

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

TO THE COMMISSION

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**REPLY COMMENTS OF THE MINORITY
MEDIA AND TELECOMMUNICATIONS COUNCIL**

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INTRODUCTION AND SCOPE NOTE

The Minority Media and Telecommunications Council ("MMTC") is pleased to endorse the Comments and the Reply Comments of the National Organization for Women Foundation et al. ("NOW"), the Comments of the American Federation of Television and Radio Artists, the Comments of American Women in Radio and Television ("AWRT"), and the Comments of KHRN Radio, Bryan, Texas.

MMTC assembled and prepared the Comments of EEO Supporters on its own behalf and on behalf of 20 other national organizations. Most of the issues raised in opposing parties' comments are already anticipated and addressed in the Comments of EEO Supporters, or in other public interest comments, particularly the Comments of NOW. The Reply Comments of NOW contain a superb analysis of the Adarand issue, which we endorse wholeheartedly.

Thus, to conserve resources and avoid duplication of effort, these Reply Comments are limited to material issues, raised in nonminority broadcasters' comments, for which no response can yet be found in the record. In Section VI of these Reply Comments, MMTC amplifies upon and updates three points raised in the Comments of EEO Supporters.^{1/}

I. Any Negotiated Rulemaking Should Be Designed With Great Care

MMTC has endorsed AWRT's call for a negotiated rulemaking, and has called for the creation of a Task Force on Equal Opportunity. Comments of EEO Supporters, pp. 5, 367-68. After

^{1/} Time and resource limitations prevented MMTC from circulating these Reply Comments for the endorsement of other national organizations. However, MMTC is confident that all or nearly all of these organizations would endorse the views presented herein.

reviewing the voluminous EEO-unfriendly comments in this proceeding, MMTC realizes that a multilateral negotiation of the issues in this proceeding would be extremely difficult. Not a single nonminority broadcaster urged stronger enforcement of the EEO Rule. Not a single nonminority broadcaster called for zero tolerance for discrimination. Not a single nonminority broadcaster asked the Commission to set a goal for the achievement of full equal opportunity and the completion of the task of EEO enforcement.^{2/} And not a single nonminority broadcaster expressed the slightest interest in a negotiated rulemaking.^{3/}

Multilateral negotiations tend to be successful when the subject matter concerns the distribution of resources, such as spectrum, airspace, fishing rights, land, pollution and money. However, civil and individual rights are at stake here. A system of race and gender exclusion has been tolerated too long and it needs to be eliminated immediately.

At no time in American history has a multilateral negotiation been successful in securing, preserving or restoring civil and individual rights. It has not been for want of effort. From the narrowly-averted 1941 March on Washington to the Montgomery Bus Boycott, to the Civil Rights Act of 1964, civil rights advocates willingly endeavored to negotiate privately with

^{2/} Many nonminority broadcasters have long supported strong EEO enforcement, and a few are outstanding EEO "superperformers." Regrettably, in this proceeding, companies like Group W, Gannett and Gray Communications have stood mute, leaving the dialogue to be dominated by EEO transgressors, EEO compliers desiring the freedom to become EEO transgressors, and those who would shield EEO transgressors.

^{3/} An attempted negotiation between MMTC and the NAB in 1995 was a failure. See NAB Comments at 2.

those who were oppressing their people. Only when those negotiations failed did they turn to direct action, to the courts and to the legislature as a last resort. History teaches that no negotiation can compel the voluntary delivery of equal opportunity by an entrenched and powerful majority, for as Frederick Douglass knew, "Power concedes nothing without a demand. It never has, and it never will."

Nonminority broadcasters' assurances that they will act voluntarily are arriving a little too late. Before the EEO Rule was adopted, the broadcasting industry had had 40 years to deliver equal opportunity voluntarily. The unregulated station brokerage business has had over 60 years to hire the first African American station broker voluntarily.

If there is to be a negotiated rulemaking, four operational predicates are essential.

First, the negotiation should be managed by a very senior person, such as a commissioner. High level leadership is critical because the issue is so critical to the integrity of the regulatory process, and the parties could hardly be farther apart.

Second, the participants must include the full representation of civil rights, civil liberties, religious, labor, minority and women's organizations, broadcast educators, minority owned broadcasters, and those nonminority broadcasters who have been especially successful in operating their EEO programs. The Commission must be careful not to permit self-selection of participants, which will result in a committee of representatives of those private companies with the wherewithal to underwrite an executive's attendance. Nor should the Commission select a

committee with only token minority and female participation, as it did in planning the creation of ATV.

Third, the purpose of the negotiation must be to develop a plan to implement (1) a policy of zero tolerance for discrimination, and (2) a goal of attaining full equal opportunity. See Comments of EEO Supporters, pp. 7-34.

Fourth, every issue raised by every party to this rulemaking proceeding, except constitutionality, must be on the table. The public interest parties have tried in vain for three years to attract the Commission's attention to dozens of proposals to improve EEO enforcement. See Comments of EEO Supporters, p. 5 n. 6. These proposals deserve full and thoughtful consideration of their proposals.

These issues need the illumination which only comes from public debate. Thus, whether or not the Commission proceeds through a negotiated rulemaking, it should set this proceeding for a morning or afternoon of en banc discussion.

II. The Best Evidence Of The Need For Strong EEO Enforcement Is The Unhelpful, And Often Hostile Tone Of So Many Of The Comments

The key word found in almost every comment filed by nonminority broadcasters or trade associations is the word "but", as in "minorities and women have made great strides, and we endorse equal opportunity, but...." That word, "but", is a signal to hold onto your wallet. "But" was always followed by radical schemes to lift EEO requirements entirely for the vast majority of broadcasters, and to weaken them substantially for the few broadcasters still subject to EEO enforcement.

The "great strides" of minorities and women certainly didn't come about before 1969, when the EEO Rule was adopted.

These strides were due almost entirely to EEO enforcement. The fact that many minorities and women have crossed the bridge to equal opportunity is no reason to blow up the bridge.

Now the NAB and some other industry commenters want to turn the clock back thirty years, eviscerating the EEO Rule just at the moment in history when the broadcasting industry has full equal opportunity within its grasp. Instead, the Commission should stay the course, and indeed should accelerate EEO enforcement with a goal of eliminating the scourge of discrimination from broadcasting by the 100th anniversary of broadcasting. Only when regulation is no longer needed to sustain equal opportunity should regulation be abandoned. As evidenced by the unhelpful and often mean-spirited comments from some of the industry parties, we are obviously nowhere near that day. EEO compliance does not yet appear to be either a high industry priority or a standard industry norm.

The tone of many of the comments in this proceeding is profoundly disturbing. Nonminority broadcasters have made only one constructive proposal.^{4/} If modified, that one proposal would meet the extremely modest requirement of the NPRM that proposals should not "undermin[e] the effectiveness of the program." Nonminority

^{4/} A proposal to revise Form 395 to encompass year-round employment, if made universal rather than optional, would help "maintain an effective EEO program" and might actually improve EEO enforcement. See p. 25 infra (discussing Comments of American Radio Systems et al. ("ARS")). Yet the same commenter has made several other proposals which do not meet the "maintaining an effective EEO program" standard. For example: "MSAs with only a 12% minority labor force would have less than half the national average of minorities. These locations should be considered to have a 'de minimis' minority labor force for recruiting purposes." Comments of ARS, p. 12; see also Comments of the National Association of Broadcasters, p. 23 ("NAB") (suggesting a 10% minority labor force cutoff).

broadcasters have also endorsed one Commission proposal -- the expanded use of job fairs -- meeting this requirement.^{5/} See NPRM, 11 FCC Rcd 5154, 5163 ¶16 (1996).

The implementation of every other proposal offered by nonminority broadcasters would gut EEO enforcement. The comments were replete with manifest naiveté,^{6/} facile resignation,^{7/}

^{4/} [continued from p. 5]

No EEO enforcement body in the United States considers 10% minority representation to be "de minimis." Implementation of this proposal would exempt every station in Akron, Ft. Wayne, Grand Rapids, Harrisburg, Knoxville, Minneapolis, Peoria, Pittsburgh, Providence, Salt Lake City, Sarasota, Syracuse, Youngstown, Worcester, and many other cities. And under the "dominant minority group" policy, which essentially permits a licensee to target only groups with more than de minimis representation, Blacks in the Los Angeles market would be denied EEO protection since they represent only 9.5% of the population. See Howard Dogloff, 5 FCC Rcd 7695, 7696 (1990).

^{5/} Job fairs have their limitations. They are helpful in recruiting entry level people, but are almost useless in recruiting potential managers or senior professionals. An experienced broadcast professional, especially if he or she is underemployed at a local station, is unlikely to publicly appear at a job fair potentially attended by his own employer.

Unfortunately, most of the comments relating to job fairs favored a substitution of the perfunctory collection of resumes for pro-active recruitment. For a cautious endorsement of job fairs and a proposal on how to make them into an effective tool to advance equal opportunity, see Comments of EEO Supporters, p. 52.

^{6/} One commenter suggested a "voluntary plan." Comments of Haley, Bader & Potts, p. 7. Nothing is stopping the industry from having a "voluntary" plan now, and nothing has stopped the industry from developing one at any time in the past three generations. Unfortunately, workplace integration has never occurred voluntarily in any industry. A few companies do more than what is minimally required. Most do not, and most will not.

^{7/} One broadcaster actually maintained that "[w]e have done all we can do, and we conclude from our efforts that very few minorities have an interest in working in the broadcast industry, for whatever reason." Comments of Community Service Radio, p. 2.

internal contradictions,^{8/} earnest pleas to invest wolves with the authority to guard sheep,^{9/} and even one admission of conduct which is apparently discriminatory.^{10/} Furthermore, with one solid

^{8/} For example, Haley, Bader & Potts criticized, on constitutional grounds, the Commission's review of EEO performance when minority employment "falls below statistical guidelines." However, Haley, Bader & Potts simultaneously proposed that "[i]f a broadcaster's employment profile bears a reasonable relationship to the relevant minority population, the broadcaster should be presumed to have made a 'good faith' effort" and thus be immunized from sanctions. Comments of Haley, Bader & Potts, pp. 10 and 27. Apparently, this commenter believes that statistical review of EEO performance is only unconstitutional when the results do not favor the broadcaster. NOW had it exactly right in observing that "some broadcasters appear to prefer that the policy were [results-based rather than efforts-based], presumably so that it would be easier to attack and eliminate." Reply Comments of NOW, p. 6 n. 20.

^{9/} See Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1008 (D.C. Cir. 1966) (analogizing renewal of the WLBT-TV license to an "elect[ion] to post the Wolf to guard the Sheep in the hope that the Wolf would mend his ways because some protection was needed at once and none but the Wolf was handy.") For example, one commenter proposed that a station should be able to provide "affidavits or certifications from management and staff of the station" on whether the station discriminated, with such certifications to be "dispositive of any challenges in the absence of any specific complaint of actual past or ongoing discrimination." Comments of Virginia Broadcasting Corporation, p. 4. Under this formulation, a self-serving and summary "certification" from the station manager saying "of course we didn't discriminate" would trump all other evidence suggestive of discrimination. The Commission is all too familiar with what happens when it lets broadcasters check boxes to certify compliance with basic regulatory requirements. See Comments of EEO Supporters, pp. 180-83 (discussing how box-checking of financial certifications by construction permit applicants was a failure.)

^{10/} See Comments of Cornerstone Television, maintaining that its station, located just twenty miles from Pittsburgh, is in a "remote area with no public transportation. This makes it very difficult for the minority applicants to be able to get transportation to our station." Cornerstone also revealed that while its station generated five minority applicants last year, "[t]wo of these applicants were overqualified for the positions available." As the 9th Circuit has explained, a finding that an applicant's qualifications are clearly superior to those of the selectee "is a proper basis for a finding of discrimination."

[n. 10 continued on p. 8]

exception,^{11/} no research with even the pretense of objectivity was offered by any nonminority broadcast commenter.^{12/}

^{10/} [continued from p. 7]

Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1492 (9th Cir. 1995). See also, EEOC v. Insurance Company of North America, 49 F.3d 1418, 1421 (9th Cir. 1995); Stein v. National City Bank, 942 F.2d 1062, 1066 (6th Cir. 1991); Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 118 (2d Cir. 1991); Taggart v. Time, Inc., 924 F.2d 43, 47 (2d Cir. 1991).

^{11/} The survey of job fairs and similar initiatives prepared by 26 state broadcaster associations was quite illuminating. See Comments of NAB (Appendix). The data is reliable because the facts reported therein involve activities which occur in public view and are thus verifiable. Furthermore, the majority of state associations responded to the survey. The results indicate that a sizeable minority of state broadcaster associations have manifested a clear and multifaceted commitment to provide EEO support (e.g., multiple job fairs) for their members. Unfortunately, the results also indicate that most state broadcaster associations lack such a commitment. Nonetheless, the survey results give MMTC some comfort that its cautious endorsement of job fairs as a recruiting tool was not just wishful thinking.

MMTC cautions, though, that these survey results should not be interpreted as evidence that voluntary efforts would continue if EEO regulation is curtailed or eliminated. The better evidence of that is the absence of these initiatives by unregulated entities such as station brokers, consulting engineers, syndicators, radio networks and advertising agencies -- not to mention broadcasters themselves before the EEO Rule was adopted.

^{12/} The Texas Association of Broadcasters' estimated costs of EEO compliance are grossly flawed. For example, TAB's unscientific survey suggested that EEO costs \$9,500 per year for television stations and \$19,000 per year for radio stations. That is ridiculous, since television stations are generally larger than radio stations. See Comments of the Texas Association of Broadcasters, Attachment A, p. 9. Furthermore, as NOW has pointed out, TAB's estimates appear to include all personnel-related matters, rather than just EEO. See Reply Comments of NOW, p. 7.

Haley, Bader & Potts honestly acknowledged that its survey of radio stations "does not claim to conform to principles of scientific design or to produce statistically verifiable results[.]" Comments of Haley, Bader & Potts, p. 28. Indeed, Haley, Bader & Potts did not supply information about how many broadcasters were sent the instrument. The instrument (Attachment 2 of the Comments) is grossly slanted: it repeatedly refers to EEO efforts as "burdens" and asks not one question going to whether, or how, the industry's EEO performance could be strengthened.

[n. 12 continued on p. 9]

The mean-spiritedness of so many of the industry comments reveals a profound lack of awareness or recollection of history. Many of the commenters appear to have forgotten that White men

12/ [continued from p. 8]

Nor did the firm provide any indication of how the Commission might extrapolate from a nonrandom, nonstratified sample of 41 to a population of over 12,000.

Self-serving, unscientific and unverifiable surveys, such as those of TAB and Haley, Bader & Potts, yield nothing useful to policymakers. Commissioner Kenneth Cox has written of the quality of research the FCC expects to receive in its proceedings:

I do not think that either [one applicant's] programming survey or [the other applicant's] check survey was well designed or properly executed, and each then submitted conclusionary reports based on interpretations which can be charitably described only as giving their respective private positions the benefit of every doubt. This is not the way to furnish information to a regulatory agency which must make important decisions on the basis of the data supplied. If these are the methods currently in use among broadcasters, it may be necessary to require that the underlying data be furnished in all cases, to permit spot checks by our staff as to the accuracy of the tabulations and conclusions based thereon. One making a material representation to the Commission should have taken reasonable steps to be sure that the statements made can be sustained if challenged.

Television Broadcasters, Inc. (KBMT, Beaumont, Texas), 1 FCC2d 970, 976 (1965) (Concurring Statement of Commissioner Kenneth A. Cox).

Perhaps nonminority broadcasters' failure to invest in original research is a sign that they do not really consider gutting EEO to be a matter of the highest priority. One need only compare the industry research filed this proceeding with the depth and quality of research filed in the ATV, DAB, must-carry and multiple ownership proceedings to realize that, apparently, the elimination of EEO just is not that important to the industry. However, the preservation of EEO is of paramount importance to the civil rights, religious, Black college, minority broadcasters, women's and minority communities. Every national organization representing these constituencies before the Commission filed or participated in comments which vigorously oppose any rollback of the EEO Rule or evisceration of EEO enforcement.

received a three-generation headstart in the broadcasting business, with women excluded from sales and engineering jobs "partly because most station managers prefer a man" and from announcing jobs because women were not thought to be "physically able to endure the long hours of work."^{13/} They have forgotten that for the first five of broadcasting's nine decades, minorities could not work anywhere no matter what their qualifications -- in large part because the FCC looked the other way for years while it gave broadcast licenses to segregated licensees, including noncommercial training institutions -- and renewed the licenses ministerially. See Comments of EEO Supporters, pp. 141-54.

They have forgotten that not until 1962 did a television network (ABC) employ a Black reporter. They have forgotten that Thurgood Marshall's 1955 interview with Douglas Edwards wasn't carried by WLBT-TV in Jackson, Mississippi because of "cable trouble." Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 998 (D.C. Cir. 1966).

They have forgotten that Nat King Cole's television program had to be cancelled in 1956 because southern stations wouldn't carry it. They have forgotten that a Columbus, Mississippi radio station helped incite the riot at the University of Mississippi, in which two people died, when James Meredith sought to enroll. The Columbus Broadcasting Company, Inc., 40 FCC 641 (1965).

^{13/} See Ronald Pesha, "Announcers Wanted, \$25 a Week," Radio World, September 18, 1996, p. 43 ("Pesha") (quoting from the leading 1941 text, Waldo Abbot's Handbook of Broadcasting). Pesha, a broadcast historian, added that "[t]his is not to say that women could not find jobs in radio. Who else would purvey household hints and recipes, deliver talks about child training and etiquette, or do the filing? Many stations also employed 'hostesses' to greet visitors and conduct tours."

They have forgotten that in 1972, one Rochester, NY radio owner characterized only certain types of jobs as "suitable" or "feasible" for minorities, and another used a "Job Application - Male" form for announcers and a "Job Application - Female" form for secretaries. Rust Communications Group, Inc., 53 FCC2d 355, 363 (1974) and Federal Broadcasting System, Inc., 59 FCC2d 356, 365 (1976).

They have forgotten that a Norfolk television station held its Christmas party at a segregated country club and had to tell the Black employees that it was very sorry, they couldn't come. WAVY-TV Television, Inc., 53 RR2d 655, 660 ¶9 (1983).

They have forgotten that even as they worked side by side with Whites at two Philadelphia radio stations, Blacks earned only 40% of the Whites' pay. Banks Broadcasting Company, MM Docket No. 85-65, FCC 85-122 (released April 4, 1985).

They have forgotten that radio stations in Greenwood, Mississippi and Beaumont, Texas changed their formats from Black to country/western and fired their Black employees without giving them a chance to try out in the new format. Leflore Broadcasting Company, 36 FCC2d 101, 103 (1972) (subsequent history omitted) and Beaumont NAACP v. FCC, 854 F.2d 501, 508 (D.C. Cir. 1988).

They have forgotten that after rejecting well qualified secretarial job candidate Linda Johnson, broadcast licensee Henry Serafin asked Buffalo CETA caseworker Cheryl Gawronski "don't you have a white girl to send me? She [Ms. Johnson] would make charcoal look white." Catoctin Broadcasting Corp. of New York, 4 FCC Rcd 2553, 2555 (1989) (subsequent history omitted).

They have forgotten that a St. Louis radio station defended its failure to recruit Blacks by asserting that Blacks seldom listen to classical music. The Lutheran Church/Missouri Synod, 9 FCC Rcd 914, 923 ¶25 (1994).

They have forgotten that even today, in major cities like New York, Los Angeles and Chicago, minorities are represented on the staffs of major television and radio stations in proportions far less than than their representation in the community, and that the EEO performance of even very similar licensees differs substantially.

Thus, many nonminority broadcasters do not know, or do not want to remember, that years of discrimination have left minorities and women with tremendous ground to make up.^{14/} And they may neither know nor care that discrimination remains the broadcasting industry's greatest shame.

No anti-civil rights tone permeated the comments in the rulemaking proceeding the Commission conducted in 1968 to develop the EEO Rule. The Rule was adopted with the support of every commenter except the NAB. See Nondiscrimination in Broadcasting, 13 FCC2d 766 ¶2 (1968) ("Nondiscrimination - 1968"). Now -- to give one example -- we have the North Carolina and Virginia Associations of Broadcasters advocating, with all seriousness, that broadcasters should not be required even to report their employment of women because "women have made great strides in the broadcast

^{14/} One broadcaster knows. CBS contended that "only a relatively small number of stations would presently meet a 100 percent parity figure for both overall and top-four employment, making this the benchmark for any relaxation of the Commission's requirements in this area would render such a liberalization largely meaningless at the outset." Comments of CBS at 15 n. 16.

industry, in all sizes of broadcast markets. Circumstances have changed such that women, as a group, are no longer disadvantaged with respect to broadcast industry employment."^{15/}

Only two things have changed since 1969: the Commission has given a sign of weakened commitment to EEO by adopting the NPRM in this proceeding, and some in Congress, under pressure from EEO transgressors in their states, have openly exhibited hostility to EEO enforcement.^{16/} The crops have grown where the seeds were planted.

The Commission can correct its error by remembering that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.'" Palmore v. Sidoti, 466 U.S. 429, 433 (1984), quoting Palmer v. Thompson, 403 U.S. 217, 260-61 (1971) (White, J. dissenting)).

^{15/} Comments of the North Carolina and Virginia Associations of Broadcasters, p. 11. For statistics on the extent to which women remain "disadvantaged with respect to broadcast industry employment" see Comments of EEO Supporters, pp. 35-44.

^{16/} See Reauthorization of the Federal Communications Commission: Hearing before the Subcommittee on Telecommunications and Finance of the Committee on Commerce, 104th Cong. 1st Sess. No. 104-28, 36 (1995) (Statement of Congressman Ralph Hall).

III. **The EEO Rule Is Constitutionally Sound**

The Reply Comments of NOW fully respond to all constitutional objections. We add only these brief remarks.

A. **The EEO Rule imposes no pressure to hire based on race**

Some commenters feel that the mere existence of the EEO Rule places broadcasters under "considerable pressure to give preferential treatment to minorities (and to a lesser extent to women) to make sure the station's 'numbers' meet the Commission's 'processing guidelines.' Licensees sometime react to this pressure from the Commission by hiring minorities in positions for which they are unqualified." Comments of Golden Orange Broadcasting Co. ("Golden Orange"), p. 13. A rule is not flawed simply because one regulatee "reacts" erroneously.^{17/} Moreover, no party cites even

^{17/} One commenter speculated that a station might feel compelled to hire minorities. Without citing a single example, Haley, Bader & Potts averred that a station could escape scrutiny by either maintaining "impeccable records of hiring and recruitment efforts" or,

[a]lternatively, the station could hire a minority replacement [for a departing White employee] that would bring it within EEO processing guidelines and obtain a prompt and probably uncontested grant of its renewal application. While the EEO Program does not "require" the station to take the second option, it imposes harsh consequences for not doing so. No station that wishes to be able to assign its license in the foreseeable future can ignore those consequences.

[n. 17 continued on p. 15]

one specific example of the hiring of even one unqualified person because of the EEO Rule.

In practice, the EEO Rule places no pressure at all on broadcasters to hire on any basis other than merit. The FCC has never sanctioned even one station for not hiring at 50% of parity. Just two weeks ago, it unconditionally renewed the licenses of two stations which employed zero minorities for most of the license term. Downs Satellite Broadcasting of South Carolina, Inc., FCC 96-387 (released October 10, 1996).^{18/} A station which does not hire at 50% of parity, but follows the Commission's modest EEO recruiting procedures, need not fear EEO sanctions. Low minority or female employment is one piece of evidence of discrimination,

^{17/} [continued from p. 14]

Comments of Haley, Bader & Potts, p. 13. Haley, Bader & Potts is wrong for three reasons.

First, no one has ever lost a deal to buy a station because of an EEO violation, except in Lutheran, which was designated for hearing the day before the assignment application was filed with the FCC.

Second, Haley, Bader & Potts' argument acknowledges that a licensee has two choices: comply with the EEO Rule's race-neutral procedures, or violate those procedures and engage in reverse discrimination in the hope that this will disguise the violation of the EEO procedures. The fact that someone could defraud law enforcement authorities to escape accountability is never a justification for not having the law. The Commission and the public would probably see through such a fraud anyway, since nonstatistical evidence of EEO violations is often available.

Third, the EEO guidelines are neither ironclad nor dispositive. Almost all stations not meeting the EEO guidelines never face a petition to deny or EEO sanctions, because their EEO programs manifest adequate recruitment efforts.

^{18/} This decision is not yet final; thus, we are serving the licensee's counsel with a copy of these Reply Comments.

but it is insufficient to give rise to EEO sanctions.^{19/}

Another version of the "pressure to hire" theory is the suggestion that it is improper for the Commission to evaluate the inclusion of minorities in interview pools (as opposed to applicant pools). See Comments of Golden Orange, citing Northeast Kansas Broadcast Service, Inc., 11 FCC Rcd 4083, 4084 ¶14 (1996).

Northeast Kansas was wisely decided. If the purpose of recruitment is to give minorities a chance to present their qualifications to a licensee, and the licensee does not consider the qualifications of any applicant it does not interview, then a chance to be interviewed is essential. A broadcaster does nothing for equal opportunity by going through the motions of generating applications or resumes from minorities, then throwing them in the garbage. If the selection process is entirely race-neutral, there is nothing wrong with insisting that minority applicants make it not only into the mailbox, but into the interview room. If it is constitutionally permissible for minorities to be encouraged to submit their qualifications in print, it is just as permissible to

^{19/} Golden Orange pointed to a decision whose text included the station's employment statistics. Golden Orange Comments at 15 (citing Kravis Company, 11 FCC Rcd 4740 n. 1 (1996)). What Golden Orange omitted to mention is that these statistics were needed to evaluate petitioner to deny's allegation that the stations may have discriminated in employment. Similar statistics are considered by the EEOC in virtually every Title VII case. They are the starting point for the evaluation of a discrimination complaint. And as nonminority broadcasters repeatedly asserted in this proceeding, they want credit for hiring minorities -- that is, they want statistics to be considered -- to rebut an inference of discrimination.

permit them to present their qualifications with sound, visual images and personal presence.^{20/}

B. The nexus between minority and female employment and programming is clear

One commenter maintained that the EEO Rule cannot promote diversity because only "officials and managers" influence broadcast programming. Comments of Golden Orange, p. 26. Another commenter contended that only the station owner affects programming. Comments of Smithwick & Belendiuk, p. 15. Both commenters are wrong. Owners and managers' vital influence over program policy underscores that the EEO Rule is necessary in order to permit minorities and women to gain entry to the career ladder which leads to the executive suite.

Moreover, while minorities and women are climbing that ladder, they exercise considerable influence over programming. Just as the CEO of General Motors does not unilaterally design Chevrolets, a broadcast station's manager or owner has neither the time nor (in many cases) the expertise to micromanage which problems, needs, interests and issues are addressed and how they are addressed.

^{20/} The NAB claimed that the assessment of interviewee pools "treads dangerously close to placing an interviewee at a competitive disadvantage because of race or gender. It also places the licensee in jeopardy of a discrimination, or even a reverse discrimination, lawsuit, under Title VII of the Civil Rights Act or state law." Comments of NAB, p. 5. Here is how such a Title VII charge would read: "I wasn't hired because the employer included a minority with better qualifications than me in its interview pool. If I had enjoyed the privilege of being in an all-White interview pool, I would have been hired." Unsurprisingly, the NAB could not come up with an example of a case in which an employer was accused of discriminating just because she talked to minorities.

C. **Far from being based on racial stereotyping, the EEO Rule attacks racial stereotyping**

Some commenters suggested that hiring minorities or women does not necessarily advance diversity because it is stereotyping to assume that a particular person holds particular views. See, e.g., Comments of Smithwick & Belendiuk, p. 15. It is stereotyping to assume that an individual holds certain views. However, that is an argument against tokenism, not an argument against equal opportunity. While no person should be hired to singlehandedly represent all minorities or all women, it is not stereotyping to predict that ten minority broadcast professionals will more likely reflect the thinking prevalent in the minority community than will ten White people. Nor is it stereotyping to think that a radio station with 40 employees, ten of whom are minorities, will treat issues differently than another station with 40 employees, only one or two of whom are minorities. Nor is it stereotyping to predict that listeners scanning a dial with ten stations, each of which has 40 employees, ten of whom are minorities, will more likely receive a wider range of viewpoints than would the listeners to ten other stations, each of whose staffs is 40 White males.^{21/}

^{21/} The Supreme Court has addressed this "stereotyping" issue in the context of minority ownership, using an analysis which is based substantially on the value of minority employment as an operational tool to promote diversity. In a holding in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) which was unaffected by the result in Adarand Constructors, Inc. v. Peña, 115 S.Ct. 2097 (1995), the Court explained:

[n. 21 continued on p. 19]

21/ [continued from p. 18]

[t]he judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping. Congressional policy does not assume that in every case minority ownership and management will lead to more minority-oriented programming or to the expression of a discrete "minority viewpoint" on the airwaves. Neither does it pretend that all programming that appeals to minority audiences can be labeled "minority programming" or that programming that might be described as "minority" does not appeal to nonminorities. Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group [emphasis supplied].

547 U.S. at 579. Also,

[a]lthough all station owners are guided to some extent by market demand in their programming decisions, Congress and the Commission have determined that there may be important differences between broadcasting practices of minority owners and those of their nonminority counterparts.

[n. 21 continued on p. 20]

In Jackson, Mississippi today, where every station is integrated, broadcast programming is quite different than it was in 1966, when no station was integrated. Lest we forget, WLBT-TV was an all-White television station.

Broadcast professionals chose this field because they are engaged with ideas, issues and policy. As a rule, they are open-minded, communicative and collaborative. Nothing promotes diversity more than a workplace environment which fostering interracial communication among these individuals, who share the

21/ [continued from p. 19]

547 U.S. at 580. Also,

[e]vidence suggests that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoints, especially on matters of particular concern to minorities. "[M]inority ownership does appear to have specific impact on the presentation of minority images in local news," inasmuch as minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities. In addition, studies show that a minority owner is more likely to employ minorities in managerial and other important roles where they can have an impact on station policies [emphasis supplied; footnotes citing sources omitted].

497 U.S. at 580-82. And,

[w]hile we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves [emphasis supplied].

497 U.S. at 582.

goal of presenting the fruits of their shared communication to the public through a communicative medium.

Thus, the EEO Rule is not based on racial stereotyping. Instead, by fostering interracial communication, the EEO Rule does more than perhaps any other federal rule to attack racial stereotyping.

IV. No Evidence Has Been Presented To Justify A Departure From UCC III

The NAB's entire analysis of how to get around Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529 (2d Cir. 1977) ("UCC III") was as follows.

The situation has changed dramatically since [1977]. Commission staffing has changed, and demand on Commission resources has increased. Moreover, the Commission now requires stations to maintain records for each job opening concerning the sources that were contacted, the number of minorities and women in each applicant and interviewee pool, the number of referrals from each source, whether an individual applicant was offered a job and whether an offer was accepted. Although there is flexibility in how stations keep these types of records, the maintenance of these records have become a necessity. This is a highly burdensome system for all stations, particularly those with few financial and personnel resources. The record in this proceeding and in the Notice of Inquiry will provide the Commission with more than adequate justification for changing its rules. The Commission may move boldly forward in this proceeding, without fear of the UCC decision, by raising the reporting threshold to 20 fulltime employees. We strongly urge the Commission to do so.

Comments of the National Association of Broadcasters, pp. 22-23.

The self-evident insufficiency of this analysis is almost a concession that UCC III remains good law. The NAB has made only two points: (1) the Commission has more to do now than it did in

1977, and (2) broadcasters have to maintain more EEO data than they did in 1977.

The NAB's first contention is incorrect. In 1977, it typically took three years for the Commission to decide an EEO case; now it takes only a few months.

The NAB's second contention is both incorrect and immaterial. Stations have always had to maintain personnel records, for EEO and many other purposes. See Comments of EEO Supporters, pp. 103-106. Moreover, the maintenance of these records is easier now than it was in 1977, given the computerization of professional offices. Id., pp. 60-61. The bottom line is that no comment in this proceeding showed that even one broadcast station lacks the financial ability to do the recordkeeping required by the EEO Rule. Saying that EEO compliance is a "burden" does not make it one.

The EEO Supporters provided fourteen reasons why EEO compliance is needed now even more than it was needed in 1977. Comments of EEO Supporters, pp. 56-84. They explained in detail why the considerations rejected in UCC III should still be rejected. Comments of EEO Supporters, pp. 85-100. They explained why EEO compliance does not burden law abiding broadcasters, and why reductions in EEO enforcement would impose considerable burdens on minority station owners, Black colleges, discrimination victims, EEO compliers, listeners, viewers and others. Id., pp. 101-40. Their overwhelming case for continued and stronger EEO enforcement is far more compelling than the bald, undocumented, poorly researched and self-serving claims by some broadcasters that EEO compliance is a "burden."

V. **Nonminority Broadcasters' Proposals To Weaken EEO Enforcement Should Be Rejected**

A. **Public broadcasting should continue to be held to the same EEO standards as commercial broadcasters**

It is unfortunate that the Curators of the University of Missouri have contended that public broadcasters

face hiring obstacles related to their academic requirements and financial restrictions. The Curators are not in a position to authorize the employment of a number of individuals from the general population who have no experience, background or interest in teaching or working in an academic environment. For these reasons, public institutions should be exempted from the Commission's new recruitment and hiring requirements.

Comments of the Curators of the University of Missouri, pp. 5-6.

Actually, public broadcasters should be held to even higher standards of EEO performance than commercial broadcasters, since public broadcasters bear a special responsibility to train the next generation of broadcast professionals, executives and entrepreneurs. Public broadcasters readily embrace higher standards of journalistic ethics, public affairs performance, quality of programming, and service to children. They should embrace higher EEO performance standards as well.^{22/}

B. **The Commission uses an appropriate and fair test to scrutinize requests by suburban stations to use alternate labor forces for EEO purposes**

One commenter asked the Commission to allow licensees to define their target workforces so as to include areas (presumably

^{22/} Although public broadcasters do not always hire from the general population, they often have access to resources unavailable to other broadcasters. See, e.g., American University, 47 RR2d 1133, 1134 (1980) (holding that licensee could draw on the station's own minority training program as a source of employees).