3. Data must be maintained regularly and supplied in the event of a compliance audit or Bilingual investigation

Good recordkeeping is the key to any meaningful enforcement program. If a regulation is lawful, there is no reason not to require licensees to maintain the data needed to permit the FCC to enforce the regulation.

Unfortunately, in the past the Commission has too readily permitted EEO-noncomplying licensees to immunize themselves from major sanctions or a hearing by their own supposedly poor recordkeeping. See, e.g., CRB of Florida, Inc., 6 FCC Rcd 2303, 2304 ¶¶10-11 (1991) (licensee reported no minority referrals for 16 vacancies. It maintained no records, but its license was renewed with a $7,500 forfeiture); Sarasota Renewals, 5 FCC Rcd 5683, 5685-86 ¶¶22-25 (1990) (licensee did not know the referral sources for eighteen employees out of 27, and didn't know the number of minority interviewees for 25 of the 27 positions, but its license was renewed with only a $2,000 forfeiture). Instead, the Commission should draw adverse inferences from licensees' failure to maintain records.

There is good authority for this approach: the Uniform Guidelines on Employee Selection Procedures mandate that employers must retain sufficient records "which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group...in order to determine compliance with these guidelines." 29 CFR §1607.4. The Uniform Guidelines also provide that "[w]here the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the

selection process from the failure of the user to maintain such data." 29 CFR §1307.4(D).[376/]

C. What can the FCC do to ensure that recruitment will be performed effectively?

1. Noncursory review of all applications

We endorse the cable SIS procedure as a proven, thorough approach transferable to broadcast regulation. The SIS audit form is used to validate written claims in EEO programs for 20% of cable systems each year.[377/] SIS review determines whether a cable system honored the promises it made in its EEO program to notify specifically named organizations whenever a job is open. It bodes well that cable industry commenters in this proceeding seemed comfortable with the SIS approach and did not raise substantial objections to it.

The results of SIS review are often quite revealing. In our experience, between 10% and 20% of cable systems simply ignore their EEO programs after they file them. Many of these cable systems filed their EEO programs never intending to implement them.

376/ Sometimes a claim of poor recordkeeping may be made to conceal deliberate destruction of inculpatory documents. Such behavior is a serious abuse of process, being comparable to the fabrication or suppression of evidence. See WWOR-TV, Inc., 7 FCC Rcd 636, 641 ¶40 (1992) (fabrication of evidence); Dorothy O. Schulze and Deborah Brigham, 6 FCC Rcd 4218 ¶2 (1991) (advising non-parties against attending depositions). To learn whether this happened, the Commission should ask which former employees helped maintain these documents, then interview these former employees. Indeed, failure to keep appropriate records may constitute "spoilation" -- especially if maintenance of the records is mandated. See Rogers v. Exxon Research & Engineering Co., 550 F.2d 834, 843 (3d Cir. 1977), cert. denied, 434 U.S. 1022 (1978).

377/ Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992 - Equal Employment Opportunities, 8 FCC Rcd 5389, 5394 ¶28 (1993) ("EEO Report and Order - 1993"); Amendment of Part 76 of the Commission's Rules to Implement to Equal Employment Opportunity Provisions of the Cable Communications Policy Act of 1984, 102 FCC2d 562, 601-602 (1985).

If applied to broadcasting, SIS forms would have value well beyond their ability to reveal misrepresentations. If licensees know in advance that they may be audited, they will be much more diligent in implementing their EEO programs.

2. Bilingual review to identify problem applicants

A broadcaster has no right not to have EEO allegations investigated. The decision to investigate is firmly committed to the Commission's discretion, as long as that discretion is exercised rationally. The Telecommunications Act affords the Commission clear discretion to "require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked." 47 U.S.C. §308(b).[378/]

It is unfair to refuse to investigate because a citizen group has failed to obtain incriminating internal station records on its own. See Stone v. FCC, 466 F.2d 316, rehearing denied, 466 F.2d 331 (D.C. Cir 1972) ("Stone") (expressing concern that owing to the Commission's insensitivity to petitioners' lack of access to licensees' internal documents, "the renewal process is [perceived as] a meaningless exercise or a never-ending battle for which [representatives of the public] have insufficient resources.") Thus, there will always be a need for Bilingual investigations.

378/ The Commission has already profoundly changed the way it exercises its discretion to investigate EEO cases without conducting any rulemaking proceedings. See FCC EEO Enforcement (showing how the Mass Media Bureau dramatically reduced the percentage of EEO petitions to deny undergoing Bilingual investigations, without any public notice of this policy change); cf. Mass Media Bureau Backlog Reduction Plan, Public Notice No. 54882 (MMB, released June 15, 1995) (reducing the level of review afforded certain petitions to deny).

In control cases, the Commission has not hesitated to conduct full document production and depositions to get at the truth of the matter, see Fox, 10 FCC Rcd at 8452; or to hold hearings, see Trinity Broadcasting of Florida (I.D.), 10 FCC Rcd 12020 (ALJ, 1995) (exceptions pending). The Commission should apply this same diligence to the equally important EEO cases.

a. The Commission should seek data covering the full license term

When the Commission performs a Bilingual investigation, the period of time for which data is requested is usually no more than three years. This appears to be a matter of custom. If there is a reason for the review period being three years, the Commission has never disclosed it. Since licensees maintain records throughout the full term, there is no rational basis for the Commission to deliberately shield itself from reviewing these records.

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

The availability of eight years of data would enable the Commission to make more sensitive evaluations of a licensee's performance. Eight years of data would generate more accurate and fair conclusions because they will be based on a larger sample of applicants and interviewees.

Furthermore, an eight year review period is essential if the Commission is to accurately assess forfeitures. The Commission is expected to assess forfeitures for "each violation or each day of a continuing violation."[379/] Without a full license term of data,

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

the Commission cannot know how many violations, or how many days of a continuing violation, should be the basis for an accurate calculation of a forfeiture.

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

b. The Commission should use witnesses much more effectively

The Commission operates at a disadvantage when it conducts a Bilingual investigation: it knows nothing, and the licensee knows or ought to know everything. Yet Bilingual investigations use the weakest evidence gathering tool in the arsenal of discovery: the written interrogatory. With the benefit of thoughtful contemplation, the respondent may craft the least revealing answer he can legally submit.[380/] Thus, it is not surprising that the

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380/ Professor Wright explains that

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

Wright, Law of Federal Courts 620 (5th ed. 1994).

only Bilingual investigations which have led to hearing have been those in which the licensee was careless or lied. The principal deficiency in Bilingual investigations is that they never identify discriminators unless they are also liars.

To solve this problem, the Commission should maintain the flexibility to use more powerful investigative techniques where appropriate -- particularly those involving witnesses. In Beaumont, 854 F.2d at 508-10, a case involving the departures of all but one of a station's Black employees soon after the format changed, the Court held:

> [t]he Commission had an obligation to be more vigilant in investigating the circumstances of these departures. With only one exception, the licensee presented no affidavits from the departed employees to corroborate its accounts. Nor did it provide the Commission or the petitioners with the full names and addresses of the departed employees. The Commission approved the license renewal without requiring the licensee to submit even this most basic information. In doing so, it tolerated a situation in which only the party that was accused of practicing intentional discrimination had access to the alleged victims. In short, the Commission did not conduct its inquiry in a reasonable way.
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> The licensee did not reveal the full names and addresses of, or other identifying information about, the terminated black employees. Without this information, the Commission has only the licensee's possibly self-serving - and sometimes inconsistent - explanations for their departure....In light of the licensee's exclusive access to the black former employees, the Commission erred in not taking more affirmative steps to investigate the validity of the licensee's accounts....[the Commission should have obtained] the full names and addresses of, or other identifying information about, the terminated black employees. Without this information, the Commission has only the licensee's possibly self-serving - and sometimes inconsistent - explanations for their departure.

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

The Commission certainly should interview witnesses in any case resembling Beaumont. Where there have been at least three discrimination complaints, or a number of unexplained departures of protected group employees, the Commission should interview the former employees, any unsuccessful protected group job applicants, and any good samaritan or other corroborating witnesses.381/ The

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381/ Most law enforcement agencies treasure good samaritan witnesses, and at times the Commission has taken them quite seriously. See, e.g., Gaines, 10 FCC Rcd at 6591 ¶17 (EEO issue had been added when a former station executive provided a declaration stating that a former General Manager had informed him that the owner did not want Blacks working at the station. The former executive also stated that he was scorned by the program director for having hired a Black technician); New Mexico Broadcasting Company, Inc. (HDO), 54 FCC2d 126, 135 (1975) (the good samaritan, who was a job applicant, alleged that the President and General Manager of the licensee had informed him that "I don't hire Mexicans, Niggers or anybody with long hair.")

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

facts need not exactly parallel Beaumont's facts. Discriminators, like other lawbreakers, try to stay ahead of the law in the strategies they employ to break the law.[382/] Interviews with witnesses, aimed initially at pinning down the time sequence of events, should root out instances of deliberate discrimination.[383/]

382/ A case should not have to exactly fit the Beaumont model. In Beaumont, the licensee changed format from Black to country-western. The licensee assumed that its Black announcers and sales staff would be incapable of working in the new format, but the licensee never gave them a chance to try out. Within a few weeks' time, all but one had left the station. In response to a Bilingual letter, the licensee claimed they'd each left voluntarily. The NAACP "broke" the Beaumont case when it realized that most of the Black employees who had supposedly left voluntarily had each actually left the day after a White person had begun work in the same job.

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

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

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

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

In its treatment of witnesses, the Commission should attempt to protect witnesses from retaliation. Broadcasting is a close-knit industry, and "blackballing" is common. The Commission should employ the same witness protection techniques used by EEOC investigators. In appropriate cases, the Commission should avail itself of the procedures flowing from Section 403 of the Communications Act to ensure that employees can participate in Commission proceedings without fear of retaliation. The Commission should also expressly adopt the anti-retaliation protections embodied in Title VII and in the EEO's procedural regulations, and should declare that it will enforce these provisions aggressively to protect witnesses and complainants and preserve the integrity of its processes.

3. Random, spot audits of some applications

In 1985, the Commission adopted procedures for field audits of cable systems, to be used for "situations that present problems during the paper investigation."[384/] While field audits have not been used often enough, they are quite successful when used,[385/] and they undoubtedly have a prophylactic effect on EEO compliance. These audits include a review of personnel files and in-person interviews with managers and records custodians. The audits are especially valuable in enabling Commission staff to assess the demeanor and candor of the cable system officials. These procedures should be adopted for broadcasting as well.[386/]

The Commission has wide discretion to conduct audits, announced and unannounced. See 47 U.S.C. §303(n), authorizing the Commission to inspect all radio installations "in order to ascertain whether they conform to the requirements of the rules and regulations of the Commission,...or the provisions of any act under which they are licensed or constructed." The D.C. Circuit has closed the book on the question of the Commission's authority,

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384/ EEO Report and Order - 1985, 102 FCC2d at 604.

385/ See Adelphia, 9 FCC Rcd at 909 ¶5 (imposing $121,000 forfeiture for violations uncovered during site visit); Prime Cable, 5 FCC Rcd 4590 (1990) (imposing $18,000 forfeiture for violations uncovered during site visit).

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

holding that it "has the discretion to determine what procedures best assure protection of the public interest. Black Citizens for a Fair Media v. FCC, 719 F.2d 407, 418 (D.C. Cir. 1983). Failure to allow inspections is a sanctionable offense. Norfolk Southern Railway Company, 11 FCC Rcd 519 ¶3 (1996).

We emphasize that field audits are no substitute for the evidentiary hearing mandated by Section 309 of the Communications Act. Instead, by focusing the evidence, they will either obviate the need for a hearing or make a hearing much easier for all sides to try because most of the evidence can be stipulated in.

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

In the prehearing phase of nearly every EEO case which eventually went to hearing, there was a time when the Commission's staff first recognized that the licensee was a rogue. This sometimes happened with the first Bilingual letter, or even the second. However, by the time the staff found it necessary to send a third Bilingual letter, it surely knew that this was not a case of honest confusion or miscommunication. Instead, the public needed protection from that licensee immediately. In such instances, the Commission should issue an order in the nature of a preliminary injunction, delineating EEO practices which must be followed while the investigation or hearing is in progress.[387/]

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

In addition, the Commission should leave open to petitioners, and reserve for use on its own motion, the availability of temporary restraining orders in especially egregious cases. These orders should track similar orders issued on behalf of shareholders when company management may have committed serious malfeasance. In such a case, a court will name a trustee to oversee spending, and the court will often impose conditions on which actions require the trustee's approval. An order of this type in an EEO case might be appropriate, for example, when it appears that the licensee is about to fire most of the minority employees in circumstances suggestive of discrimination. Such an order will preserve the status quo, protect the minority employees' jobs, and ensure that all employees are made available for interviews when the Commission conducts a site audit. See pp. 272-73 supra.[388/]

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

388/ Only in extremely rare cases would it be necessary to appoint a trustee to supervise a licensee's personnel policies. In such an instance, the Commission might draw from the ranks of retired FCC attorneys, Review Board members and administrative law judges.

5. The Commission should evaluate the cost-effectiveness of each investigative method

The methods discussed in this Section are likely to be quite cost-effective. To ensure that the Commission's investigative methods remain tailored to the harm and keep current with evasive practices by law violators, the Commission should evaluate each investigative method in 2007, the end of the next renewal cycle.

VII. A Zero Tolerance Policy For Discrimination

If our country is to continue to operate the world's preeminent system of broadcasting, we must adopt a policy of Zero Tolerance for discrimination. The industry enjoyed 29 years of EEO regulation without the loss of one license for discrimination. During this time, the tactics of discriminators grew more sophisticated. As doors have opened, so has resistence grown.

Now is the time for the learning phase of EEO enforcement to end, and the era of strict compliance to begin. This proceeding is the place to announce a policy of Zero Tolerance for discrimination.[389/]

EEO does not burden law abiding broadcasters. As we have shown, it benefits them economically and professionally. See pp. 176-184 supra. However, license holding by EEO violators does burden the general public, minority and female broadcasters and broadcast professionals.

389/ The nation's leading civil rights organizations have presented this recommendation on four occasions between 1993 and 1996. On each occasion, the Commission failed to rule. EEO Report and Order - 1993, 8 FCC Rcd at 5389; EEO Report - 1994, 9 FCC Rcd at 6276; in their Petition for Clarification after the release of the Streamlining NPRM, and in the MMTC Streamlining Comments. The Commission owes a legal and moral duty to the organizations filing these Comments, and their constituencies, to provide at last an up-or-down ruling on the question of whether it will adopt a Zero Tolerance Policy for discrimination.

Furthermore, the credibility of the Commission's EEO enforcement program depends profoundly on its willingness to take all measures to uncover intentional discriminators and remove them from the broadcast business, and to uncover habitual EEO violators and exhibit close to zero tolerance for them. We seek a one-strike rule for habitual EEO violators and a no-strike rule for discriminators.

The time for a Zero Tolerance Policy is long overdue. The Commission's 1994 EEO Report found that even after 25 years, scores of broadcasters had not learned the elementary skill of recruiting widely for minority and female job candidates.390/ The findings of the Tennessee Study validate those of the 1994 EEO Report:

- Six percent of stations reported the use of no referral sources at all and 24% reported no sources which produced minority referrals. Moreover, the median number of productive minority sources is only two. Id. at 49.

- A surprisingly high proportion of the stations which reported minority referral data (25%) reported not one minority referral in the entire reporting year. Minorities comprised less than 5% of the applicant pool at 30% of the stations, and less than 10% of the applicant pool at 41% of the stations. Furthermore, 27% of the stations had not attained 50% of parity with the workforce in the composition of their applicant pools, even though the pools included applicants for secretaries and janitors. Id. at 50.

390/ "[T]here 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.

- Ten percent of the stations reported no female referrals in the reporting year, and sixteen percent received three or fewer female referrals. Id. at 50.

- Staff size was correlated with the number of referral sources, but not with the number of productive referral sources. Thus, many large stations apparently use their resources to propound long lists of local organizations which may or may not be cultivated as genuine sources of minority or female referrals. Id. at 52.

- The measures of percentage of parity attained for minority employment in the industry cumulatively shows that substantial progress is yet to be made for top four category positions. While the median minority fulltime employment percentage of parity was 64%, the median minority top four category percentage of parity was only 46%. Id. at 51.

Given the extent of EEO noncompliance this late in the history of civil rights, it is essential that a Zero Tolerance Policy has teeth. Regulators must not declare that they have "zero tolerance" and then continue with business as usual.

First, the Commission must declare its willingness to consider any evidence of discrimination or habitual EEO violations -- statistics, EEO complainants' statements, and inferences of discriminatory intent from the truthful as well as the untruthful statements of licensees. See pp. 311-33 infra. This will take hard work.[391/] The Commission will not always be able to shift the burden of develpping evidence to petitioners to deny, because they lack the power to conduct predesignation discovery.[392/]

391/ The D.C. Circuit emphasized thirty years ago that "a pious hope on the Commission's part for better things from [a licensee] is not a substitute for evidence and findings." UCC I, 359 F.2d at 1008.

392/ See Citizens for Jazz on WRVR v. FCC, 775 F.2d 392, 397 (D.C. Cir. 1975) ("[i]t would be peculiar to require, as a precondition for a hearing, that the petitioner fully establish...what it is the very purpose of the hearing to inquire into.")

Second, the Commission should begin to distinguish more carefully which habitual EEO violators are most likely to be intentional discriminators. See pp. 280-332 infra. For the most part, habitual EEO violators are discriminators who are clever enough to prevent the Commission and the public to catch them in the act.393/

Third, the Commission should improve the effectiveness of Bilingual investigations by expanding the scope of evidence sought, the range of sources from which it seeks evidence, and the tools it uses to develop its evidence. See pp. 265-72 supra.

Fourth, the Commission should not wait as long as eight years for a station's next renewal application to arrive before the Commission grapples with serious allegations that a licensee is discriminating today. See pp. 273-75 supra.

Fifth, the Commission should immediately outlaw the worst threat to antidiscrimination enforcement in a generation: the practice of some licensees of requiring employees, as a condition of employment, to enter into one-sided, binding agreements to arbitrate all EEO disputes. See pp. 251-63 supra. These draconian civil rights waivers directly undermine the FCC/EEOC Agreement and

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393/ Tester studies have disclosed that about 20% of American business discriminates against minorities at the point of hire. See Reskin at 26-28. Nonetheless, the Commission has only made findings of employment discrimination against three renewal applicants in the past 25 years. Catoctin, 4 FCC Rcd at 2553; Walton (Decision), 78 FCC Rcd at 857; King's Garden, 34 FCC2d at 937. Thus, most discriminators in broadcasting have hidden their actions very cleverly indeed.

frustrate the Commission's ability even to learn of any discrimination. Under no circumstances should the Commission permit a public trustee to coerce its employees to check their civil rights at the door as a condition of working in the broadcasting industry.

Sixth, the Commission should begin to focus its attention on the "Second Generation" issues in EEO policy: the treatment of minorities and women after they've been hired. For 25 years, the Commission has focused almost entirely on the first level of the employment relationship: the opportunity to learn that a job is open. Every Bilingual letter focuses on that question. Yet the Commission's diversity goals can only be effectuated when minorities and women have real power to influence what goes out over the air. Consequently, it is time to review compliance with the elements of EEO programs which require broadcasters, inter alia, to hire, train, compensate, promote employees fairly. See pp. 234-41 supra.

EEO is the only remaining test available to the Commission to render the public interest determination required upon renewal of a license, 47 U.S.C. §309(e). Thus, it should enforce a Zero Tolerance Policy irrespective of a licensee's staff size, market size, influence, prestige, noncommercial status, format, programming or length of tenure.

A. Under a Zero Tolerance Policy, the Commission should consider all behaviors and all evidence which might be probative of discrimination

It is a well established principle that agency action must be "based on a consideration of the relevant factors."[394/] In this spirit, the Commission should state that it will no longer reject, out of hand, any type of evidence of possible EEO noncompliance. While the Commission should not conduct a dragnet, it should investigate EEO violations the same way it investigates pirate stations, obscene broadcasts or out of band emissions -- with an openness to considering any useful evidence, and a commitment to follow that evidence wherever it leads.

B. What behaviors should be treated as discriminatory under a Zero Tolerance policy?

1. Nonresponsiveness or evasion in responding to a Bilingual inquiry

As the Commission recognized every time it designated an EEO case for hearing, lying about or concealing evidence of EEO violations is probative of whether the broadcaster is covering up actual discrimination.[395/] This inference is especially strong

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394/ Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); Weyburn Broadcasting Limited Partnership v. FCC, 984 F.2d 1220, 1227-28 (D.C. Cir. 1993); David Ortiz Radio Corp. v. FCC, 941 F.2d 1253, 1260 (D.C. Cir. 1991). See 5 U.S.C. §706(2)(A) (court shall set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.")

395/ See, e.g., Dixie Broadcasting Co. (HDO), 7 FCC Rcd 5638 (1992) ("Dixie/HDO"); WXBM-FM, Inc. (HDO), 6 FCC Rcd 4782 (1991); Albany Radio, Inc. (HDO), 97 FCC2d 519 (1984); Metroplex Communications of Florida, Inc. (HDO), 96 FCC2d 1090 (1984); New Mexico, 54 FCC2d at 126.

given the secure place in communications law of the rule against misrepresentations.[396]

Sanctions for lying to conceal violations short of discrimination are too slight to risk the license by lying. Consequently, only a licensee that knows it discriminated would have sufficient motive to misrepresent an EEO program.

2. Deliberate and systematic violations of outreach requirements which are evident even without "self-assessment," particularly word-of-mouth recruitment by a homogeneous workforce

Twenty-two years ago, the D.C. Circuit held that where "serious factual disputes raise a question about whether a licensee's affirmative action program systematically and positively encourages minority hiring, training, and advancement, a hearing must be held on the licensee's compliance with its affirmative action obligations[.]" BBC, 556 F.2d at 64-65. Since then, hundreds of licensees have been sanctioned for affirmative action violations. However, only a handful have gone to hearing on this issue, and when the issue is designated it tends to be as a nondisqualifying afterthought to other issues.[397] The time has come to designate hearing issues in instances of deliberate and flagrant violations of each section of the EEO regulations.[398]

396/ See RKO General, Inc. v. FCC, 670 F.2d 215 (D.C. Cir. 1981). Misrepresentation and lack of candor go to character irrespective of the context in which they arise. See 47 CFR §73.1015; see also Policy Regarding Character Qualifications in Broadcast Licensing, 5 FCC Rcd 3252 (1990), revised, 7 FCC Rcd 6564 (1992).

397/ See, e.g., Dixie (HDO), 7 FCC Rcd at 5640 ¶15.

398/ The Commission almost rendered this holding in Leflore Broadcasting Company, Inc., 65 FCC2d 556 (1977), aff'd, 636 F.2d 454 (D.C. Cir. 1980), but has never squarely decided this question. See Beaumont, 854 F.2d at 507.

Affirmative action violators very often are discriminators. In every instance in which a discrimination issue was designated for hearing, the evidence giving rise to the issue became known in the course of the Commission's investigation of an affirmative action violation. Federal courts understand this: applying what is known as the "Craik Principle," courts have long held that a deliberate and systematic failure to abide by easy-to-follow affirmative action requirements may reveal intentional discrimination.399/ When an employer knows that it is expected to take simple, race- and gender-neutral steps to recruit to avoid discrimination, its intentional election not to take those steps is one piece of evidence of discrimnatory intent.

The Craik principle applies with great force to broadcasters, owing to their special public interest obligations and longstanding notice of EEO requirements.400/ Craik-type discrimination is often called "unintentional" only because scienter is difficult to

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399/ Craik, 731 F.2d at 472, discussed at 93 n. 157 supra.

400/ The Bilingual II court understood this, noting that it has never agreed with "the assumption that unzealous prosecution of an affirmative action plan can never constitute evidence of intentional discrimination sufficient to require a renewal hearing." Id., 595 F.2d at 633 n. 49. As Judge Robinson declared in his partial dissent in Bilingual II, 595 F.2d at 643 n. 61: "unlike most other employers, broadcasters operate under a requirement that they make affirmative efforts to increase their employment of women and minority individuals....Thus a disparity in a broadcaster's employment profile is less likely to be the result of unintentional practices than would be the case for such differentials in the figures for other employers."

extract from unwilling witnesses.[401] In a never-overruled holding, the Commission recognized that "it is the consequences of the licensee's employment practices, not the intent, which determines whether discrimination requiring remedial action exists" (emphasis in original).[402]

The persistence of so-called "unintentional" discrimination, manifesting itself as affirmative action violations, can only be addressed by holding the licensee to be just as accountable for affirmative action violations as it would be for open and notorious discrimination.

That is why the Commission should appreciate the limitations of self-assessment. Properly done, self-assessment is a valuable means by which a law-abiding broadcaster fine-tunes its EEO program and renders it more effective. But it is a fiction that if only

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401/ The U.S. Commission on Civil Rights has long recognized that "'systemic discrimination,' i.e., discriminatory practices - most, but not all, unintentional - [are] built into the systems and institutions which control access to employment opportunity." U.S. Commission on Civil Rights, Statement on Affirmative Action for Equal Employment Opportunities (February, 1973) at 3. In the seminal article on fair recruitment under Title VII, Alfred W. Blumrosen explains:

> No subjective prejudice or negative feeling toward minorities is required under the statute. Few employers purposefully seek or desire to discriminate against minorities.... Title VII is not a criminal statute requiring mens rea. It is regulatory social legislation designed to change conduct and eradicate discriminatory practices. Its operation does not turn on the subjective feelings of employers, unions, and other respondents.

Blumrosen, "The Duty of Fair Recruitment Under the Civil Rights Act of 1964," 22 Rutgers L. Rev. 465, 475 (1968).

402/ Federal (HDO), 59 FCC2d at 364 ¶27 (emphasis in original), citing, inter alia, Diaz v. Pan American Airways, 422 F.2d 385 (D.C. Cir. 1971)) ("Diaz").

broadcasters would "self-assess," they would become aware of the compositions of their own hiring pools and staff, and would become conscious of their own biased recruiting, selection and hiring practices. Sophisticated discriminators are always very much aware of their own personnel practices and personnel outcomes.403/

Most commonly, intentional discrimination in the recruitment context will take the form of word-of-mouth recruitment from a homogeneous workforce. We have discussed this practice at length; see pp. 63-73 supra.

If we are ever to complete the task of remedying the present effects of past discrimination, all broadcasters must pull their weight. Broadcasters must learn that their licenses are at stake if they design their recruitment methods to foster discrimination.

403/ The premise of the "self-assessment" concept is that a discriminator is blissfully unaware of its own hiring practices. The "self-assessment" concept assumes that nobody in business thinks consciously about racial isolation, which is absurd. Race crosses most businesspersons' minds daily, although many will deny it. For some, it is a source of discomfort, evasion, and avoidance, if not outright prejudice.

The effect of the "self-assessment" concept is that guilty broadcasters are rescued from having to go to hearing. The prototypical "self assessment" case is Miami Renewals (WLVU-AM-FM), 5 FCC Rcd 4893 (1990) ("Miami"), recon. denied, 8 FCC Rcd 398, 399-401 (1993), aff'd, Florida NAACP, 24 F.3d at 271. In Miami, the Commission held that

> the licensee did not maintain adequate records and does not appear to have engaged in meaningful self-assessment of its EEO program. Had it done so, it would have discovered that its recruitment efforts were not productive. WLVU/WLVU-FM hired no minorities for any of the 54 hiring opportunities during the license term in an area where the available labor force is 15.2% minority (emphasis in original).

Id. at 4898 ¶43. This was "self-assessment" run riot. Did this licensee really have to "discover" why it had hired no minorities for 54 vacancies?

3. Relegation of minorities or women to low pay, specialized format, or parttime positions; or outright tokenism

The Commission should express Zero Tolerance for any two-tier system of work assignments. In its most extreme manifestation, an EEO program exhibited an "apparent classification of only some positions as 'suitable' or 'feasible' for minority applicants." Rust/HDO, 53 FCC2d at 363. The Commission declared:

> This limitation is diametrically opposed to the policies which give rise to our rules, particularly the concept that equal employment, as a minimum, requires that minorities be considered for all job openings. We are further troubled by the callousness inherent in this program, which lessens the licensee's efforts to recruit minorities in the face of three years of zero minority employment. Under these circumstances, we believe that a prima facie case of employment discrimination has been established.

Id. at 363-64.[404] The relegation of minorities or women to bottom-five category employment is especially abhorrent, both because it may be indicative of discrimination[405] and because it undermines the goal of promoting diversity. A secretary, janitor or night-shift announcer has limited influence on program service.

Two-tier employment systems are usually more subtle than the one in Rust. For example, an EEO program may be directed only to

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404/ See BBC, 556 F.2d at 63-64 n. 19 (discussing Rust, and noting that even where the licensee didn't use the words "suitable" or "feasible," its actions -- in this case, a training program which was not designed to help Blacks move into professional and managerial jobs -- amounted to "limiting advancement to those it deems 'suitable' for training."

405/ See, e.g., Hayes, 415 F.2d at 1038 (extreme patterns of assigning Blacks only to low-skilled jobs and Whites only to high-skilled jobs may compel an inference of discrimination).

certain departments in a station.[406/] In another permutation of two-tier systems, a duopoly may channel virtually all of the minority applicants to the minority-format station, where employees often have lower job status and earn lower pay than their counterparts across the hall who do exactly the same work.[407/]

Another subtle two-tier practice is the relegation of minorities to parttime employment. Parttime employees "constitute a significant portion of the total workforce at most broadcast stations," Broadcast EEO - 1987, 2 FCC Rcd at 3970 ¶21. The Commission has recognized the value of an integrated parttime workforce as a source of candidates for promotion to fulltime jobs.[408/] On the other hand, parttime employees typically earn no benefits, receive low pay, work the least desirable shifts -- and worst of all, enjoy little interaction with the rest of the staff and thus have little impact on diversity. Parttime employment of minorities is factored into EEO decisions as a minor mitigating factor, see, e.g., WFSO(FM), 7 FCC Rcd 6056, 6046 ¶8 (1992);

406/ See, e.g., Carolina Radio of Durham, 74 FCC2d 571 (1979).

407/ See Independence, 53 FCC2d at 1166 ¶19 ("the facts before us imply that the licensee has limited its consideration of minority persons to WHAT. Such segregation would be contrary to the letter and spirit of our equal employment rules." (emphasis supplied)). See also Babrocky v. Jewel Foods, Inc., 773 F.2d 857 (7th Cir. 1985) (employer maintained sex-segregated job classifications, e.g., only men were hired as meat cutters and only women as meat wrappers).

408/ See Alabama/Georgia Renewals, 6 FCC Rcd 5968, 5972 ¶34 (1991) ("we would not consider such employment as a substitute for the licensee's failure to employ Blacks, the dominant minority, in full-time positions until the last year of the license term or as mitigation for a record of substantially inadequate efforts to recruit more minorities for full-time positions. Second, no evidence exists that minority part-time employees have ever been promoted to full-time positions.")

Century Broadcasting Corp., 40 RR2d 1019 (1977), but not as an aggravating factor, see Radio Chattanooga, Inc., 7 FCC Rcd 2929 (1992), recon. denied, 10 FCC Rcd 9773, 9774 ¶8 (1995). To be consistent, parttime employment should be considered both as a mitigating and an aggravating factor. Failing to hire minorities or women for fulltime jobs is aggravated where the station hires minorities or women only for parttime jobs or, worse yet, does not hire minorities or women even for parttime jobs.409/

Another variation on the theme of two-tier empkloyment is "tokenism" -- hiring one, and only one, minority or woman in a somewhat significant position, with the understanding that he or she will be the last such person thus employed. The only good to come out of Lutheran Church is that this practice will no longer be available as "license renewal insurance," since the Commission, to its discredit, too often tolerated or rewarded tokenism.410/ Indeed, the Commission has even allowed licensees to rebut the inference of discrimination when they claim that they offered a job

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409/ We are aware of instances in which stations reported a minority person as a parttime employee even though the individual was a one hour per week sports stringer or a half hour per week program host and an independent contractor. The Commission should expect a parttime employee to be subject to FICA withholding and to be employed at least ten hours per week, some of which should be on-site, interacting with other employees.

410/ See, e.g., Radio Chattanooga, 7 FCC Rcd 2929, 2930-31 ¶14 (1992), recon. denied, 10 FCC Rcd 9773 (1995) ("Radio Chattanooga") ("the licensee made some efforts to fulfill its EEO obligations" and "consistently employed at least one Black in a full-time position throughout the license term.")

to a minority who didn't take the job.[411] In one infamous case, the Commission even invoked the fact that a licensee hadn't terminated minorities. There were no terminations because no minorities had been hired in the first place.[412]

An "offer to hire" is unverifiable and may not be genuine: the minority or woman who turned down the job may have deemed the offer an insult, or may have been someone the licensee already knew wouldn't take the job.[413] Evidence of these "offers to hire" are seldom accompanied with evidence showing how many White males were also offered the job and did not accept.

If a single application or "offer to hire" can save a license, EEO regulation won't amount to much. A licensee would have to refuse even to talk to minority or female applicants before the Commission would designate its renewal application for hearing.

Tokenism is an affront to EEO enforcement because it undercuts the principle that a person's civil rights are personal

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411/ See Beacon Broadcasting Corporation, 9 FCC Rcd 2132, 2136-37 ¶¶27-35 (1994), recon. denied, Eagle Broadcasting Company, Inc., 11 FCC Rcd 7380 (1996) ("Beacon") (the station failed to use the two minority sources its 1986 assignment applications promised to use; it kept virtually no EEO records, but its license was saved by one minority hire and two offers to hire. The "minority" who was hired was not even reported as Hispanic until after the Petition to Deny was filed, and both of the "offers to hire" were unverified).

412/ "Unlike Beaumont, in which designation for an evidentiary hearing was required, the record of WLVU/WLVU-FM does not suggest a sudden simultaneous departure of minority employees[.]" Miami, 5 FCC Rcd at 4898 ¶41.

413/ In one case with which undersigned counsel is familiar, a radio station offered a night announcer's job to a Black man who was the lead anchor on the leading television station's nightly newscast. It then used this "offer" as evidence of lack of discriminatory intent. In another instance, a broadcaster offered a job to a woman who had just informed the broadcaster that she had accepted another job earlier the same day.

to him or her. One's civil rights cannot be advanced by the fact that someone else is treated fairly.[414/] See, e.g., EEOC v. New York Times Broadcasting Service, Inc., supra, 542 F.2d at 358 (finding discrimination where employer argued that it already had a female employee and therefore didn't need to hire another).

The Commission's treatment of tokenism is perhaps the only area of its EEO jurisprudence in which some of the Commission's decisions cannot be reconciled with others.[415/] Radio Chattanooga, Beacon, Miami and Columbus Renewals are directly contradicted by the Commission's unequivocal rejections of tokenism in Louisiana Renewals, 7 FCC Rcd 1503, 1508 ¶38 (1992), recon. denied, 8 FCC Rcd 3239 (1993) ("Louisiana"),[416/] Kansas City Youth for Christ, Inc.,

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414/ If one's civil rights could be effectuated by token fair treatment of someone else, a hotel with 100 Black tourists standing in line could set aside all of its rooms to Whites except one. Cf. Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241 (1964). A school district which provides no English instruction for 1800 Chinese children would be immunized because it provided such instructions for a thousand others. See Lau v. Nichols, 414 U.S. 563, 564 (1974). A municipality would be excused from excluding Blacks from its boundaries because a few Blacks still reside within its boundaries or a few Whites still live without its boundaries. See Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960). Most Blacks could be excluded from a grand jury because some were included. Mitchell v. Rose, 570 F.2d 129, 133 (6th Cir. 1978).

415/ In order to prepare these Comments, we reviewed every reported FCC EEO decision since 1968. While we obviously do not agree with many of these decisions, they were generally consistent with each other -- except in this area. The Commission's treatment of tokenism was the only area of the Commission's EEO jurisprudence in which no clear pattern or direction of the cases could be determined.

416/ "The mere presence of two or three Blacks on the stations' staffs of 25, 26 and 22 employees from 1986-1989, respectively, also does not excuse the licensee's lack of a program and lack of self-assessment. We pointedly reject the argument that the mere presence of a small number of minority employees who are holdovers from a previous licensee proves that the current licensee is engaged in successful minority outreach efforts. In fact, the presence of such employees offers no evidence whatsoever of affirmative action efforts by the current licensee." Id.

3 FCC Rcd 6866, 6868 ¶13 (1988) ("Kansas City"),[417] or Communications Fund, Inc., 7 FCC Rcd 8636, 8639 n. 15 (1992) ("Communications Fund").[418]

In his partial dissent in Bilingual II, Judge Robinson explained why tokenism in broadcast EEO is unacceptable:

> [T]okenism and other attempts to hide discriminatory designs are no more commendable than overt prejudice. Racism and sexism assume many forms, and a complete bar to employment is but one of them. Statistically-significant underrepresentation can be the result of purposeful discrimination as much as can absolute exclusion. For instance, race or sex may simply be one factor in an employment decision - as for an employer who hires only exceptional black applicants - but the prohibited animus is still there. (fns. omitted).

Id., 595 F.2d at 653. See also BBC, 556 F.2d at 64 n. 21 ("the fact that WTVR has hired some women and minority workers cannot shield WTVR's affirmative action efforts from scrutiny" where a "hopeful, but erratic and equivocal, statistical record" is present).

The Commission should take the opportunity provided by this proceeding to make a clear and unequivocal statement that in the future, it will follow Louisiana, Kansas City and Communications Fund, and condemn tokenism and other Jim Crow employment practices in every form in which they arise.

417/ The Commission held that since the licensee made no efforts to attract minorities, "the licensee's employment of minorities at all appears to be purely happenstance." Id.

418/ "The fact that a station has hired one minority, in and of itself, does not mean that it has an effective EEO program." Id.

4. Dumping compliance efforts into the last few months of the renewal term

Compliance efforts beginning after a petition to deny is filed do not reflect EEO performance before that time, nor do they serve to predict future EEO performance in the absence of scrutiny. NBMC, 775 F.2d at 342.[419] After NBMC, many broadcasters simply began preparing for renewal a few months earlier. Consequently, we have seen many instances of EEO performance which began a few months before renewal time -- too early to directly implicate NBMC; too late to be meaningful.[420]

To avoid evasion of the underlying principle of NBMC, the Commission should afford EEO performance in the last year of a license term little weight if it was not preceded by several years of substantial compliance.

419/ It is well established that performance while under intense regulatory scrutiny is nonpredictive of future compliance. See, e.g. Gonzalez, 901 F.2d at 761-62 (fact that minority employees were "promoted just before trial...does not constitute a defense to plaintiffs' charges, nor does it moot the issues....research leads us to conclude that often the acts relied upon as evidencing good faith are taken in response to the lawsuit filed by the discriminatee. Such actions in the face of litigation are equivocal in purpose, motive and permanence"); Craik, 731 F.2d at 478 (post-suit evidence not entitled to the same weight as pre-suit evidence); Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968) ("[s]uch a last minute change of heart is suspect, to say the least"); Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n., 375 F.2d 648, 658 (4th Cir. 1967) ("[p]rotestations of repentance and reform timed to anticipate or blunt the force of a lawsuit offer insufficient assurance that the practices sought to be enjoined will not be repeated"); Stender v. Lucky Stores, 57 FEP 1431 (N.D. Cal. 1991) (summary judgment denied in part because company's performance in relevant time frame may have been "litigation driven").

420/ See, e.g., Louisiana, 7 FCC Rcd at 1508 ¶38 ("[t]he licensee's virtual absence of recruitment records demonstrates its lack of commitment to or interest in EEO efforts or self-assessment until the end of the license term. Such records are essential for adequate self-assessment.")

6. Irrational excuses suggestive of race or gender prejudice

If any evidence of race or gender prejudice should be fully reviewed in hearing, it is the irrational excuses for EEO nonperformance which broadcasters file with the agency itself. Prepared with the benefit of private contemplation and with the assistance or availability of specialized counsel, these statements are carefully crafted to avoid the appearance of discriminatory animus. What always gives these statements away is their lack of logic[421/] and their total lack of documentation.[422/]

When confronted with these pretextual statements, the Commission should go on heightened alert for the presence of discrimination,[423/] initially by seeking instances in which the licensee's pretextual excuses may have been translated into

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421/ The typical pretextual statement attributes to minorities or women a habit or characteristic found among everyone. Classic examples include claims that minorities or women don't like to work for low pay (see p. 299 infra) or that that minorities or women are hired away by stations in larger markets (see p. 300 infra). A substitution of the words "White males" for "minorities" or "women" in these statements easily illuminates the race or gender stereotypes embedded in them.

422/ See Beaumont, 854 F.2d at 508 (although the licensee claimed that most Blacks weren't qualified for radio jobs in its area, and it could not outbid competitors because of its financial position, "nowhere in the record is either assertion corroborated, and the Commission appears to have made no independent attempt to do so.") See also Dister v. Continental Group, Inc., 859 F.2d 1108, 1113 (2d Cir. 1988) ("[t]hose who can demonstrate no legitimate reason for acting more likely than not acted for a discriminatory reason.")

423/ See Burdine, 450 U.S. at 255 and n. 10 (pretextual statements almost always are indicative of discriminatory intent). See also Milles v. M.N.C. Corp., 750 F.2d 867 (11th Cir. 1985) (subjective standards by an employer whose practices have a substantial adverse impact on a protected group have often been held to violate Title VII).

disparate treatment of specific individuals.[424/] Carefully drawn supplemental document production requests will often yield evidence that statements originally made in writing to the agency are only the beginning of a long paper trail of discrimination.[425/]

Careful scrutiny of pretextual statements is essential if the Commission is to break its unfortunate pattern of inferring discrimination only from misrepresentations. See p. 280 supra.[426/]

424/ Judge Robinson has illuminated the connection between pretext and disparate treatment. He explains that "disparate treatment" means

> not only consciously plotted acts that result from racial animus, but also conduct arising from the thoughtlessness of stereotypes and irrational generalizations. Both conscious purpose and subconscious purpose - neglect - can fall within this category, for behind today's failure to think of minority interests is yesterday's deliberate decision to discriminate....It makes little difference whether a licensee purposely calculated that an applicant was unable to handle the responsibilities of a position bcause of his race or whether the licensee's socialization was so imbued with the stereotype that it simply never occurred to him that the applicant could do the job....As has been said in another context, "the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." Hobson v. Hansen, 269 F.Supp. 401, 497 (D.D.C. 1967), aff'd as modified sub nom. Smuck v. Hansen, 408 F.2d 175 (en banc 1969).

Bilingual II, 595 F.2d at 637 n. 14 (Robinson, S., Dissenting in Part).

425/ See Gallo v. Prudential Residential Services, Ltd. Partnership, 22 F.3d 1219, 1223-24 (2d Cir. 1994) ("[b]ecause writings directly supporting a claim of intentional discrimination are rarely, if ever, found among an employer's corporate papers, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination.")

426/ See, e.g., Dixie (HDO), 7 FCC Rcd at 5638; Albany, 97 FCC2d at 519; Metroplex, 96 FCC2d at 1090.

> there are certain highly specialized areas of broadcast industry employment in which few women and minorities have as yet acquired the requisite professional skills. This is the case particularly as to college graduate electronic engineers....The licensee should show in its EEO program that the skills are in fact required, and provide Census or similar data indicating that, as to women or minorities, individuals possessing these skills are as yet in short supply. Evidence of efforts at recruitment should also be presented. The Commission expects that the cases in which such a showing can properly be made will be few" (emphasis supplied).

EEO Processing Guidelines, 79 FCC2d 922, 932 (1980) (emphasis supplied).428/ The reason minorities and women are seldom employed by stations which believe them "unqualified" is that these stations haven't given them a chance.429/

b. Claims that minorities prefer not to work in a particular format

The Commission long ago recognized that minorities can and should work at any station in any community, and indeed can and

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428/ In the past, these arguments typically arose in the context of a request for an alternative labor force. The Commission typically found that such arguments lacked merit. See Radio Dinuba Company, 11 FCC Rcd 8931 (1996) (rejecting argument that "many persons in the area do not speak English and many do not have even a high school education"); see also Golden West Broadcasters, 10 FCC Rcd 1602, 1604 n. 11 (1995) and San Luis Obispo Limited Partnership, 9 FCC Rcd 894, 904 n. 23 (1994) (to the same effect). The fact that the Commission will not compare a station's employment profile to its relevant labor force will not lessen the instances of assertion of this claim. Broadcasters will continue to make this argument in order to justify their failure even to recruit minorities.

429/ Before Lutheran Church, the Court recognized that a licensee's sudden increase in minority employment, after it has claimed that such hiring was impossible, might stand as evidence that the original claims had no merit. See NBMC, 775 F.2d at 358 (Concurring Opinion of Judge Kenneth Starr) (noting that "once WYEN at long last undertook a vigorous recruitment effort, the number of minority employees at the station took a significant turn upward").

should own any type of station in any type of community in order to promote diversity. Waters, 92 FCC2d at 1265. Thus, the suggestion that broadcast professionals of one race are uninterested in getting work at a broadcast station that doesn't primarily play "their" music, or are less qualified to do that work, is perhaps the single most horrible manifestation of discrimination known to the Commission. We refer to this contention as the "Format Pretext."

In Lutheran/HDO, 9 FCC Rcd at 923 ¶25 (vacated on other grounds; subsequent history omitted) the Commission recognized that the suggestion that minorities are less able to work in classical music than Whites is "inherently discriminatory." Unfortunately when faced with virtually identical facts involving stations with other formats, the Commission has admonished the broadcaster, but has not designated the renewal application for hearing.[430/] No wonder broadcast licensees continue to use this excuse.[431/]

The Commission has also failed to designate an application for hearing when the Format Pretext was more carefully worded as a suggestion that it is difficult to compete with minority format

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430/ See, e.g., Kettle Moraine Broadcasting Company, Inc., 12 FCC Rcd 11799, 11802 (1997) (Polka music and agricultural news); Davidson County Broadcasting, Inc., 12 FCC Rcd 3375, 3381 (1997) (Southern gospel, news and talk show programming); Lotus, 9 FCC Rcd at 2120 and n. 13 (classical); Stauffer Communications, Inc., 9 FCC Rcd 879, 884 ¶12 and n. 7 and 885 ¶15 and n. 9 (1994) (news); Double L Broadcasting, 7 FCC Rcd 6435, 6442 n. 12 (1992) (Big Band); WINFAS, Inc., 5 FCC Rcd 4902, 4902-03, 4904 n. 7 (1990), recon. denied, 8 FCC Rcd 3897 (1993) (country-western); Delaware Broadcasting Co., 58 RR2d 1297, 1299 n. 6 (1985) (country-western); Bob Jones, 25 FCC2d at 723 (1970) (religious and classical).

431/ See, e.g., Lotus Communications, Inc., 9 FCC Rcd 2117, 2120 n. 13 (1994) ("Lotus") (licensee repeated its station format and salary limitations arguments as an excuse for EEO noncompliance despite rejection by the Commission of those same arguments in a previous license term).

stations for minority employees, even though this formulation of the Format Pretext also embeds within it the assumption that minority broadcast professionals are unable or uninterested in working outside of "their" music.[432/] While minority format stations usually do employ high proportions of minorities, they are able to do so because they offer minorities an antidiscrimination sanctuary -- a reliable opportunity to work. However, stations in other formats have the bulk of the industry's jobs, and no minority broadcast professional we have ever encountered turns down a genuine opportunity to earn a living. It would be absurd for the Washington Post to claim that it has difficulty hiring Black reporters because they prefer to work for the Washington Afro-American.

Because the Format Pretext is so invidious, and in light of the frequency of their invocation by broadcasters despite Commission admonitions that such arguments lack merit, the Commission must treat these arguments as evidence of possible discrimination under its Zero Tolerance Policy. It should reject any and all pretextual contentions that minorities are unresponsive to recruitment because they supposedly choose where to earn a living based on such a ridiculous criterion as the station's format, and investigate thoroughly when these stereotypes are propounded in the future.

432/ See, e.g., Eagle Radio, Inc., 9 FCC Rcd 836, 855-56 ¶39 and 856 n. 37 (1994) (subsequent history omitted) (claim that country-western format made recruitment more difficult). See also GAF Broadcasting Company, Inc., 10 FCC Rcd 10760, 10764 ¶8 and n. 7 (1995) (to the same effect; classical format).

c. Claims that central city residents will not commute to the suburbs

Some suburban stations have contended that minorities (or more charitably put, "central city residents") are unwilling to work at suburban stations. Many explanations are offered for this perceived unwillingness including, difficulty in commuting to the suburbs for work, bad highways, lack of bus service, and lack of sufficient pay to justify the commute. Almost never are any of these arguments supported by documentation. In fact, in many of these cases, the licensee has failed to make even a modest attempt to attract minority applicants from nearby central cities.

It is interesting that central city stations never claim that suburbanites cannot make the same thirty mile commute into the city -- even though driving downtown in rush hour traffic usually takes longer than driving in the other direction. However, some suburban stations find it tempting to forego minority recruitment throughout the renewal term, then claim, at renewal time, that they thought they did not have to recruit because they are not situated in front of a city bus stop.

The Commission usually rejects this reverse-commuting argument.[433/] However, rarely has the Commission viewed these claims as, themselves, possible evidence of discrimination warranting additional scrutiny in the form of further inquiry or hearing. The Commission must scrutinize these claims more closely

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433/ See Buckley Broadcasting Corp., 9 FCC Rcd 2099, 2101 ¶¶16-18 (1994) (subsequent history omitted) ("Buckley") (stations were 20 miles from Syracuse and three of the 14 employees lived more than 20 miles away) WXBM-FM (HDO), 6 FCC Rcd at 4784 ¶15 (rejecting licensee's claim that Blacks won't drive 13 miles to work); Suburban Washington, D.C. Renewals, 77 FCC2d 911 (1980) (30 miles is a reasonable commute).

to determine whether they evidence a pretext to discrimination where such arguments are (1) not supported with documentation; and (2) are coupled with inadequate recruitment efforts.

d. Claims that minorities or women require higher pay than White males

Another argument some broadcast licensees have used as an excuse for EEO noncompliance is that minorities or women are unwilling to accept lower paying jobs. Put in a more benign way, these stations claim that their recruitment efforts are impaired because they cannot offer the same salary levels as their competitors. It is surely a surprise to learn that minorities and women, now or at any time in our history, have become accustomed to making more money than White males for the same work.[434/] The Commission has made it plain that salary limitations "affect minorities and nonminorities equally."[435/] However, the Commission rarely has made further inquiry, and has never designated for hearing any applications which made such claims.

As a result, broadcasters feel quite comfortable in continuing to make these statements in defense of EEO nonperformance. Because this absurd argument is so prevalent, the Commission must take a more aggressive enforcement approach in addressing such claims. Specifically, the Commission should adopt a policy that it will consider these claims to be a pretext for

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434/ See Testimony of Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, Before the Subcommittee on Employer-Employee Relations, Committee on Economic and Educational Opportunities, United States House of Representatives, March 24, 1995, at 4 (pointing out that in 1993, "the median income of African Americans was barely more than one-half that of whites.")

435/ Lotus Communications, Inc., 9 FCC Rcd at 2120 n. 13.

discrimination unless they are supported by documentation.

e. Claims that minorities or women prefer occupations other than broadcasting

On occasion, broadcast licensees have argued that minorities or women prefer to work in jobs in manufacturing, agriculture, marketing, or some other occupation than broadcasting. In no case has a broadcaster licensee documented this claim.[436/]

Hiring across industries (especially in sales) is very common. No one has ever made the argument that it is difficult to recruit White males into broadcast employment because they are overrepresented in banking, insurance, finance, law medicine or government. At best, the argument that minorities cannot be recruited into the broadcasting industry is a self-fulfilling prophecy. At worst, it is a pretext for discrimination and the Commission should consider it as such when evaluating an licensee's EEO record.

f. Claims that minorities or women eventually leave for larger markets

Medium market broadcasters commonly argue that it is difficult to retain minorities or women because they eventually leave for larger markets. This argument disregards a fact well known by every medium market broadcaster: its employees are drawn from even smaller markets. Both genders and all races climb the career ladder from small to large market, and from small to large station, in the same way. Thus, the argument that minorities and

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436/ See, e.g., Sandab Communications Limited Partnership II, 11 FCC Rcd 9040 (1996) (subsequent history omitted) (discussing licensee's purpose in contending that minorities are disproportionately employed in agriculture).

women cannot be retained smells of pretext. It should give rise to an inference of possible discrimination.

g. Claims that women make poor employees because they marry or get pregnant

The contention that women make poor employees or are harder to retain because e.g., they marry, become pregnant, or have children is an obvious signal of discriminatory intent.[437/] Statements like these should always be treated as a pretext for discrimination and applications of licensees who make this claim should automatically be designated for hearing.

h. Customer preference discrimination

Perhaps the most troubling argument a broadcaster can make to defend its failure to hire minorities and women is one which relies on the assumption that members of its audience, or its advertisers, prefer the station to employ White males, or do not prefer the station to employ persons with attributes, such as a subjective

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437/ See, e.g., KEZE Radio, 44 RR2d 1527 (1978) ("[y]our explanation for the station's difficulty in retaining female employees is not entirely satisfactory. Men do not experience pregnancy; however, they also marry, divorce and have 'other personal problems.'"). See also Haynes v. W.C. Caye & Co., 52 F.3d 928 (11th Cir. 1995) (claim that women were not "tough enough " to handle debt collection was held to be direct evidence of sex discrimination.

voice quality or accent in an announcer[438/] which are thought to be disproportionately present among minorities and women.[439/] A common permutation of this argument is the suggestion that minorities or women lack "experience" in selling a particular type of spot or format. See Lutheran (HDO), 9 FCC Rcd at 924.

These arguments are little more than thinly disguised customer preference discrimination, which has been invalidated by the courts. See Diaz, 442 F.2d at 386 (holding that flight attendant positions may not be restricted to

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438/ Voice quality is so subjective that the risk of discriminatory application of a voice quality standard is very high. The EEOC is highly troubled by contentions that speech patterns hinder job ability. See EEOC Dec. No. 79-16, 26 FEP Cases 1764, 1965 (1978) (Iranian applicant for job as librarian showed that ability to speak English clearly was not necessary for successful job performance).

This issue arose once in a federal court of appeals; interestingly, it involved a White plaintiff who brought the only "reverse discrimination" case under Title VII in the history of broadcasting of which we're aware. It involved a White male production manager with announcing experience who was laid off when the Black-oriented radio station at which he worked downsized. Chaline v. KCOH, Inc., 693 F.2d 477 (5th Cir. 1982) ("Chaline"). The station had never had a White announcer. Id. at 478. The company's defense to Chaline's race discrimination suit was a claim that "he does not have the proper 'voice' to serve as a disc jockey on a black-oriented radio station [and] is not sensitive to the listening tastes of a black audience." Upholding the trial judge, the appellate court found that "such a subjective job qualification provides a 'ready mechanism for racial discrimination,'" citing Johnson v. Uncle Ben's, Inc., 628 F.2d 419, 426 (5th Cir. 1980). Chaline, 693 F.2d at 481. Chaline proved that he had used a "Black" voice before in preparing commercials, and "the record reflects that he demonstrated his mastery of the voice and idiom during the course of trial." Id. at 482.

439/ Worse yet was a case (arising three years ago) in which a station conducted an audience survey to help it develop the appropriate "sound" but instructed interviewers in writing not to ask substantive questions of Black respondents.

women simply because male business travelers prefer to be waited on by female attendants).440/

Business necessity claims based on highly subjective criteria are inherently suspect, for they often "discriminate in fact under a facade of apparent neutrality." Rogers v. International Paper Co., 510 F.2d 1340, 1345, rehearing denied, 510 F.2d 1357 (8th Cir. 1975). Examination of the goals underlying subjective selection criteria "might reveal underlying personal biases or discriminatory stereotype[d] classifications." Id. at 1346.

The FCC has always been suspicious of licensees' racially tainted claims of "suitability" for certain positions. See Rust (HDO), 53 FCC2d at 363 (rejecting applicant's "apparent classification of only some positions as 'suitable' or 'feasible' for minority applicants"). It ought to be suspicious, because we expect to see more of these subjective claims in the future, whether stated explicitly or applied in fact. The job consolidation attendant to superduopolization in local markets has begun to force some minority-format stations to market themselves so as to reach wider audiences. Rather than assume that these

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440/ In these cases, more than a mere "business purpose" is required: an employee must have a "compelling business necessity" for a discriminatory practice. U.S. v. St. Louis-San Francisco Ry. Co. 464 F.2d 301 (8th Cir. 1972) (en banc). The licensee would carry a heavy burden of proof that the requirement is job-related, having a "manifest relationship to the employment in question," Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). If "an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited" and an alternative, nondiscriminatory practice must be used instead. Id. at 431-32. The EEOC deems an employer to be discriminating when it has failed to determine whether "suitable alternative selection procedures and suitable alternative methods" of selection could have been employed. Uniform Guidelines on Employee Selection Procedures, 29 CFR §1607.3(B).

stations' predominately minority staffs are capable of reprogramming their own radio station, some group owners have begun to purge the minorities.[441] The open or implied use of customers' presumed preferences as a surrogate for race- or gender-skewed employee selection or work assignments is inherently discriminatory. The Commission should examine it in hearing.

i. Claims based on other irrelevant factors, such as the unemployment rate, the station's size, location or financial condition, the actions of subordinates, or the loss or nonmaintenance of records

Defenses premised on factors uncorrelated with race, or factors inconsistent with broadcasters' responsibilities as public trustees, are completely irrelevant to EEO compliance. At worst, such statements, when coupled with other pretexts, constitute evidence of discriminatory intent.

For example, claims that the unemployment rate is particularly low[442] are sometimes made as an attempt to show that it is more difficult to hire minorities or women. Actually, this factor usually renders it easier to hire minorities and women, whose unemployment rate is usually well above the unemployment rate for White males.

441/ We have seen this before. When many school districts were desegregated, school boards assumed, without proof or any basis in fact, that Black teachers could not teach White pupils and that Black administrators could not supervise White teachers. Thus, the courts have held that teachers displaced when a formerly segregated Black school is closed "must be judged for continued employment by definite objective standards with all other teachers in the system." Rolfe v. Lincoln County, Tennessee Board of Education, 391 F.2d 77, 80 (6th Cir. 1968); see also North Carolina Teachers Association v. Asheboro City Board of Education, 393 F.2d 736, 744 (4th Cir. 1968); Stell v. Savannah Board of Education, 387 F.2d 486, 497 (5th Cir. 1967).

442/ See, e.g., Beacon, 9 FCC Rcd at 2134; Peter J. Jorgenson, 6 FCC Rcd 6510 (1991).

A station's staff size and market size are not correlated with EEO performance. See Tennessee Study at 52. Nothing intrinsic to one's experience as a minority or a woman makes it more or less likely that such a person would prefer a large or small market or station in which to learn a living.

Arguments that a licensee cannot comply with EEO regulations because of its financial condition[443/] also suggest intentional discrimination, given that the cost of compliance is nominal. See pp. 7-8 supra.

The Commission should not accept the excuse that a failure to recruit, failure to keep records, or failure to maintain an effective EEO program is the fault of a rogue manager. Although the urge to pass blame is human, the Commission should remind broadcast licensees that they are ultimately responsible for choosing and supervising their subordinates.[444/] Well-established rules of agency make a subordinate's actions those of the licensee.[445/] As an expert agency, the Commission has learned that absentee station owners or corporate level managers seldom leave regulatory policy matters as important as EEO entirely to the unsupervised discretion of their local managers. Broadcasters that delegate all EEO responsibility to local managers are still

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443/ See, e.g., Arkansas Educational Television Commission, 3 FCC Rcd 1923 (1988).

444/ University of Southern California, 11 FCC Rcd 7239, 7242 (1996) (rejecting claim that EEO record was mitigated by mismanagement or misconduct of a former employee); Trustees of the University of Pennsylvania, 69 FCC2d at 1394.

445/ See, e.g., King v. Horizon Corp., 701 F.2d 1313, 1318-19 (10th Cir. 1983); Thomas v. Colorado Trust Deed Funds, Inc., 366 F.2d 140, 143 (10th Cir. 1966).

ultimately responsible for those managers' performance.[446/]

Finally, as we have shown, the Commission should more closely scrutinize broadcasters' claims that they lost or forgot to maintain records. See pp. 304-305 supra. On occasion, this overly facile claim has masked thinly veiled fraud, made possible by the calculation that the Commission will abstain from pursuing the matter to its rightful conclusion. At a minimum, the Commission interview those with personal knowledge and reconstruct the missing records. The Commission should either establish or rule out whether the loss or failure to maintain records is itself a deliberate effort to conceal discrimination, particularly when this defense is combined with other, pretextual arguments.

7. Selling airtime based on anti-minority or anti-woman appeals

In order to discourage minority or female employment, businesses often go out of their way to create a hostile or

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446/ Cf. RKO, 670 F.2d at 215 (rejecting, inter alia, attempts by licensee to blame misconduct on subordinates) Some mitigating weight may be given to claims that subordinates were responsible for EEO violations if the licensee took immediate and dramatic action as soon as he learned that his instructions had not been carried out. See TelePrompTer Cable Systems, Inc., 40 FCC2d 1027 (1973) (after misconduct surfaced, a new board of directors was elected as expeditiously as possible. The new board initiated a special study to inform it on how to prevent recurrences, and management began a housecleaning to purge itself of past misconduct).

forbidding climate. This practice discourages minorities and women from seeking employment with these firms. Employers using this strategy can surgically eliminate the need to discriminate against specific persons at the point of hire,

Recently, the Commission has become aware of the practice of some rep firms, on behalf of broadcast clients, of discouraging trade with African-American and Hispanic stations. One infamous memo referred to the need to solicit "prospects", not "suspects."447/ A related practice, indulged by some ad agencies with the cooperation of selected broadcasters, is the use of "dictates" such as "no Black, no Spanish" -- targeted at formats but really directed at consumers.

The Commission does not have to tolerate the consequences of this behavior in the employment context. If a broadcaster, its co-owned or affiliated rep firm or ad agency, or an unaffiliated rep firm or ad agency acting at the broadcaster's direction or with its informed consent uses an expressly racist or sexist appeal in seeking the business of advertisers, the Commission should investigate to determine whether the broadcaster has created a hostile environment in violation of its EEO regulations. If the practice has affected, or is likely to affect minority or female employment opportunities, including opportunities for promotion or equal opportunity in work assignments, the Commission must enjoin the behavior, using injunctive relief or the hearing process as necessary.

447/ See p. 22 and n. 45 supra (discussing the Civil Rights Forum on Communications Policy study of discrimination in advertising, a study triggered by the 1998 "Katz Memo" that referred to Caucasians as "prospects" and African-Americans as "suspects".

This approach would continue to allow broadcasters and advertisers to develop consumer campaigns targeting particular demographic groups, recognizing that some demographic groups are more likely to buy certain goods and services than others. But it would also send a clear message that the Commission does not stand for the use of anti-minortiy or anti-woman sales strategies that distort and inhibit the free flow of commerce over regulated airwaves. A broadcaster that engages in such practices or uses a rep firm or ad agency that does is profiting from discrimination in marketing. That is unacceptable.

8. Selling a station, or using a broker that sells stations using procedures that exclude minority buyers

Real estate practices like racial "blockbusting" or "steering" are obviously unlawful.[448/] Yet many broadcast station brokers commonly operate in ways that effectively exclude all or virtually all minority buyers.[449/] Two specific practices have come to our attention.

First, most brokers use word-of-mouth contacts from a homogeneous workforce -- White and male -- to sell stations. Minorities are not called, even though there are several minority companies who could bid for eight-figure deals, and dozens who can bid for seven-figure deals, if given timely notice and an opportunity to do so. Typically, they are not. Minority entrepreneurs learn of these deals after they're announced in the

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448/ See 42 U.S.C.§3601 et seq.

449/ The brokerage business has been incredibly slow to integrate its ranks. We know of no minority broker who has ever been employed at any full service brokerage firm.

trade press.[450/] Alternatively, they get brokers' calls only on stations some broker thinks are (as we often hear) "suitable for a minority," such as urban or Spanish format stations, or AM standalones in large cities -- often overpriced "dogs" the White-owned companies did not want to buy. This practice is closely analogous to "recruitment discrimination" in the employment context, which is inherently discriminatory. See pp. 63-73 supra.

Second, some brokers only provide due diligence materials, such as station financials, to buyers who already have a line of credit set up to permit them to buy whatever stations they choose. As far as we know, only one or two minority broadcasters has ever secured such a line of credit. Nearly all minority broadcasters, even the more successful ones, need to buy stations one or two at a time on a deal-by-deal basis with the approval of their lenders and senior investors. This criterion is excessive and unnecessary, since due diligence materials are commonly shared by half a dozen people engaged by any buyer. It is analogous to the Commission's former Ultravision policy, which discouraged minority ownership by requiring construction permit applicants to show in advance that they possessed a full year of working capital with the absurd assumption of zero revenue.[451/] The policy was repealed in 1982 in part because the Commission recognized that it inhibited minority ownership.[452/]

450/ 45-Day Notice for Sale of Broadcast Property, FCC 78-323, 43 Fed. Reg. 24560 (1978) (rejecting Commissioner Hooks' proposal that would have required broadcasters to put stations on the market for 45 days before they are sold).

451/ Ultravision, 1 FCC Rcd at 547.

452/ Financial Qualifications Standards, 87 FCC2d at 201.

When broadcasters aid and abet these kinds of discriminatory practices, they help to create an economic climate that acts artificially to depress minority ownership opportunity by endowing racism with economic power. In this way, too many broadcasters help prevent minorities from achieving what is one of the principal ultimate goals of EEO regulation -- widespread minority ownership of broadcast facilities.

As a first step in correcting this serious problem, the Commission should require broadcasters to certify on Form 314 and 315 that they did not trade with a broker who engaged in these practices. The Commission should deny applications filed by broadcasters that fail to make this certification truthfully.