

The NPRM contains estimates of the number of stations and employees who would be deprived of EEO protection if the NPRM's "small station" exemption proposal is adopted as a final rule. Id. at 11-12 n. 34. However, in light of the above, those estimates -- already troubling enough -- are severely flawed. Ironically, it is very large licensees combining several AM-FM combinations into fictitious "small station" units who will be able to avail themselves of EEO "relief" which was probably intended for mom-and-pop, standalone operations.

- C. **Because the deterrent effect of short term renewals has been eviscerated by the bar on competing applications, the Commission should ask the public to suggest alternative remedies for gross EEO misconduct**

The Telecommunications Act renders it impossible to file an application which is mutually exclusive with a renewal application. Consequently, whatever deterrent effect a short term renewal may once have had, that effect is gone now.

At one time, the Commission employed a number of creative remedies for gross EEO misconduct. See, e.g., Independence Broadcasting Co., 53 FCC2d 1161, 1166 (1975) (job structure analyses); Arkansas Television Co., 46 RR2d 883 (1979) (goals and timetables). Perhaps other remedies can be created. The Commission should ask the public to develop and propose them in their comments.

- V. **The Commission Should Correct Its Initial Regulatory Flexibility Analysis To Reflect The Considerable Burdens Some Of The NPRM's Proposals Would Impose On Several Parties**

As shown at §I(B) herein, a flawed IFRA pollutes a rulemaking proceeding and renders judicial review inevitable. It is well established that broadcast regulation is not a private affair

involving only the government and the broadcaster. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). Yet the NPRM considers "burdens" on "broadcasters" without once considering whether reductions in EEO enforcement, and elimination of the only tools available for EEO review, will create far greater burdens on other parties besides EEO non-complying broadcasters. Set out below is a discussion of those burdens by five experts.

A. Minority broadcast station owners

James L. Winston, Executive Director and General Counsel of the National Association of Black Owned Broadcasters, states in his Declaration (Exhibit 1 hereto):

Black owned broadcasting stations are proud to be the very best EEO "supercompliers" in the industry. To the best of my knowledge, not one of the approximately 200 Black owned broadcasting stations has ever received any kind of EEO sanction. Also, to the best of my knowledge, none has ever been the subject of an FCC EEO Branch staff investigation pursuant to Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621 (D.C. Cir. 1978). In no segment of the industry do minorities have a better chance for career development than in Black owned broadcasting stations.

The FCC's NPRM on "EEO Streamlining" identifies the parties in need of relief from "regulatory burdens" as "broadcasters." The NPRM would have been more accurate had it more specifically referred to "certain nonminority broadcasters." Since becoming Executive Director of NABOB in 1982, I have heard Black station owners identify numerous critical concerns: lack of access to capital, discrimination by financial institutions, discriminatory audience measurement methods by ratings services, discrimination by advertisers, the loss of the FCC's tax certificate policy, the continuing erosion of the Commission's multiple ownership rules, and many others. I have never heard a Black station owner identify EEO compliance or recordkeeping responsibilities as a burden which requires Commission "streamlining."

EEO compliance is not a burden for Black station owners, because we are usually sought out by young minority persons seeking to enter the business. Black owned stations are very frequently the first point of entry for African Americans and other minority persons seeking to break into broadcasting, but we cannot hire and train all of the minorities seeking to enter this business. Black station owners see effective EEO enforcement as an important impetus for creating the trained African American talent for the growth of African American ownership. If the Commission does not continue to require nonminority owned stations to hire, train and promote minorities, there will be an inadequate pool of experienced media professionals to move up into key management positions at our stations or to become owners themselves.

That is why NABOB was delighted to see that the NPRM recognized 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 necessary to become media owners and entrepreneurs." NPRM, FCC 96-49 (released February 16, 1996) at 3 ¶3.

Intense competitive pressure has been placed on Black station owners by last year's loss of the tax certificate policy and by the multiple ownership provisions in the Telecommunications Act. These developments have created a substantial risk that we may lose many of our stations.

Thus, NABOB is quite dismayed that the FCC would even consider any material cutbacks in EEO enforcement. We recognize that the FCC has framed the issue as whether "burdens" on broadcasters can be eased while "maintaining effective industry EEO oversight." NPRM at 10 ¶17. But it is not enough merely to "maintain" EEO oversight, given the high level of discrimination which continues to infect the industry we love. Instead, the FCC should be soliciting proposals to make EEO enforcement much more effective than it is now.

The Regulatory Flexibility Act requires the FCC to identify any "burdens" on any "party" as part of any notice of proposed rulemaking. The EEO Streamlining NPRM is incomplete at best, since Black owned broadcasters will be profoundly burdened by any cutback in EEO enforcement:

- Nonminority broadcasters will have even less of an incentive to train African Americans and other minorities for broadcast careers. This responsibility -- and the attendant costs -- will fall even more heavily on Black owned broadcasters, who will always do more than our share of this training.

- The pool of African American professionals available to us when we wish to hire experienced African American managers of our stations will become even smaller than it is now.
- The number of African Americans with top management experience transferable to entrepreneurship will decline over time, yielding an even smaller pool of future African American station owners.

Each of these burdens will translate into comparatively lower profit ratios for our stations than similarly situated White owned stations -- thereby increasing the already intense pressure exerted by investors and financial institutions who wish to have our members sell their properties. By omitting any mention of these burdens on Black owned broadcasters, the NPRM almost surely violates the Regulatory Flexibility Act.

Worse still, the "small" and "small market" stations targeted by the NPRM are precisely the stations which many Black owners view as their primary competitors. Most Black owned stations are themselves small stations, and a disproportionate number are situated in small markets. By excusing our direct competitors from EEO responsibilities, the FCC will comparatively disadvantage Black owned broadcasters.

Finally, I am troubled by the NPRM's failure to seek proposals on how to reward truly outstanding EEO compliance. Ministerial EEO compliance may be "good business" but the kind of truly exceptional EEO performance typical of Black owned stations is seldom justifiable purely on financial grounds; indeed, it has generally been its own reward. After the loss of the tax certificate policy, Black station owners are in desperate need of a regulatory initiative which will attract investment dollars to them, attract new station purchase opportunities to them, and attract the best qualified industry professionals to them. While the NPRM does propose some kind of exemption of stations with "good numbers" from some reporting requirements, that is not what Black broadcasters really want at all. We don't have any distaste for EEO procedures. What we need is a reward, with real economic value, for EEO performance above and beyond the call of duty.

The National Association of Black Owned Broadcasters speaks in harmony with this nation's leading civil rights organizations in calling for the FCC to revise its NPRM to take into account the genuine and profound harm to the public interest which will attend any cutbacks in EEO enforcement.

Mateo Camarillo, President of O.N.E., Inc. and a media investor with interests in six radio stations in California, states in his Declaration (Exhibit 2 hereto):

With the death of the tax certificate policy, it has become infinitely more difficult for Hispanic media entrepreneurs to receive startup or acquisition financing. Before 1995, most minority station deals were predicated on the existence of the tax certificate policy, which I have utilized in the past. Now it's all we can do to hold onto what we've already acquired.

On top of this, the FCC's proposal to cut back on EEO enforcement is especially hard to swallow. We're being kicked when we're down.

As a media investor, I have dealt regularly with broadcast station brokers. Some of them are excellent and their contributions to the industry are surely considerable. But I never cease to be amazed at how some of them stereotype Hispanics as being interested only in owning Spanish format stations.

Brokers' perspective on Hispanic entrepreneurs is limited because they've had no exposure to the views of Hispanic employees. It should trouble the FCC that to this day there is only one minority broadcast station broker, and he's an independent. Not one White broker has ever trained even one minority broker.

In personality, social commitment and operating philosophy, broadcast brokers are very similar to most station owners. Broadcast brokering requires no college degree or any great genius.

Thus, if broadcast EEO enforcement is reduced or terminated, we can expect the broadcast industry's workforce -- especially radio stations' workforce -- to come to resemble the broadcast station brokerage business.

Hispanic broadcast station owners depend on a pool of well trained minority talent, including especially Hispanic talent, to share their cultural perspectives and diversity the broadcast content of their stations. If Anglo station owners need not hire and train Hispanics, Hispanic station owners will have to do all of the management development for Hispanics in-house on our limited budgets. On top of that, we will still find ourselves bearing the costs of training Hispanics who are then hired away by our Anglo competitors. Why should Anglo stations train Hispanics if (1) broadcasters are no longer required to do training for EEO purposes and (2) Anglo broadcasters can easily steal good Hispanic employees from Hispanic owned stations, and let the Hispanic owners bear the costs of training?

Thus, Hispanic station owners should have been identified in the FCC's Notice of Proposed Rulemaking as an additional party "burdened" by any reduction in EEO enforcement.

Dorothy Brunson, Chair of the Association of Black Owned Television Stations, states in her Declaration (Exhibit 3 hereto):

The nation's 31 minority owned television stations have never had the slightest quarrel with the FCC's EEO Rule. It doesn't "burden" us in the least; indeed, it help us by making available to us a wide range of trained talent who we'd otherwise have had to train ourselves.

Thus, I cannot understand why the FCC considers those "burdened" by EEO to be all broadcasters; apparently, it wasn't thinking of us. I cannot understand why the FCC would consider reducing EEO responsibilities for the stations at which most people in our industry begin their careers. I cannot understand why the FCC, which professes to be concerned with the maintenance of its minority ownership policies and with diversity, is so eager to cut back on the only remaining pro-diversity protection found anywhere in its rules and policies. After nearly 40 years in this business, I simply do not understand it at all. I certainly never expected this from President Clinton's FCC.

I doubt I'll ever truly retire. But when and if I ever do, I would like to be able to sell my station to another African American and thus "keep it in the family." I have worked far too hard to make WGTW-TV a success to sit back and watch as the Black community loses it. But if the FCC makes it more difficult for Black people to develop careers in this business, how in the world am I going to find someone Black and experienced to buy my station?

The civil rights organizations seeking reconsideration and clarification of the "EEO Streamlining" order are right on target. If a broadcast license means anything at all, it means that the owner is committed to taking aggressive and pro-active steps to bring all Americans into the mainstream of communications. The FCC would be well advised not to cheapen a broadcast license by eviscerating EEO enforcement in the name of "reducing burdens" on a few insensitive and anti-social licensees.

B. Black colleges

Dr. James Hawkins, Chair of the Black College Communications Association, states in his Declaration (Exhibit 4 hereto):

I note that the FCC's Notice of Proposed Rulemaking on "EEO Streamlining" speaks of "broadcasters" as the group which suffers "burdens" in need of regulatory relief. I am disturbed, though, that the Notice of Proposed Rulemaking says not one word about the burdens an EEO enforcement cutback would impose on other parties besides White broadcasters -- including Black colleges and universities, Black students seeking to make good on their years of work in obtaining a broadcasting education, and Black broadcasting professionals who will suffer a heightened level of job discrimination.

Most of the Black college broadcasting programs came into existence after -- and large part because -- the FCC adopted its EEO Rule in 1971. The first such program, at Howard University, was created that year. No such program existed before 1971, because unchecked discrimination in the industry was so extensive before that time that it would have been absurd for Black college administrators to assure Black college broadcasting graduates that broadcasting careers awaited them.

One of our primary objectives as educators is "mainstreaming our students. "Mainstreaming" means insuring that the students have access to state of the art equipment and broadcasting techniques, and insuring that the students do not artificially restrict themselves to working only at Black-formatted stations. In order to fulfill this mainstreaming objective, each Black college broadcasting program relies very heavily on internship programs at FCC-licensed facilities. Thus, any cutback in EEO responsibility will result in the disappearance of many of the best training opportunities presently open to Black broadcasting students. Inevitably, a cutback in internship opportunities will impose on the Black colleges considerable new burdens and costs attendant to providing in-house practicum experiences for their students.

Equal opportunity in broadcasting is still a fairly new concept. Most of those who entered the industry in the 1970's (the first decade of FCC EEO enforcement) have yet to attain ownership and senior management positions in broadcasting companies. Therefore, this year's class of Black college graduates still lacks access to any significant networking and alumni support from Black broadcasting managers with hiring authority. It will probably take another generation of strong FCC EEO enforcement before the networking opportunities typically enjoyed by White students are available to our students.

Even today, after a generation of FCC EEO enforcement, roughly two thirds of the graduates of Black college broadcasting programs are still unable to find jobs in their chosen field. It is difficult to overstate the burdens on our graduates from a reduction in the already crabbed career opportunities available to them. Having devoted four years of hard work to securing a broadcasting degree, Black broadcasting students have foreclosed to themselves the opportunity to enter a more traditional and "safe" field such as teaching. This career choice is not made lightly by our students: it is made in reliance on the FCC's promise that the broadcasting industry -- although virtually foreclosed to Black people from 1920 to 1971 -- would open its doors and welcome us.

If Black colleges cannot promise their students that jobs might be available to them upon graduation, the very premise for the existence of Black college broadcasting programs will have evaporated. Even a slight reduction of opportunity for our graduates would threaten the very existence of many Black college broadcasting programs and would significantly burden all of them. Even the surviving programs would have to commit far greater resources to recruitment and placement, thereby further straining the budgets of the colleges' academic programs.

We are particularly troubled by the FCC's proposal to exempt "small" and "small market" stations from meaningful EEO obligations. These "small" and "small market" stations are the very stations at which most Black college graduates begin their professional careers. Although our entering freshmen typically aspire to careers at large stations in large markets, every broadcasting teacher at a Black college must repeatedly stress to students that large stations, and stations in large markets, seldom hire college graduates without fulltime industry experience unless the students are related to the owner or manager.

Black colleges' placement and alumni programs are specifically tailored to opportunities at "small" stations and stations in "small" markets. Indeed, our advice to students is that they must be willing to sacrifice their social lives and be ready to go to Montana to work after graduation -- if that's where the jobs are. We repeatedly emphasize to our students that they must start "small" and work their way up.

The FCC's EEO rules and policies have been the single most critical factor in promoting equal employment opportunity for people of color in the broadcasting industry. Opportunities for Black students seeking to enter this business continue to be far too scarce, compared to opportunities for similarly situated and similarly educated White students. Consequently, the FCC should dramatically strengthen its EEO enforcement effort, and set a goal of eliminating discrimination from broadcasting, root and branch, in the near and foreseeable future.

The Black College Communications Association is shocked and dismayed that the FCC would even think of cutting back on EEO enforcement at this time.

C. Discrimination victims

Eduardo Peña, Communications Counsel and past National

President of LULAC, states in his Declaration (Exhibit 5 hereto):

As the EEOC's past Director of Compliance (1970-1979), I know that the absence of any meaningful EEO compliance data renders it virtually impossible for a civil rights enforcement body to identify likely discriminators and hold them accountable. Discrimination victims are usually unaware that they are discrimination victims. Employers hardly advertise this fact.

Thus -- quite apart from the fear of retaliation infecting the labor force in a relatively tight-knit industry -- it's not surprising that there are few individual complaints of discrimination against broadcasters. But today, if someone suspects that she has been discriminated against by a broadcaster, she can at least examine the station's public file and review Form 395 and Form 396. From these documents, a person suspecting that she might be a discrimination victim can at least get a sense for whether the EEO activity the licensee says it undertakes is realistically tailored to the job market and to the station's labor requirements. If referral sources are identified in Form 396, the person suspecting discrimination can call those organizations as references to determine whether the licensee has been genuine and consistent in its dealings with the referral source. This research will often enable a person suspecting discrimination to either realize that her suspicions are justified or, on the other hand, realize that her suspicions are unwarranted and that any adverse employment actions she has experienced are likely due to nondiscriminatory factors. In this way, the existence of Form 396 helps discrimination victims decide whether to proceed, and helps innocent broadcasters avoid needless and unfortunate EEOC charges or FCC complaints.

Without any meaningful information on Form 396, no person suspecting that she is a discrimination victim will have any independent basis for evaluating whether she is in fact a discrimination victim. Moreover, a genuine discrimination victim complaining to the EEOC or the FCC will have little evidence with which to make out a case, and the EEOC or FCC will have little basis for determining whether the licensee is discriminating. Thus, the evisceration of Form 396 will profoundly burden discrimination victims. (fn. omitted).

D. Job referral sources

Eduardo Peña states in his Declaration (Exhibit 5):

Every FCC order imposing a conditional renewal on a broadcaster contains a footnote suggesting that the broadcaster contact local units of minority and women's organizations to obtain their assistance in identifying qualified candidates for employment. See, e.g., Newport Broadcasting, Inc. (WADK/WOTB, Newport, Rhode Island), FCC 96-96 (released March 29, 1996) at 4 n. 12 (naming the National Hispanic Media Coalition, American Women in Radio and Television and the National Urban League). These organizations are truly the FCC's and EEO-sensitive broadcasters' silent partners in EEO compliance.

Regrettably, it's inevitable that a cutback in EEO enforcement by government agencies leads to an increase in discrimination. No amount of jawboning will convince someone with a propensity to discriminate that the government's intentional action removing a protection against discrimination is not a signal that the government considers discrimination to be a low priority. Anyone doubting this need only study the history of the EEOC under the leadership of Eleanor Holmes Norton and J. Clay Smith, and compare it with the history of the EEOC under Clarence Thomas.

Thus, an increase in discrimination will lead to a reduction in demand for Hispanics in broadcasting, and a reduction in invitations, sent by broadcasters to Hispanic organizations, for referrals of applicants for specific job openings. Organizations such as local LULAC councils will thus be at a severe disadvantage when a qualified person comes to them for assistance in securing broadcast employment. Instead of being able to refer to routine postings of specific jobs, LULAC councils will have to telephone the placement directors of each station to ask them, one by one, if they have a job open. This is profoundly inefficient and expensive. It's patently unfair to expect volunteers to do this.

Furthermore, the absence of meaningful Form 396 information will make it impossible for a local community organization to make an informed judgment as to which broadcasters are making a genuine effort to seek out and employ minorities. Presently, local organizations benefit enormously by knowing which broadcasters are, and which are not, equal opportunity employers. Local organizations do not waste time sending minority job seekers on a fool's errand to visit employers uninterested in hiring minorities. Without Form 396 data, how is a community group to know which broadcasters are, and which are not, promising sources of jobs for minority candidates?

Consequently, the increase in discrimination likely to result from a cutback in EEO enforcement, and the elimination of Form 396 data, will each impose very significant burdens on job referral organizations.

E. Individual job applicants

Eduardo Peña states in his Declaration (Exhibit 5):

Individuals seeking employment through community organizations are likely to waste considerably more time in job searches if EEO enforcement is reduced. Owing to greater discrimination, minorities will spend more time and effort filing useless job applications. And when minorities use the resources of a community group to sharpen their search for a job, they will find those community groups less aware of which specific jobs are open at which stations, and of which stations are generally uninterested in hiring minorities. By making the process of seeking a job in broadcasting more difficult, expensive and time consuming for minorities, and by reducing the number of jobs available to minorities, the Streamlining NPRM will discourage minorities from seeking employment in broadcasting and will profoundly increase the time and cost burdens on those minorities who do wish to continue to seek employment in broadcasting.

F. Petitioners to deny

Eduardo Peña states in his Declaration (Exhibit 5):

The FCC relies almost entirely on petitioners to deny as its early warning system -- indeed, its only warning system -- that a broadcast licensee might be violating Commission rules. The number of FCC EEO investigations conducted on its own motion in the past decade which led to sanctions against a licensee can be counted on the fingers of two hands. However, dozens of broadcasters have been admonished or sanctioned as a result of petitions to deny. Every one of the ten hearings designated by the FCC since 1971 in EEO cases resulted from a petition to deny.

Thus, Petitioners to deny truly stand in the role of good samaritan witnesses whose role is essential to the Commission's exercise of its responsibility, under Section 309 of the Communications Act, to make an informed and affirmative determination that a grant of an application would serve the public interest.

Petitioners to deny are already at a profound disadvantage in attempting to prove discrimination. Broadcasters seldom admit that they discriminate, although obviously many of them do it routinely. But at license renewal time, the only information available to members of the public who might wish to draw inferences about who may be, and who probably is not discriminating are the raw employment data on Form 395 and the EEO programs on Form 396.

In reviewing this information, petitioners to deny usually guess right: the vast majority of petitions to deny are granted at least in part. But it is a rare case which is designated for hearing. That is because petitioners to deny lack any opportunity for meaningful discovery, and are faced with the extraordinary requirement that petitioners essentially prove intentional discrimination just to get a hearing -- a virtual impossibility without access to the testimony of witnesses.

The elimination of Form 396 for many broadcasters -- or the reduction in the already sparse information to be contained in Form 396 -- will leave petitioners to deny unable to guess, with any degree of accuracy, which broadcasters might be EEO violators. For example, if a petitioner to deny does not know whether a renewal applicant interviewed or hired minorities, how in the world will the petitioner know whether the applicant might be discriminating?

Furthermore, once petitioners to deny are forced to rely on just the raw numbers in Form 395 as a tool for deciding whose EEO bonafides should be tested, it's inevitable that EEO opponents will allege that petitioners to deny really advocate a quota system. Petitioners' sole reliance on Form 395 will degrade the quality, the fairness, and the value of petitions to deny to the FCC. Broadcasters who don't deserve to be targeted will be targeted mistakenly, and broadcasters who do deserve to be targeted will be skipped mistakenly.

Consequently, the Streamlining NPRM would impose considerable new costs and burdens on petitioners to deny by making it far more difficult -- indeed almost impossible -- for petitioners to deny to ascertain and adjudicate instances of gross EEO violations, including intentional discrimination.

G. Broadcasters innocent of discrimination

Eduardo Peña states in his Declaration (Exhibit 5):

It's unfortunate that in its zeal to eviscerate EEO enforcement, some broadcast trade organizations have not thought about how the existence of meaningful EEO data protects innocent broadcasters from erroneous allegations of discrimination and assists broadcasters in securing a steady flow of qualified job applicants.

Without meaningful information on Form 396, petitioners to deny will be guided only by the tiny beacon of information provided by Form 395. Most national civil rights organizations, including LULAC, try hard not to target a broadcaster based solely on its low "numbers", because, like the FCC, we look to EEO efforts as the best evidence of genuine EEO compliance. If "EEO Streamlining" happens, LULAC will still do its best to target the guilty and excuse the innocent. But if petitioners to deny are given only numbers to go by, it's inevitable that some broadcasters, innocent of EEO noncompliance, will be caught up in the net of good faith petitions to deny.

Furthermore, the higher costs of operation, and greater inefficiencies of operation imposed on community groups by the absence of EEO data, as shown above, will spill over onto broadcasters. Referrals from community groups are free. A reduction in these referrals will impose greater labor search costs on all broadcasters, depriving them of ready access to a broad spectrum of talent.

Finally, the greater incidence of discrimination in the industry will inevitably discourage good and talented people from seeking careers in the field. This brain drain from broadcasting will most seriously burden EEO compliers, who genuinely desire to take advantage of all sources of talent irrespective of race.

H. Broadcast listeners and viewers

Eduardo Peña states in his Declaration (Exhibit 5):

The FCC's EEO program is intended to provide diversity of voices by insuring that the staffs of broadcasting stations are integrated. Every human resources professional knows that the stream of ideas derived from a business organization is the mixture of the ideas contributed by its tributary persons, the employees. The Supreme Court realizes this too. NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976).

More discrimination and a reduction in minority employment virtually guarantee the resegregation of the airwaves. Anyone listening to the national disgrace called "talk radio" can hardly disagree that a greater diversity of viewpoints, and particularly the addition of minority viewpoints, would benefit our nation's public discourse.

With the loss of the minority ownership policies, the reduction-in-progress in the number of minority owned stations, and the media concentration being spawned by the Telecommunications Act, the FCC's only remaining pro-diversity protection is the EEO Rule. Thus, the Streamlining NPRM should have recognized and sought comments on the burdens faced by members of the public -- the listeners and viewers -- who desire, expect and deserve to receive the full fruits of the First Amendment from their government-licensed radio and television spectrum.

VI. The Commission Should Amend The NPRM To Seek Comment On EEO-Proactive Initiatives

- A. The Commission should revise language in the NPRM which improperly seeks comment only in support of EEO enforcement reductions rather than seeking comment on both sides of the issue**

Most notices of proposed rulemaking ask for comment in the most expansive way possible, to avoid even the appearance of wishing to discourage any member of the public from filing comments. Expansive language is especially appropriate here, since there is a good deal of unfinished business in the FCC's review of its EEO enforcement efforts.

In response to Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-261 (NPRM), 8 FCC Rcd 266 (1993) (Cable Act NPRM) and Implementation of the Commission's Equal Employment Opportunity Rules (NOI), 9 FCC Rcd 2047 (1994), several national civil rights and religious organizations placed before the Commission dozens of well conceived proposals which would comprehensively reform the FCC's EEO enforcement effort, making it far more effective and converting it into a vehicle capable of bringing about the elimination of discrimination within a reasonable time; the NAACP's February 17, 1993 proposals in response to the Cable Act NPRM were

captioned, in the alternative, as a petition for rulemaking.^{2/} Furthermore, on August 23, 1993, the NAACP and the Office of Communication of the United Church of Christ timely filed an extensive Petition for Reconsideration of the Report and Order in MM Docket No. 92-261, Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-261 (R&Q, 8 FCC Rcd 5389 (1993)).

^{2/} Pleadings in which the organizations' proposals were contained included:

- [a] Comments and Petition for Further Rulemaking of the National Association for the Advancement of Colored People, MM Docket No. 92-261 and RM-_____ [still unassigned], filed February 17, 1993
- [b] Comments of the Office of Communication of the United Church of Christ, MM Docket No. 92-261, filed February 16, 1993
- [c] Comments of the League of United Latin American Citizens, the Minority Media and Telecommunications Council, the National Association for the Advancement of Colored People, the National Bar Association and the Office of Communication of the United Church of Christ, MM Docket No. 94-34, filed June 14, 1994
- [d] Comments of the National Hispanic Media Coalition, MM Docket No. 94-34, filed June 13, 1994
- [e] Comments of the Foundation for Minority Interests in Media, MM Docket No. 94-34, filed June 13, 1994
- [f] Reply Comments of the League of United Latin American Citizens, the Minority Media and Telecommunications Council, the National Association for the Advancement of Colored People, the National Bar Association and the Office of Communication of the United Church of Christ, MM Docket No. 94-34, filed July 1, 1994
- [g] Further Comments of the Minority Media and Telecommunications Council, MM Docket 94-34, filed September 15, 1995

(fn. 9 continued on p. 36)

2/ (continued from p. 35)

Referring to the small letters (e.g. "[a]") above, the proposals advanced by the civil rights and religious organizations and rejected or ignored by the Commission include:

Jurisdiction

- Extension of jurisdiction to the networks [c]
- Review of group owners [a] [c]
- Review of marketwide EEO practices [a] [c]
- Inclusion of use of minority contractors in broadcast EEO review [c]
- Extension of EEO Rule to include persons with disabilities [f]

Operation of EEO Programs

- Expansion of the number of job categories on Form 395 [c] [d]
- Break out promotion data on Form 395 by race and by fulltime/parttime status [c]
- Development of model recordkeeping system [c] [g]
- Experimental use of alternative EEO efforts showing for very small stations [g]
- Use of short-form 396 (Form 396-EZ), containing basic information needed to independently validate EEO compliance, for very small stations [g]

Investigatory Procedures

- Additional investigations on the Commission's own motion [a]
- More thorough Bilingual investigations [a] [c]
- Clarification of definition of "applicant" in Bilingual letters [g]
- Bilingual investigation coverage of entire license term [c]
- Interviews with witnesses as part of Bilingual investigations [c]

(fn. 9 continued on p. 37)

2/ (continued from p. 36)

- Bilingual review of noncompliers from previous renewal terms [c]
- Extension of Cable SIS investigations to broadcast licensees [c]
- Use of random and targeted field audits [c]
- Use of predesignation discovery in appropriate cases [c]
- Meaningful midterm EEO review [a] [b] [c]
- Expedited review of EEO cases [a]
- Negotiation of Memoranda of Understanding with Section 706 agencies [c]
- Compensation of private attorneys general from a public interest fund [c]

Standards of Performance and Proof

- Zero tolerance policy for discrimination [g]
- Upgrading of the zone of reasonableness [a] [c] [d]
- Focus on management level employment apart from top four category analysis [d]
- Focus on each minority group, rather than just the "dominant" minority [d]
- Use current census data or estimates as baseline for analysis [d]
- Acceptance of statistical evidence [a] [c]
- Consideration of recidivism, e.g., consideration of evidence of misconduct occurring in previous renewal terms [a]
- Consideration of individual allegations of discrimination [a]
- Recognition of all evidence of discriminatory intent [a]
- Consideration of parttime hires [c] [d] [e]

(fn. 9 continued on p. 38)

However, the Commission has repeatedly failed to consider these proposals, having failed to mention them in the NPRM or, in the case of the NAACP's February 17, 1993 pleading, even to provide the common courtesy of the assignment of an "RM number" as required by Section 1.403 of the Commission's own rules.^{10/}

2/ (continued from p. 37)

- Inference of EEO noncompliance from licensee nonresponsive to inquiry [a]
- Focus on training of minority youth as a compliance factor [e] [f]
- Focus on EEO practices affecting employees after they are hired, rather than just recruitment [a], [c]

Defenses

- Exclusion of race-neutral factors as defenses (e.g., market size, station size, format and purported low pay rates) [c]

Sanctions and Incentives

- Progressive discipline [a]
- Definition of an EEO violation [a]
- Meaningfulness of forfeitures [a]
- Assessment of forfeitures at mid-license term [c]
- Addition of new types of sanctions [a]
- Elimination of EEO sanctions carrying over from assignor to assignee, where assignee is an EEO "Supercomplier" [g].

^{10/} Three weeks ago, the Common Carrier Bureau issued a Public Notice, DA 96-414, Report No. CC 96-10 (released March 25, 1996) (Exhibit 6 hereto) in which it reported that it had taken only four days to assign an "RM number" to a "complex" petition for rulemaking filed by America's Carriers Telecommunication Association seeking regulation of long distance service by non-tariffed entities over the Internet. The Bureau stated that "[w]hen petitions for rulemaking are filed with the Commission, a public notice is routinely issued shortly after the petition is filed." That would certainly come as a surprise to the NAACP and many other minority groups. See Exhibit 7 hereto.

Regrettably, the Commission has a long history of misconduct, ranging from benign neglect to dirty tricks, in its procedural handling of minority-related proposals and pleadings. Some of this history has been set out in the NAACP's "Partial Opposition to 'Motion for Remand of Record', and Motion to Require Hearing on Remand" in South Carolina State Conference of Branches of the NAACP v. FCC, No. 92-1159 (D.C. Cir., pleading filed June 2, 1993; the merits of the pleading were not ruled upon) at 9-13 n. 8 (entire pleading appended hereto as Exhibit 7). Suffice it to say that the Commission's behavior regarding civil rights related pleadings would never be tolerated if it were visited on telephone companies or nonminority broadcasters. This long history really suggests that the FCC administers separate and unequal algorithms for the administration of justice.

The NPRM only continues this pattern of unequal treatment. After inviting comment on several means of reducing EEO compliance responsibilities or reducing the agency's EEO enforcement capabilities, the NPRM stated that the Commission

encourage[s] commenters to submit any other proposals that would minimize any undue paperwork burdens for all broadcasters while maintaining effective industry EEO oversight.

Id. at 10 n. 17. Thus, the NPRM expressly waves off proposals which would increase the effectiveness of EEO oversight, including those proposals which might be construed not to "minimize... burdens" on broadcasters if they discriminate or violate the EEO Rule. Worse yet, in considering how reductions in EEO enforcement capability are consistent with Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 533 (2d Cir. 1977)

("UCC") (which held that the FCC "does not argue, nor could it, that the need for equal employment opportunity has become less urgent in the intervening years [since it adopted the EEO Rule]"), the Commission stated that it

invite[s] commenters to provide sufficient evidence, particularly empirical data, concerning the alleged burden imposed by our existing regulations...and any other data that would support these proposals, such as changes in broadcasting or the marketplace since the original rules were adopted (emphasis supplied).

Id. at 15 ¶30. Thus, comments arguing that "changes in broadcasting or the marketplace", such as the impact of the Telecommunications Act and the loss of the minority and female ownership policies, would not "support these proposals" are unwanted because they would not "support these proposals."^{11/}

Before volunteers from the public invest huge amounts of time and effort developing and refining their comments in this proceeding, they are entitled to be assured that the Commission will read and act on them concurrently with its action on the industry's proposals. That is all we ask today.

^{11/} Senior commission officials have openly solicited broadcasters to file comments which would enable the Commission to get around UCC. At the NAB State Leadership Conference March 4, 1996, Charles Kelley, Chief of the Enforcement Division of the Bureau, told broadcasters that current EEO Rules are "overburdensome" and require unnecessary paperwork. "Kell[e]y urged commenters to document their problems in way that will stand up in court when and if Commission relaxes requirements, as expected." "FCC's Stewart Sets Out Priorities For Mass Media Bureau," Communications Daily, March 5, 1996, p. 3. We intend no criticism of the staff, who presumably were only doing what the commissioners, through the express language in the NPRM, apparently expected them to do.

B. The Commission should consolidate MM Docket 96-16, MM Docket 94-34, and the NAACP's February 17, 1993 EEO Petition for Rulemaking

The EEO forfeiture and "streamlining" proposals certainly could have been taken up in separate documents. By placing them in the same notice of proposed rulemaking, the Commission certainly recognized the efficiency and wisdom of considering closely interrelated matters simultaneously.

How unfortunate, then, that the Commission has left MM Docket 94-34 open, with the NAACP/Church of Christ Petition for Reconsideration therein still pending nearly three years after it was filed. Furthermore, the Commission has still not afforded the NAACP the courtesy of the "RM number" required by its rules and policies. See Exhibit 6 hereto.

For the sake of administrative consistency, and to restore lost public confidence in the agency's fairness, the Commission should consolidate MM Docket No. 96-16, MM Docket No. 94-34, and the NAACP's EEO Petition for Rulemaking.

C. The Commission should solicit proposals to create positive incentives for outstanding EEO performance

Many companies which comply with EEO do so because they realize that "it's good business." But to be really honest about it, we must recognize that some of the tasks attendant to making up for decades of industry neglect of EEO cost more than their benefits to any individual company if it acts alone. Economists refer to this dilemma as the "free rider" problem: no single company has a financial incentive to bear, by itself, the costs of solving a social problem common to all of society (e.g. pollution control). For example, there's an obvious financial disincentive

to train minorities and women for positions in broadcast management, because the EEO noncompliers will simply "steal" the people trained by the EEO compliers.

Thus, the Commission must find a way to make "supercompliance" financially rewarding. It should invite proposals aimed at creating these financial incentives for the few, but hopefully growing number of broadcasters whose EEO efforts are truly above and beyond the call of duty.^{12/} See Declaration of James L. Winston, Executive Director and General Counsel, National Association of Black Owned Broadcasters (Exhibit 1 hereto) at 4 (noting the value of such incentives for minority owners, virtually all of whom would presumably qualify).

^{12/} It is not necessary to tie a certification of an EEO program as outstanding on the percentage of workforce parity attained, as appears contemplated in one of the proposals in the NPRM, at 13-14 ¶25. Not only will many perceive this test to be a quota, the mere number of employees hired is often not the best evidence of presence of an outstanding compliance program. Better evidence is provided by the program itself, if the program achieves the often nonquantifiable goals of fertilizing the industry with persons who enjoy decision making power, who receive training for advancement, who are treated well and compensated fairly, and who are empowered to mentor others and bring them into the industry. Moreover, it is virtually always going to be the case that a company with a program like this, over time, will enjoy good "numbers" anyway.

VII. **Because The NPRM Is Flatly Contrary To The Clinton Administration's Civil Rights Policies, The Commission Should Expressly Invite The Civil Rights Division Of The U.S. Department of Justice, The Equal Employment Opportunity Commission, And The United States Commission On Civil Rights To File Comments**

President Clinton has declared that

Affirmative action has not always been perfect, and affirmative action should not go on forever: It should be changed now to take care of those things that are wrong, and it should be retired when its job is done. I am resolved that that day will come. But the evidence suggests, indeed screams, that that day has not come.

Clinton Affirmative Action Address, supra, at 14. The Department of Justice has expressed the administration's approval of programs such as the EEO Rule, whose "objective...is to expand the pool of applicants...to include minorities, not to use race or ethnicity in the actual [hiring] decision." Memorandum to All Agency General Counsels from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, United States Department of Justice (June 28, 1995) at 7 (fns omitted).

Consequently, we are at a loss to comprehend why the FCC would advance a proposal to cut back on this benign form of affirmative action. We understand that, as an independent agency, the FCC is not bound by administration policy. Nonetheless, the agency would serve itself well by expressly inviting the Department of Justice, the EEOC and the United States Commission on Civil Rights to file comments in this proceeding.

VIII. **The Commission Should Promise To Rule On Any Reasonable Proposals To Increase The Effectiveness Of EEO Enforcement**

Several national civil rights and religious organizations have patiently placed dozens of EEO improvement proposals before the Commission, only to twice see them placed in administrative deep space. See pp. 34-40 supra. It is certainly reasonable to expect an agency to rule on a litigant's contentions in a reasonable time, irrespective of the merits.^{13/}

It would not be appropriate to ask the civil rights and religious organizations to repeatedly refile their proposals, or to "argue against themselves" and arbitrarily excise some of them. Developing an optimally aggressive EEO enforcement effort is a complex, multifaceted task deserving of comprehensive review of every element of the process.

When it rules of this Petition, the Commission should declare that it will, at last, provide a merits ruling on all major contentions raised by all parties.

^{13/} See Citizens Communications Center, 61 FCC2d 1095, 1103 (1976) (Statement of Commissioner Benjamin L. Hooks, dissenting in part to the denial in toto of a 62 point citizen group rulemaking petition (filed in 1973), and declaring that "it is all but inexcusable for this Petition to have been unanswered for a period approaching three years. When the Commission is accused by its detractors of being unresponsive to the public interest groups, the procrastinaion here can be pointed to as a sterling example of studied inaction.")