

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

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In the Matter of)
)
Streamlining Broadcast EEO)
Rules and Policies, Vacating the)
EEO Forfeiture Policy Statement)
and Amending Section 1.80 of the)
Commission's Rules to Include)
EEO Forfeiture Guidelines)

MM Docket No. 96-16

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TO THE COMMISSION

COMMENTS OF EEO SUPPORTERS

VOLUME II

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Of Counsel: David Honig
Minority Media and Telecommunications Council
3636 16th Street N.W., Suite AG-58
Washington, DC 20010
(202) 332-7005

Kofi Asiedu Ofori
Office of Communi-
cation of the
United Church
of Christ
2000 M Street N.W.
Suite 400
Washington, DC 20036
(202) 331-4265

Ronda Robinson
631 Constitution
Ave. N.E. #3
Washington, DC 20002
(202) 547-5699

Counsel for:
Minority Media and Telecommunications Council
Office of Communication of the United
Church of Christ
National Council of Churches
American Civil Liberties Union
American Hispanic Owned Radio Association
Association of Black Owned Television
Stations
Black Citizens for a Fair Media
Black College Communications Association
Chinese for Affirmative Action
Cultural Environment Movement
Fairness and Accuracy in Reporting
Hispanic Association on Corporate
Responsibility
League of United Latin American Citizens
Minority Business Enterprise Legal Defense
and Education Fund, Inc.
National Association for the Advancement of
Colored People
National Association of Black Owned
Broadcasters
National Bar Association
National Hispanic Media Coalition
National Rainbow Coalition
National Urban League
Operation PUSH
Women's Institute for Freedom of the Press

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September 17, 1996

**VI. To Maintain Its Enforcement Credibility,
The Commission Must Declare Zero Tolerance
For Discrimination, And Close To Zero
Tolerance For Habitual EEO Noncompliance**

If our country is to continue to operate the world's preeminent system of broadcasting, we must adopt a policy of Zero Tolerance for discrimination.

The industry has enjoyed twenty-five years of EEO regulation without the loss of one license for discrimination. During this time, the tactics of discriminators have grown more sophisticated. As opportunity has grown, so has resistance.

Now is the time for the learning phase of EEO enforcement to end, and the era of strict compliance to begin. This proceeding is the place to announce a policy of Zero Tolerance for discrimination and near-zero tolerance for habitual EEO noncompliance.^{257/}

EEO does not burden law abiding broadcasters. As we have shown, it benefits them economically and professionally. See pp. 107-116 supra. What we must not do is burden the general public and minority and female broadcasters and broadcast professionals by allowing discriminators and EEO violators to continue to be licensees. See 117-140 supra. The credibility of the Commission's

^{257/} The NAACP, MMTC, the Office of Communication of the United Church of Christ, LULAC and others have presented recommendations such as those in this Section on three previous occasions. On each occasion, the Commission failed to rule on their recommendations. EEO Report and Order - 1993, 8 FCC Rcd at 5389; EEO Report - 1994, 9 FCC Rcd at 6276; Order. As the Commission considers cutbacks in EEO enforcement, it owes a legal and moral duty to the twenty-one national organizations filing these Comments, and their constituencies which consist of the majority of the American people, to provide at last an up-or-down ruling on the question of whether it will adopt a Zero Tolerance Policy for discrimination. See p. 3 n. 3 and p. 5 n. 6 supra.

EEO enforcement program depends profoundly on its willingness to leave no stone unturned to uncover intentional discriminators and remove them from the broadcast business, and to uncover habitual EEO violators and exhibit close to zero tolerance for them. We recommend a one-bite rule for habitual EEO violators and a no-bite rule for discriminators.

The time for a Zero Tolerance Policy is long overdue. The Commission's 1994 EEO Report found that even after 25 years, the elementary skill of recruiting widely for minority and female job candidates has not been learned by scores of broadcasters.^{258/} The findings of the Tennessee Study validate those of the 1994 EEO Report:

- Six percent of stations reported the use of no referral sources at all and 24% reported no sources which produced minority referrals. Moreover, the median number of productive minority sources is only two. See p. 49 supra.
- A surprisingly high proportion of the stations which reported minority referral data (25%) reported not one minority referral in the entire reporting year. Minorities comprised less than 5% of the applicant pool at 30% of the stations, and less than 10% of the applicant pool at 41% of the stations. Furthermore, 27% of the stations had not attained 50% of parity with the workforce in the composition of their applicant pools, even though the pools included applicants for secretaries and janitors. See p. 50 supra.

^{258/} "[T]here continues to be evidence in cases in which the Commission sanctions licensees that women and minorities are still not recruited for a significant number of positions. In fact, despite our requirements, in many of these cases, for which we have issued sanctions, positions were filled without any recruitment having taken place. Given the foregoing, we believe that a continuing need exists for EEO enforcement in the communications industry." (fn. omitted). EEO Report - 1994, 9 FCC Rcd at 6314-15.

- Ten percent of the stations reported no female referrals in the reporting year, and sixteen percent received three or fewer female referrals. See p. 50 supra.
- Staff size was correlated with the number of referral sources, but not with the number of productive referral sources. Thus, many large stations apparently use their resources to propound long lists of local organizations which may or may not be cultivated as genuine sources of minority or female referrals. See p. 52 supra.
- The measures of percentage of parity attained for minority employment shows that substantial progress is yet to be made for top four category positions. While the median minority fulltime employment percentage of parity was 64%, the median minority top four category percentage of parity was only 46%. This means that approximately half of the radio stations in Tennessee have failed even the FCC's lenient "zone of reasonableness" test used to determine whether thorough review of their EEO programs is needed to exclude the possibility that their stations might be discriminating. See p. 51 supra.

Given the extent of EEO noncompliance this late in the history of civil rights, it is essential that a Zero Tolerance Policy has teeth. Regulators must not declare that they have "zero tolerance" and then continue with business as usual.

First, the Commission must declare its willingness to consider any evidence of discrimination or habitual EEO violations -- statistics, EEO complainants' statements, and inferences of discriminatory intent from the truthful as well as the untruthful statements of licensees. See pp. 220-221 infra. This will take hard work.^{259/} The Commission will not always be able to shift the burden of evidence-development to petitioners to deny, who lack the

^{259/} The D.C. Circuit emphasized thirty years ago that "a pious hope on the Commission's part for better things from [a licensee] is not a substitute for evidence and findings." UCC I, 359 F.2d at 1008.

power to conduct predesignation discovery.^{260/}

Second, the Commission should begin to distinguish more carefully which habitual EEO violators are most likely to be intentional discriminators. See pp. 247-250 infra. For the most part, habitual EEO violators are discriminators who are clever enough to prevent the Commission and the public to catch them in the act.^{261/} By focusing on these EEO violators, the Commission would overcome the appearance of being a Highway Patrol whose cruisers stop only those driving more than 120 when the speed limit is 60.

^{260/} The Commission certainly should be initiating more Bilingual investigations on its own; most now begin with the review of a petition to deny. The Commission has discretion to allow predesignation discovery. Bilingual Bicultural Coalition on the Mass Media v. FCC, 492 F.2d 656 (D.C. Cir. 1974) ("Bilingual I"). If the Commission's resources do not permit it to use the investigative tools discussed herein, it should allow predesignation discovery instead. Such a procedure would impose no unfair burdens on licensees, since every defendant in a Title VII or 42 U.S.C. §1981 case must submit to full discovery so that the plaintiff can be in a meaningful position to respond to a denial of discriminatory intent or a defense of business justification. See, e.g., Ward's Cove, 490 U.S. at 642. The petition to deny process is too important to allow it to be subverted by the Commission's failure to investigate serious allegations. Stone v. FCC, 466 F.2d 316, rehearing denied, 466 F.2d 331 (D.C. Cir 1972) ("Stone"); see Citizens for Jazz on WRVR v. FCC, 775 F.2d 392, 397 (D.C. Cir. 1975) ("[i]t would be peculiar to require, as a precondition for a hearing, that the petitioner fully establish...what it is the very purpose of the hearing to inquire into.")

^{261/} As we have seen, about 20% of American business discriminates at the point of hire, but the Commission has only made findings of employment discrimination against three renewal applicants in the past 25 years. Catoctin, 4 FCC Rcd at 2553; Walton (Decision), 78 FCC Rcd at 857; King's Garden, 34 FCC2d at 937. Thus, most discriminators in broadcasting have hidden their actions very cleverly indeed.

Third, the Commission should modernize its "Zone of Reasonableness", so that it focuses its resources more closely on the licensees which are most likely to be violating the EEO Rule with impunity. See pp. 283-289 infra.

Fourth, the Commission should improve the effectiveness of Bilingual investigations by expanding the scope of evidence sought, the range of sources from which it seeks evidence, and the tools it uses to develop its evidence. See pp. 290-302 infra.

Fifth, the Commission should not wait as long as eight years for a station's next renewal application to arrive before the Commission grapples with serious allegations that a licensee is discriminating today. See pp. 303-304 infra.

Sixth, the Commission should immediately outlaw the worst threat to antidiscrimination enforcement in a generation: the incipient practice of some licensees of requiring employees, as a condition of employment, to enter into one-sided, binding agreements to arbitrate all EEO disputes. See pp. 305-312 infra. These draconian civil rights waivers directly undermine the FCC/EEOC Agreement and frustrate the Commission's ability even to learn of any discrimination. Under no circumstances should the Commission permit a public trustee to coerce its employees to check their civil rights at the door as a condition of working in the broadcasting industry.

Seventh, the Commission should begin to focus its attention on the "Second Generation" issues in EEO policy: the treatment of minorities and women after they've been hired. For 25 years, the Commission has focused almost entirely on the first level of the employment relationship: the opportunity to learn that a job is open. Every Bilingual letter focuses on that question. Yet the Commission's diversity goals can only be effectuated when minorities and women have real power to influence what goes out over the air. Consequently, it is time to review compliance with the elements of the EEO Rule which require broadcasters, inter alia, to hire, train, compensate, promote employees fairly. See pp. 313-320 infra.

The Commission must be completely unsentimental about this. EEO is the only remaining test available to the Commission to render the public interest determination required upon renewal of a license, 47 U.S.C. §309(e) (1996); see pp. 82-83 supra. Thus, it must enforce a Zero Tolerance Policy irrespective of a licensee's staff size, market size, influence, prestige, religious beliefs, noncommercial status, format, programming or longevity.

A. A Zero Tolerance Policy means an intention to consider all evidence which might be probative of discrimination or other EEO violations

It is a well established principle that agency action must be "based on a consideration of the relevant factors."^{262/} In this spirit, the Commission should state that it will no longer reject, out of hand, any type of evidence of possible EEO noncompliance. This includes statistical evidence (see pp. 222-228 infra); evidence of recidivism (see pp. 229-232 infra); evidence of a licensee's misconduct at other facilities (see pp. 233-234 infra); evidence from witnesses (see pp. 235-244 infra; see also pp. 295-299 infra); evidence from nonresponsiveness and evasion as well as outright misrepresentations (see pp. 245-246 infra); evidence of deliberate affirmative action violations (see pp. 247-250 infra); evidence of a licensee's irrational avoidance of minority recruitment sources (see pp. 251-252 infra); evidence of a licensee's disparate work assignments by race or sex (see pp. 253-256 infra); and evidence derived from logical inferences drawn from a licensee's own words contained in papers it files with the agency (see pp. 257-280 infra.)

In Florida NAACP v. FCC, 24 F.3d 271 (D.C. Cir. 1994) ("Florida NAACP"), the Court upheld the Commission's discretion to disregard extreme statistical and inferential evidence of

^{262/} Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); Weyburn Broadcasting Limited Partnership v. FCC, 984 F.2d 1220, 1227-28 (D.C. Cir. 1993); David Ortiz Radio Corp. v. FCC, 941 F.2d 1253, 1260 (D.C. Cir. 1991). See 5 U.S.C. §706(2)(A) (1996) (court shall set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.")

discrimination.^{263/} The Commission is now blessed or damned with the "discretion" -- the choice -- to look the other way rather than investigate further when a licensee is probably discriminating.

It does not matter that Florida NAACP was wrongly decided if the Commission does the right thing and declares that whether or not it has the discretion granted it in Florida NAACP, it will no longer elect to exercise that discretion.^{264/}

Today's discriminators are sophisticated and evasive. See pp. 74-75 supra. Thus, while the Commission should not conduct a random dragnet, it should investigate EEO violations the same way it investigates pirate radio stations, obscene broadcasts or out of band emissions -- with an openness to considering any useful evidence, and a commitment to follow that evidence wherever it leads.

^{263/} The licensee in Florida NAACP had hired no minorities in 84 vacancies, and had contended that its 23-mile distance from Tampa inhibited minorities from working at the stations. Id.

^{264/} The Florida NAACP Court did not have before it the extensive evidence the Commission has now collected through this rulemaking proceeding.

1. **Statistical evidence, adopting standards comparable to those used in EEOC systemic or class action litigation**

Statistics are the heart of any review of allegations of discrimination. In civil rights cases, "statistics often tell much and Courts listen." Alabama v. U.S., 304 F.2d 583, 586 (5th Cir.), aff'd, 371 U.S. 37 (1962). Sometimes statistics "do more than speak for themselves - they cry out 'discrimination' with unmistakable clarity." Muniz v. Beto, 434 F.2d 697, 702-03 (5th Cir. 1970). "Statistics may not give definitive answers, but they clearly can raise valid questions." Nondiscrimination in Broadcasting, 23 FCC2d 430, 432 (1970) ("Nondiscrimination - 1970").

Statistics are critical because of the paucity of individual complaints, owing to the NBC Policy (see pp. 235-244 infra), employees' fear of retaliation, employees' or job applicants' unawareness that they have been discrimination victims, and broadcast professionals' frequent decision not to waste time applying for work at a company with a reputation as a discriminator.

Statistical tests have their limitations. They cannot reveal whether a licensee discriminated by failing to consider minority or female applicants, or in whether a licensee discriminated by placing minorities or women in lower status positions, paying them less, offering them inferior benefit packages, harassing them on the job, or more readily reprimanding, suspending or terminating them. Only full discovery, including the testimony of well protected witnesses, could reveal such activity by a licensee.

Nonetheless, an enhanced ability to perform statistical tests would represent a significant advance in FCC EEO procedures, and potentially could result in an increase in the number of discriminators who no longer escape scrutiny merely because of the insufficiency of the evidence.

The Commission should take five steps to improve its use of statistical evidence.

First, the Commission should be far more assertive in drawing inferences of possible discrimination from statistics. The courts have long recognized that in applying the EEO Rule, "statistical evidence of an extremely low rate of minority employment could constitute a prima facie showing of discrimination." Stone v. FCC, 466 F.2d 316, 329-330 (D.C. Cir. 1972) ("Stone"). Indeed, while statistics often combine with other evidence to present an inference of discrimination, statistics can be an independent grounds for further inquiry. Bilingual II, 595 F.2d at 630 ("[b]efore the Commission is obliged to conduct further inquiry, however, it must be before it either well-pleaded allegations of overt discrimination or statistical evidence of substantial underemployment of minority groups" (emphasis supplied)).^{264/}

^{264/} See also Judge Robinson's dissent in part in Bilingual II: "where a long-term disparity is established and no satisfactory explanation is given, it ordinarily can be expected that intentional manipulation has been worked." Id., 595 F.2d at 643.

Meager statistical evidence is often overutilized to clear an accused. The mere hiring of one minority, or even one undocumented offer to hire, may be enough to immunize a renewal application from further review. See pp. 277-280 infra.^{265/} However, statistical evidence is far underutilized in identifying likely discriminators.^{266/}

Second, the Commission should hold broadcasters to a higher standard of statistical review than the standard which would obtain in an EEOC systemic case or class action.^{267/} Because they are

^{265/} Judge Robinson, dissenting in part in Bilingual II, was "unable to comprehend the Commission's half-stated position that statistics can be trusted to indicate an absence of intentional discrimination but not to indicate its presence." Id., 595 F.2d at 652 (Robinson, S., Dissenting in Part).

^{266/} See, e.g., Beaumont, 854 F.2d at 508 (where there was a substantial decline in minority employment, including the loss of ten of the station's eleven Black employees, followed by the inclusion of only three Blacks among the next 112 hires in a market which is 21.7% Black, "[t]he Commission in this case did not obtain the necessary information to determine that the very substantial discrepancy between black employment at the station and the number of blacks in the workforce was of benign origin.")

^{267/} Because the evidentiary standards applied to broadcast licensees should exceed those of the EEOC, it is puzzling that the FCC at times rejects statistical proof by reciting that it is not the EEOC. See, e.g., Pasco Pinellas Broadcasting Company (WLWU-AM-FM, Dunedin/Holiday, Florida) (Reconsideration), 8 FCC Rcd 398, 399 ¶10 (1993), aff'd, Florida NAACP, 24 F.3d at 271 (stating that the petitioner had used a statistical test, the hypergeometric distribution, "which...the Commission does not employ" but giving no reason why the test was inappropriate). As Judge Robinson declared, dissenting in part in Bilingual II, the FCC "may not simply invoke talismanically the fact that it is not the Equal Employment Opportunity Commission to reject out of hand a statistical showing that in analogous areas of the law would indicate 'substantial under-representation' and erect a prima facie case of intentional discrimination" (fn. omitted). Id., 595 F.2d at 646.

public trustees, and because they are expected to set an example for other industries, broadcasters should be held to the highest standards of EEO performance. See Nondiscrimination - 1968, 13 FCC2d at 242. The EEOC certainly expects the FCC's handling of evidence at least to measure up to EEOC standards.^{268/} However, the FCC's use of statistics in EEO review is far more rudimentary, and gives the respondent far more latitude, than would EEOC statistical standards. Despite the superior importance of broadcasting, the FCC is the only EEO enforcement body in the nation whose statistical review is inferior to EEO standards.

The FCC's statistical review should be comparable to a thoroughly investigated EEOC systemic or class action case.^{269/} These investigations liberally draw inferences from statistics, and the FCC should do so as well.

^{268/} FCC/EEOC Agreement, 70 FCC2d at 2331, Appx. §III(a) (delegating to the FCC the task of processing those complaints which the EEOC is unable to handle; e.g., where a station's staff size is less than the EEOC's jurisdictional minimum of fifteen employees).

^{269/} In disparate impact cases, a lower level of statistical significance is needed than in a disparate treatment analysis. Page v. U.S. Industries, 726 F.2d 1038, 1054 (5th Cir. 1984); see also Rivera v. City of Wichita Falls, 665 F.2d 531, 545 n. 22 (5th Cir. 1982). Disparate treatment is established when the statistics show a "gross disparity" between the selection rates of a protected and nonprotected group. Hazelwood School District v. U.S., 433 U.S. 299, 307-08 (1977) ("Hazelwood"). Disparate impact is established when the statistics show a "marked disproportion" between the selection rates of protected and nonprotected group. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Third, the Commission should employ refined statistical tools to evaluate the likelihood that a station's EEO profile is attributable to discrimination. Given the FCC's resource limitations, the zone of reasonableness test has some value in screening out probable nondiscriminators from routine scrutiny. However, because this simple statistic lacks evaluative sensitivity, it cannot completely incriminate or exculpate a licensee. The Commission should employ other generally accepted tests of statistical significance where the numerosity levels (staff sizes) are great enough.^{270/}

^{270/} In order to determine whether a hiring record makes out a statistical prima facie case of discrimination, it is necessary to determine the probability that the selection of a particular number of minorities or women out of all total selections could not have occurred by chance. See Hazelwood, 433 U.S. at 299. This calculation may be performed by using the hypergeometric distribution (sampling without replacement), which will closely approximate the binomial distribution.

The use of standard deviations is appropriate for large stations. An inference of purposeful discrimination can be drawn "[a]s a general rule for such a large sample, if the difference between the expected value and the observed number is greater than two or three standard deviations." Id. at 309 n. 14. Two standard deviations will encompass 91.43% of the total area under a normal curve and three standard deviations will encompass 95.73% of the total area under a normal curve.

A chi-square test might supplement the zone of reasonableness criterion as a measurement of the extent to which the proportion of a protected group at the station is statistically significantly different from the proportion which would obtain if employees were drawn from the workforce at random. Such tests may be used when cell sizes are at least five, thereby allowing its use throughout most of the country for stations with at least 25-50 or more employees, or for hiring data over several years for stations of almost any size. For example: a station hires 200 people over four years; five were minorities. Minorities make up 20% of the population. A chi-square test with $n = 400$ and one degree of freedom would yield $\chi^2 = 30.6573$ and $p \leq 0.00001$ -- meaning that the probability that those hired are a representative sample of the population is virtually zero.

Fourth, the Commission should use current reliable population estimates to evaluate minority representation in the workforce, and it should not delay the use of Census data after its release.^{271/} Although minority populations in many areas of the country are increasing rapidly, the Commission used 1980 Census data until well into 1993. See Sage, 10 FCC Rcd at 4429. In virtually every case, the use of this ancient data favors renewal applicants and disfavors minorities. We know of no other EEO enforcement body which uses thirteen year old data when more recent data is available. The use of current data is particularly critical, given that Census data undercounts minorities in the first instance.^{272/}

Fortunately, we are now in the middle of a Census cycle. Thus, a change in policy, announced now, would provide ample advance notice.

^{271/} Virtually all licensees use such sources as Duncan, BIA and SRDS for financial planning and sales of airtime. These sources each report current demographic estimates. None relies on 13-year old Census data. No licensee can seriously claim that it does not know the demographic composition of its own community, which it covers as a journalist and which it was presumed to know in order to be freed of the ascertainment obligation. See Deregulation of Radio, 84 FCC2d at 1036.

^{272/} In Wisconsin v. City of New York, 116 S.Ct. 1091 (1996) ("Wisconsin"), the court held that the federal government need not adjust Census figures to compensate for the undercounting of Blacks, Hispanics and other minority groups in the nation's cities and along the border." The Commerce Department had acknowledged that Blacks had been undercounted by 4.8%, Hispanics by 5.2%, Native Americans by 5.0% and Asian-Pacific Islanders by 3.1%. Id. We note that the Wisconsin court did not hold that the federal government may not adjust Census figures, only that it is not required to do so.

Fifth, the Commission should expand the scope of its statistical analyses to measure factors other than the representation of protected group employees on Form 395. Form 396 provides a snapshot of recruitment, hiring and promotion data, and Bilingual investigations provide even more useful data of this type. Percentage of parity analysis, similar to that used for employees reported on Form 395, might be used for this data as well.^{273/} The large cell sizes generated by applicant flow data over a period of years would endow this data with considerable value as a measure of the effectiveness of recruitment procedures. Data on hiring, spanning a period of several years, would be invaluable in assisting the Commission in its evaluation of the EEO performance of smaller stations, which have higher than average turnover rates. See p. 51 supra (discussing findings of the Tennessee Study).^{274/} Hiring data would also be valuable in revealing whether discrimination might have influenced the selection of employees from among the pool of applicants.^{275/}

^{273/} The Tennessee Study provides aggregate measurements of this data, and demonstrates that the appropriate variables can be defined to yield useful data on these criteria. See Exhibit 1, Appendix A.

^{274/} Small samples diminish the predictive value of statistical evidence, Teamsters v. U.S., 431 U.S. 324, 340 n. 20 (1977), but the problem is not insurmountable. When a small sample precludes a finding of statistical significance, a finding of discrimination can be based on the statistics if augmented by other evidence of discrimination, Segar v. Smith, 738 F.2d 1249, 1283-84 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985).

^{275/} In many instances, a station's EEO program is adequate, and the station is generating applicants, but few are ever hired. See Hester v. Southern Ry., 497 F.2d 1374, 1379 (5th Cir. 1974) ("[t]he most direct route to proof of racial discrimination in hiring is proof of disparity between the percentage of blacks among those applying for a particular position and the percentage of blacks among those hired.")

2. **Recidivism, including previous admonitions or sanctions or failure of a midterm review**

Thirty years ago, the D.C. Circuit declared that "[w]hen past performance is in conflict with the public interest, a very heavy burden rests on the renewal applicant to show how a renewal can be reconciled with the public interest. Like public officials charged with a public trust, a renewal applicant...must literally 'run on his record.'" UCC I, 359 F.2d at 1007. An EEO recidivist carries an even heavier burden of demonstrating that its past record -- stretching back many years -- should be attributed to accidental or random factors.

Unfortunately, the Commission has exhibited a troubling tendency to look the other way rather than grapple with recidivists.^{276/} While recidivists are not the only EEO violators the Commission should scrutinize,^{277/} they are especially

^{276/} See, e.g., BBC License Subsidiary, L.P., 10 FCC Rcd 10968, 10975 ¶35 (1995) ("BBC License Subsidiary") (Commission declines to revisit a previous renewal term in which it had found no EEO violations); Radio Ohio, Inc., 7 FCC Rcd 6355, 6358-59 ¶¶21-27 (1992) ("Radio Ohio") (declining to treat applicant as a recidivist even though it had an extremely poor EEO record during four license terms and drew sanctions in one of them); D.W.S., Inc., 7 FCC Rcd 7170, 7171 n. 6 (1992) (refusing to treat applicant as a recidivist although the applicant reported no top four category fulltime minority employees in twelve of the preceding fifteen years).

^{277/} A licensee's suggestion that its wrongdoing during one renewal term is but an isolated occurrence, an aberration, or was confined to a single investigation would prove too much. This "aberration" theory would excuse every licensee which commits misconduct only in one license term, and it would immunize every licensee from EEO scrutiny during its first eight years of operation. See Kathryn R. Schmeltzer, 7 FCC Rcd 8583, 8584 (Field Operations Bureau 1992) ("[r]egarding [the licensee's] statement that it has 'a history of overall compliance,' we note that this is the first time that [the licensee] has been inspected by the FCC, therefore, there has not been much of an opportunity to develop a history of either compliance or noncompliance.") We note that none of the renewal applicants designated for hearing on an EEO issue since 1972 was a recidivist. See pp. 185-186, Table 7 supra.

appropriate subjects for prosecution.

The Commission should announce a four-part policy for dealing with EEO recidivists.

First, all those receiving sanctions in a previous renewal term should receive Bilingual letters upon their next renewals to ensure that recidivists do not escape review.^{278/}

Second, the Commission should examine a renewal applicant's record in the just-concluded license term in light of its performance in an earlier term or its showing at a Midterm Review.^{279/} While not dispositive, previous misconduct is a piece of evidence worthy of consideration along with other evidence of a continuing EEO violation. Viewed in isolation, the earlier term's performance may not have quite been troubling enough to have resulted in sanctions. However, the same conduct, when repeated,

^{278/} One of the Commenters herein, the National Rainbow Coalition, routinely reviews the EEO programs of every renewal applicant sanctioned in a previous term. It is happy to report that in the past year, it has only identified two recidivists. Sanctions usually -- but not always -- get a licensee's attention and bring about compliance.

^{279/} In its discussion of forfeitures, the NPRM proposes that a "reminder, admonishment or caution given to the licensee by the Commission regarding a certain aspect or aspects of the licensee's EEO program in the previous license term would not be considered a prior EEO violation for purposes of these guidelines." NPRM, 11 FCC Rcd 5154, 5172 n. 46. Irrespective of the merits of this proposal for forfeiture purposes, the Commission should treat a previous admonishment as having placed a licensee on actual notice that its behavior was unacceptable. Thus, a repetition of previously admonished conduct should give rise to an inference of recidivism.

A licensee sanctioned two renewal terms ago, but not sanctioned in the immediate previous term, who commits the same misconduct again in the current renewal term, should still be considered a recidivist. A renewal does not wipe the slate clean: the licensee is still on notice that its conduct is sanctionable. See Anti-Drug Abuse Act of 1988, 6 FCC Rcd 7115 (1991) (holding that a conviction for drug dealing can lead to a revocation proceeding regardless of when the misconduct occurred).

might well be properly sanctionable.^{280/}

Third, recidivist EEO violators should be sent to hearing irrespective of whether or not the violations are suggestive of

^{280/} There are many reasons why conduct in an earlier license term may not have resulted in sanctions. The Commission may have been going through a period when it seldom enforced the EEO Rule (e.g., from 1981 through 1987). The conduct may have been "concealed until after the end of the license term in which it took place[.]" Deregulation of Radio (Reconsideration), 87 FCC2d 797, 822 ¶58 (1981). The Commission may simply have erred in granting the earlier application. A ministerial grant of an application without an affirmative ruling on the merits does not affirmatively validate the licensee's previous conduct. See Clyde W. Pierce, 4 FCC Rcd 2378 (1989); Kent S. Foster, 54 FCC Rcd 1700, 1701-02 (Mobile Services Division, 1990).

While a licensee cannot be retroactively sanctioned for misconduct in previous renewal terms, a renewal does not act as an expungement order causing one renewal term's misconduct to vanish as evidence of a pattern reaching into successive renewal terms. The issuance of a license renewal does not prevent the Commission from subsequently noticing facts of record about a licensee's performance during the license term in question. NBMC, 775 F.2d at 342 (directing the Commission to examine noncompliance in current license term in light of noncompliance in previous license term); BHA Enterprises, Inc., 31 RR2d 1373, 1404 (ALJ 1974) (reaching back four renewal terms to prove a "continuing pattern of conduct of this licensee over the years which was violative of the Act and regulations...which calls for the imposition of the sanction of revocation of the licenses").

In two recent cases, the Commission has moved positively in the direction of considering multi-license term statistical data. See Price Broadcasting Company (Chief, Mass Media Bureau, released May 18, 1992) ("Price") (reporting the results of a Bilingual investigation based on charges of intentional discrimination during current and previous renewal terms); Heritage-Wisconsin Broadcasting Corp., 8 FCC Rcd 5607 (1993), recon. denied, 10 FCC Rcd 8132 (1995) ("Heritage") (imposing sanctions against various stations owned by the group owner after mid-term Bilingual inquiry).

intentional discrimination.^{281/}

Fourth, an EEO-sanctioned licensee should be permitted to apply for and earn a Determination of Rehabilitation. Such a Determination would entitle the licensee to be treated as a non-recidivist in subsequent renewal terms, as to the specific conduct which led to the earlier sanctions.^{282/}

^{281/} In Tulsa 23, 4 FCC Rcd 2067 (1989), the Commission issued reporting conditions for the second renewal term in a row. In her Concurring Statement, Commissioner Patricia Diaz Dennis questioned this outcome, correctly observing that "progressive discipline is a well-established, time-tested approach for ensuring a corrective change in an employer's behavior...a more serious sanction is now in order." Id. at 2070. Now that the renewal term is eight years, a "three strikes" policy would result in no licensee going to hearing for repeated violations beginning in 1996 until the year 2020. In light of the longer renewal term and the greater privilege it awards to broadcast licensees, the Commission should adopt a policy that recidivists go to hearing.

^{282/} Such a Determination would be issued if:

1. All wrongdoing employees have undergone retraining or been fired;
2. Any individual or class victims have been made whole;
3. The misconduct has been entirely corrected; and
4. The correction continued even after the licensee was no longer operating under the scrutiny attendant to a Bilingual investigation, a hearing, EEO conditions, a short term renewal, or a petition to deny.

Consistent with Bilingual II, 595 F.2d at 634, the Commission should afford a previous petitioner to deny an opportunity to comment on the appropriateness of the issuance of a Determination of Rehabilitation.

3. **EEO noncompliance at commonly owned stations or headquarters operations in other markets**

In Heritage, 8 FCC Rcd at 5607, the Commission took jurisdiction of a complaint that a multiple station owner violated the EEO Rule in most of the cities in which it operated,^{283/} even though the stations' renewals came due at different times.^{284/}

Heritage is a bright spot in the Commission's recent EEO jurisprudence.^{285/} A policy of enhanced review of group owners' bonafides is especially appropriate after the passage of the Telecommunications Act, which allowed group owners to become much larger and awarded them a tremendous competitive advantage over individual station owners. See pp. 65-68 supra.

As we have noted, headquarters operations have relatively poorer EEO records than licensed stations. They are not subject to direct EEO regulation, although they do report data on Form 395.

^{283/} The Heritage principle had long been applied in reverse, with evidence of EEO compliance at other stations being invoked as evidence in mitigation of possible EEO noncompliance at one facility. See KSDK, Inc., 93 FCC2d 893 (1983), Georgia State Board of Education, 70 FCC2d 948, 967 (1979) and Scripps Howard Broadcasting Co., 67 FCC2d 1553 (1978) ("Scripps") (invoking commonly owned stations' acceptable EEO performance to support decision not to impose sanctions at the station then under review).

^{284/} In Heritage, the Commission did not repeat the error pointed out by the D.C. Circuit in Tallahassee NAACP v. FCC, 870 F.2d 704, 710 (D.C. Cir. 1989) ("Tallahassee"). In Tallahassee, the Court ruled that the Commission may not ignore minority exclusion at co-owned stations on the pretext that those stations' renewals are not before the Commission at that moment.

^{285/} Before Heritage, the Commission's refusal to consider co-owned stations' records as evidence of misconduct had been taken to extremes. See, e.g., Federal, 59 FCC2d at 371 (designating an EEO issue against a station where there was an individual complainant, but refusing to do so against a sister station 65 miles away because of the absence of an individual complainant. Both stations used explicitly sex-segregated job application forms asking men their announcing credentials and women their typing credentials).

See pp. 40-42 supra. With the growth of superduopolies, headquarters operations are likely to grow in size at the expense of employment at regulated stations. See pp. 95-100 supra. Thus, headquarters units should also be covered by the Heritage principle.^{286/}

The Commission should continue to retain the option of calling in renewals early when many of a group owner's facilities manifest a continuing violation of the EEO Rule.^{287/}

^{286/} The Commission has long recognized that a licensee's EEO policies at facilities besides its currently-owned broadcast stations may be useful evidence of whether or not there is a corporate policy of discrimination. See Town and Country Radio, 65 FCC2d 694 (1977) (considering effect of EEO violations at stations previously owned by a construction permit applicant); Scripps, 67 FCC2d at 1554 (considering a newspaper's EEO behavior as evidence of the EEO policies of a commonly owned broadcaster). See also King's Garden, 34 FCC2d at 937, and Bob Jones, 25 FCC2d at 723 (considering the effect of discriminatory policies by, respectively, a religious organization and a university); cf. Chapman, 24 FCC2d at 282 (considering the character impact of a broadcast company shareholder's participation in a decision to maintain segregation at a cemetery). In determining which nonlicensed facilities are closely enough related to the broadcast station to allow EEO violations at the nonlicensed facility to support an inference that there is a corporate policy of violating the EEO Rule, the Commission might apply the test used to determine whether a subsidiary and its parent are considered integrated for Title VII purposes. Such enterprises are considered integrated when the subsidiary is wholly owned and the parent exercises control over the subsidiary's employment decisions. See Armbruster v. Quinn, 711 F.2d 1332, 1337 (6th Cir. 1983). Armbruster essentially adopted the test formulated by the NLRB and approved in Radio Union v. Broadcast Service, 380 U.S. 255 (1965) (per curiam). That test assesses the degree of (1) interrelated operations; (2) common management; (3) centralized control of labor relations, and (4) common ownership. See also Wynn v. Dixieland Foods, Inc., 49 FEP 416 (M.D. Ala. 1989) (discovery was directed at entire division of 50 stores, due to parol evidence that Blacks were discriminated against throughout the entire division).

^{287/} See Transferability of Broadcast Licenses, 53 RR2d 126, 127 (1983) ("[w]here serious charges are made against a multiple station owner some of whose license terms have not expired, the Commission retains the option, under §73.3539(c) of its rules, to direct the broadcaster to submit renewal applications in advance of their scheduled due date. See Leflore Broadcasting Co., Inc., 36 FCC2d 101 (1972)").

4. **EEOC charges, whether or not there is a final order, in exceptional cases**

When it adopted its nondiscrimination policy, the Commission understood that to eliminate discrimination from the broadcasting industry, it must consider evidence that specific individuals were victims of that discrimination. Thus, the Commission determined that "a petition or a complaint raising substantial issues of fact concerning discrimination in employment practices calls for full exploration by the Commission before the grant of the broadcast application before it....Furthermore, the issue is one which would in almost all cases where a substantial showing is made, require a hearing for its resolution." Nondiscrimination - 1968, 13 FCC2d at 771. A year later, the Commission concluded that it need not "await a judgment of discrimination by some other forum or tribunal" in order to help implement the national policy against discrimination. Nondiscrimination - 1969, 18 FCC2d at 241.

Just seven years later, the Commission adopted the NBC Policy over the dissents of Commissioners Hooks and Fogarty. Under that policy, the Commission generally declines to review allegations that a broadcaster has violated the the nondiscrimination provision of the EEO Rule if those allegations were made by a person claiming, in a Title VII charge, to have been a victim of that discrimination, and if there had yet to be a "final order" of the EEOC or a court. NBC, 62 FCC2d at 582.288/

288/ A year later, in The New York Times Broadcasting Service, 63 FCC2d 695, 700 (1977) ("New York Times"), the NBC Policy was extended even beyond the final order stage. In New York Times, the 6th Circuit had rendered a final order that discrimination had occurred. Nonetheless, the Commission expressed only its "concern with the court's finding" and indicated it would await the results of the proceedings on remand in the District Court before "deciding whether further Commission action is warranted."

It is time to return to the Commission's 1969 approach. Ideally, the Commission should repeal the NBC Policy, but at a minimum the Commission should announce that as part of its Zero Tolerance Policy, it will be more flexible in considering some individual allegations of discrimination.

The "final order" rule, as applied to discrimination cases, immunizes virtually all discriminators from Commission review. Twenty years of experience with the NBC Policy have yielded only three cases in which the FCC has had an opportunity to review a final order.

First, in 1977, citing the NBC Policy, the Commission declined to consider six pending Title VII charges against two large Nashville radio stations, WSM, 66 FCC2d at 1006-1008 ¶¶29-32; see n. 19 (dating the litigation to 1973). The litigation concluded in 1989 with final court orders of race discrimination against three of the complainants. Unfortunately, by then, the stations had changed hands three times. See p. 68 n. 75 supra.

Seven years later, in Washington's Christian Television Outreach, Inc., 99 FCC2d 395, 423-24 (Rev. Bd. 1984) ("WCTO"), the Review Board took into account a final order of discrimination against a construction permit applicant, but found that the case was an aberration since it involved a Black woman discriminating against a Hispanic woman. There was overwhelming evidence that the incident was in fact anomalous.

Finally, in Atlantic City Community Broadcasting, Inc., 6 FCC Rcd 925, 927 ¶¶12-14 (Rev. Bd. 1991) ("Atlantic City"), the Review Board disqualified a construction permit applicant for failing to report an adverse final order of a jury in a sexual harassment

case. However, the Board did not reach the question of whether the sexual harassment itself would have compelled denial of the application. Id. at 936 n. 3.

These three cases are all the Commission has to show for the NBC Policy in twenty years. Obviously, the NBC Policy is an abject failure.

There are three reasons why Title VII charges almost never result in a final order.

First, the charging party must be very highly motivated. Broadcasting is a close-knit industry in which an accommodating personality, a reputation for loyalty, and a willingness to conform are considered desirable attributes. Our experience teaches us that broadcast professionals' fear of retaliation or "blackballing" is enormous.^{289/} Broadcasting is not a highly unionized industry, and civil rights organizations have few resources to assist discrimination victims. Thus, even the rare individual who places her career on the line by filing a Title VII charge will find it quite difficult to spend perhaps a decade of her life in litigation.

Second, with their licenses potentially at stake, broadcasters have an enormous incentive to delay the resolution of the case and wear down the resource-poor plaintiff. We have never yet seen a case in which a civil rights plaintiff's resources exceeded those of the broadcaster.

^{289/} See, e.g., Field Communications Corp., 68 FCC2d 817, 819 n. 4 (1978), in which the Commission declined to consider a citizen group's affidavit that a Black employee was a victim of discrimination but feared retaliation if she came forward.