

D. **Did broadcasters fully utilize minority and female applicant sources, such as HBCU's, relative to their use of comparable sources of White male applicants?**

MMTC examined the 111 EEO programs filed in 1997 in the 20 markets covered by Verification of Recruitment Sources. MMTC classified all sources the broadcaster claimed to have contacted for all vacancies. The study assumed that every source was actually contacted, but as we have just seen, that was frequently not the case. Id. The results are presented in Tables 7-9.

TABLE 7

NUMBER OF SOURCES CLAIMED BY RENEWAL APPLICANTS

<u>Number of Sources</u>	<u>Number of Stations Claiming That Number of Sources</u>	<u>Percentage of All Stations</u>
0	0	0%
1	3	3
2	7	6
3	5	5
4	10	9
5	4	4
6	6	5
7	13	12
8	11	10
9	4	4
10	12	11
>10	36	32

TABLE 8

NUMBER OF MINORITY SOURCES CLAIMED BY RENEWAL APPLICANTS

<u>Number of Minority Sources</u>	<u>Number of Stations Claiming That Number of Minority Sources</u>	<u>Percentage of All Stations</u>
0	21	19%
1	10	9
2	20	18
3	23	21
4	10	9
5	4	4
>5	23	21

About 40% of the stations would not have met the NPRM's proposed "three and three" test. Fully 19% did not claim to contact any minority sources. On the other hand, not one station

contacted only minority sources -- showing there is no risk that targeted recruitment might exclude Whites. See pp. 56-57 supra.

TABLE 9

RECRUITMENT SOURCES USED BY LICENSE RENEWAL APPLICANTS

<u>Source Type</u>	Number of stations using at least one such <u>such source</u>	Total number of mentions of such sources by <u>all stations</u>
General audience national media	24	30
Minority national media	5	5
Women's national media	0	0
General audience local media	92	162
Minority local media	42	82
Women's local media	0	0
General market national search firm	1	4
Minority national search firm	2	3
General market local search firm	38	65
Minority local search firm	4	5
Predom. White national organization	8	35
Predom. White women's national organization	27	90
Minority national organization	30	77
Predom. White local organization	24	52
Predom. White women's local organization	40	74
Minority local organization	76	278
Predom. White church	12	22
Minority church	8	28
Predom. White nonlocal school	17	65
Predom. minority nonlocal school/acad. pgm.	8	58
Predom. White local school	101	404
Predom. minority local school	11	28
Local/state government employment service	47	66
Local/state government civil rights agency	8	8
Other local/state government agency	11	15
Individual named persons	0	0
Advertisers	1	1
Internet sources	8	13
Other or unable to classify	27	109

These sources are apparently underutilized: minority search firms; minority churches; minority schools; and (surprisingly) Internet sources. The Commission might point this out to guide broadcasters seeking alternative sources of applicants.

VI. **How Can The FCC Best Monitor And Enforce Its Outreach-Based Program?**

A. **EEO enforcement should be efficient, effective, and capable of evaluation**

1. **Efficiency**

Efficient enforcement means that broadcasters, employees, job applicants, and community groups each understand what is expected of them and have easy access to the Commission for redress of grievances. Employers should be able to operate a law-abiding personnel system, maintain records and file EEO-related reports and applications without expense or effort beyond that necessary to the task. Employees, job applicants and community groups should be able to challenge a broadcaster which patently avoids its EEO responsibilities without incurring unreasonable expenses, without having to secure access to the broadcaster's secret files in order to make out a prima facie case, and without waiting until the witnesses die or disappear until a case is decided.

2. **Effectiveness**

Effective EEO enforcement embodies the goals of general deterrence, specific deterrence, and remediation.

An FCC EEO decision which is intended to provide general deterrence or widespread guidance to the industry should be widely publicized by the Commission's Office of Public Affairs and discussed by the Chairman in his public statements and press releases.

The FCC should provide specific deterrence by designating for hearing any application which manifests even the appearance of race or sex discrimination, and by imposing high forfeitures and short term renewals on any applicant which has deliberately and repeatedly violated the EEO regulations short of discrimination.

EEO enforcement is remedial when a licensee has acted through negligence rather than deliberate noncompliance. In remedial cases, the Commission should impose EEO conditions tailored to fit the type of violations the Commission has uncovered.

3. Capable of evaluation

Each licensee should maintain records sufficient to allow the Commission to meaningfully ascertain whether the licensee complied with all of the key EEO provisions. As Jenell Trigg explains:

Recordkeeping requirements are the only means for the licensee to self assess and for the Commission to fully evaluate a licensee's EEO efforts. Without such requirements, a licensee would have little incentive to ensure that its community, albeit one with few minorities, would receive the benefit of a diversity of viewpoints achieved through the continued recruitment and subsequent hiring of minorities and women.

Trigg, 4 CommLaw Conspectus at 249 (fns. omitted).

B. What are the benchmarks for an effective, easy to apply, easy to enforce, and fair outreach-based program?

In order to assess whether a broadcaster is taking reasonable steps to ensure and promote equal employment opportunity, the Commission needs quantitative benchmarks that are easy to apply, easy to enforce, and fair. We propose seven key benchmarks:

1. Recruitment for each vacancy
2. Recruitment source diversity
3. Applicant pool diversity
4. Interview pool diversity
5. Creative pre-employment steps (e.g. job fairs)
6. Training, including internships

7. "Second Generation" components, including work assignments, working environment, promotion, compensation, benefits and termination.

1. **Recruitment for each vacancy**

This requirement stands at the core of any meaningful EEO regulatory program. As the Commission has long recognized, "a general notification unrelated to particular job openings is not a substitute for recruitment contacts with sources designed to elicit minority and female applicants as each vacancy occurs."^{334/}

The principle embodied in the EEO Rule that recruitment must occur "whenever job vacancies are available" (former 47 CFR §73.2080(c)(2)) was part of FCC jurisprudence for over two decades. Its logic is self-evident: whenever a job vacancy is exempted from EEO procedures, minorities and women lack a fair opportunity to seek and fill that position. There is simply no rational basis not to have EEO procedures observed for every job.

^{334/} KTEH Foundation, 11 FCC Rcd 2994, 2997 ¶23 (1996); see also Sande Broadcasting Co., 58 FCC2d 139 (1976), in which a short term renewal issued largely because licensee conducted EEO recruitment efforts in filling only three of seven vacancies. In 1994, the Commission found that "there continues to be evidence in cases in which the Commission sanctions licensees that women and minorities are still not recruited for a significant number of positions. In fact, despite our requirements, in many of these cases, for which we have issued sanctions, positions were filled without any recruitment having taken place. Given the foregoing, we believe that a continuing need exists for EEO enforcement in the communications industry." (fn. omitted). EEO Report - 1994, 9 FCC Rcd at 6314-15.

2. Recruitment source diversity

Recruitment source diversity should mean that at least some referral sources chosen by broadcasters should be especially likely to refer minorities and women. The referral sources do not need to be owned, managed or operated by minorities and women, or even have majority-minority or majority-female memberships. Nor do we suggest that it would be appropriate to use an organization (e.g. a private club) which chooses not to admit members of any race or either gender.

Broadcasters no longer have ascertainment obligations because they are presumed to know their communities. Broadcasters are in the information-gathering business. Consequently, they should be presumed to be sufficiently well informed to know who to call to find minority and female job applicants -- provided they understand that the FCC really does expect them to contact likely sources of these applicants.

That means that the Commission must provide clear guidelines and standards. Far too many broadcasters have used the same recruiting sources they used in the pre-civil rights era. For example, we commonly encounter broadcasters who recruit only through the local newspaper (and then only when a secretarial position is open) and through a handful of civic groups which include few, if any, minority members. To account for these broadcasters, the Commission adopted its infamous footnote eight in South Carolina Renewals, 4 FCC Rcd 1704, 1708 n. 8 (1989), which held that a broadcaster needed to contact minority-specific sources only if its majority sources did not produce minority applicants. That approach had an element of racism in it, and it should be abandoned. It conveyed the message that it was somehow distasteful

for broadcasters to actually have to notify minority organizations of jobs, and that these organizations need only be contacted as a desperate last resort if no other approach worked. Furthermore, broadcasters knew that for eight years at a stretch they would not be held accountable if they failed to recruit minorities and women; thus, for years many broadcasters contacted no likely sources of minority candidates. In light of the ubiquitous availability of mass faxing and e-mail, there is no justification for any procedure under which a broadcaster might rationalize its refusal to contact any primarily minority or female sources.

That is why one of the NPRM's suggestions -- having broadcasters each use at least three primarily minority or female sources -- may be the best approach. It certainly is simple, understandable and inexpensive. But there may be a better approach -- one already used by many successful broadcasters such as Capstar, Clear Channel and CBS: simply fax or e-mail each job notice to virtually all local (and several non-local) sources of broadcast job applicants. This procedure has the advantage of mooting any question of whether enough (one? three? zero?) minority or female organizations were contacted. There is no place in the country that lacks any organizations which refer minorities or women for professional employment. There are over 1,700 adult branches of the NAACP; 114 fully-staffed chapters of the National Urban League; over 600 councils of LULAC; over 100 predominately Black or Hispanic colleges with students drawn from every state in the union; 79 women's colleges with students drawn from every state; 192 Black newspapers and 132 Spanish language newspapers. Almost every small town south of Minnesota has a Black church.

It's just not hard to find good sources likely to refer minorities and women.

Thus, a blanket notification requirement would completely solve the problem of the "old boy network" by ensuring that minorities and women will enjoy the same opportunities as everyone else to learn about a job.

Fortunately, the principal cost involved in blanket notifications is very minimal -- having someone assemble occasionally update a universal fax or e-mail list. That task is easily accomplished by each community's local broadcaster's association in the very rare instance in which the local Urban League or state employment service office does not already have and update such lists.

Some broadcaster may fear that even if he contacts 20 organizations he believes in good faith to constitute essentially all local recruitment sources, the FCC might be unsatisfied on the grounds that there really are 25 such organizations. A solution would be for the Commission to pre-specify a number of sources, tied to market population, which would always represent the minimum number of local organizations presumed capable of providing referrals to broadcasters. For example, in a market of 50,000, that number might be ten; in a market of 1,000,000, it might be 30; in a market of 5,000,000, it might be 50. The Commission does not have to provide these minimum numbers in the forthcoming Report and Order; instead, the Commission can empower an advisory group to make a recommendation. See pp. 333-38 infra.

Some broadcasters have suggested that a website posting reaches everyone, but unfortunately it doesn't. It picks up those

able to afford a \$1,500 computer and \$500 in software, not to mention the access charges and training costs. See pp. 24-30 supra (discussing the sharp racial "digital divide"). Until the digital divide is eliminated, notifications to organizations will be necessary. Otherwise, website postings will simply guarantee that Whites will continue to have a much better chance than minorities of learning about broadcast job opportunities. Given the extent of the digital divide, it is astonishing that this idea of website posting has been trumpeted by some broadcasters as though it is an instant cure for discrimination.

We are aware of the argument that determining which sources are minority-specific is race-conscious under Adarand. It's not, because recruitment and interviewing are not hiring. Nonetheless, by requiring mass faxing or e-mailing, the Commission can moot this frivolous argument.

If the FCC does not require faxed or e-mailed notifications to all local sources, it will have to decide whether the number of minority- and female-specific sources to used for recruitment should be tied to market size, market demographics, or the broadcaster's staff size. The most logical correlate for the number of such sources is the numerosity of minorities and women in the market. However, question might referred to an advisory body studying technical issues. See pp. 333-38 infra.

Making the referrals is only the first step in achieving referral source diversity. The broadcaster must then make the referral source believe that it would be worthwhile to provide applicants. Thus, broadcasters need to build reputation for

treating minority and female applicants fairly.^{335/} To build that reputation, a broadcaster would be well advised not to be too quick to delete a referral source from its referral list simply because it seldom refers applicants. The effectiveness of a recruitment source is not always measured by the number of applicants it refers. Some organizations, especially civic groups, do not always have members or clients ready at a moment's notice to work at a particular type of business or in a particular type of job. Their members and clients do not want to waste time applying for jobs at businesses uninterested in hiring them. People tend to go where they're wanted. Thus, when an organization knows that a broadcaster thinks enough of its members to let it know when the sales manager's job is open, rather than just informing it when a janitor's job is open, the organization is more likely to go out of its way to refer good candidates for any job.^{336/}

^{335/} The Tennessee Study found that "[t]he fact that five stations each generated more than fifty minority applicants demonstrates that minority applicants are in plentiful supply. Apparently, they are attracted to the stations which apparently have built a reputation for employing them. Similarly, the fact that twelve stations each generated more than fifty female applicants demonstrates that female applicants are in plentiful supply. The fact that the same pattern of high recruitment numbers for a handful of stations obtained for women as obtained for minorities demonstrates that the high number of minority applicants at a handful of stations cannot be attributed to format considerations alone." Id. at 38.

^{336/} The undersigned lead counsel wishes to step outside the papers for a moment to relate this anecdotal experience: since 1989 he has been the Communications Chair of the Miami-Dade (Florida) Branch of the NAACP (where he lives). Virtually all Miami broadcasters listed the NAACP as a referral source in their renewal applications, so supposedly we're contacted whenever a job is open.

[n. 336 continued on p. 226]

The Commission should point out to broadcasters that these measures can do much to enhance the effectiveness of recruitment sources. Recruitment sources are productive when they have a stake in the broadcaster's success. Any college, agency or social club will be a more productive source when it includes broadcast managers or personalities among its members, and when its press releases are at least read by someone in the news or public affairs departments. Indeed, many broadcasters who complain about the nonproductiveness

336/ [continued from p. 225]

Actually, of the over 30 broadcast employers in the market, only one (which is actually in the West Palm Beach market) always sends job notices for every job. Three Miami stations send job notices on occasion; one of these probably is doing so most of the time. Thus, when candidates suitable for broadcast employment contact the NAACP seeking placement, we do not send them to all thirty-odd employers. Instead, we urge them to start with the four stations we know to be EEO-positive. As a result, over the years these four stations have hired several talented African American applicants referred by the NAACP. Because we're volunteers, it costs the stations nothing to receive this service.

It is no secret that a substantial proportion of broadcasters who tell the FCC they have sent notices to particular organizations actually have never done so. See Recruitment Source Selection, appended hereto and discussed herein at 212-16. Broadcasters who complain that recruitment is only "paperwork" often fail to contact obvious sources having an abundance of candidates to refer. Most Washington, D.C. area broadcasters are better than the national average in EEO compliance -- yet even in D.C. it's amazing how many broadcasters don't notify the most obvious minority sources. On March 15, 1999, MMTC contacted the individuals in charge of placement at Bowie State University's Department of Communications (50 graduates annually), Howard University's School of Communications (175 graduates annually); the University of the District of Columbia (UDC) Department of Performing Arts and Mass Media (25 media graduates annually) and the African American Media Incubator (AAMI) (20 radio graduates annually). MMTC inquired how many stations ever send them notices of job openings. Most of the local broadcasters send notices to Howard, but Bowie State regularly receives notices from only two stations, UDC from only nine stations, and AAMI from only seven stations. These schools are right in the backyard of 60 stations! Why in the world aren't graduates of these schools learning about job openings? And precisely why is the NAB fighting so hard so broadcasters won't have to send these schools faxes and e-mails?

of the local NAACP branch or LULAC council do not even know the CEOs of these organizations and have not provided them the courtesy of a telephone call to ask for their help. Then these same broadcasters grumble that the FCC has required them to do nonproductive "paperwork."

Another reason some recruitment sources may be nonproductive is that the person who handles job referrals for the organization does not know what broadcasters need. One practice we've found very effective is to have broadcasters invite the recruitment sources over at least once a year for a working lunch and a tour of the station, focusing on what each job is, what each person does, what skills and experience are required for each job and what salary range can be offered to employees working in each job. Many broadcasters are simply so close to their work that they erroneously assume that everyone in the world knows all of this.

3. Applicant pool diversity

The NPRM suggests that the only way a broadcaster can know that minorities and women have received adequate notice of a job vacancy is to review the diversity of applicant pools. Id. at 23026 ¶61. We agree. While the success of recruitment can be measured indirectly by reviewing whether minorities or women have become employed, Lutheran Church has precluded this approach.

Those who doubt that adequate notice yields minority and female job applicants must be assuming that minorities and women aren't interested in broadcast employment. That's just not worth dignifying. If minorities and women are not applying, broadcasters should reevaluate the diligence and effectiveness of their recruitment efforts. It will be the very rare case when a station

is able to show that no matter how effectively it recruited, minorities and women just would not apply.

4. Interview pool diversity

As we have noted, it is essential that licensees evaluate minority and female inclusion in interview pools to ensure that they have not discriminated in providing minorities and women a fair opportunity to present their credentials and be considered for hiring on a race- and gender-neutral basis. See pp. 84-85 n. 149 supra. The application process includes both written and oral components, and it is irrational to open the door to written communications (applications) but not oral ones (interviews).

The FCC does not propose that broadcasters interview clearly unqualified minorities and women. A written application only provides limited information about an applicant: it can identify applicants who are obviously not qualified, leaving those who may be qualified in the interview pool. Only the interviewing process can determine which of these remaining applicants really is qualified, and which of these basically qualified applicants is the best applicant. Thus, a broadcaster's non-fraudulent, nondiscriminatory decision to exclude any minority or woman applicant from an interview pool, based on that applicant's clear lack of qualifications as evidenced from his or her written application, would be a complete defense to charges that potentially qualified minorities and women were excluded from interview pools.

Thus, the FCC would only require broadcasters to ensure that minorities and women, whose written materials disclose no obvious non-qualification, are included in interview pools and are thus given a chance to prove they're the best applicants. Not even in a

theoretical sense could this "pressure" broadcasters to hire minorities and women. In Lutheran Church, the court criticized a broadcaster's obligation to evaluate the racial makeup of those it hires with the racial makeup of the community, noting that the FCC made a similar evaluation in determining not to investigate whether the licensee had complied with the former EEO Rule.^{337/} On these facts, it concluded that a broadcaster could be "pressured" to hire unqualified minorities in order to cause its employment roster to exceed the FCC's "zone of reasonableness" and thereby escape FCC review at renewal time. Although this theory was undermined by the absence of a single complaint in 29 years, at least it had a scintilla of theoretical validity because it contended that a broadcaster could receive a tangible benefit from the FCC by making race-sensitive hiring decisions. But using the "pressure" label from Lutheran Church, some broadcasters' contend that keeping track of how many minorities make it into the interview room somehow "pressures" them to hire minorities. That argument lacks even theoretical plausibility. The Lutheran Church panel identified a specific hiring action a broadcaster theoretically could take to achieve an ostensible regulatory benefit. But under the proposed regulations there is no specific race-sensitive hiring action a broadcaster could take -- even in theory -- to cause the FCC to do or abstain from doing, or even think about doing anything. A broadcaster need only give qualified minorities and women a chance

^{337/} Id., 141 F.3d at 353.

to be interviewed, and then apply race- and gender-neutral selection criteria without discrimination. If, after doing this, the broadcaster does not find that a minority or woman was the most qualified candidate interviewed, the FCC would not even know about it. Hiring minorities and women would neither mitigate nor substitute for a licensee's failure to interview qualified minorities and women.

5. Creative pre-employment steps (e.g. job fairs)

Contrary to our initial doubts, MMTC's research demonstrates that there is merit to the suggestion that broadcasters can materially increase minority representation in applicant pools by conducting recruitment at job fairs.^{338/} Certainly, nothing stops a broadcaster from attending job fairs now.^{339/} Moreover, jobs fairs should ideally supplement, rather than substitute for focused

^{338/} The Tennessee Study found that "[t]he correlation between participation in job fairs and minority applicant pool percentage of parity suggests that stations participating in job fairs are succeeding in building applicant pools in which minorities are better represented. This finding lends support to the FCC's contention that the use of job fairs may be a useful alternative means to ensure that minorities are more proportionally represented in applicant pools." Id. at 39.

^{339/} The Tennessee Study found that only 12% of the stations reported participation in a job fair in the year before they filed their 1996 renewal applications. Furthermore, only 27% of the stations reported offering training or internships during this period. The study concluded that "[t]hese low numbers for participation in optional but obviously useful EEO initiatives suggest that an EEO regime premised on "self-regulation" would be a failure." Id. at 38.

and pro-active recruitment whenever a job is open,^{340/} since job fairs usually are not strong sources of experienced candidates.

The Commission should ensure that job fair attendance does not become a meaningless exercise (as ascertainment was for some broadcasters). A job fair is not a social occasion: it is an opportunity for broadcasters to develop a pool of applicants from which minorities and women are meaningfully represented. Because resumes grow stale in about three months, licensees should attend at least four job fairs a year. A top management employee should represent the company, and that person should be expected to interview candidates, not just collect a stack of resumes, leave, and later claim that each resume represents an "applicant" to the station. Finally, the station should keep records on job fairs (location, date, sponsor, and station representatives in attendance).

Last fall, MMTC began conducting job fairs, staging ten of them this spring, six cosponsored by the Radio Advertising Bureau (RAB).^{341/} They have been enormously successful, and most of the

^{340/} See BBC, 556 F.2d at 62-63 (station claimed it used the State Employment Service and the Special Assistant to the Governor of Virginia, but actually its "contact" was limited to the passive acceptance of referrals. Its program as to minority organizations involved "waiting for them to come to it....Such passivity is not what was envisioned by the Commission when it set out broadcasters' affirmative action obligations.")

^{341/} The job fairs' sponsors have included CBS and Capstar, whose help MMTC appreciates. The RAB has been quietly conducting job fairs for years, and it does this magnificently. It has not sought to win any regulatory benefits from the FCC. Instead, it understands that wider outreach makes broadcasters more competitive by delivering them new brainpower, energy and talent.

major broadcasters have cooperated. We are persuaded that while job fairs are not sufficient by themselves to open the doors of opportunity, broadcasters ought to refresh and replenish their roster of resumes as often as they can by participating in job fairs.

In addition to job fairs, several other nontraditional means of recruitment have promise. These include:

1. Listing all job openings on a 24 hour job line maintained by the station and publicized on the air.
2. Posting all job listings with state broadcaster associations that update and widely publicize or distribute job listings to the state's principal minority and female organizations.
3. Linking its station's Internet home page that includes the station's job listings to women and minority association home pages, and vice versa.
4. Listing all job openings with national organizations that maintain job banks, and contributing to the maintenance of these job banks.
5. Participating in trade events sponsored by women and minority groups.

These steps supplement sound day-to-day EEO compliance. The Commission should consider the performance of some of these steps as a necessary component of a well-balanced, effective EEO program. At the same time, the Commission should award no credit for insubstantial, sham, frivolous or cynical public relations

exercises unrelated to equal employment.^{342/}

6. Training, including internships

In Nondiscrimination - 1969, 18 FCC2d at 245, the Commission urged broadcasters to:

consider the adoption of special training programs for qualifiable minority group members, cooperative action with other organizations to improve employment opportunities and community conditions that affect employability, and other measures in addition to the employment practices suggested in the proposed rules. These voluntary measures may well be the chief hope of achieving equal employment opportunity at the earliest possible time, and the decision to take such action rests with the individual broadcaster.

That admonition remains valid. Broadcasters too often have checked the box on Form 396 to say that they provide "on the job training" for current employees. But since all employers have to "train" employees to do specialized jobs, checking this box really means nothing at all. Indeed, it may mask discrimination.^{343/}

^{342/} See, e.g., BBC, 556 F.2d at 63 (criticizing station's claim that it actually trained anyone with a one-week program in one summer in which a handful of youth were allowed to tour the station and one or two were briefly allowed to operate a camera. The Court concluded that given the ministerial nature of this "training", "it appears extremely unlikely (and at least uncontested) that WTVR has taken reasonable steps to insure an increasing number of blacks and women among its managerial and skilled employees.")

^{343/} This scenario is all too familiar: minorities or women become so expert in a job that they can do their supervisor's job, but they will never be promoted into that job. When the supervisor retires or is promoted, the minority or female subordinate has the honor of providing "on the job training" for their supervisor's successor. See "Blacks Tend to Get Shut Out of On-the-Job Training Programs," 12 Journal of Blacks in Higher Education (Summer, 1996) at 57 (reporting on data from the Bureau of Labor Statistics which show that in 1993, new White workers, on average, trained for 116 hours while Blacks received only 80 hours of training. For workers who were retrained or needed to learn a new skill to perform their jobs, Whites received an average of 18 hours of training and Blacks received eleven hours.)

Broadcasters should be expected to employ summer interns, high school or college students earning academic credit, or qualifiable persons serving as mentees to senior managers or employees.

7. **"Second Generation" components, including work assignments, working environment, promotion, compensation, benefits and termination**

The first generation of EEO enforcement -- 1969 through 1998 -- focused entirely on recruitment for entry level positions. That was understandable, since before 1969 most broadcasters discriminated against minorities and women, and dramatic steps were needed just to get minorities and women in the door. That task is still not over, but now minorities and women who did get in the door too often face a glass ceiling, especially at the upper management level. The time has come to enable minority and female employees to break through that ceiling and achieve commensurate with their abilities.

It is also time to require equal opportunity for every job in broadcasting, including top management. Focusing solely on licensees who refuse even to recruit broadly for entry-level jobs omits licensees who carefully send entry-level job notices to minority and women's organizations, but who discreetly fail to recruit minorities and women for the most senior positions.^{344/}

^{344/} Top management will be the last stronghold of race and gender privilege. The President has observed that "in the nation's largest companies only six-tenths of one percent of senior management positions are held by African Americans, four-tenths of a percent by Hispanic Americans, three-tenths of a percent by Asian Americans; women hold between three and five percent of these positions. White males make up 43 percent of our work force, but hold 95 percent of these jobs." Affirmative Action Address at 8. See p. 47, Table 2 supra (documenting extremely low minority and female representation among broadcast general managers in major markets). This is apparent to anyone attending an NAB or state broadcaster's association meeting.

Second Generation EEO issues identified by the Federal Glass Ceiling Commission include:

- Initial placement and clustering in relatively dead-end staff jobs or highly technical professional jobs
- Lack of mentoring
- Lack of management training
- Lack of opportunities for career development
- Lack of opportunities for training tailored to the individual
- Lack of rotation to line positions or job assignments that are revenue producing
- Little or no access to critical developmental assignments, including service on highly visible task forces and committees
- Different standards for performance evaluation
- Biased rating and testing systems
- Little or no access to informal networks of communication
- Counterproductive behavior and harassment by colleagues.

Glass Ceiling Environmental Scan at 35-36 (identifying "[t]he major barriers identified by Commission research, CEO studies, and focus groups[.]"^{345/} The Glass Ceiling Commission found that the

^{345/} The Glass Ceiling Commission determined that "the following characteristics are common to all successful glass ceiling initiatives:

- They have CEO support
- They are specific to the organization
- They are inclusive
- They address preconceptions and stereotypes

[n. 345 continued on p. 236]

media industry had a special need for diversity initiatives:

Efforts to diversify television and newspaper newsrooms with minorities and women have yielded limited progress according to several recent surveys by the American Society of Newspaper Editors, the Radio and Television News Directors Foundation and Vernon Stone at the Missouri School of Journalism. Progress toward promoting minorities and women into decisionmaking positions was even less evident.

Glass Ceiling Recommendations at 47. To target these Second Generation issues, the Commission can take five steps.

First, it should shift its focus to high paying, high-influence jobs.^{346/} A regulatory focus on upper level jobs would more efficiently channel the Commission's resources toward encouraging the employment of persons who will be in a position to

^{345/} [continued from p. 235]

- They emphasize accountability
- They track progress
- They are comprehensive."

Id. at 39.

^{346/} Indeed, employing of minorities and women only in low level jobs may compel an inference of discrimination. See, e.g., U.S. v. Hayes International Corp., 415 F.2d 1038 (5th Cir. 1969).

influence programming diversity^{347/} or, ultimately, own stations.^{348/} Part of the focus on upper level jobs should include on-air positions, for which race and gender are too often not only

347/ According to the Federal Glass Ceiling Commission, "[a] 1990 Business Week profile of the chief executives of the 1000 most valuable publicly held U.S. companies showed that the critical career path for senior management positions in Corporate America historically has been finance, marketing, or operations - those areas that are likely to be directly related to a corporate bottom line. Therefore, it is significant that African American men and women are underrepresented in finance, marketing, and operations....African Americans who are at the professional and managerial levels in major mainstream corporations are clustered in the areas of community relations, public relations, personnel and labor relations, and affirmative action/equal employment opportunity areas." Glass Ceiling Environmental Scan" at 78.

348/ See EEO Report - 1994, 9 FCC Rcd at 6327 (Separate Statement of Commissioner Susan Ness): "[t]he modest advances in broadcast employment that have been made by minorities and women deserve recognition. However, I find that the overall results are inadequate, particularly in top positions such as group manager, general manager, station manager, and sales manager. One of my goals is to ensure that there are meaningful opportunities for minorities and women not only to be hired, but also to rise to the top management positions at communications companies. These promotional opportunities are essential to provide experience and to position minorities and women for ownership. Experienced management is a critical component to attract media financing." See also Glass Ceiling Recommendations at 47 (recommending that the broadcasting industry "recognize the urgency of getting women and minorities into decisionmaking positions, especially in television.")

factors in selection -- they are the determinative factors.^{349/}

Second, the Commission should announce that it will review issues of promotion and placement, starting with allegations that minorities and women are excluded from entire job categories such as management or sales.^{350/} It should overrule cases holding that

^{349/} Thirty years ago, Cokie Roberts was told "out loud and without hesitation, 'we don't hire women to do that. We will not hire women.'" Junior Bridge, "Diversity, Multiculturalism & the Media," Quill, July/August, 1996, at 16-17. Newswoman Lynn Sherr stated "[t]hink of the possibility of two women anchors on a network news broadcast, and you'll understand we're still in the Ice Age." Testimony of Lynn Sherr to the California Commission on the Status of Women, reported in part in M. Barrett, Rich News, Poor News (1978) at 156. Today, it is a dirty secret that television reporting and anchoring jobs are seldom awarded on the basis of merit alone. Too often, market racial demographics determine who is permitted to anchor, or which reporters are assigned certain types of stories or given certain beats. For example, Blacks are seldom permitted to cover business and finance, which are not seen as issues involving Blacks. Black men are seldom paired with White women in two-anchor teams, and anchor teams with two minorities are extremely rare. This should be against the law, and it is time the FCC did something about it.

^{350/} Largely-White sales forces are commonly employed as a leading source of the all-White word-of-mouth job referrals which so often become the enemy of EEO compliance. See, e.g., Reed v. Arlington Hotel Co., Inc., 476 F.2d 721, 724 (8th Cir.), cert. denied, 414 U.S. 854 (1973); cf. William H. Schuyler, 44 RR2d 559 (1978).

the Commission will not examine employment in particular job categories.^{351/}

Third, the Commission should renew the focus on training which began when it banned discrimination in broadcasting in 1968.^{352/}

Fourth, the Commission should begin to address issues of job quality, starting with the number one priority: sexual and racial

^{351/} In the middle and late 1970's, the Commission began to take steps toward emphasizing the importance of equal opportunity in all types of jobs. See, e.g., Independence Broadcasting Company 53 FCC2d 1161, 1166 (1975) ("Independence") (licensee admonished when Blacks were steered only to positions at the Black formatted AM station in a duopoly); Carolina Radio of Durham, 74 FCC2d 571, 576 (1979) (emphasizing that minorities should not be "excluded from employment in any of the upper four job categories.") Unfortunately, this promising line of cases ended in the 1980's. See, e.g., BBC License Subsidiary L.P., 10 FCC Rcd 10968, 10975 ¶37 (1998) ("BBC License Subsidiary") ("rather than examining each job category individually, [the Commission] evaluates a station's overall employment, including all upper-level job categories, in assessing a station's EEO performance"); WPIX, Inc., 5 FCC Rcd 7469, 7472 ¶17 (MMB 1990) (although no Hispanics were employed in sales or as officials and managers by a large New York City television station, the Commission limited its review only to the upper four job categories). The Commission should overrule BBC License Subsidiary and WPIX, Inc. and reaffirm the validity of Independence and Carolina Radio of Durham.

^{352/} See Nondiscrimination - 1969, 18 FCC2d at 245.

harassment, which is endemic in this field, especially in radio.^{353/}

Fifth, the Commission should be receptive to petitions and complaints focused on work assignments and conditions,^{354/}

^{353/} In a landmark decision wherein it compared sexual harassment to racial harassment, the Supreme Court stated that Title VII provides employees with the "right to work in an environment free from discriminatory intimidation, ridicule, and insult." Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986) ("Vinson"). To be actionable, the harassment "must be sufficiently severe or pervasive to alter the conditions of the employee's working environment and create an abusive working environment." Id. at 60. The Supreme Court in Vinson went on to say that even if an individual employee was not personally the object of racial harassment, that employee might nevertheless have a Title VII claim if he or she were required to work in an atmosphere where such racial harassment was pervasive. Id. at 65-66 (quoting with approval Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)). Employers should inform members of their staffs that the expression of racist or sexist attitudes in public is unacceptable "and a violation of Title VII." In that way, "Title VII may advance the goal of eliminating prejudices and biases in our society." Davis v. Monsanto Chemical Co., 858 F.2d 345, 350 (6th Cir. 1988) (citations omitted). See also DeGrace v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980).

In the only reported FCC sexual harassment case, a construction permit applicant was disqualified for failing to report an adverse court determination in a sexual harassment case but the Review Board did not reach the question of whether the sexual harassment itself was disqualifying. Atlantic City Community Broadcasting, Inc., 6 FCC Rcd 925, 927 ¶¶12-14 (1991).

^{354/} The Commission has only rarely focused on work assignments. In Independence, 53 FCC2d at 1166, it warned an AM-FM licensee not to segregate Blacks into jobs at the Black formatted and lower status AM station, and its remedy was to require a job structure analysis. This remedy is commonly used in Title VII cases whenever there is evidence that members of a protected group have been shunted into one type of position to the exclusion of others. This commonly happens to women, who often have little opportunity to rise beyond the glass ceiling level of "administrative assistant" or "researcher" rather than producer. It also commonly happens to minorities, who are frequently excluded from sales or management positions at many stations.

compensation,^{355/} opportunities for promotion,^{356/} retention^{357/} and termination,^{358/} and other qualities of the work environment.

B. What information must be maintained or filed for the FCC to evaluate EEO compliance?

1. Annual EEO reporting

We endorse the NPRM's proposal to continue to collect Form 395 data while terminating its use in connection with its review of steps to prevent discrimination. Form 395 data would be used only to evaluate whether reconfiguring of Commission enforcement resources, revision of EEO requirements, or sunseting are appropriate.

This data continues to be essential "to show industry employment patterns and to raise appropriate questions as to the causes of such patterns." Nondiscrimination - 1971, 23 FCC2d at 431. As the UCC III court pointed out, "[t]he FCC does not suggest in the present case that small station statistics are not still

^{355/} Cf. Adelphia Communications Corp. Unit 305, Palm Beach County, Florida, 9 FCC Rcd 909, 909 ¶3 (1994) ("Adelphia") ("almost all of the Blacks employed in upper-level positions were among the lowest paid upper-level employees at the unit.") In Banks Broadcasting Company, FCC 85-122 (1985), the Commission refused to designate a discrimination issue for trial albeit there was documentary and sworn evidence, including the statements of over twenty witnesses, that Blacks were being paid less than Whites for performing the same work. Banks should be firmly overruled.

^{356/} While Form 396 sought data on promotions by race and sex, it did not define a "promotion", or distinguish between fulltime and parttime positions. Nor was the Form 396 data on promotions used for enforcement purposes. Indeed, it was seldom made the subject of a Bilingual investigation.

^{357/} The issue of retention sometimes arises incidentally. See, e.g., Walton (Decision), 78 FCC2d at 876 (the only minority person hired during the license term stayed just six weeks).

^{358/} Beaumont involved disproportionate terminations of minorities.

useful for this purpose." UCC III, 560 F.2d at 534. In this or any worthy endeavor, accurate information beats ignorance.

Because this data is to be used to evaluate industrywide performance, it should be collected on all stations, irrespective of size. A full enumeration is essential to any census. Indeed, the 27-year longitudinal employment database flowing from Form 395 has been a valuable tool for scholars, who have no other source of labor force data about one of our nation's most important industries.

A census on race and gender does not "pressure" licensees to hire minorities or women. Form 395 collects data on employment of all races and both genders -- not just on minorities and women. No one could read into FCC Form 395 or its instructions any hidden message that one race or gender is to be preferred when hiring decisions are made. Nor should broadcasters feel uncomfortable identifying the race or gender of their employees. The Census Bureau has gathered this kind of data since 1790 without incident. Americans do not find these subjects offensive or intrusive.

The Commission should also restore annual reporting of interns and trainees, which were included on Form 395 until 1976. However, training has taken on a heightened importance now, in light of the diminished number of competing owners and the consequent squeeze on entry-level positions following ownership

deregulation permitted by the 1996 Act.^{359/} Thus, this is an opportune time to restore training data to Form 395.^{360/}

2. EEO programs

The Commission should improve providing clearer instructions and requiring more useful information, and omitting opportunities for nondisclosure and selective disclosure. As the Office of Management and Budget observed in 1987, a poorly designed reporting form could permit licensees to "carefully craft responses to be technically true while not revealing their shortcomings in EEO performance." Broadcast EEO - 1987, 2 FCC Rcd at 3968 ¶6. Form 396 had exactly this deficiency. Form 396 was so incomplete and subjective, and so subject to manipulation and gaming, that members of the public could seldom determine which licensees' EEO programs were genuine and which were shams.

Discriminators often passed muster by concealing their illegal actions in the guise of a safe-looking Form 396. Furthermore, in a few instances, innocent licensees were initially challenged because they misunderstood the instructions to Form 396 and filed what appeared to be inadequate or incomplete EEO programs, although once they amended their EEO programs these challenges were withdrawn unilaterally by the petitioners to deny.

In revising Form 396, the Commission should focus always on how to obtain the information it needs and the public needs to hold

^{359/} See generally Ofori; see pp. 8-12 supra.

^{360/} The only data of which we're aware on training used Form 396 data. Only 27% of the stations reported offering training or internships in the year before they filed their 1996 renewal applications. Tennessee Study, p. 38. More frequent data collection on training might be helpful by reminding broadcasters that they should think about the issue at least every year, rather than just every eight years.

law violators accountable. This requires quantification and precision. As Boeing Co. CEO Phil Condit recently said, "[t]here is an old adage in business: what gets measured - gets done."^{361/}

In these recommendations, references to Form 396 are intended to refer to the EEO program reporting instrument to be developed pursuant to the NPRM, irrespective of what form number it is assigned.

a. The form should request three years of data

One of the most valuable improvements to Form 396 would be to seek data covering a three year period, rather than the former Form 396's one-year period. In our experience, one year of data was often insufficient to yield much of use for smaller stations, and the one-year period tended to leave many licensees with the impression that they could be equal employers once every eight years, then revert to their old ways for most of the license term. The data must be maintained in any event; thus, the cost of providing three years rather than one year of data is slight relative to its considerable value.

b. Headquarters data should be reported

Form 396 should be filed for headquarters units. This requirement would prevent licensees from immunizing themselves from EEO requirements by designating employees at superduopolies as "headquarters" employees. It would also accelerate the full diversification of the industry by recognizing that a growing number of decisionmaking employees, and those interacting daily

^{361/} "What gets measured, gets done," Fair Employment Report, January 27, 1999 at 9 (comments made by Mr. Condit upon the settlement of several class-action race discrimination suits by Black employees.)

with decisionmaking employees, work in headquarters units.^{362/}

c. Top management should be responsible for EEO implementation

The former Form 396 asked for the name of the person responsible for EEO implementation. Licensees would often specify that the general manager was responsible when he or she really was not. Other licensees would accurately specify that a junior person was responsible and that person would lack the authority to perform more than ministerially or would not possess the skills and mature judgment needed to self-assess and evaluate EEO performance on a continuing basis.

The personal involvement of top management is essential to the success of an EEO program. The Commission has long recognized that licensees must devote personal attention to tasks essential to the public interest.^{363/} Thus, it was disturbing to see that firms with names like "Compliance Surety" had entered the business of handling broadcasters' minority and female recruitment for them. These outfits typically didn't do all recruitment -- just minority and female recruitment. They often provided a Jim Crow system under which White males were recruited word-of-mouth by station management, but minorities and women were "recruited" for "compliance surety" purposes.

^{362/} Headquarters EEO programs have long been required for cable; see Prime Cable, 5 FCC Rcd 4590 (1990). The cable industry has had no difficulty complying with this requirement, and broadcasters should have no difficulty either. To reduce the amount of paperwork involved, we suggest that if (as in the majority of instances) a headquarters unit is situated in the same city as one of the company's stations, the headquarters unit should be permitted to adopt the same EEO program used by its local station.

^{363/} See, e.g., Trustees of the University of Pennsylvania, 69 FCC2d 1394 (1978), recon. denied, 71 FCC2d 416 (1979).

The very thought of outsourcing fair employment is disturbing. Providing equal opportunity is the most critical obligation of a broadcast licensee seeking the privilege of continued free use of the public spectrum. Fulfilling this obligation requires the day to day, hands-on outreach efforts of top management. The task of developing working relationships with community groups, based on trust and credibility, cannot be assigned to outsiders. Such a subdelegation says that management considers the nitty gritty of developing working relationships with minority and women's groups is too distasteful or too unimportant to handle personally.

While a General Manager need not personally perform the ministerial day to day tasks attendant to EEO implementation, he or she should personally should be on top of the station's EEO policy and progress, and should be expected personally to render the key decisions needed to implement the EEO program.

**d. Program elements should
be reported retrospectively
and applied prospectively**

Form 396 should ask whether the initiatives reported thereon in the past and present tense will be continued throughout the coming license term, or whether modifications or additions are contemplated. Licensees should understand that a renewal application EEO Program, like an assignment application EEO program, is a promise, not just a report.^{364/}

^{364/} The D.C. Circuit has criticized the Commission for failing to require licensees to do what they promised in their most recent renewal application. Tallahassee NAACP v. FCC, 870 F.2d 704 (D.C. Cir. 1989) (noting that a licensee "added" a new source for future recruitment -- a source the licensee had promised to use in its previous renewal application but had not actually used).

e. **The terms "applicant" and "interviewee" should be carefully defined**

Clear definitions of the key terms "applicant" and "interviewee" will prevent padding of Form 396 with phantom persons who may never have heard of the station or who have no intention of ever working there. For example, seldom does a person who shows up at a job fair intend to be an applicant for a job at every company recruiting there. Not everyone who visits a booth at a national convention is an applicant for a job in any given city. Nor is a person referred to a station by a friend of the manager an applicant. The person may not even know he had been referred.

Thus, an "applicant" should be an individual who submits a written document (resume and cover letter, or an application form) manifesting his or her present intention to be considered for current employment at a particular broadcast station, or for employment at that station in the foreseeable future.

The term "referral" was used on former Form 396 as a synonym for "applicant," but it's not a synonym at all. A person can be "referred" by someone who does not really know him or her, and the person being referred may not be in the job market at all. Thus, the Commission should discontinue the use of the term "referral," or it should define "referral" to be a synonym for "applicant" as defined along the lines above.

Similarly, not everyone who has a casual conversation with a station employee is an "interviewee". One must first be in the stream of persons wishing to be considered for employment; that is, one must be an "applicant" before or simultaneously with being an "interviewee." Further, before or simultaneously with an

applicant's interview, the licensee should have determined that the applicant is not obviously unqualified.

Thus, an "interviewee" is an applicant who the licensee is actively considering for current employment at a particular broadcast station, or for employment at that station in the foreseeable future, and who is provided an opportunity in an oral conversation (in person or by telephone) to further document his or her qualifications. The purposes of an "interview," then, are (1) to identify, from among the applicants who are not obviously unqualified, those who are qualified; and (2) to select, from these qualified applicants, the most qualified person and offer him or her employment.

These definitions are broad enough to encompass situations in which an applicant seeks employment or undergoes an interview even though no job is presently open, so long as the broadcaster recognizes that a suitable job is likely to be open in the foreseeable future.

f. Recruitment data should be broken down by race, sex and job category

The former Form 396 was flawed by not providing a breakdown of the race and gender of all applicants and of those promoted. While the form provided the number of minority and female applicants, it did not allow any evaluation of whether they constituted 10%, 1%, or 0.1% of the applicants. Thus, it was impossible for the public, the Commission, or broadcasters themselves to evaluate the success of broadcasters' recruitment efforts. The form should be revised along the lines of Form 395, which includes this data.

This revision would also have the advantage of answering the criticism that the form should include White males, in order to avoid the incorrect impression that they can be discriminated against.

Data by race should be broken down by each race. Minorities are not fungible, and animus against one minority group is often specific to that group. Cf. Croson, 488 U.S. at 506 (holding that a remedial minority contracting program was not narrowly tailored when applied to racial groups not shown on the record to have been victimized by discrimination specific to their group). For example, recruitment only of African-American minorities in Miami would be incomplete if it missed the Hispanic near-majority there.

Finally, recruitment data should be broken down by job category and fulltime or parttime status of the job sought. For example, the former Form 396 did not disclose whether all of the minority or female applicants were recruited for secretarial or janitorial positions. No meaningful self-assessment can take place without this most basic information.

g. Referral sources should be identified

To allow for meaningful self-assessment of recruitment sources, broadcasters should identify these sources by name, frequency of use and intensity of use. This information will also enable the Commission to evaluate how to fine-tune its recruitment policies. This information will also disclose, on an industrywide basis, how minorities and women learn of job vacancies.

It's especially important that broadcasters identify their referral source contacts and phone numbers on Form 396, much as broadcasters identify tower site owners on Form 301. This simple, cost-free procedure would enable the Commission and the public to

independently verify the accuracy of the information provided, and discourage the common practice of listing the names of large national organizations (typically NAACP or NOW) knowing that verification would then be impossible. See Exhibit 1 hereto. This is the single most cost-effective modification to Form 396 the Commission could make.^{365/}

h. Maintenance of contact with minority and female applicants and employees should be reported

Form 396 should ask whether it is the station's policy to maintain contact with well qualified but unsuccessful applicants, and to stay in touch with minority and female former employees in order to engage them in the search for new employees. These steps go beyond source-driven recruitment, ensuring that word-of-mouth contacts are made by a heterogeneous group of persons motivated by an interest in broadcast employment for minorities and women.

i. Word-of-mouth recruitment should be described thoroughly to avoid discrimination

Stations should describe their word-of-mouth recruitment practices and set out the way these practices avoid perpetuating the present effects of past industrywide . A station should affirm that all employees, not just White men, are asked to refer their friends or colleagues for jobs, and that they include minority and

^{365/} Another step the Commission could take to cure this problem of nonverifiable puffery would be to include, on the form, language such as the following:

Misrepresentations about job referrals are considered very serious and may result in the denial of this application. Please carefully verify that you have actually sent job notices to each entity you identify below.

female client reps if advertisers are used as job recruiters. As noted above, minority and female unsuccessful job applicants and former employees can also be engaged in recruitment.

- j. **EEO complaints should be reported on a current and complete basis, with regular updates**

Reporting of EEO complaints is essential to the integrity of the renewal process. See CRC Broadcasting Company, Inc. (MO&O/NAL), DA 99-205 (Chief, Mass Media Bureau, 1999) (imposing \$8,000 forfeiture for concealment of discrimination complaint.) Those who feel they've been victims of discrimination often have accurate information about invidious employment practices, including but not limited to specific acts of intentional discrimination against themselves and others too afraid to come forward. For this reason, if a complainant does not object to providing an address for herself or her attorney, that information should be disclosed.

Because renewals arise only every eight years, it's essential that these complaints be reported far more frequently if the information possessed by complainants is to be of any use at all. Thus, supplemental statements should be provided at least annually, perhaps contemporaneously with the filing of Form 395.

- k. **Arbitration agreements should be fully disclosed and filed, and compulsory binding arbitration agreements should be banned**

Licenses should be asked whether they have placed a binding arbitration agreement into effect. Form 396 should make it clear that compulsory binding arbitration agreements, as defined below, violate the Commission's EEO policies. Since many ostensibly

voluntary arbitration agreements are almost as coercive as a binding agreement, a copy of any voluntary arbitration agreement should be submitted as an exhibit to Form 396.

Compulsory binding arbitration agreements are brazen attempts by companies to immunize themselves from EEO liability by requiring their employees, both new and tenured, to execute company-drafted, company-friendly, binding agreements never to file an EEO charge or complaint with the EEOC or the FCC, to answer questions asked of them by the FCC or EEOC, or even be a witness for someone else before the FCC or EEOC.

These agreements deeply offend public policy prohibiting interference with law enforcement. EEOC v. Astra USA, Inc., 94 F.3d 738, 744 (1st Cir. 1996) (holding that the EEOC's ability to investigate charges of systemic discrimination must not be impaired). We consider these agreements to present the greatest threat to equal opportunity in broadcasting in a generation.

We refer to agreements compelling an employee to agree that any EEO complaints will be subjected to binding arbitration as "compulsory binding arbitration agreements." Agreements by which employees may, but are not required, to agree that any EEO complaints will be subjected to binding arbitration are "voluntary binding arbitration agreements."^{366/} We urge the Commission to ban compulsory binding arbitration agreements, and to establish clear and fair conditions governing voluntary binding arbitration agreements.

^{366/} Agreements to submit EEO complaints to voluntary nonbinding mediation are generally harmless and need not be regulated. Indeed, the Commission's own internal EEO program provides for voluntary mediation. Creation of the Office of Workplace Diversity, 11 FCC Rcd 6864, 6867 (1996).

The former and the proposed Form 396 ask licensees to report whether there have been any discrimination complaints. However, as far as we know, no renewal applicant has yet included a statement on Form 396 to the effect that "we had no discrimination complaints because there can never be a discrimination complaint. Anyone refusing to sign a binding arbitration agreement on our terms will be fired."

Compulsory binding arbitration agreements violate Title VII. The EEOC has expressly banned them, holding that "[a]n employer may not interfere with the protected right of an employee to file a charge, testify, assist, or participate in any manner in an investigation, hearing, or proceeding" under Title VII and other statutes. EEOC, "Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) enforced statutes (April 10, 1997) at 1; see also EEOC, "Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment" (July 10, 1997). Under the FCC/EEOC Agreement, the FCC accepts the EEOC's interpretation of Title VII. Thus, the FCC should follow the EEOC's lead and expressly ban compulsory binding arbitration agreements.

These agreements inherently undermine both the nondiscrimination and recruitment sections of the proposed regulations. The Commission renews licenses based in part on (1) reports on Form 396 that there have been no discrimination complaints; (2) adjudications it must do under the FCC/EEOC Agreement when the EEOC lacks jurisdiction (e.g., where a station

has fewer than fifteen employees);^{367/} and (3) its review of final orders in Title VII under the NBC Policy and under the FCC/EEOC Agreement.^{368/} Embedded within each of these procedures is the assumption that the FCC and EEOC are each capable of learning of and, where required, adjudicating employees' EEO grievances. That assumption is invalidated when employees, as a condition of employment or on penalty of termination, are compelled or coerced to relinquish their rights to file EEO complaints or be witnesses in an EEO case. By preventing the FCC and EEOC from receiving accurate information on employees' treatment, these agreements invalidate a primary underpinning of EEO regulation.

Every compulsory binding arbitration agreement and many voluntary binding arbitration agreements would violate the regulations proposed in the NPRM because these agreements inherently discourage minorities and women from establishing careers with a company. While the existence of a binding arbitration agreement does not prove an employer's intention to discriminate, it does manifest a company's lack of trust in the process by which a jury of one's peers -- members of its own audience -- can hold it accountable for discrimination.

^{367/} FCC/EEOC Agreement, 70 FCC2d at 2331 §III(a) (requiring the FCC to handle individual EEO complaints where the respondent is beyond the EEOC's jurisdiction). For example, a station with fewer than fifteen employees would fall under this provision. See, e.g., Catocin, 4 FCC Rcd at 2554 ¶12 (an individual discrimination victim's complaint led to designation of a §73.2080(a) issue for trial. Ultimately, the issue was resolved against the licensee).

^{368/} FCC/EEOC Agreement, 70 FCC2d at 2331 §IV and 2334 (Attachment A -- sample letter from FCC to EEO complainant upon issuance of EEOC reasonable cause determination).

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

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

Particularly in an industry like broadcasting with an essentially permanent labor surplus, such agreements are inherently oppressive. These agreements are incompatible with the public trusteeship role of broadcasting, and with the obligation of licensees to affirmatively prevent rather than just abstain from discrimination. The existence of these agreements in the broadcasting industry is especially surprising because broadcasters are the guardians of the First Amendment. Yet these agreements strike directly at an employee's First Amendment right

to petition for redress of grievances.^{369/}

It would be a serious mistake for the Commission to "study" the matter rather than ban these agreements now, since their only purpose is to evade EEO regulation. Such "study" would only delay the vindication of the civil rights of minorities and women.

^{369/} See Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 750 (1981) (Dissenting Opinion of Chief Justice Burger) ("[p]lainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens").

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

Voluntary binding arbitration agreements should be presented to the Commission for its approval before they are permitted to go into effect. To permit members of the public to comment on these filings, broadcasters should be permitted to redact proprietary financial data. We offer these guidelines to inform the Commission's review.

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

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

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

4. Procedural Rights. An arbitration agreement should protect all procedural rights guaranteed by Title VII and the EEOC's rules, including statutes of limitations for filing complaints, assignments of burdens of proof, discovery rights (especially the right to take as many depositions as the Federal

Rules permit) and the anti-retaliation rules and policies.^{370/}

5. Company to Pay Costs. The company should bear all costs of arbitration, including filing fees and arbitrator's fees. That is only fair, since the company is the primary beneficiary of these agreements.^{371/} Congress created the EEOC specifically to provide a low-cost means for resource-poor discrimination victims to obtain a determination of the merits of their claims. That Congressional policy would be circumvented by a process that imposes a toll on employees' access to the EEOC and the courts.

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

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

^{370/} A remedy for the anti-retaliation rules in connection with an attempt to obtain arbitration must be available outside the arbitration process. It would be a classic Catch-22 if an employee's only protection against retaliation is found in the same agreement whose deficiencies gave rise to the alleged retaliation.

^{371/} These agreements eliminate the risk to employers of a jury verdict sympathetic to the employee.

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

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

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

11. Reports of Requests to Arbitrate. A request to arbitrate must be reported to the FCC because these requests are substitutes for reports of discrimination complaints. The EEOC, pursuant to the FCC/EEOC Agreement, 70 FCC2d at 2331 §III(a), must

inform the FCC of the filing of a Title VII charge.^{372/}

12. Reports of Final Decisions of Arbitrator. Under the NBC Policy, the Commission evaluates EEO compliance upon the issuance of a final order in a Title VII case. An arbitrator's decision is the equivalent of a Title VII final order. Consequently, these decisions must be reported to the Commission and made public. Cf. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32-33 (1991).

1. **The form should call for information on training and internships, minority and female contractors, "second generation" issues, and self-assessment**

The former Form 396 seeks no specific data on training and internships. It permitted broadcasters to check a box to manifest that the broadcaster provided "on the job training." Virtually every broadcaster checked that box, which was not surprising. Every somewhat specialized business must provide some training to every new employee; thus, checking this box meant absolutely nothing. Whether or not the box was checked told the Commission little of any regulatory value.

Thus, the form should be revised to specifically ask whether the station hired trainees or interns or provided training for students who earned course credit for the experience. The form

^{372/} Arbitration agreements must contain a "Failsafe" provision under which the arbitrator's final decision cannot be "vacated" through a subsequent private settlement. Otherwise, a company could take advantage of the absence of appellate rights in an arbitration to completely insulate itself from filing final order reports with the FCC. All a company would have to do is offer an employee who has just won an arbitration award a small additional sum in exchange for consenting to have the arbitrator's decision "vacated." No rational person would refuse to take the extra money, since the amount awarded by the arbitrator is already a sure thing.

should ask broadcasters to provide this information for traineeships available to those who are historically disadvantaged, including but not limited to minorities and women. In this way, broadcasters would not receive credit for training their own relatives or their biggest advertisers' relatives. Tailoring training programs in this way also obviates the need to ask the race and gender of the trainees, since a program targeted at the disadvantaged will inevitably include minorities and women.

Section 634 of the Act authorizes the FCC to collect data on cable television operators' contracting, and that information has been required since 1985. 47 CFR §76.76(e)(1). The Commission is also authorized to collect this data for broadcasters in light of Sections 151, 309(i) and (j), and 334(a) of the Act.^{373/} Arms length contacts between equals in the business world will do much to counteract the "old boy network" which made EEO regulation necessary in the first place. Business relationships between broadcasters and minority and female entrepreneurs often lead to shared-interest networking which evolves into increased employment of minorities and women by licensees.^{374/} These in turn lead to partnerships and mentoring relationships which ultimately bring minorities and women into ownership.

^{373/} See NPRM at 23014-23022 ¶¶26-45.

^{374/} For example, broadcast stations commonly hire salespeople from the ranks of those who sell goods and services to them. This route of entry into sales would be quite valuable, given the low representation of minorities in broadcast sales and the importance of sales experience in one's ability to become a broadcast manager or station owner. See p. 47, Table 2 supra.

The former Form 396 had a Section VIII seeking "other information," but that section was optional. Most broadcasters left it blank, probably in the belief that disclosing nothing would make their applications appear more routine. Yet a narrative is essential in providing the licensee's self-assessment of its own performance. The Commission should retain Section VIII and require licensees to provide a self-assessment narrative therein.^{375/}

^{375/} We draw a distinction between self-assessment -- which requires some thought and results in a narrative -- and self-certification, which involves checking a box. Self-certification seldom works. No broadcaster will self-certify that it is a discriminator.

The Commission's experience with self-certification has not been pretty. In 1981, the Commission began to permit broadcast construction permit applicants to check a box to certify their financial qualifications. Revision of Form 301, 50 RR2d 381 ¶2 (1981) (suggesting that financial documentation requirements might be "out of date, burdensome or superfluous.") After an alarming number of applicants falsely certified "Yes" in the belief that they would never be caught or held accountable, the Commission instituted a program of random checking. Certification of Financial Qualifications, 2 FCC Rcd 2122 (1987). Two years later, realizing that even its random checking policy "has not sufficiently deterred applicants from falsely certifying their financial qualifications," the Commission reinstated meaningful financial reporting for construction permit applicants. Revision of Applications for Construction Permit for Commercial Broadcast Stations, 4 FCC Rcd 3853, 3858-59 ¶¶40-41 (1989). In another context, the Office of the President has pointed out the dangers of self-certification of a contractor's minority status, citing two cases in which Department of Defense contractors were convicted of falsely holding out their firms as minority owned. Office of the President, Review of Federal Affirmative Action Programs, July 19, 1995, at 66. The Report criticized abuses by "front companies," noting that "[s]elf-certification has obvious advantages in terms of the reduced administrative expense and regulatory intrusion. Nevertheless, this must be balanced with the importance of ensuring that affirmative action measures are fair, which means as free of abuses as can reasonably be achieved." Id.