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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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JUL 11 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

To: The Commission

COMMENTS OF
THE PENNSYLVANIA ASSOCIATION OF BROADCASTERS

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Summary

The Pennsylvania Association of Broadcasters is pleased to continue its participation in this important matter. The Association stresses its full support of the FCC's goals underlying its EEO regulations: the promotion of programming that reflects the interests of all members of local communities, including minorities and women, and the deterrence of discriminatory employment practices. Nevertheless, the Association submits that the FCC's EEO regulations are in need of substantial repair Among all the regulatory issues facing the broadcast industry, the subject of equal employment opportunity continues to be given the highest of priorities and the most frequent attention by both broadcast stations and their state broadcast associations. In the opinion of this Association, it the administrative and paperwork burdens imposed by the Commission, not the Commission's goals, that are the problems which the Commission should take steps to remedy. The Association believes that it is uniquely qualified to comment on the FCC's proposed revisions to its regulations because they have long-term experience helping broadcasters understand and meet those requirements.

The Association, often in cooperation with the NAB, has been pro active in many ways in assisting their members to enhance access by minorities and women to increased employment opportunities at broadcast stations nationwide.

The Association believes that the Commission is fully justified in its concern that its "EEO requirements may unnecessarily burden broadcasters, particularly licensees of smaller stations and other distinctly situated broadcasters." The numerous and time consuming tasks involved in fully complying with the Commission's EEO regulations are substantial and costly in terms of personnel time. The irony of the process is that the more aggressive a station becomes in widening its outreach efforts, the more unmanageable the process becomes. The use of a daily newspaper of general circulation, for example, to supplement a station's recruitment efforts can

result in the receipt of hundreds of responses thereby tieing up staff for days and weeks in performing the multiplicity of tasks mandated by the Commission. In effect, the diligent broadcaster is penalized for its efforts. Accordingly, the Commission should look for as many ways as possible to make EEO more workable for all broadcasters and, in particular, smaller broadcasters.

Consistent with this, the Association urges the Commission to raise its "less than 5 full-time employees" exemption to a "less than 20 full-time employees" to relieve radio and television stations which have those staffing levels from the paperwork requirements of the EEO regulations. The Association also urges the Commission to raise its "less than 5% minorities" exemption to "less than 10% minorities" for the same reason. The Association recommends that the FCC adopt a "success" exemption, namely if a station is meeting or exceeding the FCC's "parity processing guidelines," the station should be relieved of the EEO paperwork requirements. The Association also suggests that the Commission make it easier for stations to use alternative labor data by requiring that only one of three criteria be shown for a station to be eligible to use such alternative labor force data.

The Association supports the Commission's proposal to give EEO credit to broadcasters who use state broadcaster association job bank programs and other joint efforts with the understanding that the state associations be given flexibility to design and implement their programs, recognizing the limited resources and staffing at such associations.

The Association believes the Commission's forfeiture scheme is arbitrary for a number of reasons. The definitions of what are "adequate pools" and "inadequate self-assessment" are too vague and thus the 66% threshold should be significantly reduced, as should the base fine amount which is excessive. Furthermore, parity compliance should be a 100% offset to any fine. Moreover, the guidelines should be applied only prospectively.

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To: The Commission

COMMENTS OF THE PENNSYLVANIA ASSOCIATION OF BROADCASTERS

The Pennsylvania Association of Broadcasters (the "Association"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, hereby submits comments in response to the above-captioned Order and Notice of Proposed Rule Making (the "NPRM"), 11 FCC Rcd 5154 (1996).[1]

I. INTRODUCTION

1. The Association is pleased to participate in this important matter. The Association stresses its full support of the FCC's goals underlying its EEO regulations: the promotion of programming that reflects the interests of all members of local communities, including minorities and women, and the deterrence of discriminatory employment practices. NPRM ¶3. Nevertheless, the Association submits that the FCC's EEO regulations are in need of

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[1] These Comments are timely filed by virtue of the Commission's Order, released June 26, 1996, DA 96-1033, establishing July 11, 1996, as the new filing deadline for comments.

substantial repair. Among all the regulatory issues facing the broadcast industry, the subject of equal employment opportunity continues to be given the highest of priorities and most frequent attention by both broadcast stations and the Association. It is the administrative and paperwork burdens imposed by the Commission, not the Commission's goals, that are the problems, problems that the Commission should now take steps to remedy. The Association believes that it is uniquely qualified to comment on the FCC's proposed revisions to its regulations because it has had long-term experience helping its broadcasters understand and meet the FCC's EEO requirements.

2. The Association, in cooperation with the National Association of Broadcasters (the "NAB") and others, regularly conducts continuing education programs on the topic of EEO at annual conventions. The FCC has supported these efforts by sending its own staff to participate on panels. The subject of EEO is also addressed in its newsletters. The Association urges its members to seek counsel in this important area from the NAB, the FCC or from attorneys in private practice who are familiar with the FCC's EEO regulations, to insure a full awareness of and compliance with those regulations. The NAB has also been very helpful in this area of law by publishing a 50 page EEO Guide with 25 suggested forms, by conducting radio renewal seminars nationwide with a special emphasis on EEO, by featuring the topic at their annual conventions and by becoming a national recruitment resource.

3. The umbrella organization of the state broadcaster associations, the Broadcast Executive Director's Association, established an EEO Task Force to collect, evaluate and publicize the many different ways that state associations and their members are working to have minorities and women choose broadcasting as a career opportunity. The NAB's Comments to be filed in this proceeding contain a sampling of specific examples of those wide ranging efforts.

They include: annual conventions and special seminars featuring EEO panels, legal hot lines, the compilation of state-wide referral sources, EEO guidebooks, forms and advisories, internship programs, scholarships, job fairs, job banks, video tapes on making broadcasting a career, career days, etc. At least one state association and others are even exploring ways to use the Internet to augment broadcaster EEO efforts, regionally and nationally.

4. The Association wants to do even more within the limits of their finite resources. It supports giving credit to broadcasters who use state association job banks. However, the state associations need flexibility in designing and implementing those programs because many of the Associations have limited resources and staffs. The Association applauds the thrust of the Commission's rulemaking and provides their comments below.

II. DISCUSSION

A. THE COMMISSION IS JUSTIFIED IN MODIFYING THE EEO RULE TO REDUCE THE ADMINISTRATIVE BURDENS PLACED ON BROADCASTERS

5. The Association believes that the Commission is fully justified in its concern that the "EEO requirements may unnecessarily burden broadcasters, particularly licensees of smaller stations and other distinctly situated broadcasters." NPRM ¶ 1. The administrative and paperwork burdens imposed by the Commission's EEO regulations and the associated costs are far too high and are in many instances unnecessary. The Association welcomes the Commission's recognition that the Commission's EEO Rule warrants reconsideration and modification to relieve undue burdens. Id.

6. It is beyond peradventure that under the provisions of § 73.2080 of the Commission's rules and regulations, the numerous and time-consuming tasks that a broadcast licensee must accomplish are substantial and costly in terms of personnel time. *Regardless* of

whether a licensee is already employing minorities and women at a level equal to their presence in the labor force, and without *any* showing that a licensee's applicant pools have been artificially limited in the past[2], a licensee must:

(a) Develop a list of targeted referral sources for recruiting women and minorities;

(b) Develop an initial working relationship with each source;

(c) Draft and send a letter to each referral source every time that there is a job opening at the station, informing the source of the necessary qualifications for the position;

(d) Document how many referral sources were contacted for each job opening during the license term;

(e) Document, for every job opening during the license term, whether each referral source produced any referrals;

(f) Document the name, race/national origin and gender of every referral generated by each recruiting source for every job opening;

(g) Evaluate the recruitment results of each referral source to determine the effectiveness of each source in generating minority and female applicants, and document such self-evaluation efforts;

(h) Document whether and how often the licensee contacted each referral source to enhance the relationship and to generate further referrals from the source;

(i) Locate and develop relationships with new recruitment sources to enhance minority and female referrals;

(j) Document all efforts to generate new recruitment sources;

(k) Draft a questionnaire, and appropriate cover letter, to be sent or given to applicants to determine their race/national origin, gender and referral source;

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[2] By contrast, the EEOC's regulations encourage voluntary affirmative action where because of historic restrictions by the employer, the available pool of qualified minorities and women has been artificially limited. 29 C.F.R. § 1608.3(c).

(l) Send every applicant for every job vacancy during the license term the above-mentioned questionnaire;

(m) Follow-up, with either a second letter or a telephone call, to any applicants that have failed to return the questionnaire;

(n) Be able to document the race/national origin, gender and referral source of every applicant, interviewee, and hire for each job vacancy;

(o) Determine that an adequate number of women and minorities have applied for each job vacancy and are being interviewed;

(p) Keep notes explaining why certain applicants were selected for interviews in case there is a question concerning why not enough minorities or females were interviewed;

(q) Determine the exact number of applicants and interviewees for each job vacancy during the license term and keep sufficient records to document the information;

(r) Determine the percentage of minority and female applicants and interviewees for each job vacancy during the license term, and keep sufficient records to document the information;

(s) Keep track of every promotion that occurred during the license term, indicating whether the promotion went to a minority or a woman;

(t) Be able to justify cases where promotions went to non-minorities and males; and

(u) Continually self-assess the effectiveness of the recruiting efforts, and be able to document such self-assessment, including every effort made to enhance minority and female recruiting throughout the license term.

The irony of this process is that the more aggressive a station becomes in widening its outreach efforts, the more unmanageable the process becomes. The use of a daily newspaper of general circulation, for example, to supplement a station's recruitment efforts can result in the receipt of

hundreds of responses thereby tying up staff for days and weeks in performing the multiplicity of tasks mandated by the Commission. In effect, the diligent broadcaster is penalized for its efforts!

7. The cost of complying with the administrative and paper burdens incident to these numerous requirements is high.[3] The Texas Association of Broadcasters surveyed stations throughout the state concerning their EEO implementation costs. Based on a representative sample of stations in Texas, the Texas Association has determined that Texas broadcasters spend an estimated combined **$12.3 million** per year in staff time merely to comply with the EEO Rule.

8. In addition to the financial drain on stations, there is a significant drain on employees' time and productivity. It is self-evident that compliance with the multiple tasks described in ¶ 6 (a-u) above places a heavy staff time and paperwork burden on broadcasters, particularly on smaller broadcasters. Smaller stations cannot afford to hire additional employees to work primarily on managing the station's EEO programs. Moreover, heavy fines imposed by the FCC -- and the even heavier fines proposed in the guidelines proposed in the NPRM -- will end up draining stations of the very resources they need to expand their recruitment of women and minorities.

B. THE "LESS THAN 5 FULL-TIME EMPLOYEE" EXEMPTION SHOULD BE RAISED TO "LESS THAN 20 FULL-TIME EMPLOYEES"

9. In view of the unduly heavy burdens imposed on stations described above, the Association urges the Commission to lessen the burdens placed on broadcasters through every avenue possible. Specifically, the Association suggests in response to the questions in ¶ 21 of

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[3] Indeed, because such a heavy burden is placed on each licensee without any showing that the licensee discriminated or even used an artificially restricted set of referral sources in the past, there is doubt as to whether the EEO Rule would survive a challenge under the equal protection clause of the Fifth Amendment. Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995).

the NPRM that stations with fewer than **twenty** full-time employees be given relief from the administrative/paperwork requirements of the EEO Rule and policies. The exemption should apply to both television and radio stations, with statutory changes requested if necessary to include television stations. See NPRM ¶ 27. The exemption would provide these smaller stations with relief from the onerous paperwork requirements described in ¶ 6 (a-u), while still covering some 76.3% of the employees of broadcast stations currently subject to the EEO Rule. See the NAB's Comments in this proceeding.[4]

10. The Association urges, as suggested in ¶ 23 of the NPRM, that exempt stations be required to file only the first page of Form 395-B and Form 396-A, and the first two pages of Form 396, certifying that they meet the criteria for the exemption. These smaller stations should otherwise be exempt from EEO reporting and record keeping requirements, as are stations with

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[4] The Association would also support an exemption for stations in smaller markets because stations in those markets have difficulty competing for employees with stations in large markets, which offer higher salaries and greater career opportunities. See NPRM ¶ 21b. The Association supports the recommendation of the NAB in their comments dated June 13, 1994, in MM Docket No. 94-34 that the Commission adopt a "small market" definition similar to that provided under the statute exempting stations serving primarily rural areas from paying overtime to their announcers, news people and chief engineer. 29 U.S.C. § 213(b)(9). The exemption would apply to stations whose main studios are located (1) outside a Metropolitan Statistical Area ("MSA"); (2) inside an MSA of less than 100,000 population; or (3) in a community of less than 25,000 population or at least 40 miles from the principal city of the MSA. As NAB noted in its comments: "These areas often lack the types of amenities which would attract applicants from other locales, generally have a small local force from which stations may recruit, and are likely to have little, if any, public transportation which would allow employees and applicants to commute great distances in order to reach the station."

In addition, the Association would support an exemption from the paperwork requirements in connection with minorities for markets with less than a 10% minority labor force. See NPRM ¶ 21c.

fewer than five employees under the current rules.[5] The Association does not believe that stations with fewer than twenty employees would be disadvantaged by the resulting lack of record keeping, any more than stations with fewer than five employees are currently disadvantaged. Rather, any potential problems could be alleviated by the following procedural rule: If a petitioner makes a prima facie challenge to an exempt station's EEO compliance, the broadcaster should be permitted to defend itself by showing that it has not been the subject of any final adverse findings of discrimination and providing a narrative description of its general efforts to provide equal employment opportunities to women and minorities. The Commission would take no adverse action against the broadcaster because of the lack of the kinds of record keeping described in ¶ 6 (a-u) above, but could require such record keeping *prospectively* if it were dissatisfied with the showing provided by the broadcaster.

11. In response to ¶¶ 29-30 of the NPRM, the Association believes that the exemption proposed above is fully justifiable and can be distinguished from the change rejected by the Court of Appeals for the Second Circuit almost twenty years ago in Office of Communications of the United Church of Christ v. FCC, 560 F.2d 529 (2d Cir. 1977) ("UCC"). In the UCC case, the court rejected the FCC's argument that the threshold for required submission of written EEO programs should be increased from five to ten or more employees because the requirement was unduly burdensome on smaller stations, noting that preparation of the required submission should take only a few hours a year to prepare. UCC, 560 F.2d at 534. In the twenty plus years since the EEO Rule was adopted, the FCC's interpretation of what is required administratively and in terms of paperwork has become vastly more formalistic, detailed and staff-intensive.

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[5] The alternative approach suggested in ¶ 24 of the NPRM does not provide sufficient relief to smaller licensees.

There can be no question that the steps described in ¶ 6 (a-u) above are *tremendously* burdensome and time-consuming, and that relief for smaller stations from those burdens is therefore fully justifiable.

C. LICENSEES THAT MEET THE "PARITY PROCESSING GUIDELINES" SHOULD BE EXEMPT FROM THE RECORD KEEPING AND REPORTING REQUIREMENTS

12. The Association also urges the Commission, as suggested in ¶ 25 of the NPRM, to relieve from the record keeping and reporting requirements all stations that have met or surpassed the "parity processing guidelines" (50%/25% and 50%/50% parity measures which are described in ¶ 10 of the NPRM). Stations in compliance with those processing guidelines should be granted relief similar to the relief for smaller stations described above. That is, these stations should be required to file only the first page of Form 395-B and Form 396-A, and the first two pages of Form 396, certifying that they meet the criteria for the exemption.

13. Stations meeting the processing guidelines should be found in presumptive compliance with the EEO Rule and, in the absence of evidence of final adverse findings of discrimination, should not be subject to enforcement sanctions. If subject to a challenge to EEO compliance, such broadcasters should be permitted to defend themselves by providing a narrative description of their efforts to comply with the EEO Rule. The Commission should take no adverse action against such broadcasters because of the lack of the kinds of record keeping described in paragraph 6 (a-u) above, but could require such record keeping *prospectively* if it were dissatisfied with the narrative description of compliance provided in response to a challenge.

14. The Association understands former Commissioner Barrett's concern that the Commission avoid any "quota-like" standard. But the Association believes that it is totally

inappropriate to require stations that have achieved the goals of the EEO Rule -- hiring minorities and women in substantial numbers -- to be burdened with the administrative costs of the numerous, time-consuming paperwork steps described in ¶ 6 (a-u) in order to avoid sanctions. If a station has been *successful*, it is simply not fair or necessary to require a showing of compliance with a long list of administrative steps artificially imposed by the Government.

D. THE COMMISSION SHOULD PERMIT THE USE OF ALTERNATIVE LABOR FORCE MEASURES

15. The Association applauds the Commission's willingness to grant a licensee's request to have its EEO record evaluated by reference to labor force data different from data on the MSA in which its station is located. NPRM ¶ 35. The Association believes that the current three-prong showing for relief is not workable. The result of using this test has been that the Commission has virtually always disallowed the use of alternative labor force data and petitioners to deny have unfairly attacked broadcasters for even attempting to use alternative labor force data.

16. The Association believes that the Commission should allow a broadcaster who satisfies any *one* of the current three criteria[6] to use alternative labor force data, rather than the current approach of requiring that all three criteria be met. Moreover, the second criterion should be changed, as proposed in ¶ 35 of the NPRM to read "commuting from those areas to the station is unlikely because of transportation difficulties or because the station's past recruitment efforts show that prospective employees are unwilling to commute from those areas."

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[6] Those criteria are: (1) the distance of the station from the areas with significant minority population is great; (2) commuting from those areas to the station is difficult (such difficulties may be based on distance but may also be based on other factors such as lack of public transportation); and (3) recruitment efforts directed at the MSA minority labor force have been fruitless. NPRM at ¶35.

17. As an alternative to distance, a television station should also be granted relief if it can show that its city grade signal does not cover a geographic area that is at issue. Similarly, FM radio stations should be granted relief if their principal community contours do not cover areas at issue, and AM stations should be granted relief based on their principal community signal coverage during the day. These alternative mechanisms of measuring the labor force will allow many broadcasters to depict more accurately the actual labor force from which they can realistically attract minority applicants.

18. In addition, the Commission should take into account the actual characteristics of a station's labor force. For example, the Court of Appeals for the District of Columbia Circuit noted that "[i]t seems quite reasonable to suggest that migrant agricultural workers -- again minority or white -- will normally be less suitable for white collar or technical jobs in a radio station." Florida State Conference of Branches of the NAACP v. FCC, 24 F.3d 271, 274 (D.C. Cir. 1994). Stations should be permitted to introduce such data in order to accurately depict the labor force from which they can attract applicants for particular positions.

E. THE COMMISSION SHOULD CREDIT JOINT RECRUITMENT EFFORTS BY STATE BROADCASTER ASSOCIATIONS AND OTHERS

19. The Association endorses the Commission's statement in the NPRM that broadcasters should be given an important credit for using the resources of state broadcaster associations and other joint efforts in their EEO recruitment efforts. NPRM ¶ 31-33. Use of such association efforts should help to reduce the administrative and paperwork burdens on individual stations without decreasing the effectiveness of the overall effort to recruit minorities and women. As the Commission notes, however, this would not relieve individual broadcasters from their ultimate responsibility to ensure that they are fully complying with the EEO Rule.

20. The Association urges, however, that the credit given broadcasters for using centralized sources be given without the overly-stringent conditions proposed in ¶ 32 of the NPRM. Specifically, the Association believes that the proposed condition that state association recruitment efforts be "tailored" to the needs of a particular broadcaster in order to be credited is too vague and potentially burdensome. State broadcaster associations will usually solicit, from local, state, regional and national sources, the referral of minorities and female applicants in two ways. They will request such sources to refer persons who have an interest generally in making broadcasting a career. They will also solicit referrals for specific vacancies. The solicitations may go out in regular newsletters, faxes, etc. The solicitations may also be immediately posted on the Association's World Wide Web home page. The responses to these solicitations would be available, on request, to all broadcasters for follow up. However, it would be administratively impracticable for a state association to send out a broad solicitation every time there was an opening at one of its member's stations. Thus, any "tailoring" condition will severely decrease the willingness of associations to implement, and stations to use, joint programs with confidence that the Commission will in fact credit them. Moreover, the Commission should not impose a requirement that a state association make additional recruitment contacts if "sufficient" applications for a particular broadcaster's vacancy are not on file in order to credit use of the state association effort by such broadcaster. Such a requirement is too burdensome on state associations. And, again, a vague requirement for "additional" recruitment contacts if there are "insufficient" resumes for a particular job will decrease the willingness of stations to use state associations with confidence and serve as a disincentive to their use by stations, and therefore defeat the purpose of the Commission's proposal. State associations have the incentive to develop programs that work but they need flexibility to undertake the potentially costly effort.

21. On a related matter, to better insure that such state broadcaster association programs will work effectively and efficiently, the FCC must officially declare that it is entirely lawful for a broadcaster or state association to encourage potential applicants to indicate their gender, race or national origin on their resumes or applications so that the state associations and stations may be assured that they in fact have an adequate pool of women and minorities for consideration. The laws of many states appear to prohibit such solicitations and the disclosure of a person's gender, race or national origin on the job application and in the job bank, thereby defeating the goal sought by the FCC, namely to make the recruitment process more efficient and less burdensome.

F. THE PROPOSED FORFEITURE SCHEME IS ARBITRARY FOR A NUMBER OF REASONS

22. The FCC has proposed that "failure to recruit for at least 66% of all vacancies for the period under review so as to attract an adequate pool of minority and female applications" will result in a base fine of $12.500. NPRM § 38. Various upward and downward adjustments are also proposed. The formula proposed by the Commission is ripe with ambiguities that make it impossible for a broadcaster to know if it is complying with the requirement or not.

1. The Definitions Used in the Forfeiture Guidelines Are Not Adequate

23. The definitions proposed in the NPRM, for example, of "an adequate pool" of minority and female applicants, are simply too vague to be of use to broadcasters. See, e.g. NPRM ¶ 43. Stations need far more guidance as to what is expected of them than the vague generalities in the NPRM, especially if they are to be subjected to the onerous new level of fines proposed in the guidelines. It is neither helpful nor adequate for the Commission to tell broadcasters that the nature of an "adequate pool" or of "inadequate self-assessment" will vary

from station to station, based on a whole variety of factors, and then to subject broadcasters to heavy fines for failing to attract these completely undefined "adequate pools" or engaging in "inadequate self-assessment." At a minimum, this uncertainty requires the FCC to significantly reduce its 66% threshold for the substantial base fine.

24. The Association urges the Commission to continue to allow stations to define who is an "applicant," rather than to provide a uniform definition such as the one suggested in ¶ 44 of the NPRM: "an individual who applies for and meets the stated minimum qualifications for a position." That definition would mean that each and every person who responded to, for example, a classified advertisement in a general circulation newspaper would count as an "applicant," at least unless the station could establish that the person did not meet the "minimum qualifications" for the position, whatever that vague term is supposed to mean. And, the burdensome requirements described in ¶ 6 (a-u) would then apply to each respondent to the advertisement. For example, each such respondent would need to be sent the questionnaire-related inquiries described in ¶ 6 (k-m). This would create an administrative nightmare. Indeed, the result would no doubt be to create a disincentive to using general circulation newspaper advertisements in order to avoid the paperwork requirements that would result in connection with each respondent. Needless to say, this is hardly a result the Commission should desire.

25. The Association believes that the Commission's proposal to use the term "vacancies" to refer only to full-time positions is correct. NPRM ¶ 44. As the Commission notes, its policies have always focused on full-time employees and should continue to do so. However, the Association believes that stations should be allowed *extra credit* for recruiting and hiring minorities or women for part-time positions. Programs that recruit minorities and women for part-time positions can provide invaluable training to minorities and women and can lead to

increased full-time hiring of minorities and women later -- not just by the station in question, but also by other stations. The Commission's rules should make it clear that programs for part-time hiring of minorities and women are encouraged by providing extra credit for stations that conduct or participate in them.

2. The Sanctions Proposed in the Forfeiture Guidelines Are Much Too Harsh

26. The Association believes that the fines specified in the proposed new guidelines are far too harsh, particularly given the ambiguity in the formula. The $12,500 base forfeiture for a failure to recruit so as to attract "adequate pools" of minorities and women for at least 66% of all vacancies would pose a severe hardship on many small stations. Moreover, the size of the base fine is unfair, given that a station's recruitment success turns on two factors, each beyond the station's control: the presence of an adequate number of referral sources for women and/or minorities and the productivity of those sources. The base forfeiture alone is equivalent to a full year's starting salary at some small market stations. Imposition of the fines proposed will actually diminish job opportunities since small broadcasters will be forced to cut jobs in order to pay the fine. The possibility of high fines will also provide an incentive for broadcasters to use independent contractors or part-time employees to avoid the potential penalties. Lastly, the downward adjustments in the guidelines simply provide inadequate relief for smaller broadcasters.

27. The Commission's policy should be to lead broadcast stations into compliance, not to impose punitive fines. Twenty years ago, the Commission articulated a principle that the Association believes remains valid:

> In accord with the usual common sense principle expressed in Title VII of avoiding litigation where possible, where we believe that a licensee has merely

> failed to take sufficient steps to ensure equal employment opportunities for minorities and women, our preferred solution has been to order the licensee to take immediate corrective steps and to monitor its future affirmative action efforts.

Nondiscrimination in Employment Practices (Broadcast) (Report and Order), 60 F.C.C. 2d 226, 228 n.4 (1976). The Commission should continue its efforts to encourage *voluntary* compliance, rather than imposing fines that will cause severe and unnecessary hardships on many small stations. Also, there should be a 100% offset in the base amount as well as in any add-on where the station is hiring at 50% parity, both overall and in the top-four job categories.

28. The proposal to require automatic designation for hearing where the station previously was given a short-term renewal is draconian. First, the current licensee may have inherited the short-term renewal based on conduct of the former owner. This circumstance is not taken into account. Second, while certain factors will be taken into consideration to forestall a short-term renewal, no factors are said to be considered to forestall designation for hearing. That is unreasonable.

3. The Forfeiture Guidelines Should Be Applied Only Prospectively

29. Any EEO forfeiture guidelines adopted by the Commission should be applied only to conduct and sanctions thereof that occur *after* the effective date of those guidelines. The Association emphatically disagrees with the Commission's position that upon adoption it can apply the guidelines to conduct that precedes the guideline's effective date. See NPRM ¶ 47. To impose sanctions against licensees for conduct prior to adoption of the guidelines is fundamentally unfair and violates the essential due process requirement of full prior notice.[7]

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[7] The essential requirements of a change in policy are clear:

(continued...)

30. The Supreme Court has made clear that agencies may not generally adopt rules with retroactive effect unless Congress has made a specific grant of retroactive rulemaking authority, something Congress did not do in the Communications Act of 1934.[8] As the Court stated in Bowen, "retroactivity is not favored in the law.[9] In Bowen, the Supreme Court struck down an attempt by the Department of Health and Human Services to apply Medicare hospital cost-reimbursement limits, adopted in 1984, retroactively to 1981.[10]

31. Because the EEO standards and sanctions announced in the guidelines depart significantly from the Commission's prior EEO decisions, retroactive enforcement of those

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[7] (...continued)

> "Although an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that when it decides to reverse its course, it must give notice that the standard is being changed . . . and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect." (emphasis added)

RKO General, Inc. v. FCC, 670 F.2d 215, 224 (D.C. Cir. 1981) (quoting Boston Edison Co. v. FPC, 557 F.2d 845, 849 (D.C. Cir.), cert. denied sub nom. Towns of Norwood, Concord, and Wellesley, Mass v. Boston Edison Co., 434 U.S. 956 (1977)), cert. denied, 456 U.S. 927 (1982).

[8] See Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) ("Bowen").

[9] Id. at 208.

[10] Similarly, in Greene v. United States, 376 U.S. 149 (1964), the Court struck down an attempt to apply a statute retroactively. There, the petitioner, an employee of a Navy contractor, was dismissed in 1953 when his company was terminated by the Navy. Six years later, the Supreme Court found that the Navy's dismissal of the petitioner and his company was unlawful. At that time, a government regulation provided for restitution for the contractor employee in any case where the termination had been finally adjudicated unlawful. In 1960, six months after the petitioner submitted his claim for restitution, however, that regulation was modified to substantially narrow the circumstances under which a terminated contractor could receive restitution. The petitioner was denied restitution on the basis of the modified 1960 regulation. The Court held that "[w]hatever petitioner's rights are, there can be no doubt they matured and were asserted under the 1955 directive." Id. at 160. The Court thus held that the petitioner was entitled to restitution under the 1955 regulation in effect at the time of his claim.

standards and sanctions violates established concepts of fairness.[11] Many licensees have adopted EEO programs based on their understanding of the Commission's standards prior to the adoption of the guidelines. To impose sanctions on these licensees for actions that preceded the applicable rule unfairly penalizes licensees without cause.

32. Use of the guidelines to sanction conduct that takes place before the guidelines are enacted would also violate the Commission's obligation to treat similarly situated applicants in an even-handed manner. See Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. 1965) ("Melody Music"). While the Commission claims that the EEO guidelines are not a change in the Commission's rules, but only a clarification, the guidelines nonetheless will present a radical departure from sanctions previously imposed. An examination of cases decided before and after the February 1, 1994 enactment of the now rescinded Policy Statement indicates that in the past, violations received significantly lower sanctions than will similar violations judged under the new policy.

33. In Eagle Radio Inc., 9 FCC Rcd 836 (1994), decided under the Policy Statement, a licensee, in Fort Worth, Texas, had minorities present in 11 of 47 applicant and interview pools, and hired 10 minorities between 1987 and 1990. When the licensee's 1990 renewal application was acted on by the Commission in 1994, the FCC imposed a $25,000 fine, reporting conditions and a short-term renewal. A second licensee in Midland, Texas, had minorities present in seven of 29 applicant and interview pools, and hired four minorities. For this level of recruiting, the licensee received a $25,000 fine, reporting conditions, and a short term renewal.

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[11] The Commission's 1987 EEO Report reoriented the Commission's EEO focus from statistical employment profile analyses to concentration on actual recruitment efforts. The guidelines, however, threaten to sanction licensees for failing to attract an "adequate" applicant pool despite either substantial recruitment efforts or demonstrated hiring of minorities and females

34. However, other licensees that had similar conduct during the late 1980's received significantly lower penalties merely because the Commission processed their renewal applications prior to the enactment of the Policy Statement. For example, in Double L Broadcasting of Lansing Limited Partnership, 7 FCC Rcd 6435 (1992), a licensee had minorities in only five applicant pools out of 16 upper-level positions -- and received only an admonishment. Moreover, in Radio Seaway, Inc., 7 FCC Rcd 5965 (1992), a Cleveland, Ohio FM station had 31 full-time positions during the license term. The licensee failed even to contact outside referral sources for 20 of those 31 openings, and apparently did not begin affirmative recruitment for job vacancies until the EEO reporting year. For this, the licensee received only reporting conditions and no fine.

35. Similar penalties were imposed in Certain Broadcast Stations Serving Communities in the Sarasota, Florida Area and Other Florida Communities, 5 FCC Rcd 5683 (1990). An Orlando licensee hired only three minorities out of 47 overall positions, and only four out of 130 interviewees were minorities. The licensee received only reporting conditions, and no fine. In the same decision, a Tallahassee licensee received only reporting conditions for hiring only two minorities out of 14 job vacancies, and only having six minorities among 61 interviewees. A second Tallahassee licensee could identify the referral source for only nine out of 27 hires, only knew the number of minority interviewees for two positions, and only hired three minorities, yet received reporting conditions and a $2,000 fine.[12] These cases demonstrate

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[12] Id. at 5685. See also Spectacor Broadcasting, L.P., 9 FCC Rcd 1729 (1993) recruiting sources for only seven of 37 hiring opportunities, and had only 12 minorities out of 144 interviewees received a full-term renewal, reporting conditions and a $12,500 fine); Niles Broadcasting Company, 7 FCC Rcd 5959, 5960 (1992) (licensee who only recruited for four of 10 openings, had only 5 minority applicants, and did not assess its EEO efforts until the last few months of the license term received reporting conditions for three

(continued...)

the clear departure from past practices which was occasioned by the Policy Statement and which will be occasioned by the virtually identical new guidelines.

36. This uneven treatment of applicants governed by the same policy demonstrates the problems that would be inherent in the Commission's unlawful retroactive application of the guidelines and clearly violates the principle of Melody Music. Accordingly, the Commission should apply its new policies only to conduct and sanctions thereof that occur after the effective date of any new forfeiture guidelines.

III. CONCLUSION

Based on the foregoing, the Association respectfully asks the Commission, in resolving this proceeding, to adopt the positions set forth herein.

Respectfully submitted,

THE PENNSYLVANIA ASSOCIATION
OF BROADCASTERS

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12/ (...continued)
years); Goodrich Broadcasting, Inc., 7 FCC Rcd 6655, 6656-57 (1992 (Muskegon licensee who could not identify recruitment sources for 29 of 42 positions, and had minorities in only three of 38 interview pools received reporting conditions).

CERTIFICATE OF SERVICE

I, Susan R. Fisenne, hereby certify that copies of the foregoing **"COMMENTS OF THE PENNSYLVANIA ASSOCIATION OF BROADCASTERS"** were served via hand-delivery on this 11th day of July, 1996, to the following:

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