

2. **The Commission should revise its "dominant minority group" policy to focus on each minority group with at least 5% representation in the workforce**

Minority groups are not fungible. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1989) (holding that a remedial minority contracting program was not narrowly tailored when applied to racial groups not shown on the record to have been victimized by discrimination specific to their respective groups).

Discrimination against some minority groups but not others is common. Thus, the Commission's EEO enforcement effort must not immunize broadcasters from accountability for discrimination against one group because they hire members of another group.

The "dominant minority group" policy solves this problem. Mission Central, 56 FCC2d at 782, 784.^{362/} The policy is a wise one, and needs but one important and easy correction: the Commission has never said how significantly represented a minority group must be in the community to be entitled to recognition in an EEO program. A bright-line rule would provide guidance to everyone. We recommend 5%, the same figure which triggers the need to have an EEO Program for minorities generally.

^{362/} See also Bilingual II, 595 F.2d at 625 n. 7 ("[e]vidence of actual discrimination in hiring, evidence of recruiting aimed selectively at one minority, and evidence that a particular group has had little or no representation on a station's payroll are clearly relevant, and should be examined to determine whether an employer is in fact discriminating against a 'nondominant' minority, notwithstanding acceptable overall figures"). The "dominant minority group" policy does not contemplate scrutiny of a renewal applicant's employment of a group only slightly represented in a community. Compare Letter to Howard B. Dogloff (WTHZ-FM, Tallahassee, FL), 5 FCC Rcd 7695, 7696 (1990) (Hispanics, being 1.7% of the population of the MSA, were not a significant group in the labor force) with KRMD, Inc., 53 FCC2d 1179, 1186 (1975) (finding Blacks the dominant minority group where they comprised 33% of the SMSA and 99% of the composite minority population in the SMSA).

3. **"Management" should be precisely defined to require that a "manager" supervises other persons**

Whether or not the Commission adopts a zone of reasonableness for management, it should define management to better suit the goal of diversity. While broadcasters seldom convert their janitors to managers anymore,^{363/} in our experience it is still common for broadcasters to assign management titles to persons who don't manage anyone at all and who have little influence on program diversity.

The Commission should ensure that "category upgrading" is not an option available to broadcasters seeking a legal means of creating a misleading appearance of equal opportunity.

^{363/} New Mexico Broadcasting Co., Inc. (Decision), 87 FCC2d 213, 246 ¶83 (1981) (janitor categorized as a manager). See Window Dressing at 88-107 (describing extensive misclassifications of women and minorities as officials and managers on Form 395. The minority and female "managers" often supervised no one and earned low salaries).

D. **The Commission should improve the effectiveness of Bilingual investigations**

The Commission operates at a disadvantage when it conducts a Bilingual investigation: it knows nothing, and the licensee knows or ought to know everything. Bilingual investigations use the weakest evidence gathering tool in the arsenal of discovery: the written interrogatory. With the benefit of thoughtful contemplation, the respondent may craft the least revealing answer he can legally submit.^{364/} Thus, it is not surprising that the only Bilingual investigations which have led to hearing have been those in which the licensee was careless or lied. The principal

^{364/} Professor Wright explains that

[i]nvariably much of the efficacy that attaches to oral examination on deposition is lost when [Fed. Rules Civil Proc.] Rule 33 interrogatories are used. At the very outset, the interrogated party is fully apprised of all the questions that will be addressed to him. He is accorded time to ponder and reflect on his answers and to formulate them in writing with exactness and caution. He may take the advice of counsel and secure the assistance of other persons in framing his replies, benefits that he does not enjoy at a rapid oral examination. Moreover, the examining party is handicapped by the fact that he is required to formulate all of his questions in advance of receiving answers to any of them. Attempts at evasion, which might be met by a persistent oral examination, cannot be easily dealt with. The flexibility and the potency of oral depositions is in large part lacking in written interrogatories to an adverse party.

Wright, Law of Federal Courts 576 (4th ed. 1983).

deficiency in Bilingual investigations is that they never identify discriminators who are careful and truth-telling.

Since 1987, the Commission has been faithful to the requirement of Bilingual II that it conduct investigations when a station's EEO performance is languishing or its EEO program is unacceptable. However, we are fearful that the Commission may have quietly retreated from the requirements of Bilingual II. This June, in Sandab, FCC 96-305, the Commission granted two renewal applications without a Bilingual investigation. The applicant did not file a substantive opposition to a petition to deny; it reported no minority employment in the top four job categories for five years, and it invoked a number of questionable excuses (e.g. the supposed predominance of minorities in agricultural employment) as reasons for its poor EEO performance (see p. 266 supra). The renewals were granted unconditionally by the full Commission, even though the Bureau is authorized to grant unconditional renewals. See 47 CFR §§0.283(a)(4) and (b)(1).

Our purpose here is not to argue the merits of Sandab, but to inquire whether Sandab was intended as a signal by the full Commission that it is returning to the 1981-1987 era during which it initiated approximately four Bilingual investigations (one of which was a sham; see Beaumont, supra, 854 F.2d at 505).^{365/} We trust that if the Commission decides -- as it did between 1981 and 1987 -- to disregard the requirements of Bilingual II, it will say so openly in this rulemaking proceeding with the benefit of a full record.

^{365/} Since Sandab is in litigation, we are providing a copy of these Comments to the licensee's counsel.

1. **The Commission should seek data for the entire license term**

When the Commission performs a Bilingual investigation, the period of time for which data is requested is "usually the last three years of the license term or however long the present licensee has owned the station, whichever is less." NPRM, 11 FCC Rcd at 5174 ¶44. This appears to be a matter of custom. If there is a reason for the review period being three years rather than some other period, the Commission has never disclosed it. Since licensees maintain records throughout the full term, there is no rational basis for the Commission to deliberately shield itself from these records.

The effect of a three year review period is that every licensee is EEO-immune for the first five years of its term. These five years operate as a "safe harbor."

The availability of eight years of data would assist the Commission by making possible more sensitive statistical evaluations of a licensee's performance. For example, stations with few employees, but high turnover rates, generate a sizeable number of hiring opportunities over the course of several years.^{366/} These hiring opportunities would provide a far

^{366/} The Tennessee Study found that "[t]he majority of stations are essentially exempt from detailed EEO review now, owing to nothing more than the presence of a low turnover rate in the reporting year. Fifty-eight percent of the stations reported three or fewer top four category hires during the reporting year, and 34% reported three or fewer fulltime hires during the reporting year. Virtually no stations whose Form 396 EEO programs reported three or fewer hires have ever been the subject of a Bilingual investigation, irrespective of how many persons had been hired in earlier years or how many persons are likely to be hired in subsequent years." See p. 48 supra.

superior database than Form 395 data for evaluating the effectiveness of a smaller or medium sized station's EEO program.

Furthermore, an eight year review period is essential if the Commission is to accurately assess forfeitures. Forfeitures may be assessed for "each violation or each day of a continuing violation."^{367/} Without a full license term of data, the Commission cannot know how many violations, or how many days of a continuing violation, should be the basis for an accurate calculation of a forfeiture.

Finally, an eight year review period would underscore the seriousness and nonwaivability of the requirement that licensees operate an effective EEO program throughout their license terms.

^{367/} This language is found in 47 U.S.C. §503(c)(2)(A) (1996) and in the implementing rule, 47 CFR §1.80(b).

2. **The Commission should use the Cable SIS Form to test for deliberate noncompliance**

In its enforcement of the Cable EEO Rule, the Commission has developed a very effective written audit form, the "SIS" (Supplemental Investigation Sheet). The SIS is used to validate written claims in EEO programs for 20% of cable systems each year.^{368/} SIS forms are used, inter alia, to determine whether a cable system honored the promises it made in its EEO program to notify specifically named organizations whenever a job is open.^{369/}

The results are often quite revealing. In our experience, between 10% and 20% of cable systems simply ignore their EEO programs after they file them. Of course many of these cable systems knew when they filed their EEO programs that they would never implement them.

If applied to broadcasting, SIS forms would have value well beyond their ability to identify misrepresentations. If licensees know in advance that they may have to prove their bonafides, they will be much more careful to fully implement their EEO programs.

^{368/} See EEO R&O - 1985, 102 FCC2d at 601-602; EEO NPRM - 1993, 8 FCC Rcd at 267 ¶4; EEO R&O - 1993, 8 FCC Rcd at 5394 ¶28.

^{369/} A slight modification in Form 396 would be required before SIS forms may be applied to broadcast EEO regulation: the model EEO program form would need to include a statement to the effect that the initiatives set out as having been accomplished over the preceding twelve months will be continued in the future, or, if not, that other specifically identified procedures will be followed. See pp. 325-333 infra.

3. **The Commission should request names and last known addresses and phone numbers of possible witnesses, and it should interview key witnesses**

As we have noted, Bilingual investigations use the weakest of discovery tool, the written interrogatory. See p. 290 supra. Thus, the Commission should maintain the flexibility to use more powerful investigative techniques where appropriate.

In Beaumont, 854 F.2d at 508-10, a case involving the departures of all but one of a station's Black employees soon after the format changed, the Court held:

[t]he Commission had an obligation to be more vigilant in investigating the circumstances of these departures. With only one exception, the licensee presented no affidavits from the departed employees to corroborate its accounts. Nor did it provide the Commission or the petitioners with the full names and addresses of the departed employees. The Commission approved the license renewal without requiring the licensee to submit even this most basic information. In doing so, it tolerated a situation in which only the party that was accused of practicing intentional discrimination had access to the alleged victims. In short, the Commission did not conduct its inquiry in a reasonable way.

* * *

The licensee did not reveal the full names and addresses of, or other identifying information about, the terminated black employees. Without this information, the Commission has only the licensee's possibly self-serving - and sometimes inconsistent - explanations for their departure....In light of the licensee's exclusive access to the black former employees, the Commission erred in not taking more affirmative steps to investigate the validity of the licensee's accounts....[the Commission should have obtained] the full names and addresses of, or other identifying information about, the terminated black employees. Without this information, the Commission has only the licensee's possibly self-serving - and sometimes inconsistent - explanations for their departure.

Beaumont was not the first time the Court found it necessary for the Commission to interview witnesses. In Bilingual II, 595 F.2d at 635 n. 59, the Court suggested that "the names and addresses of individual minority employees, and the types of jobs they hold" might yield additional useful information.

The Commission certainly should interview witnesses in any case resembling Beaumont. Where there have been at least three discrimination complaints, or there have been a number of unexplained departures of protected group employees (even if they did not occur simultaneously; see n. 370 infra), the Commission should interview the former employees, any unsuccessful protected group job applicants, and any good samaritan or other corroborating witnesses.^{370/} The facts need not exactly parallel Beaumont's

^{370/} Most law enforcement agencies treasure good samaritan witnesses, and at times the Commission has taken them quite seriously. See, e.g., Gaines, 10 FCC Rcd at 6591 ¶17 (EEO issue had been added when a former station executive provided a declaration stating that a former General Manager had informed him that the owner did not want Blacks working at the station. The former executive also stated that he was scorned by the program director for having hired a Black technician); New Mexico (HDO), 54 FCC2d at 135 (good samaritan, who was a job applicant, alleged that the President and General Manager of the licensee had informed him that "I don't hire Mexicans, Niggers or anybody with long hair." The case was designated for hearing.)

[n. 370 continued on p. 297]

facts. Discriminators, like other lawbreakers, try to stay ahead of the law in the strategies they employ to break the law.^{371/} Interviews with witnesses, aimed initially at pinning down the time

^{370/} [continued from p. 297]

However, the Commission has not always been kind to good samaritan witnesses. See, e.g., Lincoln Dellar, 8 FCC Rcd 2582, 2586 ¶¶30-31 (MMB 1993) (two good samaritans alleged, inter alia, that a station had misclassified a White woman as Black, had sexually harassed several women, and had advertised in the newspaper without identifying itself as an EEO employer, but the Commission rejected these allegations largely because they were unspecific in some respects and were not made under penalty of perjury); Marin Broadcasting Company, Inc., Debtor in Possession, FCC 96-190 (released May 2, 1996) at 5 (good samaritan witness' allegations were rejected without hearing because he stood alone against several people the licensee controlled and because he made his allegations "more than three years after the petition to deny the renewal applications was filed. Thus, [the witness] appears to have been motivated by antipathy toward [the licensee], rather than by a desire to set the record straight"); cf. Field Communications Corp., 68 FCC2d 817, 819 n. 4 (1978) (Commission would not consider a citizen group's affidavit that a Black employee was a victim of discrimination but feared retaliation if she came forward. The FCC felt it was enough that the EEOC's rules protected her against retaliation).

^{371/} A case should not have to exactly fit the Beaumont model.

In Beaumont, the licensee changed format from Black to country-western. The licensee assumed that its Black announcers and sales staff would be incapable of working in the new format, but the licensee never gave them a chance to try out. Within a few weeks' time, all but one had left the station. In response to a Bilingual letter, the licensee claimed they'd each left voluntarily. The NAACP "broke" the Beaumont case when it realized that most of the Black employees who had supposedly left voluntarily had each actually left the day after a White person had begun work in the same job.

[n. 371 continued on p. 298]

sequence of events, should root out instances of deliberate discrimination.^{372/}

^{371/} [continued from p. 297]

There are several reasons why stations might choose to change the racial composition of the staff to nearly all-White. A change in format is one reason, but sometimes new owners, or a new manager, will come onto the scene with a preference for working in a predominately White environment. After Beaumont, stations know that they cannot accomplish this type of staff "lightening" instantaneously -- so they do it gradually, over the course of as many as two years, to minimize the likelihood that anyone will notice. Sometimes the process can be left to natural attrition -- allowing minority employees to continue to work, but letting them know that they will never be promoted, so that they will eventually and quietly leave. Care is taken to provide for them financially upon termination so that they will never file EEO complaints. Thereafter the station may send job notices to recruitment sources to create the appearance of EEO Rule compliance, but it will actually replace the vacant positions through word of mouth contacts by White staff members.

Is this discrimination? Of course -- and it is exactly the pattern of subtle discrimination which some broadcasters have adopted to get around cases like Beaumont.

^{372/} For example, when did new management or ownership arrive, or when was a programming change announced? When was each employee evaluated? Did her evaluations change, and when did they change? Did recordkeeping systems change, and when? Did formerly stored records begin to be destroyed, and when? Before a person began work, was he or she interviewed, introduced to the staff, or hired, before the job was posted with recruitment sources? Once these time sequences are clear, the Commission will usually know whether a case is a hearing case. If it is, the discovery process will permit an administrative law judge to sort out all of the facts.

Another situation calling for witness interviews arises when a licensee claims that it cannot respond fully to a Bilingual letter because its personnel records are incomplete or missing. Presently, in such cases, the Commission finds that the licensee did not "self-assess." It then issues a forfeiture, and the case is over. Instead, the Commission should recognize that the absence of written records does not mean that the desired information is gone forever. In a nearly all-White station, the presence of any minority job applicants or employees will be difficult to forget. Thus, in such a case, the Commission should interview the General Manager, Personnel Director and records custodian to help them reconstruct as much of the missing information as possible. The questions asked in these interviews will be fairly standard. In instances where the records are mostly complete, these interviews could usually be conducted by telephone.

In its treatment of witnesses, the Commission should exercise care to protect witnesses from retaliation. Broadcasting is a close-knit industry, and "blackballing" is common. Thus, the Commission should employ the same witness protection techniques used by EEOC investigators. In appropriate cases, the Commission should avail itself of the procedures flowing from Section 403 of the Communications Act.

4. **The Commission should use targeted field audits, with on-site review of personnel files, when the answers to written Bilingual questions are especially troubling**

In 1985, the Commission adopted procedures for field audits of cable systems, to be used for "situations that present problems during the paper investigation."^{373/} While field audits have not been used often enough, they are quite successful when they are used,^{374/} and they undoubtedly have a prophylactic effect on EEO compliance. These audits include a review of personnel files and in-person interviews with managers and records custodians. The audits are especially valuable in enabling Commission staff to assess the demeanor and candor of the cable system officials. These procedures should be adopted for broadcasting as well.^{375/}

We emphasize that field audits are not a substitute for the evidentiary hearing mandated by Section 309 of the Communications Act. Instead, by focusing the evidence, they will either obviate the need for a hearing or make a hearing much easier for all sides to try because most of the evidence can be stipulated in.

^{373/} EEO Report and Order - 1985, 102 FCC2d at 604.

^{374/} See Adelpia Communications Corporation's Unit 305, Palm Beach County, Florida, 9 FCC Rcd 908, 909 ¶5 (1994) ("Adelpia") (imposing \$121,000 forfeiture for violations uncovered during site visit); Prime Cable, 5 FCC Rcd 4590 (1990) (imposing \$18,000 forfeiture for violations uncovered during site visit).

^{375/} In one case, nineteen years ago, the Commission did conduct a broadcast site visit. The Commission conducted the site visit after it received documents stating that Form 395's had been revised to delete several fulltime people to make it appear as though the stations' employment profile was more diverse than it really was. WSM, 66 FCC2d at 1000 ¶19. Three years later, the Commission stated that it had expanded and reorganized its EEO staff, which would "permit on-site reviews in appropriate cases." The Advancement of Black Americans in Mass Communications, 76 FCC2d 385, 392 n. 11 (1980). Not one such "appropriate case" has arisen in the past sixteen years.

5. **The Commission should provide injunctive relief to protect the public from continuing EEO violations while investigations or hearings are underway**

If one recalls the prehearing phase of nearly every EEO case which eventually went to hearing, there must have been a time when the Commission's staff first recognized that the licensee was a rogue. This probably did not occur when the staff sent its first Bilingual letter, or even the second, which may have been necessitated by honest confusion or miscommunication. However, by the time the staff found it necessary to send a third Bilingual letter, it probably knew that the public needed protection from that licensee immediately. In such instances, the Commission should issue an order in the nature of a preliminary injunction, delineating EEO-protective personnel practices which must be followed while the investigation or hearing is in progress.^{376/}

In addition, the Commission should leave open to petitioners, and reserve for use on its own motion, the availability of temporary restraining orders in especially egregious cases. These orders should track similar orders issued on behalf of shareholders when company management may have committed serious malfeasance, e.g. by looting the treasury. In such a case, a court will name a trustee to oversee spending, and the court will often impose conditions on which actions require the trustee's approval. An order of this type in an EEO case might be appropriate, for

^{376/} The EEOC lacks injunctive powers, having been granted only the power to investigate and make cause findings. See 42 U.S.C. §2000e-5 (1996). However, the FCC has broad authority under §312(b) of the Communications Act to issue cease and desist orders. This authority is manifested in §1.91 of the Rules.

example, when it appears that the licensee is about to fire most of the minority employees in circumstances suggestive of discrimination. Such an order will preserve the status quo, protect the minority employees' jobs, and ensure that all employees are made available for interviews when the Commission conducts a site audit. See p. 300 supra.^{377/}

The Commission does not hesitate to act injunctively when the public interest so requires. See, e.g., Kentown Speedway and Hobbies, 1 FCC2d 889 (1965) (enjoining use of incidental radiation devices). It prefers not to await license renewal time before acting on complaints of pornographic broadcasts. Video 44, 3 FCC Rcd 757, 759 ¶21 (1988); see Infinity Broadcasting Corp. of Pennsylvania, 2 FCC Rcd 2705 (1987). It insists upon mid-term relief in election law (reasonable access) cases. Implementation of 47 U.S.C. §312(a)(7), 53 RR2d 89, 93 (1983). No lesser standard should govern continuing civil rights violations.

^{377/} Only in extremely rare cases would it be necessary to appoint a trustee to supervise a licensee's personnel policies. In such an instance, the Commission might draw from the ranks of retired administrative law judges or other retired Commission officials.

E. In appropriate cases, the Commission should call in renewals early

In Leflore Broadcasting Co., Inc., 36 FCC2d 101 (1972)

("Leflore (Early Renewal)") the Commission called in a renewal application early when the licensee changed format from Black to country/western, locked out the Black announcers, and did not give them a chance to try out in the new format.^{378/} We consider Leflore (Early Renewal) to reflect the Commission's EEO jurisprudence at its very best.

Leflore (Early Renewal) was all the more remarkable because, at the time, the renewal term was only three years. With an eight year term now, the need not to await the next renewal window will present itself far more frequently than it did in 1972.^{379/}

Early renewals enable the Commission to act quickly -- e.g., before a station is sold or before the owners disappear into an LMA, or before additional EEO violations are committed. In this

^{378/} The Commission's consideration of construction permit applicants is the closest logical parallel to the situation which would obtain if it discovered a serious EEO violation when the next renewal window is still years away. Like broadcasters in the early years of an eight year renewal term, construction permit applicants will face renewal windows only in the distant future, if ever. The Commission (by delegated authority) has not hesitated to designate EEO issues in construction permit cases rather than await a grant and subsequent renewal window. See Atlantic City, 6 FCC Rcd at 925, 927 ¶14; Town and Country Radio, 41 RR2d 1177, 1180 (Rev. Bd. 1977); Central Texas Broadcasting Co., Ltd., 47 RR2d 1449 (Kuhlmann, ALJ, 1980).

^{379/} Early renewals are authorized by Section 312(a)(2) of the Communications Act, which provides for revocation due to "conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application." Section 312(a)(2) of the Act is implemented by Section 73.3539(c) of the Rules.

way, the Commission can hold a licensee accountable for conduct which is "capable of repetition, yet evading review."^{380/}

The use of early renewals is uncommon, in part because most petitions to deny are filed against renewal applications.^{381/} Early renewals would most likely be appropriate in five situations: (1) an especially poor television midterm review; (2) a midterm complaint serious enough to result in the issuance of a Bilingual letter at renewal time; (3) a case in which EEO reporting conditions were ignored;^{382/} (4) a case "[w]here serious charges are made against a multiple station owner some of whose license terms have not expired,"^{383/} or (5) a case where serious EEO allegations are made in a challenge to a transfer or assignment application, since the applicant could long postpone accountability by voluntarily dismissing the application.

^{380/} Roe v. Wade, 410 U.S. 113, 124-25 (1973). See also Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976); Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911).

^{381/} Before Leflore (Early Renewals), early renewals were fairly common. See, e.g., Herbert P. Michels (WAUB), 17 RR 557, 560 (1958), recon. denied, 17 RR2d 560 (1958); Albuquerque Broadcasting Co. (KOB), 25 FCC 683, 792 (1958); Narragansett Broadcasting Co. (WALE), 7 RR 37, 63 (1951). Since Leflore (Early Renewals), the Commission has repeatedly manifested its readiness to call in renewals early. See WWOR-TV, Inc., 6 FCC Rcd 6569, 6574 ¶21 (1991); Tulsa 23, 4 FCC Rcd 2067, 2070 n. 12 (1989) ("Tulsa 23"); Greater Portland Broadcasting Corp., 3 FCC Rcd 1953, 1954 (1988); Transferability of Licenses, 53 RR2d 126, 127 (1983) ("Transferability"); Screen Gems, Inc., 46 FCC2d 252, 288 (1974); Shawn Phalen, 6 FCC Rcd 2789, 2801 n. 33 (Miller, ALJ, 1991) (subsequent history omitted). Nonetheless, since Leflore (Early Renewals), the Commission has never called in a renewal early, although in Heritage, 8 FCC Rcd at 5607, and in Price, supra, it did conduct midterm Bilingual investigations.

^{382/} See Tulsa 23, 4 FCC Rcd at 2070 n. 12.

^{383/} See Transferability, 53 RR2d at 127.

F. The Commission should outlaw agreements which require employees to forego their civil rights as a condition of employment

Recently, we have become aware of a dangerous new strategy being employed by some broadcasters to immunize themselves from EEO liability: requiring their employees, both new and tenured, to execute company-drafted, company-friendly, binding agreements never to file an EEO charge or complaint with the EEOC or the FCC, or even be a witness for someone else before the FCC or EEOC.

We consider these agreements to present the greatest threat to equal opportunity in broadcasting in a generation.

We refer to agreements compelling an employee to agree that any EEO complaints will be subjected to binding arbitration as "compulsory binding arbitration agreements." Agreements by which employees may, but are not required, to agree that any EEO complaints will be subjected to binding arbitration are "voluntary binding arbitration agreements."^{384/} We urge the Commission to ban compulsory binding arbitration agreements, and to establish clear and fair conditions governing voluntary binding arbitration agreements.

The Commission may be unfamiliar with these agreements. Form 396 asks licensees to report whether there have been any discrimination complaints. However, as far as we know, no renewal applicant has yet included a statement on Form 396 to the effect

^{384/} Agreements to submit EEO complaints to voluntary nonbinding mediation are generally harmless and need not be regulated. Indeed, the Commission's own internal EEO program provides for voluntary mediation. Creation of the Office of Workplace Diversity, 11 FCC Rcd 6864, 6867 (1996). The Commission's internal EEO program is a fine example for the regulated industries to follow.

that "we had no discrimination complaints because there can never be a discrimination complaint. Anyone refusing to sign a binding arbitration agreement on our terms will be fired."

While it is an open question whether some of these agreements violate Title VII's nondiscrimination requirements, these agreements inherently undermine both the nondiscrimination and affirmative action sections of the EEO Rule. The Commission renews licenses based in part on (1) reports on Form 396 that there have been no discrimination complaints; (2) adjudications it must do under the FCC/EEOC Agreement when the EEOC lacks jurisdiction (e.g., where a station has fewer than fifteen employees);^{385/} and (3) its review of final orders in Title VII under the NBC Policy, see pp. 235-244 supra, and under the FCC/EEOC Agreement.^{386/} Embedded within each of these procedures is the assumption that the FCC and EEOC are each capable of learning of and, where required, adjudicating employees' EEO grievances. That assumption is invalidated when employees, as a condition of employment or on penalty of termination, have been

^{385/} FCC/EEOC Agreement, 70 FCC2d at 2331 §III(a) (requiring the FCC to handle individual EEO complaints where the respondent is beyond the EEOC's jurisdiction). For example, a station with fewer than fifteen employees would fall under this provision. See, e.g., Catoclin, 4 FCC Rcd at 2554 ¶12 (an individual discrimination victim's complaint led to designation of a §73.2080(a) issue for trial. Ultimately, the issue was resolved against the licensee).

^{386/} FCC/EEOC Agreement, 70 FCC2d at 2331 §IV and 2334 (Attachment A -- sample letter from FCC to EEO complainant upon issuance of EEOC reasonable cause determination).

compelled or coerced to relinquish their rights to file EEO complaints or be witnesses in an EEO case. By invalidating the assumption of employees' access to the FCC and the EEOC, these agreements invalidate a primary underpinning of the EEO Rule.

In addition to undermining the EEO Rule, every compulsory binding arbitration agreement and many voluntary binding arbitration agreements directly violate the EEO Rule because they inherently discourage minorities and women from establishing careers with a company. While the existence of a binding arbitration agreement does not prove an employer's intention to discriminate, it does manifest a company's profound disrespect for the process by which a jury of one's peers -- members of its own audience -- can hold it accountable for discrimination. After experiencing decades of systematic discrimination, minorities and women -- including those who personally would never file an EEO complaint -- can hardly feel the greatest enthusiasm about working for a company which sets itself above America's civil rights laws and policies. Consequently, binding arbitration will discourage talented minorities and women from pursuing long term careers with such a company.^{387/}

Furthermore, these agreements offend the EEO Rule by strengthening the hand of middle managers who do not respect a parent company's antidiscrimination policy. Once shielded by these agreements, middle managers would no longer have as strong a disincentive to discriminate or to disregard the company's EEO

^{387/} See 47 CFR §73.2080(c)(3)(ii) (requiring company with an "underrepresentation of either minorities or women [to] examin[e] the company's personnel policies and practices to assure that they do not inadvertently screen out any group and take appropriate action where necessary."

programs.^{388/}

It is troubling enough that binding arbitration could take even one company out of the stream of broadcast EEO enforcement. An even greater danger is that binding arbitration agreements could be adopted by most major broadcast companies. If that happens -- and absent FCC intervention it could well happen -- meaningful broadcast EEO enforcement will come to an end. The industry, at its own private will, would have immunized itself entirely from the EEO Rule. Moreover, a broadcast professional unwilling to forego her civil rights as a condition of employment would have nowhere to go to further her career.

Particularly in an industry like broadcasting with an essentially permanent labor surplus, such agreements are inherently oppressive. These agreements are incompatible with the public trusteeship role of broadcasting, and with the obligation of licensees to do much more than just eschew discrimination. See pp. 16-20 supra. Broadcasters are guardians of the First Amendment, yet ironically these agreements strike directly at an employee's First Amendment right to petition for redress of grievances. Therefore, it is offensive to public policy to require a broadcast employee to forfeit her civil rights in order

^{388/} The undersigned counsel has recently discussed this question with four CEO's or COO's of leading broadcast group owners. Without exception, they personally support the EEO Rule and its long term goals, and they want their companies to go the extra mile to comply. However, a common difficulty is that the tasks attendant to adjusting competitively to the Telecommunications Act have spread CEO's very thin. There is simply less time in the day to keep a close watch on middle managers' compliance with policies such as EEO. It is a source of genuine frustration for the CEO's that not every middle manager possesses the expertise, the attentiveness and the good will to implement a parent company's equal employment policies exactly as the parent company wants these policies implemented.

to make a living in her chosen field.^{389/}

It would be a serious mistake for the Commission to "study" the matter in order to "gain more experience" with these new instruments, whose only real purpose is to evade the EEO Rule. Such "experience" would come entirely at the expense of minorities and women. Thus, the Commission should act now to ban compulsory binding arbitration agreements. Furthermore, voluntary binding arbitration agreements should be presented to the Commission for its approval before they are permitted to go into effect. To permit members of the public to comment on these filings, broadcasters should be permitted to redact proprietary financial data. We offer these guidelines to inform the Commission's review.

^{389/} See Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 750 (1981) (Dissenting Opinion of Chief Justice Burger) ("[p]lainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens").

The discharge of an employee at will may offend public policy. See, e.g., Kroen v. Bedway Security Agency, Inc., 633 A.2d 628 (Pa. 1993) (refusing to take polygraph test); Garner v. Morrison Knudsen Corp., 456 S.E. 2d 907 (S.C. 1995) (refusing to report criminal activity); Sides v. Duke Hospital, 328 S.E.2d 818 (N.C. 1985) (refusing to commit perjury at employer's request; Martin Marietta Corp. v. Lorenz, 823 P.2d 100 (Colo. 1992) (refusing to deceive federal contractor); Bravo v. Dolsen Cos., 888 P.2d 147, 154 (Wash. 1995) (engaging in concerted action as nonunionized employees); Call v. Scott Brass, Inc., 553 N.E.2d 1225 (Ind. App. 1990) (performing jury duty); McClung v. Marion County Commission, 360 S.E.2d 221, 227 (W.Va. 1987) (petitioning for redress of grievances by seeking access to courts for overtime wages); Novosel v. Nationwide Ins. Co., 721 F.2d 893 (3d Cir. 1983) (exercising First Amendment speech rights). A demand that an employee forfeit her First Amendment right to petition the government for redress of an employment discrimination grievance is at least as offensive as these examples.

1. Truth in Arbitration. The agreement should expressly spell out which civil rights the employee would forego by entering into the agreement (e.g., the right to seek judicial review, including appellate review). The agreement should correctly state all rights and duties of the employer and employee.

2. Neutral Arbitrator. The arbitrator must be selected jointly, with both sides having veto power.

3. Case Precedent. The arbitrator must be bound not only by federal civil rights laws and the EEO Rule, but also by case precedent interpreting those laws and the EEO Rule. The arbitrator must be forbidden from accepting, either as a prestipulated fact or as a rebuttable presumption, the lawfulness or validity of any written or unwritten company policy, practice, or interpretation of law.

4. Procedural Rights. An arbitration agreement should protect all procedural rights guaranteed by Title VII and the EEOC's rules, including statutes of limitations for filing complaints, assignments of burdens of proof, discovery rights (especially the right to take as many depositions as the Federal Rules permit) and the anti-retaliation rules and policies.^{390/}

5. Company to Pay Costs. All costs of arbitration, including filing fees and arbitrator's fees, should be borne by

^{390/} A remedy for the anti-retaliation rules in connection with an attempt to obtain arbitration must be available outside the arbitration process. It would be a classic Catch-22 if an employee's only protection against retaliation is found in the same agreement whose deficiencies gave rise to the alleged retaliation.

^{391/} These agreements eliminate the risk of a jury verdict sympathetic to the employee -- as sometimes happens with racially diverse urban juries.

the company. That is only fair, since the company is the primary beneficiary of these agreements.^{391/} Congress created the EEOC specifically to provide a low-cost means for resource-poor discrimination victims to obtain a determination of the merits of their claims. That Congressional policy would be circumvented by an agreement imposing financial burdens on employees.

6. Recovery Rights. The arbitrator must be required to afford the employee all recovery rights to which he or she would be entitled in a court of law, including punitive damages and (where applicable) attorneys fees. Without this potential relief, it is impossible to recruit a private attorney to represent an EEO complainant, who typically has few resources and is litigating against a company which may have huge resources.

7. Nonsurvival. These agreements should not survive the employment relationship, e.g., they should not apply to termination. Typically, the consideration given by the employer to the employee as an inducement to enter into these agreements is the promise of employment or continued employment on a presumably nondiscriminatory basis. If the employment relationship dies, the agreement should end as well.

8. Nondisclosure of Refusal to Sign. The company should be prohibited from disclosing to third parties, or disseminating internally, the fact that an employee has declined to sign such an agreement. Nor should any adverse consequences befall an individual because of her election not to sign such an agreement.

9. Protection of Witness and Whistleblower Rights. An agreement should not preclude an employee or former employee from being a witness in a discrimination or affirmative action case (whether before the FCC, EEOC or any other tribunal.) An

agreement barring testimony in an EEO case borders on obstruction of justice. It more closely resembles the "code of silence" practiced in prisons and gangs than the rule of law.

10. Protection of FCC's Investigative Rights. An agreement must not prevent the FCC from interviewing an employee or former employee as part of a Bilingual investigation or site audit, or calling an employee as a witness in a hearing. The agreement should not be construed to require the Commission to obtain a subpoena to secure the testimony of any employee, former employee or official.

11. Reports of Requests to Arbitrate. A request to arbitrate, which is a substitute for a reportable Title VII charge, must be reported to the FCC, just as the EEOC, pursuant to the FCC/EEOC Agreement, 70 FCC2d at 2331 §III(a), must inform the FCC of the filing of a Title VII charge.^{392/}

12. Reports of Final Decisions of Arbitrator. Under the NBC Policy, the Commission evaluates EEO compliance upon the issuance of a final order in a Title VII case. An arbitrator's decision is the equivalent of a Title VII final order. Consequently, these decisions must be reported to the Commission and made public. Cf. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 32-33 (1991).

^{392/} Arbitration agreements must contain a "Failsafe" provision under which the arbitrator's final decision cannot be "vacated" through a subsequent private settlement. Otherwise, a company could take advantage of the absence of appellate rights in an arbitration to completely insulate itself from filing final order reports with the FCC. All a company would have to do is offer an employee who has just won an arbitration award a small additional sum in exchange for consenting to have the arbitrator's decision "vacated." No rational person would refuse to take the extra money, since the amount awarded by the arbitrator is already a sure thing.