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March 1, 1999

OUR FILE NO.
0159-125-63

96-126

Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Re: MM Docket No. 98-204

Dear Ms. Salas:

Transmitted herewith are the original and nine copies of the Comments of Haley Bader & Potts P.L.C. in the above-referenced proceeding, regarding the Commission's broadcast and cable equal employment opportunity rules and policies.

Kindly communicate any questions directly to this office.

Respectfully submitted,

John Wells King

John Wells King

JWK/ah
Enclosure
cc: The Honorable William E. Kennard, Chairman
The Honorable Susan Ness
The Honorable Harold Furchtgott-Roth
The Honorable Michael Powell
The Honorable Gloria Tristanti
All with Enclosures

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MAR - 1 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The

# Federal Communications Commission

Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| Review of the Commission's | ) | MM Docket No. 98-204 |
| Broadcast and Cable | ) | |
| Equal Employment Opportunity | ) | |
| Rules and Policies | ) | |
| and | ) | |
| Termination of the | ) | MM Docket No. 96-16 |
| EEO Streamlining Proceeding | ) | |

TO: The Commission *en banc*

## Comments of Haley Bader & Potts P.L.C.

By Notice of Proposed Rule Making adopted November 19, 1998, released November 20, 1998 (FCC 98-305) ("NPRM"), the Commission requested comments concerning revision of its broadcast equal employment opportunity rules and policies in response to the decision of the United States Court of Appeals for the District of Columbia Circuit in *Lutheran Church-Missouri Synod v. FCC.*[1]

Haley Bader & Potts P.L.C. ("HBP"), on behalf of clients subject to the former and proposed EEO rules and policies, herewith submits the following comments in response to the NPRM.

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1 141 F.3d 344 (D.C. Cir. 1998), *rehearing denied,* September 15, 1998. (Hereinafter "*Lutheran*"). By subsequent orders, the Commission, through its Chief, Mass Media Bureau, extended the time for filing comments to March 1, 1999.

Before The

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## TABLE OF CONTENTS

Summary ..... 3

Introduction ..... 3

What is programming diversity? ..... 7

Is programming diversity lacking? ..... 10

What is the Commission's interest in programming diversity? ..... 15

What is the regulatory goal? ..... 18

Does recruitment outreach affect diversity? ..... 19

What is expected of Commission licensees? ..... 25

The Commission should adopt a program of voluntary efforts and initiatives ..... 27

Conclusion ..... 30

Participants and Declarations ..... 31 et seq.

## Summary

The Commission's regulation of broadcast and cable industry employment practices rests firmly and exclusively on the principle of promoting diversity in programming.

In attempting to apply this principle, however, the Commission proposes to implement a rule that has no defined goal, in order to achieve an unmeasured -- and immeasurable -- objective, through means that have no empirical relationship to the ends.

"Programming diversity" is an elusive abstract. An estimation of its present state, shortcomings, and achievement of some ideal, are equally indefinable. Even if it were quantifiable, a question of constitutional magnitude is raised by governmental attempts to promote race-based and gender-based programming diversity.

A regulatory program that imposes outreach obligations on all broadcasters and cable systems in the hope that employment of increased numbers of minorities and women will result, so that they will be enabled to affect programming decisions based on their personal views as minorities and women, and ultimately to own media of mass communications over which their personal views will be conveyed, is not narrowly or even reasonably tailored to achieve a governmental interest in programming diversity.

The proposed rule should be scrapped. More direct means of affecting and promoting programming diversity exist. In any event, the definitional challenge remains unmet.

The Commission should continue its salutary efforts to promote consciousness of minority and female participation in the mass media, and to advocate participation in and compliance with voluntary industry initiatives.

## Introduction

The Court held the Commission's broadcast licensee equal employment regulations unconstitutional because the government's asserted interest in diversity of programming does not justify its use of racial classifications in hiring. The Court remanded on the sole question

At the very outset, the problem with a race- or gender-based programming diversity standard is that it rests upon the generalization that thoughts and behavior can be categorized by race and gender. This is sensitive and dangerous ground.

Assuming that a programming diversity standard can be formulated, however, no evidence exists that programming diversity is lacking in American broadcasting. Indeed, the public record suggests the opposite: the proliferation of media services has led to an unprecedented number of programming outlets and audience choices.

Even if it were not so, however, what is the government's interest in programming diversity and the need for regulatory oversight? *Lutheran* held that the government's interest is not compelling. *Metro* held eight years earlier that the government's is an important interest.[3]

Assuming that the government's interest is at least important, warranting intermediate constitutional scrutiny, the question arises

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Commission's nearly 30-year old EEO policy. The Commission offered the petition for public comment in the context of its EEO streamlining proceeding, MM Docket No. 96-16 (Notice of Proposed Rule Making released February 16, 1996), which the instant proceeding terminated.

3 *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990) ("*Metro*"). Importantly, *Metro's* finding was made in the context of the FCC's procedures for awarding licenses, not the regulation of employment practices. The *Metro* rationale was premised on the concept of promoting many "voices." The connection between many "voices" and employment practices is tenuous, at best.

Broadcasters and cablecasters have no way of knowing whether their recruitment efforts are sufficient. The proposed EEO rule would be accompanied by a program of enforcement and threat of sanctions for licensees that fail to measure up, but to what? For failing to contribute to the nebulous concept of programming diversity?

HBP applauds and supports initiatives to foster and promote voluntary industry efforts to fulfill the spirit of equal opportunity and recruitment outreach in the American media. The proposed EEO rule, however, is flawed in numerous ways, many of them of a constitutional magnitude. It should be abandoned. In its place the Commission should adopt an activist role in promoting voluntary industry compliance with recruitment outreach efforts.

## What is Programming Diversity?

The Commission observes that its statutory public interest standard includes the mandate to ensure that "broadcasting and other programming services serve the interests and needs of all sectors of the community . . . ."[4] The mandate springs from the bedrock notion that

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[4] NPRM at ¶ 40.

"the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ."[5]

In the context of the EEO rule and policies, the law of *Lutheran,* and the current proceeding, the government's interest in programming diversity has been no more precisely defined than "the fostering of programming that reflects minority viewpoints or appeals to minority tastes."[6] This compels one to ask, "What are minority viewpoints? What appeals to minority tastes?"

These questions place the government upon constitutionally infirm and socially repugnant ground. They rest upon the unfounded generalization that thoughts and behavior can be categorized by race and gender.[7] Contemporary law and society reject that proposition. The assumption that an individual holds certain views or characteristics by virtue of his or her race or gender indeed can be inimical to the public welfare.

> [T]he use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages, and legitimizes the mode of

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5 *Associated Press v. United States,* 326 U.S. 1, 20 (1945).

6 *Lutheran,* 141 F.3d at 354.

7 See Justice O'Connor's dissent in *Metro, supra,* 497 U.S. at 615 (1990), ". . . the interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior."

> thought and behavior that underlies most prejudice and bigotry in modern America.[8]

The courts now acknowledge that to believe a person's race controls his or her point of view is to engage in stereotyping.[9]

> The Supreme Court . . . "has remarked a number of times, in slightly different contexts, that it is incorrect and legally inappropriate to impute to women and minorities 'a different attitude about such issues as the federal budget, school prayer, voting, and foreign relations.'" Michael S. Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion,* 71 TEX. L. REV. 993, 1000 (1993) (quoting *Roberts v. United States Jaycees,* 468 U.S. 609, 627-28, 104 S.Ct. 3244, 3255, 82 L.Ed.2d 462 (1984). "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the government may not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how they act or think." *Metro Broadcasting,* 497 U.S. at 602, 110 S.Ct. at 3029 (O'Connor, J., dissenting).[10]

Indeed, "diversity" as the basis for racial classifications in any setting other than remedying past wrongs, can backfire and frustrate the constitutional purpose and goal of equal protection under the law. "Unless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics

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8 Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities,* 1974 SUP.CT.REV. 12 (1974), quoted in *Hopwood* v. *State of Texas,* 78 F.3d 932, 946 (5th Cir. 1996).

9 *See Hopwood, supra* at 946.

10 *Id.*

of racial hostility."[11] One federal court concluded: [12]

> Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.

The case law and contemporary social imperative are clear: the government's use of racial and gender classifications perpetuates group distinctions on the basis of race or sex. Absent a remedial purpose, these classifications are contrary to the public interest; they transgress constitutional protections.

## Is Programming Diversity Lacking?

Assuming the concept of programming diversity can pass constitutional scrutiny, the question arises whether regulation in this area is necessary -- is there a lack of programming diversity in the American media?

Elementary principles of administrative procedure require an agency to "examine the relevant data and articulate a satisfactory

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11 *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (Plurality opinion). The Commission has never claimed that its EEO rule is designed to remedy past discrimination. See *Petition for Rule Making to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 FCC 2d 766, 775 (1968).

12 *Hopwood, supra,* at 945.

explanation for its action including a 'rational connection between the facts found and the choice made.'"[13]

The NPRM neglects to raise the question posed above. The Commission's postulation of a new EEO rule assumes without discussion a need for regulation. The need for regulation rests on the unsupported and untested premise that programming in American media lacks diversity in some measure.

On previous occasions -- significant to this proceeding because of their relation to program regulation -- the Commission has not acted to adopt, amend, or rescind its rules and policies without first building a factual record upon which to base its decision.[14]

In repealing television nonentertainment programming guidelines, for example, the Commission relied upon three studies of television programming performance covering an eight-year period.[15] They enabled the Commission to conclude that marketplace forces rather than regulatory guidelines are primarily responsible for the levels of

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13 *Motor Vehicle Manufacturers Assn. V. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (*"State Farm"*), quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

14 The decisional process for making rule or policy or for modifying or rescinding it is the same. *State Farm, supra.*

15 *The Revision of Programming and Commercialization Policies, Asertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC2d 1076 (1984). (*"TV Deregulation"*).

informational programming broadcast by television stations, and that "these forces have consistently elicited a level of such programming well above the amounts arbitrarily set by our processing criteria."[16]

Similarly, the Commission's historic radio deregulation order was based on a record of (1) broad public comment on the specific deregulatory issues there under consideration, (2) "Public Participation Workshops" held by Commissioners in five cities across the country, and (3) specially-convened panel discussions.[17] On that record, the Commission concluded that radio stations should be permitted to tailor their programming to market conditions and the nature of their listenership.[18]

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16 *Id.* at 1085.

17 *Deregulation of Radio,* 84 FCC2d 968 (1981). (*"Radio Deregulation"*).

18 *Id.* at 997-8. The result of this determination was that "where there are few stations in the community, each station must be more general in its coverage of issues. However, in communities having a large number of radio services available, the public interest is not offended by permitting each station to base its service, including the issues to which it will be responsive with programming, upon the nature of the radio services otherwise available in the community and the interests of its own listenership. In this way all will continue to obtain the benefits of radio without regulations that straight-jacket all stations into the same mold." *Id.*

In both proceedings, the Commission looked to marketplace forces and increased competition, not regulation, as the principal mechanisms for assuring the broadcast of diverse, responsive programming.[19]

The Commission has no contemporary record by which to measure programming diversity, and the NPRM does not seek it. In light of prior Commission actions involving considerations of programming diversity -- the broadcast of programming responsive to all significant community elements -- the failure to compile a showing on the question whether diversity is lacking, is fatal to the Commission's present undertakings. The Commission should issue a supplemental notice and invite comment on this specific question, in order to develop an adequate record for decisionmaking.

The public record is rich with evidence that the opportunity for programming diversity has never been greater. Since 1969, when the first EEO rule was adopted, the number of AM and FM stations has increased 85%, from 6,745 to 12,496.[20] The number of commercial television

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19 *See TV Deregulation at* 1086-1088 ("[L]icensees should be given this flexibility to respond to the realities of the marketplace by allowing them to alter the mix of their programming consistent with market demand."); *Radio Deregulation at* 978 (the number of market outlets creates economic incentives to narrowcast to discrete audiences).

20 *Broadcasting & Cable Yearbook 1998* at D-702 ("*Yearbook*"); "Broadcast Station Totals as [of] January 31, 1999," Mimeo No. 92060, February 18, 1999 ("'Station Totals'").

stations has increased 82%, from 872 to 1,590.[21] Low power television did not exist in 1969. Today there are 2,136 low power television stations.[22]

The cable television industry consisted of only 2,490 systems serving 4.5 million subscribers in 1970. By 1998, system growth had increased by more than 300%, to 10,845 systems serving 64.1 million subscribers, thirteen times as many subscribers as it served 30 years ago.[23]

The Commission has recognized a variety of other video programming distribution technologies, including direct broadcast satellite services and home satellite dishes, wireless cable systems in the multichannel multipoint distribution service (MMDS) and the local multipoint distribution service (LMDS), satellite master antenna television, the Internet, home video sales and rentals, interactive video and data services (IVDS), local exchange telephone carriers (LECs), and

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21 *Yearbook* at B-239; "Station Totals."

22 "Station Totals."

23 *Television & Cable Factbook 1998,* at F-1 ("*Factbook*").

electric and gas utilities.[24] These contribute to programming diversity on a scale unimagined 30 years ago.

The program services delivered by multichannel video program distributors have enjoyed a similar growth. During 1997 there were 172 national satellite-delivered cable programming services, a one-year increase of 17% over the 147 services reported in 1996, and an increase of 62% over the 106 services reported in 1994.[25] Never before have viewers had so many video programming choices.

A cursory review of the growth of program outlets and services thus suggests that programming diversity is not lacking in America, but, quite the contrary, is increasing at an exponential rate.

## What Is The Commission's Interest In Programming Diversity?

Throughout the history of broadcast regulation, the federal government has attempted to foster programming diversity in a number of ways. Not until the advent of equal employment opportunity and affirmative action, however, did the Commission focus on race- or

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24 *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report,* FCC 97-423, released January 13, 1999, at ¶ 4 (*"Video Programming"*).

25 *Video Programming,* at ¶ 158.

gender-based classifications in considering diversity of programming among licensees.[26]

*Lutheran* states in unequivocal terms that "it is impossible to conclude that the government's interest [in programming diversity], no matter how articulated, is a compelling one."[27] There is no doubt about the meaning of the Court's holding, nor is there any need to interpret it.

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26 The Commission's predecessor, the Federal Radio Commission, required applicants for renewal of license to attach a printed program and report the average time devoted weekly to particular kinds of programming, such as entertainment, religious, commercial, educational, agricultural, and fraternal programming. *Review of the Commission's Regulations Governing Television Broadcasting (Further Notice of Proposed Rule Making),* 10 FCC Rcd 3524, 3547-8 (1995).

The Commission's *1960 En Banc Programming Statement* listed fourteen types of programming viewed as serving the public interest. They were (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, and (14) entertainment programs. 44 FCC2d 2303 (1960).

In 1971, the Commission adopted community ascertainment obligations for broadcasters which required them to survey specific segments of the community, and to provide programming in response to problems, needs, and interests ascertained from such surveys. *Primer on Ascertainment of Community Problems by Broadcast Applicants,* 27 FCC 2d 650 (1971).

The Commission later implemented a mandatory checklist that enumerated 19 distinct community groups the interests of which broadcasters are obligated to identify and to serve. *Ascertainment of Community Problems by Broadcast Applicants (First Report & Order),* 57 FCC 2d 418, 35 P&F Rad.Reg.2d 1555 (1975). Among the community elements identified were minority and ethnic groups, and organizations of and for women. The sample checklist adopted by the Commission also stated, "While the following are not regarded as separate community elements for purposes of this survey, indicate the number of [community] leaders interviewed in all [19] elements . . . who are: (a) Blacks, (b) Hispanic, Spanish speaking or Spanish-surnamed Americans, (c) American Indians, (d) Orientals, (e) Women." 35 P&F Rad.Reg.2d at 1592.

27 141 F.3d at 355.

The law of the case is thus clear: since the government's interest is not a compelling one, its use of racial classifications in a regulatory scheme designed to promote program diversity is unconstitutional.[28]

The NPRM acknowledges the Court's holding, that the governmental interest in programming diversity is not "compelling," but concludes that that interest "nevertheless provides a reasonable basis for the rules proposed [herein], which . . . could not reasonably be viewed as pressuring broadcasters to adopt racial preferences in hiring."[29]

The concept of "reasonable" racial classifications is a dangerous and slippery slope for the Commission to mount. As Justice Kennedy observed in *Metro*:[30]

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28 *Adarand Constructors, Inc., v. Pena,* 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). The *Lutheran* Court observed that "the sort of diversity at stake in this case has even less force than the 'important' interest at stake in *Metro Broadcasting.*" 141 F.3d at 355. The Court reasoned that *Lutheran* dealt, as does the proposed EEO rule, only with "intra-station" diversity, while *Metro* dealt with "inter-station," or many "voices," diversity. The Court observed, "It is at least understandable why the Commission would seek station to station differences, but its purported goal of making a single station all things to all people makes no sense." *Id., at* 495-6. Justice Kennedy, joined by Justice Scalia in his dissent in *Metro,* was not nearly as kind: "I cannot agree . . . that the Constitution permits the Government to discriminate among its citizens on the basis of race in order to serve interests so trivial as 'broadcast diversity.'" 497 U.S. 547, 633 (Kennedy, J., dissenting). The *Lutheran* Court observes relevantly that four Supreme Court Justices who argued in *Metro* that the government's desire to encourage broadcast content reflecting a racial view was at odds with equal protection, were in the majority in *Adarand.* (Justice Thomas, also in the *Adarand* majority, was not a member of the Court when *Metro* was decided.)

29 NPRM at ¶ 25.

30 *Metro, supra,* 497 U.S. at 631 (Kennedy, J., dissenting).

> Almost 100 years ago in *Plessy v. Ferguson,* 163 U.S. 537, this Court upheld a government-sponsored race-conscious measure, a Louisiana law that required "equal but separate accommodations" for "white" and "colored" railroad passengers. The Court asked whether the measures were "reasonable," and it stated that "[i]n determining the question of reasonableness, [the legislature] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort. *Id.* at 550. The *Plessy* Court concluded that the "race-conscious measures" it reviewed were reasonable because they served the governmental interest of increasing the riding pleasure of railroad passengers. The fundamental errors in *Plessy,* its standard of review and its validation of rank racial insult by the State, distorted the law for six decades before the Court announced its apparent demise in *Brown v. Board of Education,* 347 U.S. 483 (1954).

The constitutional magnitude of the Commission's undertakings forecloses "reasonableness" as a basis for adoption of the proposed EEO rule.

## What Is The Regulatory Goal?

The failure of the NPRM to define, measure, and evaluate programming diversity in American media leads to the question of what the regulatory goal is. The Commission seeks programming diversity but is silent on achievement of it. Where is the goal line? If we do not know how far we are today from a vision of programming diversity, and we do not know what that vision looks like, how will we know if and when we get there?

The NPRM deals with this question only tangentially, and its conclusions are troubling. If anything, the NPRM suggests that the

proposed EEO rule would remain in effect *ad infinitum.* "[R]ecruiting efforts should be continuous, even when entities believe that they have already achieved a diverse workforce."[31] The NPRM is silent on whether recruiting efforts should be continuous even when a licensee believes it has achieved diverse programming.

To paraphrase Justice O'Connor, the Commission's approach to programming diversity through its EEO rule "effectively assures that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminat[ing] entirely from government decisionmaking such irrelevant factors as a human being's race' . . . will never be achieved."[32]

The failure of the NPRM to establish some kind of achievement standard or objective for programming diversity is a fatal defect in the proposed EEO rule.

## Does Recruitment Outreach Affect Diversity?

The NPRM requests specific comment on the question whether a nexus exists between minority and female employment and diverse

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31 NPRM at ¶67.

32 *Croson, supra,* 488 U.S. at 495, 109 S.Ct. at 722 (plurality opinion of O'Connor, J.) (quoting *Wygant* v. *Jackson Board of Education,* 476 U.S. 267, 320 (Stevens, J., dissenting)).

programming.[33] HBP polled a number of its clients on this and the other questions the Commission asks, in order to assist in the development of a full record in this proceeding.

The information supplied by HBP clients reflects that there is no nexus between minority and female employment and the fostering of diversity in programming.[34] None of the HBP respondents was able to provide an example of a programming decision that was influenced by the race or gender of a station staff member, whether or not the staff person was in a position to influence programming.

On the basis of the information supplied by participating HBP clients, it is apparent that the proposed EEO rule is overbroad in its reach and misdirected in its target. These flaws are manifested in several ways.

First, to require every broadcast station and cable system to demonstrate diversity in outreach, in the expectation that it will generate diversity in employment, which will produce diversity in programming, and will lead to diversity in ownership, is to require all entities to be all things to all people. As the *Lutheran* court noted, this makes no sense.[35]

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33 NPRM at ¶ 45.

34 See attached Declarations.

35 *See* n. 28, *supra*.

It also contradicts the Commission's previous, well-founded view, that the public interest is not offended by broadcasters tailoring their programming to their audiences.[36]

Second, the proposed EEO rule applies to all employees of a licensee, even though it is established that only a small percentage have any connection to programming. To apply the rule to positions such as receptionist, board operator, or duty engineer cannot be said to influence programming diversity to any degree whatever.

Third, the proposed rule rests upon an assumption not supported by the facts, namely that all broadcast employees are on a lifetime broadcast career track, from entry level through programming and management ranks to ownership. Many employees, including those responsible for programming, leave stations to go to work for nonbroadcast employers. They do not spend a lifetime in the industry. Employees leave to sell insurance, to work for the telephone company, to enter the ministry, to begin their own nonbroadcast enterprise, to be an office worker elsewhere, to retire, or to engage in myriad other nonbroadcast activities.[37]

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36 *See* n. 18 and 19, *supra*. The same can be said for cablecasting.

37 See attached Declarations.

A corollary is that people enter the programming arena from disciplines other than broadcasting or cable system employment. They come from the motion picture industry, independent production companies, advertising agencies, book, magazine and newspaper publishers, professional sports, and other varied career backgrounds. Broadcast employment does not present a monolithic, tenure-track, cradle-to-grave career commitment that the proposed EEO rule presupposes.

Fourth, the proposed EEO rule ignores the reality that the universe of program time available to a broadcast station or cable system is very small, in most cases less than ten percent of a broadcast station's time. Except at the relatively small number of radio stations that broadcast a local news and talk format, nearly all of that time is consumed by recorded music or network and syndicated programming. Most cable system local originations are produced by others on PEG or leased access channels. Of 11,112 cable systems operating in 1995, only 943, or about 9%, engaged in non-automatic originations.[38]

Therefore, entirely apart from the question of a nexus between employment and programming diversity, the foregoing considerations

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38 *Factbook, supra.*

raise the question whether the burden of an EEO rule, as applied to every employee of every broadcast station and cable system in America, is justified by any perceived net benefit to the regulatory goal of programming diversity. HBP believes the question must be answered in the negative.

The proposed rule must, at the very least, meet the constitutional requirement of narrow or reasonable tailoring. The proposed EEO rule isn't narrowly or even reasonably tailored. The Commission has proposed a regulatory program that encompasses one hundred percent of the employee universe in an effort to reach the small percentage that have influence over programming, for purposes of affecting ten percent or less of local program time, with the expectation that programmers' business decisions will be influenced by their race or gender, and that some of them someday will own their own station over which they may and would exert similar influence.

There are more direct ways for the Commission to foster diversity in programming. Two that have been used before are immediately apparent.

First, under the former ascertainment scheme, the Commission required broadcasters to report on community leaders with whom they had made contact during the renewal term, classified by community

element.[39] Included in the checklist of community elements were minority and ethnic groups, and organizations of and for women.

The Commission could consider soliciting program information from licensees based on the community elements it formerly prescribed for ascertainment. Such information would ostensibly give the Commission some basis for evaluating programming diversity. This approach, however, would require the Commission to develop the same goals and objectives that the current proposal lacks, by asking what programming diversity is, where it is today, and what it is ultimately supposed to be.

Second, the Commission's fundamental mandate to make radio services available to the Nation comprehends the authority to establish new services. The Commission has initiated a review of the potential for this in MM Docket No. 99-25, which examines the creation of a new low power FM radio service. Indeed, among the specific objectives of the proceeding are to "foster opportunities for new radio broadcast ownership, and promote additional diversity in radio voices and program services."[40]

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39 *See* n. 26, *supra.*

40 *Creation of a Low Power Radio Service,* FCC 99-6, released February 3, 1999, at ¶ 1.

Review of programming records and the exercise of the power to allocate radio frequencies clearly are more direct means of fostering programming diversity than regulation of employment practices.

## What Is Expected Of Commission Licensees?

The proposed EEO rule obligates licensees to engage in a course of conduct in employment practices, namely, recruitment outreach. Yet the proposal lacks any quantifiable or meaningful standard of conduct or an ultimate goal or objective. The Commission itself stresses that "there is no maximum, minimum, or even optimal level of diversity in employment."[41] Presumably, this means that the Commission intends the EEO rule to have effect forever, regardless whether its regulatory purpose, programming diversity, is ever achieved.

The NPRM proposes that licensees recruit in any manner they wish, "as long as they can demonstrate that their efforts attract a broad cross section of qualified applicants."[42]

As an alternative, the NPRM proposes to require that licensees use a specific number of recruitment sources for each vacancy, some of

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41 NPRM at ¶67.

42 NPRM at ¶ 64.

which are minority- and female-specific sources.[43]

The Commission notes that the proposed program will not require parity or other measure of a station's workforce with the local labor force.[44] But it requires entities to "prove that they have made good faith efforts to broaden their applicant pools for all vacancies,"[45] and the Commission will impose "appropriate sanctions" for entities that "violate the recruiting and recordkeeping requirements."[46]

This framework is, of course, borrowed from the former EEO rule, but it lacks one critical element: a performance standard. The program is entirely devoid of any results-orientation and assessment geared to the ultimate objective of programming diversity. Neither the licensee nor the Commission can know from the proposed EEO rule whether it will have any impact on diversity in programming. Yet the framework exposes licensees to the risk of sanction, including significant monetary forfeitures, for recruiting and recordkeeping violations.

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43 NPRM at ¶ 65. The NPRM proposes, for example, to require at least six recruitment sources, three of which would be minority- and female-specific, and of those three, at least one would be minority-specific and another female-specific.

44 NPRM at ¶ 67.

45 NPRM at ¶73.

46 NPRM at ¶74.

## The Commission Should Adopt A Program Of Voluntary Efforts And Initiatives

In the wake of the *Lutheran* decision, industry elements have come forward in strong support of the principles of nondiscrimination and equal opportunity for persons regardless of race, ethnicity, or gender. This is gratifying, and it is as it should be in contemporary America.

The Chairman has recognized these salutary efforts. He challenged broadcasters to develop their best ideas to promote ownership, management, and employment for minorities and women,[47] and followed through with his challenge by meeting with industry leaders to discuss initiatives and activities.[48] He has publicly acknowledged the pledge of many broadcasters and leading media companies to continue to abide by EEO principles.[49] He has recognized the significant efforts of the Radio-Television News Director Association's Newsroom Diversity Campaign,[50] and the Broadcast Executive Directors Association's development of a

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47 "An Era of Opportunity," Remarks by William E. Kennard, National Association of Broadcasters, Las Vegas, Nevada, April 7, 1998.

48 *Statement of FCC Chairman William Kennard on Meeting with Broadcast Executives on Minority Issues,* July 14, 1998.

49 "Thinking Ahead" by William E. Kennard to NAACP 1998 Annual Convention Telecommunications Forum, Atlanta, Georgia, July 13, 1998; Remarks by William E. Kennard to NAB Radio Convention, Seattle, Washington, October 16, 1998 ("NAB Radio"); Remarks by William E. Kennard, to American Women in Radio and Television, Washington, D.C., September 11, 1998 ("AWRT").

50 Remarks of William E. Kennard to the Radio-Television News Director Association Annual Convention, San Antonio, Texas, September 25, 1998.

model program to promote diversity in the radio industry.[51] The Chairman joined actor Jimmy Smits in sponsoring a CEOs' forum on promoting opportunities for racial and ethnic minorities in entertainment industries.[52]

The National Association of Broadcasters has considered several proposals to increase industry participation by minorities, including hosting a summit on opportunities for minorities and women in broadcasting, to which industry groups would be invited such as the Radio-Television News Director Association, the Broadcast-Cable Financial Management Association, and trade and state associations. The meeting would facilitate ways to provide resources for broadcasters to do training, host job fairs, and recruit minorities and women.[53]

We believe private sector initiatives to develop awareness and to promote action are preferable to a scheme of government regulation that by definition must resort to racial classification, and which burdens those subject to such regulation with threat of sanction. The Commission should embrace the Chairman's tireless efforts to promote industry

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51 NAB Radio, *supra.*

52 *Statement of FCC Chairman William E. Kennard Applauding Jimmy Smits' Call for Promoting Opportunity in the Entertainment Industry,* June 23, 1998.

53 "Board Pushes Ahead On Minorities," *Broadcasting & Cable,* January 4, 1999, at p. 14.

participation in voluntary programs of nondiscrimination and outreach among minorities and women. Such a course of action would be constitutionally unassailable. In the Chairman's words, it is "the right thing to do. It's right for [industry]. And it's right for the country."[54]

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54 AWRT, *supra.*

## Conclusion

The courts have made it increasingly clear that government should not use racial classifications for any purpose other than to remedy past discrimination. The propose rule, based as it is on the generalized and abstract notion of program diversity, does not meet this test for use of racial classifications.

The Commission should partner with private industry to promote broad, voluntary initiatives to achieve its goal of diversity in programming.

Respectfully submitted,

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# PARTICIPANTS

| LICENSEE | STATION | COMMUNITY OF LICENSE |
|---|---|---|
| Gore-Overgaard Broadcasting | KBIF(AM) | Fresno, California |
| | KLAV(AM) | Las Vegas, Nevada |
| | WNAI(AM) | Newburg, Kentucky |
| | WTMR (AM) | Camden, New Jersey |
| James Crystal Enterprises | WRMF(FM) | Palm Beach, Florida |
| | WRLX(FM) | West Palm Beach, Florida |
| | WFTL(AM) | Ft. Lauderdale, Florida |
| | WDJA(AM) | West Palm Beach, Florida |
| | WJNA(AM) | West Palm Beach, Florida |
| Leighton Enterprises, Inc. | KNSI(AM) | St. Cloud, Minnesota |
| | KCLD(FM) | St. Cloud, Minnesota |
| | KCML(FM) | St. Joseph, Minnesota |
| | KZPK(FM) | Paynesville, Minnesota |
| | KDLM(AM) | Detroit Lakes, Minnesota |
| | KBOT(FM) | Pelican Rapids, Minnesota |
| | KNOX AM/FM. | Grand Forks, North Dakota |
| | KYCK(FM) | Crookston, Minnesota |
| Nebraska Rural Radio Association | KRVN AM/FM | Lexington, Nebraska |
| | KTIC(AM) | West Point, Nebraska |
| | KWPN(FM) | West Point, Nebraska |
| | KNEB AM/FM | Scottsbluff, Nebraska |
| Omni Broadcasting | KBHP(FM) | Bemidji, Minnesota |
| | KKZY(FM) | Bemidji, Minnesota |
| | KBUN(AM) | Bemidji, Minnesota |
| | WJJY(FM) | Brainerd, Minnesota |
| | KTCF(FM) | Brainerd, Minnesota |
| | KIKV(FM) | Alexandria, Minnesota |
| Woodland Communications Corp. | KKXK(FM) | Montrose, Colorado |
| | KUBC(FM) | Montrose, Colorado |
| | KEJJ(FM) | Gunnison, Colorado |

DECLARATION

I, Harold W. Gore, do hereby declare and state as follows:

1. I am the Chairman of Gore-Overgaard Broadcasting, which operates AM radio stations in Las Vegas, Louisville, Fresno, and Daytona Beach. I have been engaged in broadcast station operation, management, and ownership for forty years. In my extensive experience I have been responsible for the supervision of hundreds of employees in broadcast stations in many of the Top 100 markets, including Philadelphia, Chicago, Atlanta, Houston, Baltimore, Miami, San Diego, Milwaukee, Cincinnati, and Tampa-St. Petersburg.

2. The general manager holds the responsibility for programming decisions at our stations. Much of the broadcast day at our stations is brokered to third parties in program blocks of various types, ranging among newscasts and current events discussions, call-in and advice programs, religious broadcasts, and foreign language programming.

3. Staff positions that are not assigned programming responsibilities do not influence our programming decisions. We make our decisions about the programming we offer based on what market demand we see for programs. A good example is our experience with our Camden/Philadelphia station, WTMR. There, we perceived an unmet demand for religious gospel programming, which we broadcast 12 hours daily, from 6 p.m. to 6 a.m. At WTMR we employed four persons full-time: one white male, two African American males, and one female, who was general manager.

4. During my career in broadcasting I have worked with and supervised Native Americans, African Americans, and Hispanics, in both programming and non-programming positions. I believe in equal opportunity principles, and we integrate them into our hiring and recruitment practices. We rarely employ as many as five full-time persons, however, so we do not have formal programs at all of our stations.

5. I cannot recall any instance of any programming that in my perception was affected or influenced by the race or gender of a station staff member.

6. Many of the people that I have employed and supervised over the years have gone on to other positions in broadcasting, but it is often not the case. For example, one of my general managers left the station to acquire muffler repair franchises. Another general manager left to enter the ministry. Another went into full-time broadcast brokerage, and yet another GM is today an insurance agent. One of my sales managers went to work in sales at Arbitron. Two other former sale managers each formed their own broadcast audience research firm.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 24, 1999

By: Harold W. Gore
Harold W. Gore

DECLARATION

I, John J. Sowada, do hereby declare and state as follows:

1. I am the President of Leighton Enterprises, Inc., which operates three AM and six FM stations in the States of Minnesota and North Dakota. I have been involved in broadcasting and management for the past sixteen years. I have been responsible for the supervision of more than one hundred employees in medium and small market broadcast stations.

2. At our stations, principal control of day to day non-entertainment programming rests with the news director, program director, and operations director. The general managers of our stations are also active in the process, and of course, the buck stops with me, as President.

3. We are driven in our choice of programming, both entertainment and non-entertainment material, by its relevance to our community and what we perceive our audience wants. We get input on this from a variety of sources, including our staff, marketing data and surveys, and the public. In every case of a programming idea or topic, we ask ourselves, "Does this have community relevance, and is it something that our listeners would like or benefit from?" This type of approach to programming does not proceed along lines of race, ethnicity, or gender. However, I believe it has produced a variety of programming that attracts men and women listeners of all races and ethnicities,

4. During my career in broadcasting I have worked with and supervised Native Americans, African Americans, and Hispanics, in a variety of staff

positions. I believe in equal opportunity principles, and we integrate them into our hiring and recruitment practices. I cannot recall any instance involving programming that, in my view, was affected or influenced by the race or gender of a station staff member. As I think about program diversity, I recall the community elements that the FCC listed for its community leader survey under the old ascertainment procedures. That seems to me like a good way to evaluate the diversity in a station's programming.

5. Our St. Cloud AM Station KNSI is a news/talk station, and locally originated programming accounts for fifteen to twenty percent of its broadcast week. At our music-formatted stations, locally produced programming is perhaps four percent of the broadcast week.

6. Our St. Cloud stations are a kind of "farm team" for larger stations in Minneapolis-St. Paul, so many former employees of ours continue on in broadcasting there. However, probably as many employees leave us to go to work in nonbroadcast fields. For example, one female went from news to the promotions department of a theme park. A female announcer moved into sales, then left us for a sales position with a banking forms and software company; she is now a department manager there. Another female went from radio sales to mortgage brokerage, and she is now a computer programmer. A former traffic manager became a bookkeeper, and she is now with an accounting firm as a benefits specialist. Former female salespersons have moved into sales in other areas -- newspaper; furniture, automobiles.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 15th, 1999

By: _____
John J. Sowada

D E C L A R A T I O N

I, Eric F. Brown, do hereby declare and state as follows:

1. I am General Manager of Nebraska Rural Radio Association, which owns and operates six AM and FM stations in the state of Nebraska. I have been engaged in broadcast station management for the past 25 years and have been responsible for the supervision of nearly 100 employees of small market broadcast stations.

2. Nebraska Rural Radio Association is unique among broadcast licensees in the United States: it is a membership organization owned by more than 4,000 Nebraska farmers and ranchers. It began broadcast operations in 1951 under its charter as "an agricultural organization, organized and operated exclusively for educational purposes and for the promotion of social and economic welfare in rural areas." Today, the Association operates AM/FM combinations at Lexington in south central Nebraska; Scottsbluff in western Nebraska; and West Point in eastern Nebraska.

3. At our stations the news director, farm director, and program director have day-to-day control over nonentertainment program content, with my oversight and input as general manager.

4. We do not have a rigid formula or method for developing ideas for program subjects and topics. They can and do come from anyone who cares to contribute them, whether a staff member, a Board member, or a member of the general public. In the end, however, the farm director, news director, or program director assumes responsibility to determine whether a programming idea will be pursued and to prepare the content of the program, again, subject to my oversight as general manager.

5. During my career in broadcasting I have worked with and supervised Native Americans, African Americans, and Hispanics in both programming and non-programming positions. I believe in equal opportunity principles and we are conscious of them in our hiring and recruitment practices, although the minority population is relatively small in the markets we serve.

6. There has not been any program that was affected or influenced by the race or gender of a station staff member. We broadcast a weekly Spanish-language program that is produced by an Hispanic staff member. It is mostly music but occasionally it will contain come news material. The news segments deal with issues that are of equal concern to Hispanics and non-Hispanics alike, such as crime, youth and drugs, education, politics, taxes, and the like. We also recently broadcast an anti-drug program as part of a symposium, once in English and a second time in Spanish. There was nothing in the program or in our decision to do a bilingual broadcast that suggested the Hispanics' views about drug abuse would be any different than any other group. We did this in order to serve our audience better. We also

broadcast our severe weather warnings in both English and Spanish.

7. Our AM stations are oriented toward news and talk and therefore have a high level of local originations, about 50% of the broadcast week or 84 hours. Our FM stations are music-formatted. Their local originations account for about nine percent of the broadcast week or about seven hours.

8. We have a very stable staff and little turnover. However, it has been our experience that persons who leave our employ pursue jobs outside of broadcasting. For example:

a. An African American engineer was hired by the telephone company.
b. A female copy writer left to go to work for the newspaper in Kearney, 35 miles away; another female copy writer opened a dress shop in Kearney.
c. A female salesperson left to do sales for a company not involved in broadcasting.
d. One female copy writer and one female program director have retired after 30 years with the Association.

9. Nebraska Rural Radio Association will celebrate its 50th Anniversary in 2001. We think it is significant that women have held at least two of the nine seats on the Board of Directors ever since the Association's founding. There are currently three female Board members.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 26, 1999.

By: Eric F. Brown
Eric F. Brown, General Manager

DECLARATION

I, Louis H. Buron, Jr., do hereby declare and state as follows:

1. I am the President of Omni Broadcasting, which operates one AM and four FM stations in the State of Minnesota. I have been engaged in broadcast station management for the past twenty-five years, and have been responsible for the supervision of hundreds of employees in broadcast stations ranging in size from the Top Ten Markets to small market stations.

2. At the Omni Broadcasting stations, principal control of day to day non-entertainment programming rests with the news director. Other personnel that are involved with programming decisions include the program director, the general manager, and myself, as owner.

3. Staff positions that are not assigned programming responsibilities have, from time to time, brought programming ideas to the attention of programming personnel. A good example is that one of our general sales managers, a female, gave us some programming ideas with respect to the Heart Association, a community organization in which she is active. Similarly, suggestions will come to us through employees associated with other community groups such as the Chamber of Commerce. In the end, however, it is the decision and responsibility of the news director or program director, as the case may be, to determine whether a programming idea will be pursued, and to prepare the content of the program.

4. During my career in broadcasting I have worked with and supervised American Indians, African Americans, and Hispanics, in both programming and non-programming positions. I believe in equal opportunity principles, and we integrate them into our hiring and recruitment practices.

5. I cannot think of a single example of any programming that in my perception was affected or influenced by the race or gender of a station staff member.

6. Locally originated programming at our stations accounts for about 6% of the broadcast week, or approximately 10 hours.

7. Probably as many, if not more, employees who leave us, pursue non-broadcast positions than new positions in broadcasting. I can think of a number of recent examples:

- An American Indian male air personality left us to go to work for a casino.
- Our female receptionist and promotions assistant went to a local college as promotions director.
- An American Indian female air personality left us to go to work for her tribal council.
- A female sales account executive, who came to us with a background in nursing, left us when her husband was relocated.
- A female air personality left us to enter sales for a car dealership.

3. I have worked with hundreds of people during my broadcast career, perhaps more than a thousand. Very, very few of these have pursued ownership of broadcast properties as a career goal, perhaps a half dozen.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 17, 1999

By: _____
Louis H. Buron, Jr.

DECLARATION

I, Mike Boen, do hereby declare and state as follows:

1. I am the General Manager of the Omni Broadcasting stations at Brainerd, Minnesota, WJJY-FM and KTCF-FM. I have been engaged in broadcasting and broadcast station management for the past twenty-one years, the majority of that time in the Minneapolis-St. Paul market.

2. At Omni Broadcasting's Brainerd stations, principal control of day to day non-entertainment programming rests with our program director. News content is determined on a day-to-day basis by our air personnel that broadcast the news. I and the stations' owner, Louis H. Buron, Jr., also carry responsibility for, and can be involved in, decisions about programming on the stations.

3. Staff positions that are not assigned programming responsibilities may have brought programming ideas to our attention, but it is rare, and I cannot think of any examples of when that happened.

4. During my career in broadcasting I have worked with and supervised American Indians, African Americans, and Hispanics, in both programming and non-programming positions. I believe in equal opportunity principles, and we integrate them into our hiring and recruitment practices.

5. In my experience, no instance comes to mind of any programming that in my perception was affected or influenced by the race or gender of a station staff member.

6. Locally originated programming at our stations accounts for about 9% of the broadcast week. A significant portion of that consists of extensive weather reports several times each hour, which is very important in this area. Not taking weather reports into account, our locally originated programming comprises about 4% of the broadcast week.

7. Employees who leave us more often pursue non-broadcast positions than new positions in broadcasting. Of six females that we formerly employed, a salesperson wound up selling groceries wholesale; a copywriter-administrative assistant left to take a similar position at a resort; another became a hospital admissions clerk; one relocated to the Twin Cities with her husband; and two simply quit without taking another job. An American Indian male that we employed in sales left us to pursue sales in the building materials industry.

8. Two female former employees have continued in broadcasting. One, who was a part-time announcer for us, is now in a full-time news position in our market. Another worked for us in high school. She is now in college, and will work for us this summer.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 17th, 1999

By: Mike Boen

Mike Boen

DECLARATION

I, Dave Vagle, do hereby declare and state as follows:

1. I am the General Manager of the Omni Broadcasting station at Alexandria, Minnesota, KIKV-FM. I have been in broadcast station management for the past fifteen of my 25 years in broadcasting.

2. Our station's principal non-entertainment programming is probably our weather reports because of their importance in this region. We also broadcast news reports in drive-time, and we originate a community affairs program that is broadcast weekly, called Focus. Day-to-day responsibility for the content of weather and news reports rests with our on-air personnel. My wife, Irene, is our Public Service Director. She determines the subject and content of Focus, produces it, and hosts it. I and the stations' owner, Louis H. Buron, Jr., also carry responsibility for, and can be involved in, decisions about programming on the stations.

3. We get programming ideas from many people, inside the station and out, but Irene decides what goes on the program and how to treat the topic. I cannot think of a show or an issue that I would consider was influenced by the fact that Irene is a woman. I'm not sure I could identify a view that Irene has simply because she is a woman. I see views shaped more by upbringing, political affiliation, church, and similar social factors, than just by a person's gender.

4. I believe in equal opportunity principles, and we integrate them into our hiring and recruitment practices. I am not aware of any situation where programming was affected or influenced by the race or gender of a station staff member.

5. Locally originated programming at our stations accounts for about 10% of the broadcast week. A significant portion of that consists of weather reports several times each hour.

6. Employees who leave us more often pursue non-broadcast positions than new positions in broadcasting. One female salesperson left us to sell insurance. Another went into sales at the local newspaper. A female administrative assistant moved to a similar position in a non-broadcast company. One female air personality went to another station in our market.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 17, 1999

By: Dave Vagle
Dave Vagle

DECLARATION

I, J. Stephen Glasmann, do hereby declare and state as follows:

1. I am the President of Woodland Communications Corporation, which operates three AM and FM stations in the State of Colorado. I have been engaged in broadcast station management for the past eighteen years, where I have been responsible for the supervision of about one hundred employees in medium and small market broadcast stations.

2. At our properties, principal control of day to day non-entertainment programming rests with the news director. Both the program director and I also may be involved with programming decisions.

3. During my career in broadcasting I have worked with and supervised Native Americans, African Americans, and Hispanics, in both programming and non-programming positions. I believe in equal opportunity principles, and we integrate them into our hiring and recruitment practices.

4. Locally originated programming at our stations accounts for about 10% of the broadcast week, or approximately 17 hours. We broadcast a weekly Spanish-language program that is produced by an Hispanic staff member. So far as I am aware, news segments of the program deal with issues that are of equal concern to Hispanics and non-Hispanics alike, such as crime, youth and drugs, education, politics, taxes, and the like. I do not believe there would be a particular "Hispanic" view of any of these issues.