markets. The Commission, therefore, should adopt the proposals discussed in NAB's comments to reduce the burdens on small broadcasters and provide more certainty in its EEO rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Streamlining Broadcast EEO	)	MM Docket No. 96-16
Rule and Policies, Vacating the EEO	)	
Forfeiture Statement	)	
and Amending Section 1.80 of	)	
the Commission's Rules to Include	)	
EEO Forfeiture Guidelines	)	

Reply Comments of The National Association of Broadcasters

In comments in this proceeding, the National Association of Broadcasters ("NAB")[1] described the advances the broadcasting industry has made in hiring women and minorities. This evidence fully supports modifying the Commission's present and proposed burdensome EEO recordkeeping requirements. NAB urged the Commission to provide the recordkeeping and other relief — such as credit for joint recruitment — for broadcasters that the Commission proposed in the *Notice*.[2] In addition, NAB recommended that the Commission adopt a "sliding scale" approach to violations of the EEO rules, one which would place as much emphasis on broadcasters' employment profiles as on their recruitment efforts. NAB believes that

[1] NAB is an incorporated association of radio and television stations and broadcasting networks. NAB serves and represents the American broadcasting industry.

[2] *Order and Notice of Proposed Rule Making* in MM Docket No. 96-16, 11 FCC Rcd. 5154 (1996).

the vast majority of comments in this proceeding provide ample basis for the Commission to take these actions.

NAB responds to the few parties — primarily the Minority Media and Telecommunications Council ("MMTC") and the National Organization for Women, *et al.* (collectively referred to as "NOW") — who urged the Commission refrain from such actions. In particular, we contend that these parties are mistaken in their belief that the recordkeeping that is necessary to fully comply with the Commission's current efforts-based EEO regime is not overly burdensome on broadcasters. The record in this proceeding, and in the EEO *Inquiry* in MM Docket No. 94-34, clearly demonstrate that the Commission's EEO process must be streamlined.[3]

I. The EEO Policies Advocated by MMTC Would Be Unconstitutional

There is little need to address at length the arguments made by MMTC in its voluminous and extraordinarily tardy comments.[4] Much, if not most, of MMTC's comments do

---

[3] MMTC, NOW and American Women in Radio and Television ("AWRT") call for a negotiated rulemaking as a means to allow all sides to have adequate input in this proceeding. NAB believes that such a process is unnecessary, since all parties have had adequate opportunity to express their views in this proceeding and the Commission's EEO *Inquiry*. They argue that the negotiated rulemaking process would allow them to obtain more information about job fairs and other industry outreach efforts. They do not contend that any such information has been denied to them, or explain how their obtaining such information would aid the Commission.

[4] MMTC submitted its comments *seriatim* and the final volumes were not filed until September 6, 1996, three weeks after the last deadline established by the Commission in response to its repeated requests for extensions of time, and following MMTC's failure to file its comments on the date when all other parties submitted theirs. That MMTC's utter disregard for deadlines established by the Commission is unfair to other parties and that it makes a mockery of ordinary concepts of orderly administrative process hardly needs stating. That the Commission has accepted MMTC's comments in these circumstances perhaps reflects an admirable determination to permit the broadest possible record to be established before making a decision on the future course of the Commission's EEO policies, but should not require other parties to answer each and every claim made in MMTC's rambling submissions.

not respond to the proposals made in the *Notice*, but instead reiterate MMTC's views of the broader policy objectives that the MMTC believes Commission should follow in this area.

MMTC's comments might be appropriate if this were 1966, not 1996. A very large portion of its comments is devoted to varying forms of a call for an end to racial discrimination in our society.[5] No one could disagree with the worthiness of that goal, or with the fact that its achievement has been an objective of our national policies and of the Commission for the past generation. Broadcasters have and do support that objective, and the evidence of hiring patterns in the broadcast industry set forth in NAB's comments shows that, increasingly, employment at radio and television stations reflects the diverse makeup of our society. Comments, like those of MMTC, that fail to recognize the achievements of the past generation in improving opportunities for minorities and women are of little use to the Commission in assessing its EEO policies. That no one disagrees that an end to any vestiges of employment discrimination should continue to be our National goal does not, however, readily translate into particular EEO policies that the Commission should adopt. Moreover, as Justice Stevens wrote in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), we should be cautious about fostering perceptions that government is mandating preferences based on race "[b]ecause that perception . . . can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor." 448 U.S. at 545 (Stevens, J., dissenting).

---

[5] MMTC also argues that enhancing employment opportunities for minorities and women is good business and that companies that provide equal opportunities for all will have a better chance of succeeding in the marketplace. MMTC Comments at 107-16; *see also* Comments of NOW at 4-5 n.5. Acceptance of that argument could lead the Commission to conclude that regulation in this area is unnecessary because marketplace forces will ensure equal opportunity. Moreover, Justice O'Connor has pointed out that the Supreme Court has not approved "preferences for minorities that might seem sensible from a business or social point of view." *Johnson v. Transportation Agency*, 480 U.S. 616, 649 (1980)(O'Connor, J., concurring)(quotations omitted).

MMTC, NOW, and AWRT argue that the Commission should largely retain its current EEO enforcement stance or, in the case of MMTC, add to its EEO rules. Their comments fail to grapple with the impact of the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995). To the extent that their comments address the *Adarand* decision, they parrot the tentative conclusion in the *Notice* that the *Adarand* standards have no application to the Commission's EEO rules. This argument holds that *Adarand* applies only to programs that require a racial preference, while the FCC's EEO policies only mandate "outreach" and do not demand race-based hiring. This analysis, however, mischaracterizes both the *Adarand* decision and the actual impact of the FCC's existing and proposed EEO policies.

The principles established in *Adarand* are not limited to programs that mandate race-based selections. Instead, they apply to all governmentally established racial differentials. "[W]e hold today that *all racial classifications*, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." 115 S. Ct. at 2113 (emphasis added). Thus, if the Commission's EEO rules require licensees to classify applicants by race, they are subject to strict scrutiny.[6]

Clearly, the Commission's current and proposed rules do mandate racial classifications. A licensee which seeks to comply with the Commission's EEO rules must be conscious of race at every level of the hiring process. For each and every opening, licensees are

---

[6] In *Regents of the University of California v. Bakke*, 438 U.S. 265, 288-89 (1978), Justice Powell addressed a similar argument that the admissions plan at issue there established a "goal," rather than a "quota." He concluded, "[t]his semantic distinction is beside the point. The special admissions program is undeniably a classification based on race. . .."

required to recruit from referral sources that are likely to produce minority and female applicants. They are required to keep detailed records of the race and sex of each applicant so that (1) they can assess the effectiveness of each referral source and (2) they can demonstrate that they had an adequate number of minority and female applicants in the "pool" for each position.[7]

NOW (Comments at 11, 12) contends that, even if a station is required to recruit in a race-conscious fashion, its actual hiring decisions are not affected by the Commission's rules. *See also* MMTC Comments at 104. While licensees are free to hire the individual they deem best qualified for any particular opening, as a practical matter it cannot be argued that the Commission's current rules and proposed forfeiture policies do not encourage race and gender-conscious hiring decisions. Stations whose race and gender employment profiles fall substantially below the Commission's expectations are more likely to face staff inquiries into their employment practices and petitions to deny.[8] The Commission's policies thus pressure stations to ensure that their actual employment profile, and not just their applicant pools, reflect the minority population of the area they serve. Thus, the Commission's EEO policies go far beyond a mere requirement that stations engage in outreach activities and must be analyzed under *Adarand*.

---

[7] If stations were not required to do so by the Commission, merely keeping such records of the race of each applicant could subject them to charges of discriminatory hiring practices, particularly for smaller stations where hiring and EEO compliance responsibilities are shared by the same individual.

[8] Under the Commission's 1994 *EEO Policy Statement*, the penalty for recruitment shortcomings could be mitigated by a showing that the station employed minorities and women at or above parity. This policy had the effect of creating race-based hiring obligations, for a station whose applicant pools did not meet the Commission's standards or which could not prove that it had sufficiently recruited for every opening would have a strong incentive to maximize its hiring of minorities or females in order to reduce its potential penalties.

NAB in its comments urged the Commission to adopt a different approach, one which allowed licensees more flexibility in the ways in which they reach out to minorities and women in filling job openings. That or a similar approach deserves the Commission's careful consideration for, as we will explain, the proposal in the *Notice* and the policies favored by MMTC would almost certainly run afoul of the Equal Protection Clause.

The Commission has asserted two objectives as support for its EEO policies: "to promote programming that reflects the interests of minorities and women in the local community in addition to those of the community at large and to deter discriminatory employment practices." *Notice* ¶ 3. As an initial matter, except as a means of promoting the first objective, the second is beyond the Commission's statutory authority. In *NAACP v. FPC*, 425 U.S. 662, 669 (1976), the Supreme Court held that "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation." The Court held that the eradication of discrimination was not a goal that could be read into a general statutory mandate to advance the public interest. In a footnote, the Court recognized that the FCC had regulated licensees employment practices and concluded that those regulations could be sustained in order "to ensure that . . . licensees' programming fairly reflects the tastes and viewpoints of minority groups." *Id.* at 670 n.7. Thus, the only interest that the Commission can seek to advance in its EEO policies is the fostering of diverse viewpoints on broadcast stations.

Whether that interest alone can justify race-conscious regulations is increasingly under question. While Justice Powell's separate opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), accepted race-conscious admissions policies as a

means of ensuring diversity in an educational setting, two recent decisions by the courts of appeals suggest that enhancing diversity can no longer justify race-based differentials. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 64 U.S.L.W. 3868 (U.S. July 1, 1996)(No. 95-1773); *Taxman v. Board of Education of Piscataway*, 91 F.3d 1547 (3d Cir. 1996)(*en banc*).[9]

Even if the Commission may continue to regulate broadcasters' hiring practices in order to ensure that programming reflects audience diversity, under *Adarand* the Commission's regulations must be narrowly tailored to achieve that objective. The approach proposed in the *Notice* and that favored by MMTC, AWRT, and NOW would not meet that test. The Commission has and proposes to continue regulating hiring for all full-time station positions. Many of these positions, such as sales personnel, engineers, maintenance employees, and clerical personnel, have no responsibility for programming. While persons in those positions might be promoted to programming jobs, the likelihood of that occurring on a broad scale is doubtful. Thus, the Commission's EEO rules sweep more broadly than the interest that supports them.

Another indication that the rules favored by MMTC would be viewed as overbroad is the fact that even stations whose minority and female employment is at or over parity for their market must continue to demonstrate compliance with the Commission's recruitment rules. Again, if the objective of the EEO policy is to ensure that a station's programming reflects the needs and interests of minorities and women, a station whose employment profile reflected their presence in the workforce would presumably have achieved that goal. The requirement that stations at or above parity continue to engage in race-conscious recruiting and hiring suggests that the rule is broader than needed to achieve the FCC's objectives.

---

[9] Notably, *Taxman* was decided under the arguably more permissive Title VII standards rather than the Equal Protection clause analysis that the Commission's rules would need to satisfy.

That the rules MMTC and others wish to retain could not be upheld under *Adarand* is suggested by other factors as well. In discussing the application of strict scrutiny in *Adarand*, the Court pointed with approval to the plan considered in *United States v. Paradise*, 480 U.S. 1067 (1987). 115 S. Ct. at 2117. There, a race-based remedy was approved to counter the effects of a history of pervasive discrimination by the Alabama National Guard. There is no basis to conclude that there is any remotely similar history of discrimination by broadcast stations. Even if there were a history of discrimination at some stations, and the effects of that discrimination continued to persist at those stations, that would not support a rule which applies to all broadcasters regardless of their employment history.[10]

A final reason why the Commission's EEO policies as now enforced and as proposed would face serious jeopardy under the *Adarand* standards is that they are not time-limited. The Commission began EEO enforcement in 1969 and it has continued to require race-conscious hiring in various ways ever since then. The *Notice*, however, does not contain any analysis of the impact of the Commission's rules on programming over that period or evidence that further remedial action is needed. For all that appears, the Commission could continue to maintain its EEO policies indefinitely. However, it is very clear that government mandates for race-conscious programs must be limited in time. They must not extend beyond the period needed to achieve the government's objective. *See United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). Open-ended regulation can hardly be described as narrowly tailored.

---

[10] As the Court held in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986), "societal discrimination alone is [not] sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination . . . before allowing limited use of racial classifications in order to remedy such discrimination." *See also Kirwan v. Podberesky*, 38 F.3d 147 (4th Cir.), *reh. denied*, 46 F.3d 5 (4th Cir. 1995), *cert. denied*, 115 S. Ct. 2001 (1995).

The Commission, therefore, must reject MMTC's opposition to modifying its EEO policies. When the government mandates that hiring or other decisions be influenced by racial classifications, it faces an increasingly heavy burden to demonstrate that those rules are needed to reverse the specific effects of discrimination and that they are no broader than necessary to achieve that objective. NAB believes that the Commission should adopt policies that favor increased opportunities for minorities and women in broadcasting. The policies favored by MMTC instead will place the Commission's entire EEO program at risk.

II. The Commission Should Disregard the "Research" Submitted By MMTC Due To Its Incompleteness and Misinterpretation of Results

In support of its claim that the Commission should continue, if not strengthen, its current affirmative action requirements, MMTC submitted a study which they assert shows that broadcasters are not affording equal opportunity in hiring. This "research" is, at best, a recitation of data collected on Tennessee radio stations.[11] The sources of much of the data MMTC laboriously describes and tries to analyze is unclear, making it impossible for the Commission or other parties to evaluate the accuracy of the study. In addition to inferior and incomplete data description, MMTC tries to use correlation analysis to analyze the efforts and effects of broadcasters' EEO efforts. That effort falls into the classic correlation analysis trap, that correlation does not imply causation. MMTC even acknowledges in a footnote (n. 32, p.34) that an alternative analysis would be preferable to accomplish their objectives, but that they do not have enough data to conduct such an analysis.

[11] Although MMTC asserts that Tennessee stations are representative of the EEO experience of stations across the country, no analysis is provided to substantiate that claim.

Data Description Confusion

MMTC cites different groups for which they have data, often combining these groups in their descriptions. MMTC states there were 210 Tennessee radio stations (AM standalones, FM standalones, and AM/FM combos) which filed license renewal applications with the FCC in 1996. MMTC also states that at the same time there were only 66 Tennessee stations which filed Form 395 for a two-week period between January and March 1995, the source MMTC uses for station employees categorized by race and job category. MMTC does, however, have market size and demographic data for all of the 210 Tennessee stations using 1990 Census information. Finally, MMTC uses station hiring data for 77 Tennessee stations, the source of which is unstated, but which may be from the license renewal forms.

As can be seen, it is easy to confuse the various groups of stations for which data are being compared. In fact, MMTC, itself, appears to err in their comparison, which leads to incorrect conclusions. For example, MMTC states that, "[P]roposals to deregulate EEO compliance for 'small market stations' would exempt 7.6% of the currently non-exempt Tennessee stations if the market size floor were 20,000 . . ." (MMTC Comments, Vol. III, p. 10) However, the 7.6% refers to the 210 Tennessee stations being examined for which they have license renewal applications, which includes stations that are *already exempt*. Therefore, MMTC overstates the percentages of stations which would be exempt using a market size floor of 20,000.

This is hardly the only place where MMTC uses data from widely differing samples without attempting to explain why that sample was chosen or how it affects their conclusions. Examples of these differing groups examined by MMTC, and from which conclusions are drawn, include:

- 79 Stations having EEO programs;
- 71 stations whose EEO programs contained compliance data on minority employment;
- 76 stations whose EEO programs contained compliance data on female employment;
- 72 stations supplying useful [not defined] data on minority referrals;
- 77 stations supplying useful [not defined] data on female referrals;
- 49 reporting stations each of which has at least five top four category employees, and each of whose markets has at least 5% minority population;
- 52 reporting stations each of which has at least five full-time employees, and each of whose markets has at least 5% minority population;
- 43 reporting stations each of which has at least five employees (*imputedly, more than 2.5 women*).

Conclusions Offered Without Any Basis in Data

In addition to the confusion between the different groups examined, the MMTC submission is replete with conclusions without any bases. For example, when discussing the number of stations using referral services, MMTC concludes, "thus, a good many stations are escaping Commission scrutiny for obvious potential EEO violations. . . These low numbers for participation in optional, but obviously useful EEO initiatives, suggest that an EEO regime premised on 'self-regulation' would be a failure." (p. 13) There is no definition for "obvious potential EEO violations," nor any basis for predicting success or failure. Further, since MMTC

itself recognizes that use of referral services is optional, the level of such use does not tell us anything about stations' commitment to equal opportunity or compliance with the FCC's rules.

Another conclusion without any apparent basis in data concerns the percentage of referrals which were minorities. This minority proportion of referrals, according to MMTC "reflects the extent to which minority applicants to a station have a realistic opportunity to compete for openings." (p. 14) Given only the raw numbers of minority applicants, there is no reasonable basis on which MMTC could have reached any conclusion about the opportunity that minority applicants have to compete for broadcast jobs.

Other "conclusions" for which the cited data provides no support include:

- "With the median number of minority referrals being four in a year, it is apparent that the majority of the station should be doing much more to encourage minorities to apply for employment." (p. 18)
- "The fact that five stations each generated more than 50 minority applicants *demonstrates that minority applicants are in plentiful supply.*" [italics added] (p. 18)
- "Ten percent of the stations reported no female referrals in the reporting year, and sixteen percent received three or fewer female referrals. *Thus a good many stations should be doing much more to encourage women to apply for employment.*" [italics added] (p. 18)

Correlation Analysis

MMTC purports to analyze its data in more depth by conducting correlation analysis between all of their variables to discover if there are certain characteristics that indicate which types of stations are more likely to conduct effective EEO programs. For example, MMTC finds that stations which use a large number of referral sources tended to have more productive sources for minorities. With this result, MMTC concludes that there are some stations who do everything to comply with EEO requirements (*i.e.*, use many referral sources) and are successful,

and there are others who "consistently do nothing" (*i.e.*, do not use referral sources and thus do not have many productive referral sources). But, this is a clear example of why correlation analysis tells us little, if anything. It could easily be the case that stations which have successful referrals decide to use more referral sources as a result. Other stations which are not as lucky in using referrals (for whatever reason) may decide that using referral sources is not productive, and look for other means of attracting minorities and women.

Another conclusion reached by MMTC in their correlation analysis involves the absence of a statistical correlation between two variables—the number of minority referrals was not correlated with minority employment at parity. From that absence of a statistically significant relationship, they conclude that stations do not seriously consider minorities in their hiring. "[M]inorities must not only be present in the applicant pool, they must be more than tokens who are numerically overwhelmed by other applicants." (p.25) How they arrive at that sweeping conclusion without knowing any of the qualifications of the minority applicants is truly remarkable and devoid of any sound research basis.

Not surprisingly, many of the indicators of EEO activity and success are correlated with station and market size, while others were not. For example, larger stations were correlated with the number of referral sources but *not* with the number of productive referral sources. These two results, taken together, prompted MMTC to conclude (without any basis), "that 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." (pp. 26-27) Again, all that MMTC's data shows is that stations which use a larger number of referral sources often do not thereby obtain a proportionately greater number of productive referrals. The mere absence of

a relationship between the number of referral sources and the number of productive referrals cannot, contrary to MMTC, be read to support any conclusion about the efforts undertaken by stations, much less the conclusion of bad faith that MMTC reaches.

Finally, and most importantly, MMTC examines the correlation between EEO program attributes with EEO success attributes and find some correlations. They, however, note that there may be other variables that "control" both program and success attributes, most notably market and stations sizes. Here is where in a footnote MMTC indicates that the data "can be manipulated to exclude the impact of a controlling variable," (p. 34) but that they do not have enough data to separate out those effects. In essence, they *cannot* refute the fact that station and market size can be extremely important determinants of the prevalence and success of EEO programs, not the lack of willingness of broadcasters to hire and promote minorities and women. This data, if anything, supports the argument of many broadcasters in small markets that the Commission's recruitment targets present them with a virtually insurmountable burden.

We have briefly discussed only some of the problems associated with MMTC's study. It is obvious from only this review that the data description and analysis is fraught with problems and does not hold up under any scrutiny. Certainly, these and other problems that occur throughout the MMTC research make it impossible for the Commission to place any reliance on either the study or the conclusions MMTC seeks to draw from it.

III. The Commission Should Recognize Parity As A Goal, But Not Make It Mandatory As Suggested By MMTC

Without elaboration, MMTC characterizes broadcast industry filings in this proceeding as being anti-EEO.[12] An objective reading of broadcaster comments, however, yields

[12]MMTC Comments at 12, n.21.

a different conclusion. The broadcasting industry is not anti-EEO; to the contrary, the industry is firmly committed to providing equal employment opportunity to minorities and women. Rather, the broadcaster comments merely expressed frustration at the uncertainty and the burdensome nature of the Commission's current EEO enforcement mechanism. Unlike the unsupported generalizations contained in MMTC's comments, most broadcaster comments contain real-life accounts of the problems confronted in tracking applicants to their referral sources and the uncertainty of knowing whether the Commission may consider their efforts to be "adequate."

One objective indicator of broadcasters' commitment to equal employment opportunity is in the actual hiring practices of the industry. As we noted in our original comments in this proceeding,[13] increased employment of minorities and women accounted for the lion's share of the increase in upper four jobs in broadcasting from 1994 to 1995. Minority-held upper four jobs accounted for 48 percent of the overall increase, while upper four jobs held by women represented nearly 60 percent of the overall increase. In addition, those upper four jobs that most often lead to ownership — officials and managers, sales workers and professionals — also saw significant gains: female-held positions accounted for 55.3% of the increase in the officials and managers category, 52.8% in professionals, and 100.4% in sales workers;[14] minority-held positions represented 46.6% of the increase in officials and managers, 35.1% in professionals and 43.6% in sales workers.[15] Every one of these increases is larger than the availability of minorities

[13] NAB Comments at 8.

[14] There was a decrease in male employment in this category.

[15] The officials and managers category increased by 965 jobs (female-held increased by 534; minority-held by 450); professionals increased by 3,262 (female-held by 1,723; minority-held by 1,244), and sales workers increased by 769 (female-held by 772; minority-held by 335). Compare the 1995 Broadcast and Cable Employment Report with the 1994 Report.

and women in the general labor force, which stands at 46% for women and 24.6% for minorities. MMTC's assertion that broadcasters are anti-EEO is baseless.

MMTC urges the Commission to establish a goal to bring the broadcasting industry to parity within its labor force by the year 2009.[16] While parity is a noble goal, it may never be achievable simply because the proportion of minorities in the labor force is rapidly increasing. Moreover, MMTC's proposal would require 100 percent of parity in both applicant pools and hires for all upper four category jobs.[17] Requiring parity in applicant pools is totally absurd; it would require broadcasters to "load up" their applicant pools with minorities — regardless of qualifications — simply to meet parity. Employers cannot force anyone to apply for a job, despite MMTC's wishes. In addition, by requiring parity in hiring, the Commission would be establishing a quota system, which it not only has eschewed, but which the Supreme Court has also deemed to be unconstitutional in *Adarand*.[18]

Instead, the Commission should adopt our proposal for a sliding scale approach to EEO enforcement. The sliding scale approach not only would recognize those broadcasters whose EEO programs are succeeding in the attracting and hiring of minorities, but also would encourage broadcasters to devise additional methods for attracting women and minorities. As MMTC noted,[19] individual attainment of workforce parity is evidence of a station's EEO

---

[16] MMTC Comments at 30-34.

[17] MMTC Comments at 283, Table 8.

[18] In addition, MMTC's proposals concerning the Commission's enforcement of a so-called "Media Participation Right" for women and minorities would stretch the Commission's regulatory role in EEO beyond all reason. MMTC Comments at 155-175. It is not only beyond the scope of this proceeding, but also could result in a set-aside program similar to that declared unconstitutional by the Supreme Court in *Adarand*.

[19] MMTC Comments at 40, n.55.

compliance. Therefore, it is only logical that as a station approaches parity, it should be given greater latitude as to how it recruits. We urge the Commission to adopt our proposal.

MMTC would also eliminate "word of mouth" as a means of recruitment, asserting that it merely perpetuates an "old boy network" of white males in the industry.[20] MMTC apparently assumes that whites associate only with whites and minorities associate only with minorities. Fortunately, that stereotype is not shared by the Commission nor the broadcasting industry, who have long recognized the benefits in word of mouth recruitment. Broadcasters often find that other broadcasters are an excellent source of finding men and women of all races who have expressed an interest in starting a broadcasting career. Moreover, current employees are a valuable resource for attracting applicants — minority as well as non-minority. The Commission should continue to encourage such recruitment efforts.

It is also unnecessary for the Commission to examine the post-hire relationship between licensees and their employees, as suggested by MMTC.[21] Other laws, such as Title VII of the Civil Rights Act, the Equal Pay Act, and state non-discrimination laws, already apply and are enforced by agencies that are more expert in the field than the Commission. Any employee who feels that he/she has been unlawfully discriminated against may file a complaint with those agencies (and with the Commission), under the protection of anti-retaliation statutes.[22]

---

[20] MMTC Comments at 31-33.

[21] MMTC Comments at 313-321.

[22] MMTC also calls upon the Commission to outlaw clauses in employment contracts which require an employee to submit EEO claims to binding arbitration. MMTC Comments at 305-312. MMTC does not provide any documentation of the prevalence of such provisions or attempt to show that, in practice, they facilitate discrimination. Again, before the Commission adopts rules in this area, it must be able to point to a record that shows that the rule will in fact advance the Commission's interest in ensuring programming diversity.

IV. EEO Recordkeeping Is Not As Simplistic As MMTC and NOW Characterized It in Their Comments

MMTC and NOW view the recordkeeping required by the Commission's efforts-based EEO enforcement regime as not being unduly burdensome on licensees.[23] NOW defines "unduly burdensome" as "any burden that is not an essential part of doing business."[24] NOW boils down the Commission's EEO process to the filing of two reports and the keeping of records regarding recruitment efforts.

However, NOW ignores the detailed recordkeeping that has become an essential part of the Commission's efforts-driven EEO enforcement. For *each* job opening licensees must note *every* source that was contacted, the number of referrals from *each* source, the number of female and minority referrals from *each* source, the number of applicants in *each* applicant pool, the number of women and minorities in *each* applicant pool, the number of interviewees in *each* interview pool, the number of women and minorities in *each* interview pool, whether a particular applicant was offered a position and, if offered, whether the applicant accepted. Then, there is the periodic self-assessment process that licensees must conduct, and the search for additional sources if there is not an "adequate" number of women or minorities in the applicant pools.

This process creates mounds of paperwork for licensees.[25] This process, and the paperwork burden it has fostered, serve to needlessly delay the hiring or promotion of qualified individuals, including women and minorities. Often, the hiring opportunity is lost as the individual

---

[23] NOW Comments at 6-8.

[24] NOW Comments at n.9.

[25] MMTC contends that much of the paperwork burden can be relieved through the use of already-existing computer software programs. MMTC Comments at 60-61. Even if computer programs are available, the gathering of information from applicants and the inputting of data into the programs would create a considerable burden on most licensees.

finds employment elsewhere. NOW is thus mistaken in its belief that the avalanche of paper required by the Commission's efforts-based EEO regime is an "essential" part of doing business. Instead, it often impairs licensees' ability to hire or promote qualified individuals, including women and minorities.

AWRT also argues (Comments at 5) that the Commission is barred from changing its enforcement policies on this record by *Office of Communication of United Church of Christ v. FCC*, 560 F.2d 529 (2d Cir. 1977). Although the court there held that the Commission had not established a sufficient record that its EEO rules were burdensome, it noted that "as we read the model EEO program that the Commission appended to its current order, . . . only a few hours each year would be required to complete it." *Id.* at 534. Whether or not the Second Circuit's characterization of the burdens imposed by the EEO rules was correct in 1977, there can be no dispute that the recordkeeping the Commission now demands requires dramatically greater efforts by stations. Thus, *United Church of Christ* provides no support for AWRT's argument.

NAB believes that its "sliding scale" approach to EEO enforcement is a sound, less burdensome alternative to EEO enforcement. As we noted in our comments, the efforts-driven scheme of EEO enforcement creates a never-ending search for referral sources and fails to recognize those licensees who have hired women and minorities at or near parity with their presence in the labor force. Our "sliding scale" approach cures both of these flaws. Licensees have the option of expanding their list of sources or conducting additional recruitment activities, based on the station's level of parity. We urge the Commission to adopt our proposed regime.[26]

---

[26] Moreover, our proposal would streamline the process while still containing enough data to allow meaningful scrutiny by potential petitioners to deny. Whether a given station had complied with the Commission's EEO rules in a given year would also be much clearer. Our proposal answers all the concerns raised by MMTC at 135-139 of its comments.

V. Small Stations Have High Turnover Rates And Difficulty In Recruiting Qualified Candidates Of All Kinds, Not Just Women And Minorities

NOW states that large stations should be held to a higher EEO standard because they have more opportunities than small stations and stations far from large minority populations to recruit qualified minority and women applicants. NOW defines the issue too narrowly and in reverse. It is not that large stations have an advantage in recruiting, it is that small stations are at a disadvantage. Moreover, the recruiting difficulties for small stations and stations far from population centers are not limited to minorities and women. These stations have a hard time recruiting and attracting qualified candidates in general. This is supported by the commenters' point that small stations tend to offer low paying positions far from major cities and that this fact affects equally all qualified potential candidates for openings.

Not only can stations in large metropolitan areas — which are more likely to have significant minority populations — offer more lucrative pay, but they are also viewed as higher prestige jobs and thus are more likely to attract qualified minority as well as non-minority candidates. This has been verified by MMTC in its limited research project, which found high turnover rates among small market stations in Tennessee.[27] With their limited resources, small market stations deserve relief. Because of the hardship that recruiting places on small stations, these stations should be released from the further hardship placed on them by the EEO record-keeping requirements.

[27] MMTC Comments, Vol. III, pp. 19-21.

VI. The Base Forfeiture Level Is Not Out Of Proportion With The Level For Children's Programming Violations; EEO Violations Do Not Lend Themselves Easily To Findings Of Multiple Violations

NOW argues (Comments at 16) that the proposed base forfeiture level of $12,500 is too low to deter violations of the EEO policy.[28] NOW compares the fines that have been levied for violations of children's programming advertising rules, "which have been as high as $125,000."

The comparison between children's advertising violations and EEO violations is faulty. Violations of children's advertising rules are discreet, program-by-program-type violations, which can easily be distinguished as separate violations. However, the EEO policy is a long-term, ongoing, self-monitoring type of program. The assessment is done over the long term rather than weekly or monthly, especially for those stations with low turnover rates. This ongoing self-assessment-type process does not lend itself to enumeration of multiple, discreet violations. It would be unfair to count violations yearly. Therefore, the base forfeiture level should remain unchanged and violations should not be counted year-by-year.

VII. Redefining "Violation" So That The "Failure To Recruit" Threshold Varies With The Size Of The Station Is Unnecessary

NOW states (Comments at 19) that the threshold of 66 percent used when assessing forfeitures is "too low." It argues that larger stations are better equipped to perform recruiting, and as such, should be held to a higher standard. NOW further asserts that a fixed 66 percent threshold is in effect an inequitable approach to resolving equal employment opportunity goals.

---

[28] NOW Comments at 14-16.

In addressing these arguments, it should be recognized that they rest upon the misguided assumption that the Commission fails to examine a station's size when determining the forfeiture amount. As pointed out in the *Notice*, the Commission already advocates the examination of a station's relative size when determining the size of the forfeiture amount. The examination of whether a station is a stand-alone station located in an Arbitron or Nielsen ranked market of 200 or above and the examination of whether a station has an average full-time staff during the period of review that exceeds 50 employees serve as two factors that the Commission considers when making a determination of the size forfeiture amount.

Based on the fact that the Commission already takes the relative size of a station into account when determining the forfeiture amount, it is unnecessary for any further action to be taken. To do otherwise, would simply result in an arbitrary and capricious rule that would not in anyway assist with advancing the equal employment opportunity goals.

Conclusion

For the foregoing reasons and those set forth in NAB's comments, the Commission should adopt a flexible "sliding scale" approach to EEO enforcement.

Respectfully submitted,

NATIONAL ASSOCIATION
OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

Henry L. Baumann

Jack N. Goodman

Steven A. Bookshester
Counsel

Terry L. Etter
Of Counsel

Mark R. Fratrik, Ph.D.
NAB Research & Planning

October 25, 1996

Certificate of Service

I, Kimberly T. Washington, hereby certify that a copy of the foregoing "Reply Comments of the National Association of Broadcasters," was sent this 25th day of October, 1996 via first class mail, postage prepaid to:

Shelly Spencer
Director
American Women in Radio
& Television, Inc.
3000 K Street, N.W.
Suite 300
Washington, DC 20007

Terri Dickerson
Executive Director
American Women in Radio & Television, Inc.
1650 Tyson Boulevard
McLean, VA 22102

Angela J. Campbell, Esquire
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, DC 200001

David Honig , Esquire
Minority Media and Telecommunications Council
3535 16th Street, NW
Suite AG-58
Washington, DC 20010

Kimberly T. Washington