media Bureau, released May 27, 1994) at 3 ¶7 (allowing duopolies and LMA's to file several separate AM-FM Form 395's, and noting that "current data processing technology available to the Commission does not allow for the employment profile of more than one station to be reported on the same Form 395-B except in cases involving an AM/FM combination.")

8/ For example, in the Syracuse, NY commercial radio market in 1994 (the last year for which marketwise EEO data was available) there were 20 stations in 14 reporting units filing Form 395. Five (each an AM or FM standalone) had fewer than five employees. The remaining 15 stations, in nine reporting units, had a total of 167 employees; imputing three employees to each of the other five stations, there were approximately 182 fulltime employees in the market, 92% of whom were in EEO-covered reporting units.

(fn. 8 continued on p. 19)

the units would fall outside the 15-employee limit of Title VII, these broadcasters would be free to discriminate at will. And because these "units" would not be required to file any FCC EEO forms, there would be absolutely no way members of the public or the FCC would ever know about it.

Admonishments by the FCC to broadcasters, asking them to allocate persons for EEO reporting purposes according to their actual job responsibilities, will not will solve this problem, for two reasons. First, broadcasters have wide discretion to assign people in good faith to jobs as they see fit. Second, the creation of a joint superduopoly sales force and a joint superduopoly programming unit will necessarily remove most employees from assignments dedicated to specific stations. No amount of jawboning can fix that.

8/ (continued from p. 18)

Let us conservatively suppose that, by 1999, the EEO reporting stations stations are combined such that the three largest AM-FM combinations each purchase or LMA stations in two other reporting units, so that there are three owner/operators left in the market (apart from the five stations with fewer than five employees). Further, suppose that as part of that consolidation, the staffs of each purchased or LMA'd station are reduced to half their size, and that they each continue to report on separate Form 395's. If the Commission raises the EEO cutoff to ten, there would have only six stations (three AM-FM combinations), with 97 employees, covered by the EEO Rule, out of a total of 145. Thus, only 67% of the employees in the market would be covered by EEO.

To summarize:

	1994	1999
Number of Stations	20	20
Number of Owner/Operators	14	8
Number of EEO-covered Stations	15	6
Number of Employees	182	145
Percentage of Employees EEO-Protected	92%	67%