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

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

COMMENTS OF
NOW FOUNDATION
NOW LEGAL DEFENSE AND EDUCATION FUND
CENTER FOR MEDIA EDUCATION
FEMINIST MAJORITY FOUNDATION
PHILADELPHIA LESBIAN AND GAY TASK FORCE
WOMEN'S INSTITUTE FOR FREEDOM OF THE PRESS

Of Counsel:

John Guenther
Nicolaine Lazarre
Law Students
Georgetown University Law Center

Jeneba Jalloh, Esq.
Randi M. Albert, Esq.
Citizens Communications Center Project
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9535

Counsel for NOW Foundation, et al.

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Summary

NOW Foundation, et al. believe that the Commission possesses ample authority and justification to retain parts of the EEO rules. Indeed, in light of judicial precedent, NOW Foundation, et al. do not believe that the Commission must abandon the current EEO policy with regard to women. In revising the EEO rules, only to the extent required by Lutheran Church, the Commission should outline specific recruiting and outreach efforts for broadcasters and then ensure enforcement of the rules through careful monitoring. Furthermore, the commenters oppose any "streamlining" of EEO that would allow a significant number of broadcasters to avoid the requirements of open and equitable recruitment.

A substantial body of precedent affirms the Commission's authority to implement EEO rules to prevent discrimination and promote broadcast diversity. Compelling evidence, both empirical and anecdotal, supports the argument that diversity of employment promotes diversity in ownership and programming. Employment diversity widens the pool of qualified potential owners and enhances the ability of women and minorities to establish the contacts and secure the financing necessary for a successful ownership bid. Moreover, diversity in employment at all levels contributes directly to programming diversity. Both upper-level decision-makers and lower-level employees have considerable influence on programming decisions.

Because broadcasters and cable operators may not be able to create effective recruiting programs capable of attracting a diverse pool of applicants, the Commission should delineate specific recruiting and outreach efforts, offering broadcasters and cable operators the opportunity to choose from among a variety of recruiting options.

To ensure the effectiveness of the newly modified rules, the Commission should maintain strong enforcement and monitoring efforts. In particular, the Commission should perform random audits throughout the license term to encourage good faith compliance with the EEO program. In addition, the Commission should exercise its authority to require record-keeping and to collect such data. Furthermore, it should continue to monitor the outcome of any discrimination complaints filed against broadcasters. Finally, the FCC should not "streamline" EEO requirements in a way that would allow a large number of broadcasters to operate without any obligation to recruit in an open and equal manner.

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The NOW Foundation, NOW Legal Defense and Education Fund, Center for Media Education, Feminist Majority Foundation, Philadelphia Lesbian and Gay Task Force, and the Women's Institute for Freedom of the Press ("NOW Foundation, et al.") respectfully submit Comments in response to the Notice of Proposed Rule Making ("Notice" or "NPRM") of the Federal Communications Commission ("FCC" or "Commission"), in the above referenced proceeding, released November 20, 1998, concerning equal employment opportunity rules and policies. In this Notice, the Commission generally seeks comment on its proposals to modify the

equal employment opportunity rule ("EEO Policy" or "EEO Rule") according to standards enunciated by the D.C. Circuit opinion declaring certain aspects of the rule unconstitutional. Lutheran Church-Missouri Synod v. FCC, 141 F.3d 244, 354 (D.C. Cir. 1998).

NOW Foundation, et al. support the Commission's efforts to maintain strong and effective EEO rules. However, we do not believe the Commission was required to alter the EEO rules as they apply to women. See NPRM ¶19. First, Lutheran Church does not reach women.[1] Second, as the Commission acknowledges, the standard of scrutiny for government gender-conscious policies is the less stringent "intermediate scrutiny" review, which these rules meet. NPRM ¶19 (citing U.S. v. Virginia, 518 U.S. 515 (1996); Ensley Branch, NAACP v. Seibls, 31 F.3d 1548, 1579-1580 (11th Cir. 1994)). Therefore, there is no need for the Commission to alter the rules as they apply to women. Having noted this objection, we will address the efficacy of the proposed regulations as they relate to other affected groups, as well as to women.

We believe that the Commission has proposed a sound approach to meeting several competing considerations and interests. The Commission must implement regulations that promote broadcasting in the public interest, see 47 U.S.C. § 151, comply with Constitutional requirements, see Metro Broadcasting v. FCC, 497 U.S. 547, 569 (1990), and are not unduly burdensome, see Executive Order 12866, 58 FR 51735, Title VII, §§ 1(a), b(3), (5), (6), (11), (12). In addition, we agree with the implementation of simultaneous revisions to the Cable EEO rules, see NPRM, Appendix B, because the Commission should not impose inconsistent obligations upon broadcasters and cable operators. Upon review of the modified EEO

[1] Lutheran Church, 141 F.3d at 351 n. 9 (stating, "gender classification has not been challenged in this case, so we will not address it."). Id.

regulations, we note that, within the constraints imposed by Lutheran Church, they effectively balance these considerations while ensuring reasonably effective outreach and recruitment.[2] The proposal serves the public interest by requiring owners of mass media facilities to notify all prospective applicants of employment opportunities regardless of gender or race.

To assist the Commission in meeting its obligation to justify these new rules, NOW Foundation, et al. have included in these comments empirical data supporting the position that employment of women and minorities at mass media facilities in all job categories will lead to more diversity of mass media ownership and increase programming diversity. NOW Foundation, et al. urge the Commission therefore to maintain enforceable rules that will afford women and minorities the greatest possible access to employment opportunities, consistent with Lutheran Church restrictions. NOW Foundation, et al. advise the Commission to delineate specific recruitment and outreach options rather than allow broadcast entities the discretion to determine how to conduct their recruiting efforts. Moreover, the Commission should maintain strong enforcement and monitoring policies. Finally, NOW Foundation, et al. oppose any efforts to "streamline" or weaken the EEO rules that would allow a large percentage of broadcasters to operate without any obligation to recruit in an open and equal manner.

I. The Commission Has Ample Authority and Justification to Retain All or Part of the EEO Rules

The Commission's authority and justification to retain the EEO Rules are supported by

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[2] The Lutheran Church court found that specifically parts (b) and (c) of the EEO processing guidelines in 47 C.F.R. § 73.2080 were unconstitutional as applied to racial minorities. The court found that broadcasters were "pressure[d] to maintain a workforce that mirrors the racial breakdown of their metropolitan statistical area ('MSA')." Lutheran Church, 144 F.3d at 352. The parity goals used under EEO processing guidelines were also cited as "a strong incentive to meet the numerical goals." Id. at 353.

the courts and Congress. The Supreme Court has consistently upheld the Commission's authority to impose regulations that ensure good faith hiring and recruitment practices as a component of broadcasters' public interest obligations. For instance, in Red Lion Broadcasting Co. v. FCC,[3] the Supreme Court confirmed that the scarcity of the broadcasting spectrum entitled Congress to legislate "suitable access to social, political, esthetic, moral and other ideas and experiences."[4] This authority to foster diversity of ideas provides the Commission with a justification for its EEO policy. Additionally, in NAACP v. FPC, the Court stated that the FCC had authority to enforce its EEO program because it was related to the Commission's obligations under the Communications Act to promote diversity of programming.[5] Furthermore, in Metro Broadcasting, the Supreme Court reaffirmed that broadcast diversity was an important governmental objective.[6]

In addition, courts have been generally willing to uphold measures designed to curb discrimination. Recently, for instance, the First Circuit Court of Appeals in Raso v. Lago[7]

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[3] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[4] Id. at 390.

[5] NAACP v. FPC, 425 U.S. 662, 670, n. 7 (1976) (stating that an agency may pass anti-discrimination measures under its authority only insofar as the discrimination relates to the agency's specific statutory charge).

[6] Metro Broadcasting, Inc v. FCC, 497 U.S. 547, 569 (1990).

[7] 135 F.3d 11, 16 (1st Cir. 1998) (citing Village of Arlington Heights v. Metropolitan Hous. Dev. Corp, 429 U.S. 252, 270-271 (1977) and Washington v. Davis, 426 U.S. 229, 247-48 (1976)). In Raso, the court held that a housing plan aimed at ending discrimination by opening

recognized that not "[e]very antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such statute" are unlawful or automatically suspect under the equal protection clause.[8] In Raso, the government conditioned federal housing funding on the requirement that "some of the apartments -- which otherwise would be automatically occupied by whites -- be made available to all applicants on a race blind basis."[9] The Commission's anti-discrimination and equal opportunity goals are similar to the government's in Raso. Thus, the Commission is justified in taking the action to promulgate reasonable EEO regulations.

Congress too has supported FCC measures directed toward EEO in broadcasting. We agree with the Commission's conclusion that the text and legislative history of the Communications Act reflect Congress' intent to grant the Commission authority to promulgate valid and reasonable EEO rules. NPRM ¶ 35.[10] As recognized in the Notice, Congress has expressly and implicitly ratified the Commission's inclusion of EEO into its regulatory scheme.[11]

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opportunity to all people did not violate equal protection principles because housing units were available to all applicants regardless of race. Id. See also Duffy v. Wolle, 123 F.3d 1026, 1038-1039 (8th Cir. 1997), rehearing en banc denied, 1997 U.S. App. LEXIS 30476 (Oct. 29, 1997), cert. denied 1998 LEXIS 3445 (May 26, 1998) (finding that "[a]n employer's affirmative efforts to recruit minority, female applicants does not constitute discrimination").

[8] Id. at 15.

[9] Id. at 17.

[10] The Commission notes that Lutheran Church specifically directed the FCC to consider its authority to promulgate an employment non-discrimination rule. NPRM ¶ 23.

[11] See NPRM ¶¶ 26-30. In 1969, the Commission first recognized that discriminatory employment practices by broadcast licensees were incompatible with their obligation to promote

In 1984, Congress codified the EEO rules as applied to the cable industry.[12] The House also held hearings on discriminatory practices limiting access to training and employment for women and minorities in broadcasting.[13]

In 1992, Congress illustrated that the status of women and minorities in the communications arena was an ongoing concern when it reviewed the public interest obligations of television broadcasters and codified the Commission's EEO program and non-discrimination regulations with regard to television licensees.[14] Congress asserted the same concern for cable when it provided in Section 22(a) of the 1992 Cable Act that "rigorous enforcement of equal employment opportunity rules and regulations is required to effectively deter racial and gender discrimination." NPRM ¶ 29. In 1996, Congress once again signaled its recognition that anti-

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the public interest and enacted the EEO rules. Petition for Rulemaking to Require Broadcast Licensees to Show Non-Discrimination in their Employment Practices, 23 FCC2d 430 (1969). [Hereinafter Non-discrimination].

[12] See 47 U.S.C. § 554; H.R. Rep. No. 98-934, at 86, 98, reprinted in 1984 U.S.S.C.A.N. 4723-2731.

[13] See, e.g. Report of the House Committee on Energy and Commerce on the Cable Communications Policy Act of 1984, H. Rep. No. 98-549, § 635:

> It is well established that the Commission has the authority to regulate employment practices in the communications industry. . . The Committee strongly believes that equal employment opportunity requirements are particularly important in the mass media area where employment is a critical means of assuring that program service will be responsive to a public consisting of a diverse array of population groups.

[14] Communications Act of 1934, as amended, 47 U.S.C. § 334. The Conference Report indicates that this section "codifies the Commission's equal employment opportunity rules, 47 CFR 73.2080 " for television licensees and permittees. H.R. Rep. No. 102-862, at 97 (1992).

discrimination was an integral requirement under the Act by inserting into the Commission's enabling provision a requirement that licensing and regulation of the industry occur "without discrimination on the basis of race, color, religion, national origin, or sex."[15]

Overall, a substantial body of precedent affirms the Commission's authority to implement Equal Employment Rules to meet Congress and the Commission's interest in preventing discrimination and promoting programming diversity. Considering the supporting law, the Commission has properly concluded that it has sufficient authority and an express directive to promulgate valid and reasonable EEO rules.

A. Employment of Women and Minorities in All Job Categories Affects Diversity in Mass Media Ownership and Programming

Compelling evidence, both empirical and anecdotal, supports the argument that diversity of employment promotes diversity in ownership and programming. While these comments include reference to compelling evidence as requested by the Commission[16] to bolster these assertions, we encourage the Commission to conduct a comprehensive empirical study to prove the nexus between diversity of employment and diversity of both ownership and programming.[17] Such a study would provide the "quantum of particularized evidence" that some courts have

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[15] 47 U.S.C. § 151 (1996).

[16] NPRM ¶ 45.

[17] The Commission has previously mentioned plans to conduct such studies. See Implementation of Section 309(j) of the Communications Act, MM Docket No. 97-234, 13 FCC Rcd. 15920, 15994 n. 224 (1998). [Hereinafter "Competitive Bidding"].

found wanting in earlier cases relating to EEO in broadcasting.[18]

1. The Nexus Between Female and Minority Employment Diversity and Diversity of Ownership in Mass Media Facilities Reinforces the Need for Strong EEO Policies

The connection between management experience and ownership opportunities is "fundamental."[19] However, diversity of ownership as a goal rings hollow if women and minorities lack access to the necessary tools of ownership.[20] The Commission correctly observes that, whether it be to bolster their credit applications or to provide them with the all-important "foot in the door," women and minorities must have employment opportunities in broadcasting if they are going to be able to take full advantage of later ownership opportunities.[21]

Congress has acknowledged the nexus between employment opportunities and ownership. In 1984, the House Commerce Committee noted the need for a "strong EEO policy" in the cable industry to ensure "that there are significant numbers of minorities and women with

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[18] Shurberg Broadcasting, Inc. v. FCC, 876 F.2d 902, 915 (D.C. Cir. 1989); see also, Lutheran Church - Missouri Synod v. FCC, 141 F.3d 244 (D.C. Cir. 1998).

[19] NOW Foundation, et al., Comments, Streamlining Broadcast EEO Rules & Policies, MM Docket No. 96-16, at 4 (July 11, 1996). [hereinafter "Streamlining"].

[20] For a detailed explanation of the nexus between broadcast ownership and diversity of broadcasting, see our argument on the influence of "decision-makers," infra 12-16; see also, Center for Media Education, et al., Comments, 1998 Biennial Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket No. 98-35 at 4-8 (July 21, 1998).

[21] Implementation of the Commissions EEO Rules, in MM Docket No. 94-34, 9 FCC Rcd 6276, 6319 (1994) (citing employment opportunities as "stepping stones" to ownership).

the background and training to take advantage of existing and future... ownership opportunities."[22] Congress reiterated this position when, in passing the 1992 Cable Act, it declared that "a strong EEO policy is necessary to assure sufficient numbers of minorities and women gain professional and management level experience..., and thus that significant numbers of minorities and women obtain the background and training to take advantage of future... broadcasting ownership opportunities."[23]

Lack of broadcast experience severely undermines the efforts of women and minorities to take full advantage of ownership opportunities. According to the National Women's Business Council, few women possess the necessary experience to start a telecommunications business,[24] and minorities face a similar situation. American Women in Radio and Television (AWRT) traces this lack of experience directly to discrimination in hiring.[25] Because women and minorities are denied opportunities for broadcast experience, few are represented in the pool of qualified owners. Evidence submitted by United Church of Christ (UCC), et al., in the Competitive Bidding proceeding stated that in Spring 1997, fewer than twenty radio stations

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[22] H.R. Rep., No. 98-934, at 84-85 (1984).

[23] H.R. Rep., No. 102-628, at 144 (1992).

[24] National Women's Business Council, Annual Report to the President and Congress, at 15 (1992).

[25] American Women in Radio and Television, Comments, Competitive Bidding, MM Docket No. 97-234, at 11 (Jan. 26, 1998).

were owned by women.[26] In 1997, none of the top twenty-five radio or television owners were women.[27] Minorities also lag far behind in ownership, accounting for fewer than 3% of all commercial broadcast stations in 1998.[28]

Women and minorities have a particular need for broadcast experience because they typically must be more qualified than their white male counterparts in order to find financial backing. Under-capitalization poses one of the most significant obstacles to women and minorities hoping to purchase mass media outlets. Historically, some lenders have discriminated against these would-be borrowers on the basis of sex or race "despite the same qualifying background or credit" as white males who are approved for loans.[29] One study found that one-third of women-owned business owners report that they believe gender played a role in their borrowing processes. Twenty percent reported that they were required to provide a husband's

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[26] UCC, et. al, Comments, Competitive Bidding, MM Docket No. 97-234, 13 n. 45 and accompanying text (Aug. 18, 1998).

[27] Spectrum Detroit, Comments, Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221, at 25.

[28] The Minority Telecommunications Development Program, National Telecommunications and Information Administration, U.S. Dept. of Commerce, Minority Commercial Broadcast Ownership in the United States (1998) (visited Nov. 4, 1998) <http://www.ntia.doc.gov/opadhome/minown98/98/black/htm>.

[29] The Minority Telecommunications Development Program, National Telecommunications and Information Administration, U.S. Dept. of Commerce, Capital Formation and Investment in Minority Enterprises in the Telecommunications Industries, Executive Summary (1995) (visited Jul. 13, 1998) <http://www.ntia.doc.gov/opadhome/mtdpweb/finover.htm>.

signature.[30] Similarly, according to another report, black and Hispanic applicants were 60% more likely to be turned down for loans than similarly situated white applicants.[31] Because they are held to a higher standard to qualify for loans, women and minorities must be allowed to acquire valuable broadcast experience to strengthen their loan applications.

Even where lenders do not overtly discriminate, women and minorities must struggle to secure financing.[32] According to a Washington Post article, for example, women have access to a mere 2% of the nearly six billion dollars in venture capital poured by investors into the economy each year.[33] The most commonly cited reasons for the inability to raise venture capital are the lack of industry experience and lack of industry contacts.[34] The Commission can help level the "playing field" by opening the doors of the broadcast industry to women and minorities.

Finally, significant anecdotal evidence supports our position that opportunities in

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[30] American Women in Radio and Television (AWRT), Comments, Competitive Bidding, MM Docket No. 97-234, at 11 (Jan. 26, 1998).

[31] Mortgage Lending in Boston, in, Implementation of § 309(j) of the Communications Act - Competitive Bidding, 5th Rpt and Order, PP Docket No. 93-253, 9 FCC Rcd. 5532, 5573-5574 (1994) ¶ 98.

[32] Broadcast Ownership Rules Studied, Wash. Post, Dec. 16, 1994, at B1 (citing the difficulty of acquiring capital as the foremost obstacle to station ownership by women and minorities).

[33] Women's Venture Capital Reaches $5.5 Million, Wash. Post, Jan. 24, 1998, at D1.

[34] AWRT, Comments, Competitive Bidding, MM Docket No. 97-234, at 12 (Jan. 26, 1998).

employment lead to opportunities in ownership. For example, Cathy Hughes, CEO of Radio One, the second largest black-owned commercial radio group,[35] began as a general sales manager at Washington D.C.'s WHUR-FM in 1973 and now owns more than a dozen radio stations in markets including Washington, Philadelphia, Atlanta, and Detroit.[36] Similarly, Cuban immigrant Joseph Rey entered broadcasting at age 23 with New York's Westinghouse Radio.[37] Within a dozen years he became the principal investor in Rainbow Broadcasting Ltd., which owns and operates WRBW-TV (UPN) Orlando, Florida.[38]

The evidence supporting the link between employment of women and minorities and ownership of mass media facilities supplies the Commission a sound basis to justify its EEO rule. Maintaining a strong and effective EEO policy is the key to broadcast experience for women and minorities as well as an important tool for future ownership opportunities.

2. A Well-Established Nexus Exists Between Diversity of Employment and Diversity of Programming

Over the past three decades, the Commission has repeatedly reaffirmed its belief in the

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[35] The Minority Telecommunications Development Program, National Telecommunications and Information Administration, U.S. Dept. of Commerce, Minority Commercial Broadcast Ownership in the United States (1998) (visited No. 4, 1998) <http://www.ntia.doc.gov/opadhome/minown98/98/black.htm>.

[36] A.I.R. Award Goes to Hughes, Broadcasting and Cable, Oct. 12, 1998, at 92.

[37] Mary Tabor, Encouraging "Those Who Would Speak Out With Fresh Voice" Through the Federal Communications Commission's Minority Ownership Policies, 76 Iowa L. Rev. 609 (1991).

[38] WRBW web site (visited February 11, 1999) <http://www.wrbw.com>.

nexus between diversity of employment and diversity of programming. The Commission first acknowledged the nexus between diversity of employment and diversity of programming in 1968.[39] In 1970, the Commission reasoned that "[p]lacing 'the power to control what the public hears and sees' in many hands [would] produce a greater diversity of editorial perspective."[40] Eight years later, the Commission reinforced its position, declaring that "[a]dequate representation of minority viewpoints in programming serves not only the needs and interest of the minority community [but also] enhances the diversified programming which is a key objective [of the Commission]."[41] Again, in 1995, the Commission noted the need to extend management and ownership opportunities to women and minorities, in part to provide a variety of perspectives.[42]

a) Diversity in Employment Among "Upper-Level" Decision-Makers and Owners Results Directly in Diversity of Programming

Both the courts and the Commission have recognized that decision-makers allow their

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[39] U.S. Comm'n on Civil Rights, Window Dressing on the Set: Women and Minorities in Television 1, 2 n.18 (1977) (citing the Commission's 1968 acknowledgment of the nexus between employment and programming diversity).

[40] Testimony of John Payton, Attorney for the City of Richmond in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), before the U.S. Senate Comm. on Commerce, Science and Transportation Communications Subcommittee (September 15, 1989), at 25 (quoting Multiple Ownership Standard, FM & Television Broadcast Stations, 22 FCC 2d 306, 310 (1970)).

[41] Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC 2d. 979, 981 (1978).

[42] Implementation of §309(j) of the Communications Act, Fifth Report and Order, 9 FCC Rcd 5532 (1994), modified by Fifth Memorandum Opinion and Order, 10 FCC Rcd. 403 (1995).

personal points of view to affect programming. In NOW v. FCC, 555 F.2d 1002 (D.C. Cir. 1977), the court found that upper-level employees -- officials and managers, professionals, technicians, and sales workers -- make decisions that affect the content of programming.[43] Similarly in its proposal to "streamline" EEO policies, the Commission observed that a diversified workforce contributes to a broadcaster's ability to provide a wider range of services to the public.[44]

This fact was acknowledged as well by the Federal Glass Ceiling Commission in 1995, when it recommended that "the [broadcast] industry recognize the urgency of getting women and minorities into decision making positions, especially in television."[45] Without diversity among owners and decision-makers, broadcast media present a narrow view of the world that often underrepresents or misrepresents the role of women and minorities.[46]

Studies regarding the employment of women in broadcasting indicate that programs created by men often portray women inaccurately on television. For example, the National

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[43] NOW v. FCC, 555 F.2d 1002, 1018 (D.C. Cir.) (1977).

[44] Streamlining ¶ 3.

[45] A Solid Investment: Making Full Use of the Nation's Human Capital, Recommendation of the Federal Glass Ceiling Commission, November 1995, at 47.

[46] Marilyn Fife, Promoting Racial Diversity in U.S. Broadcasting: Federal Policies Versus Social Realities, 9 Media, Culture and Science 481, 484 (1987); see also, Allen S. Hammond, Diversity and Equal Protection in the Marketplace: The Metro Broadcasting Case in Context, 44 Arkansas L. Rev. 1063, 1084 n.86 (1991) (arguing that majority-owned media, through its reporting, will sometimes fuel racial tensions by focusing on inter-racial crime, for example, while ignoring similar acts committed by and against members of the same race).

Commission on Working Women conducted a study analyzing eighty entertainment programs aired during the spring of 1990 and concluded that twice as many male characters as female characters were over 40, almost all the women appearing on-screen were under 50 (95%), and most women characters were employed as clerical workers.[47] Another study found that while men and women appeared in prime-time television ads in approximately equal proportions, sex stereotyped portrayals of women in advertisements persisted.[48] These portrayals are dangerous because they contribute to sexist attitudes and behaviors in young viewers.[49] Another report found that 90% of all television writers were male and suggested that creative control by men in the television industry was a possible explanation for such results.[50]

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[47] The National Commission on Working Women of Wider Opportunities for Women, What's Wrong With this Picture? The Status of Women on Screen and Behind the Camera in Entertainment Television 5, 8-9 (1990). The study also found that older women tended to play grandmothers and mothers, as contrasted to older men, whose roles embodied authority and power. Id. Nearly all leading roles were played by men, and adolescent boys received much more attention than adolescent girls. Id. at 6, 28.

[48] See D.J. Bretl and J. Cantor, The portrayal of men and women in US television commercials: A recent content analysis and trends over 15 years, in Sex Roles, 18, 595-609 (1988). See also, C.L. Ferrante, A.M and S.M. Kingsley, Images of Women in Television Advertising, Journal of Broadcasting and Electronic Media, 32, 231-237 (1988); L.T. Lovdal, Sex role messages in television commercials: An update, in Sex Roles, 21, 715-724.

[49] Id.

[50] See D.M. Davis, Portrayals of men and women in prime-time network television: Some demographic characteristics, in Sex Roles, 23, 325-332 (1990); see also Dennis Wharton, TV's Still A Man's World on Camera and Off, Study Sez, Variety, Nov. 19, 1990, at 42, n. 6 (citing a 1990 report which looked at 101 prime time entertainment series, 555 characters, and the men and women who created, directed and produced them for ABC, CBS, NBC and FOX and concluded that the stereotyped portrayals of women were due to male dominance).

Similarly, the underrepresentation of minorities in decision-making positions, particularly ownership positions, accounts for broadcast media's unresponsiveness to and stereotyping of minorities generally.[51] While NOW Foundation, et al. do not believe that there is a single "minority voice," differences of experience and viewpoint on the basis of race do exist[52] and should be better represented in broadcast media. As the Minnesota Advisory Committee to the U.S. Commission on Civil Rights established in 1993:

> The news media has tremendous influence on the attitudes of viewers and readers regarding race relations in this country. The unfair portrayal of minorities in the electronic and print media has produced negative self-images of people of color, and it has bestowed upon white people an undeserved and destructive image of superiority.[53]

Such misrepresentation harms society as whole, not just members of the minority community, and children are especially vulnerable. One study concludes that

> [a]ll children agree that roles of boss, secretary, police officer and doctor in television programs are usually played by White people while the roles of criminal and maid/janitor are usually played by African-Americans. Never do children see Latino or Asian

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[51] In 1998, minority owners controlled a mere 2.9% of all radio and television stations in the United States. See, The Minority Telecommunications Development Program, National Telecommunications and Information Administration, U.S. Dept. of Commerce, Minority Commercial Broadcast Ownership in the United States (1998) (visited Nov. 4, 1998) <http://www.ntia.doc.gov/opadhome/minown98/98/black.htm>.

[52] See, e.g., Testimony of John Payton, attorney for the City of Richmond in Croson, before the U.S. Senate Comm. on Commerce, Science and Transportation Communications Subcommittee (September 15, 1989), at 29 (arguing that "there is nothing stereotypical in the view that membership in a minority group gives one a set of distinctive viewpoints and perspectives.").

[53] Minnesota Advisory Comm. to the U.S. Comm'n on Civil Rights, Stereotyping of Minorities by the News Media in Minnesota 35 (1993).

characters as the dominant person in the listed roles.[54]

As a result of stereotyping in programming, children's views of what they can accomplish are limited.

However, the situation is different when women and minorities are in control. Studies indicate that when women make decisions about programming, they portray women in a better light and cover issues of concern to women.[55] As one policy maker put it, the "underlying theme that runs though virtually all women-owned media is the effort to help women convey their experience and viewpoints to other women and men so that more informed, more realistic, and more viable decisions in society can be made." [56] The experience of American Women in Radio and Television supports this contention. AWRT notes that 82% of the programming awarded its Commendation Awards for programming that is responsive to women's points of view was produced by women. We agree with AWRT that "this statistic provides powerful evidence of a

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[54] Children NOW Foundation, A Different World: Children's Perceptions of Race and Class in the Media 10 (1998).

[55] See AWRT, Comments, Competitive Bidding, MM Docket 97-234, at 16, filed January 26, 1998 (citing Dr. Martha M. Lauzen, Making a Difference: The Role of Women on Screen and Behind the Scenes in the 1995-1996 Prime-Time Season, School of Communications, San Diego State University, at 18, 1996). Lauzen establishes that when television shows employ one or more female executive producers, directors, or writers, female characters more often speak, introduce topics of conversation, have the last word, and advise. id.; see also, It Matters Who Makes It: A Review of Research on Women, Audiences and the Media, 28 (Mountain Media Lab, Simon Fraser Univ. 1993) (profiling successful women producers, all of whom produced popular programs featuring strong female lead characters).

[56] Donna Allen, Women in Media, Women's Media: The Search for Linkages in North America, in Women Empowering Communication, at 170 (1990).

nexus between employment of women in the broadcast industry and programming by, for and about women."[57]

Similar studies demonstrate, empirically, that when minorities are in positions to determine the content of programming, including as owners, the programming is more diversified generally with regard to race and sex. As one study of 7,000 broadcasters established:

> [B]lack formatting and black programming are significantly affected by black ownership... Black ownership also significantly increases the likelihood of programming in Spanish and of targeting females. Hispanic ownership at any significant level has a significant impact on black programming, Spanish programming, targeting Asian listeners, targeting female listeners, and American Indian programming.[58]

These studies, surveys and reports provide support for the argument that there is a nexus between female and minority employment and diverse programming.

b) Female and Minority Employment Diversity at All Levels Contributes to Diversity of Programming

A diverse workforce influences decision-makers in ways that result in more diverse programming. We agree with the Commission that lower-level employees exert influence by their very presence by reminding those in decision-making positions of the diversity represented in the viewing or listening public. NPRM ¶ 44. Generally, employees of diverse backgrounds bring different perspectives into the workplace that may influence the otherwise narrow programming choices of decision-makers.

Diversity of employment at all levels also impacts directly what one scholar has termed

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[57] AWRT, Comments, Streamlining, MM Docket No. 96-16, at 16.

[58] Jeff Dubin and Matthew L. Spitzer, Testing Minority Preferences in Broadcasting, 68 S. Cal. L. Rev. 841, 864 (May 1995).

the career "pipeline" of broadcasting, leading from lower-level to decision-making positions.[59] Anecdotal evidence supports the argument that lower-level jobs are a stepping stone to upper level employment. For example, Madeline LaCore, a senior producer at WUSA-TV (CBS) in Washington, D.C., started her broadcast career as a secretary in the sales department.[60] LaCore, an African-American female, rose through the ranks, and now as a producer in the community relations department, LaCore is responsible for keeping the station in touch with the needs of the community it serves. LaCore's boss, Kahlim Piankhi, a vice president of the station who is also African American, started his career as a secretary, as well.[61] Another African American female, Stephanie Wilson, started her career as a secretary in the engineering department. Today she is a producer in the investigative unit of the same station.

Women and minorities who influence hiring decisions may be instrumental in securing jobs for other women and minorities. For example, Sandra Butler Jones, former programming vice-president at WUSA-TV (CBS), in Washington, D.C., produced various magazine, public affairs and children's television shows during her tenure and was also responsible for recruiting

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[59] Vernon A. Stone, Minority Men Shoot ENG, Women Take Advancement Tracks, RTNDA Communicator (August 1998).

[60] Telephone Interview with Madeline LaCore, a senior producer at WUSA-TV (CBS), Washington, D.C. (Feb. 4, 1999).

[61] Id.

and hiring.[62] She is credited with providing employment opportunities to other minorities.[63]

Because decision-makers often begin their careers on the lower-rungs of broadcasting, a lack of diversity at the lower levels results in a lack of diversity in the upper-levels. Also, at some point, particularly at smaller stations, the distinction between upper and lower-level responsibilities becomes blurred. Employees on the lower rungs of their careers do a little of everything. Thus, the Commission must ensure that efforts are made to reach diverse applicants for all media jobs.

II. The Commission Should Delineate Specific Recruiting and Outreach Efforts Rather Than Afford Entities the Discretion to Determine How To Conduct Their Recruiting Efforts

NOW Foundation, et al. oppose the Commission's proposal to "afford entities the discretion to determine how to conduct recruitment efforts, as long as they can demonstrate that their efforts attract a broad cross-section of qualified applicants." NPRM ¶ 64. The Commission has stated that it seeks to advance three specific goals in modifying the EEO rules: to create effective recruitment for job vacancies; to prevent any pressure or encouragement of broadcasters to adopt racial preferences in hiring; and to limit the regulatory burden on broadcasters to the greatest extent possible. NPRM ¶¶ 61-69. However, permitting a self-designed recruitment program would: (1) give an individual broadcaster unfettered discretion to determine what race-neutral recruiting entails; and (2) leave it entirely to the broadcaster to make a retrospective

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[62] Id.

[63] Id. (according to LaCore, Sandra Butler Jones was responsible for opening up employment opportunities for minorities).

review of the success of the program. If a broadcaster fails at either of these two objectives, the goals of the EEO rules would be compromised. The Commission recognizes that broadcasters themselves have complained that the EEO rules did not provide specific guidance. See NPRM ¶ 65. Therefore, the Commission should assist media owners and meet its own regulatory goals by providing an objective recruiting policy which outlines specific rules.

A. Broadcasters and Cable Operators May Not Be Able to Create Effective Recruiting Programs Capable of Attracting a Diverse Pool of Applicants

The Commission states that it seeks effective recruitment for job vacancies so that all qualified applicants are notified of openings and have an opportunity to compete on a level playing field. NPRM ¶ 61. Self-designed EEO programs may lead to apparently race neutral hiring practices which, nevertheless, yield discriminatory results. Just as the Supreme Court acknowledged in Palmore v. Sidoti, 466 U.S. 429 (1984), "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect." The Commission has more expertise in this area and is better equipped than individual broadcasters to design a program that will likely increase the diversity of broadcast and cable employment applicants.

If the Commission allows broadcasters to design their own programs, we may see a return to the situation that existed before 1969 when broadcasters' hiring practices were not regulated.[64] Several years elapsed after the adoption of the EEO rules before women and minorities made noticeable gains in employment. In 1971, only 22% of full time employees in the commercial

[64] This is true, with the exception of broadcasters with enough employees to be subject to Civil Rights Act of 1964. The Act initially provides exemptions for employers with fewer than twenty-five employees and reporting exemptions for employers with fewer than 100 employees. 42 U.S.C. § 2000e-1(b).

television workforce were women, while women represented half the population. United Church of Christ, Office of Communication, Television Employment Practices, The Status of Minorities and Women (1975).[65] Likewise, in 1971, minorities made up 8.3% of the same workforce. Id. Minority representation among upper-level employees was just 6%. Id. In 1975, when the study was conducted, 20% of the stations which filed reports employed no minorities at all. Id. By 1997, women constituted 41.0% of full-time broadcast employees and minorities 20.2%. NPRM ¶ 4. Such statistics reveal that the EEO rules have led to significant advances over the past 30 years. Without these rules in place, women and minorities may be shut out of employment opportunities.

The Commission initially opted to design a rule which relied on broadcasters making recruiting efforts and reporting on them, rather than focusing on individual complaints of discrimination. This was because prohibitions against discrimination alone, without positive recruiting and outreach, were not sufficient to eradicate discriminatory practices. See Nondiscrimination ¶ 4. The record in the Nondiscrimination proceeding led to the Commission's realization that inaction could cause as much damage as discrimination to the ability of women and minorities to gain opportunities in employment. As the Commission concluded:

> reliance solely upon a complaint procedure to implement equal employment opportunity cannot cope with general patterns of discrimination developed out of indifference as much as out of outright bias... Overt discrimination, in the sense that an employer actually refuses to hire solely because of race, religion, color or national origin is not as prevalent as is generally believed. To a greater degree, the indifference of employers to establishing a positive policy of non-discrimination

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[65] This report was one of the first to compile the employment statistics submitted by broadcasters under the then new EEO rule. The report surveyed employment data from 1971 to 1975.

> hinders qualified applicants and employees from being hired and promoted on the basis of equality... Schools, training institutions, recruitment and referral sources follow the pattern set by industry. Employment sources do not normally supply job applicants regardless of race, color, religion or national origin unless asked to do so by employers.[66]

In short, the Commission found that deliberate discrimination was not the only barrier to non-discriminatory hiring. As the Commission's Minority Ownership Task Force eloquently concluded, "if inequities of the past are to be corrected they must be treated by measures that go beyond mere 'neutrality.'"[67] Experts in other regulated industries have consistently found that even when race-neutral policies are in place, discriminatory practices still exist.[68] Employers designing their own recruiting and hiring policies without Commission guidance may not effectively eliminate practices which present barriers to entry. A specific recruiting program will assist in combating this problem.

Furthermore, if a broadcaster fails to include an effective self-assessment mechanism in its program, severe flaws in a self-designed program would be discovered only during renewal review, after the damage had already occurred. A broadcaster could fail to recruit openly during its entire licensing period, thereby discouraging job applicants and failing to serve the public interest. Setting up the standards beforehand would avoid these potential problems.

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[66] Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 18 FCC2d 240, 242-243 ¶¶ 5-7 (June 4,1969).

[67] FCC Minority Ownership Task Force, Report on Minority Ownership in Broadcasting, 3 (May 17, 1978).

[68] Exclusionary conduct against women and minorities is often not deliberate. See 61 FR 26042, 26056, n. 72; 61 FR 26042 n. 63 (citing Discriminatory Practices in Promotion, FEP Cases).

The Commission indicated that an approach allowing broadcasters to design their own programs would afford flexibility. See NPRM ¶ 64. However, given the probability of ineffective programs, the only solution would be for the Commission to require all broadcasters opting to self-design their recruitment programs to submit their plans for review and approval, in a manner similar to the Form 396-A. Because reviewing broadcasters plans would create an administrative burden for the Commission, the better alternative would be to delineate specific rules at this time.

B. The FCC Should Offer Broadcasters and Cable Operators a Menu of Options for Recruiting Programs

Broadcasters already say that they find EEO regulations vague, and self-designed programs will only increase the ambiguity and uncertainty.[69] The appropriate response to this problem would be for the Commission to provide clear, objective standards and multiple options which are easy to follow and do not require detailed subjective determinations. Smaller entities, especially, that complain of not having the resources to recruit effectively, would then have the option of selecting the most suitable plan from among multiple possibilities.

NOW Foundation, et al. support the method by which the Commission proposes to provide guidance on recruiting. NPRM ¶ 65. The Commission proposes to require broadcasters

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[69] See NPRM ¶ 53. In the 1996 Streamlining proceeding, broadcasters stated that one of the major problems hindering compliance with the Commission's rule is vagueness. They recommended that the Commission implement a guide providing "detail concerning the steps licensees are expected to take to ensure compliance, how licensees can determine the adequacy of applicant pools, and other aspects of EEO compliance." National Association of Broadcasters, Comments, Streamlining Broadcast EEO Rule and Policies, Vacating the EEO Forfeiture Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines, MM Docket No. 96-16, ¶ 11 (July 11, 1996).

to fill vacancies by using three general or national recruitment sources and three specific sources. Id. At least one of the three specific sources would be related to minorities and at least one to women. General sources are sources that attract and cater to the entire population. These could include national newspapers such as the Washington Post, the Los Angeles Times, the Boston Globe, the Minneapolis Star Tribune, the Miami Herald. Specific sources could include journals, newspapers, magazines and other press whose mastheads explicitly or implicitly indicate that their target audience is women or minorities.

Also, industry job fairs and recruitment programs which advertise to and serve the general population should qualify as general sources.[70] Specific sources would include those sources which indicate that they specifically serve women and minorities.[71] These specific sources could include job fairs, internship and mentoring programs expressly designed to train minorities and women for employment in mass media. Simply faxing announcements to local chapters of groups such as NOW and NAACP would be insufficient unless these offices advertised as sources of mass media jobs.

The Commission recognizes the importance of minority training, internship and employment programs. NPRM ¶ 90. Therefore, mass media entities should be encouraged to

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[70] General sources could include job fairs sponsored by the National Association of Broadcasters, the Radio-Television News Directors Association, the Society of Motion Picture and Television Engineers or the International Television Association.

[71] Specific sources could include career fairs and conventions sponsored by American Women in Radio and Television, National Association of Black Journalists, Asian American Journalists Association, the National Association of Hispanic Journalists and the Native American Journalists Association.

utilize these proactive methods of recruitment in addition to more passive means such as placing advertisements in the media. In addition, employers should be encouraged to place job announcements on the Internet. However, because Internet access is not yet universal and this action is also rather passive, employers must also use other sources.

While specific sources are sure to yield diverse applicants, general sources from national organizations also yield diverse results. For example, during a 1996 job fair sponsored by the Northern California Broadcast Association, 30.6% of applicants were black, 18.7% Hispanic, 15.8% Asian and 0.7% Native American.[72] A similar event in Dallas showed that 43% of attendees were minorities, 89% of whom had some college training and 44% of whom had college degrees.[73] Companies that utilize such sources should have an easy time finding diverse applicants.

These proposals would allow entities to select recruiting methods from among various options based on their size and hiring needs, thus eliminating the complaint of smaller entities that they are unable to satisfy the Commission's rules. They would also serve as a concrete guide to employers. NPRM ¶ 65. Furthermore, use of any combination of these options should guarantee a diverse pool of applicants. These options, which focus both on general sources and on women and minority-specific sources, do not create any incentives to prefer minority applicants over other applicants. The Commission recognizes that "historically, women and minorities have had difficulty in finding out about, or taking advantage of, opportunities in the

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[72] Lanetta Kimmons, Aiding Those in Search of Work, R&R, Jan. 3, 1997.

[73] Radio Advertising Bureau, Dallas Radio Careers Fair Overview, Feb. 27, 1997.

communications industry." NPRM ¶ 61. These options focus on recruiting efforts and alerting all sectors of the population to employment opportunities.

III. The Commission Should Maintain Strong Enforcement and Monitoring Efforts In Order to Effectuate the Newly Modified Rules

The Commission proposes to enforce the rules throughout the licensing term. See NPRM ¶ 75. The best way to ensure that the goals of the modified rules are being met is to make a commitment to enforcement and monitoring.

A. Performing Random Audits Throughout the License Term is An Effective Method of Ensuring Good Faith Compliance with the EEO Program

We support the Commission's proposal to adopt an auditing system to verify entities' compliance with the rules. NPRM ¶ 57. We agree with the Commission that conducting random audits throughout the license term rather than only during renewal is an effective method of ensuring good faith compliance with any EEO program. NPRM ¶ 74. When applied properly,[74] random audits serve as a deterrent against non-compliance, without imposing pressure upon broadcasters to give preferential treatment to minorities, a result which could violate Lutheran Church. Cable entities are already subject to random audits, and we agree that the Commission should continue to review cable EEO programs every year as part of the annual certification process. Id. Random audits would allow the Commission to allocate enforcement resources productively.

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[74] The FCC should adopt auditing standards similar to those used by accountants where the auditor relies on information produced by broadcast and cable operators to verify that the process used by the entity is sound, proper procedures are followed and that the information is accurate. See Codification of Auditing Standards, Statement on Auditing Standards No. 55 §319.35 (Am. Inst. Off Certified Pub. Accountants 1989).

During audits, the Commission should consider employers' past EEO compliance record. The Commission could use the auditing process to verify that employers are actually using the recruiting sources which they indicate on forms filed with the Commission. The auditing system should also be used to make sure that entities are self-assessing and taking affirmative steps to modify ineffective recruiting methods. NPRM ¶ 75. The Commission should also require certification of self-assessment as an effective way of enforcing the rule.

The FCC must perform a significant number of audits to ensure that the rule includes a genuine enforcement component. It must sanction entities for deficiencies in meeting the recruiting and record-keeping requirements as well as for untruthful certifications. NPRM ¶¶ 74, 75. Also, if the Commission notices through its monitoring efforts that certain geographic areas yield more violations and discrimination complaints, it should eventually implement 'targeted auditing' by increasing its monitoring of those areas.

B. The FCC Has the Authority To Require Reporting Data and Should Continue to Collect Such Data

The only way for the Commission and the public to monitor industry employment trends is for the Commission to continue collecting employment data. We agree with the Commission that Lutheran Church did not limit the Commission's ability to collect data regarding hiring practices of broadcasters. NPRM ¶ 49. Though Lutheran Church's invalidation of some of the EEO guidelines impacts upon the use of some of the information collected, Lutheran Church, 141 F.3d at 352, the Commission has acknowledged that it has statutory authority to collect data, primarily to prepare annual reports to Congress.[75] See id. (citing 47 U.S.C. §§ 334(a)(2) and

[75] See also 47 U.S.C. §§ 308(b), 403.

554(d)(3)(A)).

Gathering systematic information on broadcasters' recruitment practices facilitates the drafting of efficient and logical regulations. We continue to believe that the data derived from these reports serve as a useful indicator of industry trends. Knowledge of these trends enables the public to monitor the effectiveness of the EEO rules and enables the FCC to make appropriate recommendations to Congress for legislative change. Furthermore, the collection of data is consistent with the open, participatory administrative process created under the Communications Act. Finally, there has not been a sufficient showing that the record-keeping is burdensome. Without such a showing, the Commission cannot eliminate the requirement. See Office of Communications of the United Church of Christ v. FCC, 560 F.2d 529, 532 (2nd Cir. 1977).

C. The FCC Should Continue to Monitor the Outcome of Any Discrimination Complaints Filed Against Broadcasters

NOW Foundation, et al. support the Commission's continued monitoring of discrimination complaints filed against broadcasters. The Commission should continue to forward individual discrimination complaints to the EEOC as required in the Memorandum of Understanding between the FCC and EEOC.[76] The EEOC makes reasonable efforts to investigate charges of discrimination before a broadcast license expiration date or a cable system renewal date. See Memorandum at § III(c). The Commission should nevertheless continue to

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[76] See Memorandum of Understanding between the Federal Communications Commission and the Equal Employment Opportunity Commission, 70 FCC2d 2320 (1978). In this MOU, the EEOC designated the FCC as its agent for receiving charges of employment discrimination by broadcast licensees. Charges within both agencies' jurisdiction are handled by the EEOC, which submits to the FCC a quarterly report regarding all reasonable cause determinations, letters of violations and the status of outstanding charges.

monitor discrimination allegations prior to the EEOC's final determination because complaints are a good indicator of discriminatory practices. We support the suggestion that the Minority Media and Telecommunications Council made in the Streamlining proceeding regarding the type of evidence that the Commission should consider to monitor employment discrimination. NPRM ¶ 60. Also, if the Commission notices that a particular broadcast operator has received numerous complaints within the annual assessment year, the Commission should perform an audit. Entities do not have the right to discriminate while holding a broadcast license or cable franchise and should not expect to escape review.

IV. The FCC Should Not Adopt Any Proposal to Streamline the EEO Requirements That Would Allow a Large Number of Broadcasters to Operate Without Any Obligation to Recruit in an Open and Equal Manner

In Streamlining, the Commission sought comment regarding various proposals to modify its EEO requirements with respect to certain broadcasters.[77] Specifically, the Commission requested comment on whether stations with small staffs or stations located in small markets or in areas with a small minority labor source should be eligible for (1) reduced paperwork burdens; (2) credit for the establishment of joint recruitment efforts; and (3) permission to rely on an alternative labor force when analyzing their EEO efforts. NPRM ¶ 81. NOW Foundation, et al. participated in that proceeding.[78] At this time, we reiterate our argument that streamlining the EEO requirements is not warranted and would allow approximately half of all broadcasters to

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[77] The Commission was concerned that the EEO rules may "unnecessarily burden broadcasters, particularly licensees of smaller stations." Streamlining ¶ 1.

[78] See NOW Foundation, et al., Comments, Streamlining, MM Docket No. 96-16, July 11, 1996.

escape compliance with the EEO rule.[79]

As we stated in our comments in the Streamlining proceeding, record-keeping and reporting are essential to effective EEO enforcement. Record-keeping requirements are the only means for the licensee to self-assess its own recruitment and hiring efforts. Moreover, the public relies on such statistical data to monitor station owners. Eliminating record-keeping requirements would "gut the entire petition to deny process – a process on which the Commission relies as the primary method of assessing whether a licensee is discharging its public interest obligations within its community of license." See Comments of NOW Foundation, et al., Streamlining, 11 (Jul. 11, 1997). Without proof of the "paperwork burden" complained of, the Commission has no obligation to grant additional relief to any party based on station size. See, UCC v. FCC, 560 F.2d 529 (2nd Cir. 1977).

As for the joint recruitment proposal, NOW Foundation, et al. commend the Commission's efforts to encourage participation in minority training, internship and employment programs by rewarding joint efforts. NOW Foundation, et al. propose that the Commission consider such efforts during its review of EEO policy compliance at renewal time, throughout the license term and on an ongoing basis via random audits. NPRM ¶ 74. After the Commission evaluates reports and statements submitted by licensees during these compliance review periods, the Commission could exempt those licensees that have been good faith

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[79] In Streamlining, the Commission estimated that there were 2,445 full-service broadcast stations which employ between five to ten persons. Combined with the number of broadcasters with less than five employees that are exempt from the rule, this number represents approximately half of all broadcasters. Streamlining at 12 n. 35 (citing compilation of data from the Commission's 1994 Broadcast Annual Employment).

participants in joint recruitment efforts from further extensive auditing or consider their efforts as a mitigating factor.

As for proposals relating to an alternative labor force of minority workers, we agree with the Commission that comments relating to such statistics are moot. NPRM ¶ 82 n. 102. The Lutheran Church decision ordered the Commission to abrogate its processing guidelines to alleviate the perceived "pressure" to hire minorities. Because the Commission will no longer use minority labor force statistics as part of its EEO analysis, complaining station owners no longer have any basis to object. See id.[80] In effect, under the proposed rules, stations will be required only to maintain employment data and make reasonable efforts to recruit, hire and promote without discrimination on the basis of race.

Finally, in Streamlining, the Commission considered expanding the exemptions from EEO requirements to stations with 10 or fewer full-time employees. The Commission acknowledges that it cannot raise the limit without reasoned justification in light of UCC v. FCC, 560 F.2d 529 (2nd Cir. 1977). NPRM ¶ 86. The two bases the Commission cites in the Notice for raising the limits are not reasonable. First, the Commission states that small stations complain of having fewer hiring opportunities and limited financial, personnel and time resources available for recruiting. However, if the Commission adopts our suggestion to offer broadcasters a choice of recruiting methods, smaller stations would have the option of selecting the recruiting method that is most feasible with their limited budget and personnel. Thus, any potential problem will be eliminated. Second, the Commission cites complaints from stations in small markets about their

[80] Moreover, this does not apply to women, who are already 50% of the labor force.

inability to compete for employees with stations in larger markets, which can offer higher salaries and greater career opportunities. This argument is based on the assumption that a small station would be unable to meet a certain statistical employment benchmark because it has to compete for minorities in a certain area.[81] However, as previously stated, because the Commission would no longer rely on minority labor force statistics, those concerns are now moot.

The EEO rules are not intended to burden small stations but to ensure that small stations adequately notify all possible candidates, regardless of gender or race, of employment opportunities. If a station finds that qualified women and minority candidates are being lured away by larger broadcasters, it should reassess its recruitment policies and perhaps consider an alternate recruiting method. The proposed rules seek to encourage this type of behavior by stations. Furthermore, the rules are also in place to discourage discrimination. No station, regardless of size, should be allowed to discriminate. The submission of employment data will assist the Commission in discovering broadcast and cable operators who discriminate. Because station owners with 10 or fewer represent a significant number of broadcasters and employers, the threshold should not be raised. Such a change would exclude too many broadcasters from the obligation of recruiting in an open and equal manner.

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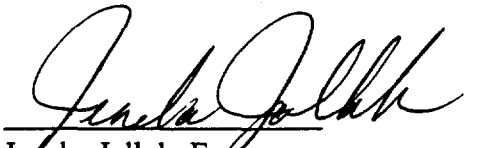
[81] Again, this argument fails for women, because women are present in every labor pool.

CONCLUSION

The Commission has undeniable authority to retain parts of the EEO rules. Revisions to these rules made to accommodate the Lutheran Church decision should delineate specific outreach and recruitment requirements for broadcasters. Moreover, strong enforcement and monitoring efforts would ensure the rules' effectiveness. Finally, the Commission should not adopt any streamlining proposal that would allow large or small broadcasters to avoid their public interest responsibilities under the Commission's EEO policies.

Respectfully submitted,



Jeneba Jalloh, Esq.
Randi M. Albert, Esq.
Citizens Communications Center Project
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, DC 20001
(202) 662-9535

Counsel for NOW Foundation, et al.

Of Counsel:

John Guenther
Nicolaine Lazarre
Law Students
Georgetown University Law Center

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