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April 14, 1999

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Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W., Room #TW-B204F
Washington, D.C. 20554

Re: MM Docket No. 98-204

Dear Ms. Salas:

Please find enclosed an original and nine copies of the Reply Comments of the Office of Communication, Inc., United Church of Christ, et. al. in the above-captioned proceeding.

I have enclosed an extra copy for your date-stamp and return to me in the enclosed, stamped self-addressed envelope.

Very truly yours,

Shelby D. Green

SDG:aml
Enclosures

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APR 15 1999
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Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPLY COMMENTS OF UCC, et. al.

Office of Communication, Inc., United Church of Christ
National Council of the Churches of Christ
in the U.S.A., Communication Commission
Evangelical Lutheran Church in America
Presbyterian Church (U.S.A.)
United Methodist Church
American Baptist Churches, USA
Black Citizens for a Fair Media

in Support of Proposed Equal Employment Opportunity Rule

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Counsel for UCC, et. al.

April 15, 1999

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To the Commission:

REPLY COMMENTS OF UCC, et. al.

The following reply comments are filed on behalf of the Office of Communication, Inc., United Church of Christ ("UCC"); National Council of the Churches of Christ in the U.S.A., Communication Commission; Evangelical Lutheran Church of America; Presbyterian Church (U.S.A.); United Methodist Church; American Baptist Churches, USA; and Black Citizens for a Fair Media, in support of the Federal Communications Commission's ("Commission") Proposed Equal Employment Opportunity Rule and Policies, ("EEO Rule") in the above-captioned rulemaking proceeding.

I. "Programming Diversity" is a Lawful and Relevant Consideration and is Well-Defined in Broadcast Regulation

Several filers of comments ("commenters") complain that "programming diversity" is ill-defined in the proposed rule and that even though licensees are under a burden to serve the public interest, the commenters do not understand and cannot ascertain what it means to offer programming reflecting minority tastes and viewpoints.[1] They make these arguments despite acknowledging that the Supreme Court ruled more than two decades ago in N.A.A.C.P. v. F.P.C.,[2] that the Commission has the statutory authority to adopt EEO rules and policies as "necessary to enable the Commission to satisfy its obligations under the Communications Act to ensure that licensees' programming fairly reflects the tastes and viewpoints of minority groups"[3] and that nearly two decades ago in Metro Broadcasting, Inc. v. F.C.C.,[4] the Supreme Court reaffirmed that holding. In support of their complaints, these commenters can only cite a comment from a dissenting justice in Metro Broadcasting.[5] These arguments are at best

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[1] See e.g., Comments of Haley Bader & Potts, P.L.C., at 8; Joint Comments of 46 Named State Broadcasters Associations, at 13-14.
[2] 425 U.S. 662 (1976).
[3] Id. at 670, n.7.
[4] 497 U.S. 547 (1990).
[5] See Comments of Haley Bader & Potts, at 8, citing Justice O'Connor's dissent in Metro Broadcasting, 497 U.S. at 615 (1990).

disingenuous and at worst refuted by the pronouncements of the Commission, the courts, and Congress.

First, since the beginning of broadcasting, the concept of diverse programming in the public interest has been a bedrock principle in the regulation of broadcasting. The Commission has so stated in its many reports and statements of policy.[6] In a recent proceeding on the review of policy and rules for television, the Commission explained: "[w]hen we talk about diversity, we generally are referring to diversity in the presentation of news and public affairs programming."[7] In a later proceeding, the Commission affirmed that

> [f]or more than a half century, the Commission's regulation of broadcasting service has been guided by the goals of promoting competition and diversity. *** Diversity, particularly of viewpoints, is the other important part of the Commission's public interest mandate.[8] The Commission's viewpoint diversity objective promotes a goal the Supreme Court has stated

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[6] See e.g., Report and Statement of Policy Res: Commission en banc Programming Inquiry, 44 F.C.C. 2303, 2314-15 (1960)(obligating licensees to develop a diversity-rich programming environment as a method of ensuring renewal of license and identifying "the major elements usually necessary to meet the public interest, needs and desires of the community ... as developed by the industry, and recognized by the Commission").

[7] In the Matter of Review of the Commission's Regulations Governing Television Broadcast; Television Satellite Stations Review of Policy and Rules, 10 F.C.C. Rcd 3524, 3550, 3554, n.93. While diversity of entertainment formats and programming is desirable, the Commission has traditionally left to marketplace forces to determine their appropriate availability and mix. Id.

[8] In the Matter of the 1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 13 F.C.C. Rcd 11276, 11277 (1998).

> underlies the First Amendment,....[that the] First Amendment 'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public...'"[9]

As early as 1969, the Supreme Court instructed licensees that "[i]t is the right of the viewers and listeners, not the right of broadcasters which is paramount[;] ...[t]he right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences..."[10] More recently, in Metro Broadcasting, the Supreme Court found that the Commission's then EEO Rule and ownership policies (in particular, those giving preferences to racial and ethnic minorities) sought to "ensure that licensees' programming fairly reflect[ed] the tastes and viewpoints of minority groups."[11] In finding a constitutionally and statutorily sufficient connection between the Commission's rules and the end of programming

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[9] Id. at 11277, citing Assoc. Press v. U.S., 326 U.S. 1, 20 (1945); accord: Federal Communications Commission v. Nat'l Citizens Committee for Broadcasting, 436 U.S. 775 (1978). The Commission's long-standing policies on multiple ownership of broadcast facilities and on network control reflect the goals of diversity, that: "promoting diversity in the number of separately owned outlets has contributed to our goal of viewpoint diversity by assuring that the programming and views available to the public are disseminated by a wide variety of speakers." 13 F.C.C. Rcd at 11277. On another occasion, the Commission stated: "[t]he public interest requires limitations on network control and an increase in the opportunity for the development of truly independent sources of prime time programming," and in fostering the feasible maximum of diverse programs sources. In the Matter of Amendment of Part 73 of the Commission's Rules and Regulations With Respect to the Competition and Responsibility in Network Television Broadcasting, 23 F.C.C.2d 382, 394, 400 (1970).

[10] Red Lion Broadcasting v. F.C.C., 395 U.S. 367, 389-90 (1969).

diversity, the Court stated that while it was "under no illusion that members of a particular minority group share some cohesive, collective viewpoint, "it was a 'legitimate inference' that as more minorities gain ownership and policymaking rules in the media, "varying perspectives will be more fairly represented in the airwaves."[12] It seems an easy conclusion that "[a] broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogenous group."[13]

The Court has not retreated from these findings. Indeed, in Adarand Constructors, Inc. v. Pena,[14] where the court overruled Metro Broadcasting on the appropriate level of judicial scrutiny (requiring strict instead of intermediate scrutiny, even in the case of benign racial classifications), Justice Stevens instructed that:

> ...the majority today overrules Metro Broadcasting, only insofar as it is 'inconsistent with [the] holding' that strict scrutiny applies

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[11] 497 U.S. at 580.

[12] Id. at 582.

[13] Id. at 579. Justice Brennan explained:

> The predictive judgment about the overall result of minority entry into broadcasting is not a rigid assumption about how minority owners will behave in every case, but rather is akin to Justice Powell's conclusion in Bakke that greater admission of minorities would contribute, on average, 'to the robust exchange of ideas.' [citation omitted]

[14] 515 U.S. 200 (1995).

> to 'benign' racial classifications promulgated by the Federal Government. ***The proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court's holding today -- indeed, the question is not remotely presented in this case*** -- and I do not take the court's opinion to diminish that aspect of our decision in Metro Broadcasting.[15] (italics added)

Nor can the commenters find much comfort in the sayings of Justice O'Connor on the value and legal relevance of diversity. While she cautioned against "generalizations impermissibly equating race with thoughts and behaviors" in her dissent in Metro Broadcasting,[16] earlier in Wygant v. Jackson Bd. of Educ.,[17] she expressed approval of racial diversity as a desirable and legal objective for a state agency. She stated:

> [a] state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest.[18]

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[15] Id. at 258.
[16] 497 U.S. at 615 (O'Connor, J., dissenting).
[17] 476 U.S. 267 (1986).
[18] 476 U.S. at 286 (O'Connor, J., concurring). Justice Stevens held a similar view in that case, stating: "[I]t is one thing for a white child to be taught by a white teacher that color, like beauty, is only 'skin deep'; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process." 476 U.S. at 315, Stevens, J., dissenting. Other cases before Metro Broadcasting and Adarand, affirmed the connection and permissibility of "diversity" as a legitimate governmental end, at least in the educational context. Following Regents of the Univ. of Cal. v, Bakke, 438 U.S. 265 (1978), in Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985), the Supreme Court affirmed on the part of the university, "discretion to determine, on academic grounds, who may be admitted to study...as one of 'the four essential freedoms' of a university". 474 U.S. at 226, n.12. See also Davis v. Halpern, 768 F. Supp. 968, 975

Moreover, the "generalizations" Justice O'Connor spoke about in her dissent in Metro Broadcasting did not concern her in the slightest in her majority opinion upholding amendments to the federal arts funding statute. In National Endowment for the Arts, et. al. v. Finley[19] ("Finley"), the court rejected a facial challenge to the constitutionality of the "National Foundation on the Arts and Humanities Act", as amended (the "Act").[20] The challengers were four artists whose applications for grants were rejected. Among other things, the Act required the chairperson of the National Endowment for the Arts (NEA) to ensure that "artistic excellence and artistic merit are criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[21]

Under the Act, applications for NEA funding are initially reviewed by advisory panels composed of experts in the relevant field of the arts.[22] Under the 1990 amendments, those panels must reflect "diverse artistic and

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(E.D.N.Y. 1991)(relying on Bakke to hold that "a university's obtaining the benefits which flow from enrolling an ethnically diverse student body" is a "compelling interest" under strict scrutiny).

[19] 118 S.Ct. 2168 (1998).

[20] 20 U.S.C. §954(d).

[21] 20 U.S.C. §954(d)(1).

[22] 118 S. Ct. at 2172.

cultural points of view" and include "wide geographic, ethnic, and minority representations," as well as "lay individuals who are knowledgeable about the arts."[23]

The district court ruled in favor of the artists, finding that the provision, pertaining to "artistic excellence and artistic merit", failed to adequately notify applicants of what is required of them or to circumscribe NEA discretion.[24] The district court reasoned that "the very nature of our pluralistic society is that there are an infinite number of values and beliefs, and correlatively, there may be no national 'general standards of decency.'"[25]

A divided panel of the Court of Appeals affirmed the district court's ruling, concluding among other things, that the "decency and respect" criteria are not "susceptible to objective definition," and therefore raises the danger of arbitrary and discriminatory application" and was void for vagueness under the First and Fifth Amendments.[26]

The Court rejected the artist's argument that the Act imposed a categorical requirement which operated to exclude applicants whose works did not fall within that

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[23] Id. at 2174, citing §§959(c)(1)-(2).
[24] Id., citing 795 F. Supp. at 1472.
[25] Id., citing 795 F. Supp. at 1471-72.
[26] Id., citing 100 F.3d at 680-81.

requirement. Instead, the criteria admonished the assessment of artistic merit, but did not disallow any particular viewpoints.[27] The NEA was merely required to take "decency and respect" into consideration and the legislation was aimed at reforming procedures rather than precluding speech. Justice O'Connor explained that the NEA's enabling statute contemplated a number of indisputably constitutional applications for both the "decency" prong of the particular section challenged and its reference to "respect for the diverse beliefs and values of the American public." For instance, educational programs are central to the NEA's mission[28] and "decency" is a permissible factor where "educational suitability" motivates its consideration.[29] Permissible applications of the mandate to consider "respect for the diverse beliefs and values of the American public" were also apparent. In setting forth the purposes of the NEA, Congress explained that "[i]t is vital to democracy to honor and preserve its multicultural artistic heritage."[30] Justice O'Connor pointed out that the NEA "expressly takes diversity into

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[27] 118 S.Ct. at 2176.
[28] See §954(9)("Americans should receive in school, background and preparation in the arts and humanities"); §954(c)(5)(listing "projects and productions that will encourage public knowledge, education, understanding, and appreciation of the arts").
[29] 118 S.Ct. at 2170.
[30] See §951(10).

account, giving special consideration to 'projects and productions ... that reach, or reflect the culture of, a minority, inner city, rural, or tribal community,' ...[31] as well as projects that generally emphasize 'cultural diversity,'"[32] Justice O'Connor concluded, "[r]espondents do not contend that the criteria in [the section] are impermissibly applied when they may be justified, as the statute contemplates, with respect to a project's intended audience."[33]

A. Racial and Cultural Differences Are Facts

Racial and cultural differences in America are facts and relevant to viewpoint and perspective.[34] The race of an individual suggests characteristics much more consequential than superficial physiology. It is one of the dominant

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[31] §954(c)(4).
[32] 118 S.Ct. at 2177, citing §954(c)(1).
[33] Id.
[34] See CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES 135 (1996)("It defies logic to suggest that we can overcome American's color legacy and achieve racial justice without ensuring the ... important institutions 'look like America,' to use President Clinton's phrase"; Robert S. Chang, Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, 81 Cal. L. Rev. 1243, 1247-50 (1993)(arguing that discrimination suffered by Asian Americans is different than that suffered by other groups, and that this has "certain implications for the study of Asian-Americans and the Law"; Note, An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education, 109 Harv. L. Rev. 1357, 1366-67 (1996)(describing the influence of race on experience); Kenneth L. Karst, Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation, 43 U.C.L.A. L. Rev. 263, 336 (1995)(suggesting that race actually represents culture in the context of diversity policies).

characteristics that affects both the way the individual looks at the world and the way the world looks at the individual.[35] A considerable body of empirical research and social science theory, indeed our whole history, show life experiences for racial and ethnic minorities in America that are remarkably different from that for whites.[36] And, tellingly, the results of numerous recent polls and studies show almost polar opposite attitudes and views, between Blacks and whites, Hispanics and whites, Blacks and Hispanics, and men and women, on a number of

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[35] See Richard A. Wassertrom, Racism, Sexism, and Preferential Treatment: An Approach to the Topics, 24 U.C.L.A. L. Rev. 581, 586 (1977).

[36] See discussion in our original comments and text accompanying note 34, in these reply comments. Some headlines reveal cases and instances of special and harmful treatment of minorities as a class of persons. See e.g., "Nationwide Settles DOJ Fair Housing Challenge on Homeowners Insurance, Law & Business Report, Banking Policy Report, April 7, 1997, at 2 (reporting on the settlement of charges of racial discrimination in the issuance of homeowners' insurance through the use of facially neutral underwriting standards, but which had the objective and effect of denying coverage to minorities); Michael Janofsky, "Texas Lenders Pledge $1.4 Billion in Housing Case", N.Y. Times, March 10, 1998(reporting that three lenders agreed to pay the sum in settlement of charges that white applicants were approved for mortgages, while black applicants with equivalent or better qualifications were turned down); "Avis Expresses Satisfaction With Conclusion of Justice Department Review, Justice Takes No Action Against Company, Citing Avis' Voluntary Anti-Discrimination Measures...", PR Newswire Association, Inc., PR Newswire, May 22, 1998(reporting on decision by Justice Department to conclude its investigation of alleged racial discrimination against Blacks in the rental of cars and that Avis had settled one of the cases prompting the investigation); "U.S. Seeks to Overhaul Organ Transplant Policy, Medicare: Controversial Proposal Emphasizes Need Over Location, Minorities in Particular Could Benefit." L.A. Times, March 1, 1999, at 1 (reporting that significant disparities exist in transplant waiting time; Black kidney patients, for instance, wait an average of three years nationwide, twice the time for whites); Lynda Richardson, "White Patients Have More Access to New AIDS Drugs, A Survey Shows", New York Times, at Sec. 1, p. 25. The survey was conducted for the HIV Health and Human Services Planning Council

pressing and current topics. Consider the survey results of views and attitudes on: a proposal to allow citizens to carry concealed weapons;[37] assisted suicide;[38] the existence of police brutality;[39] the fairness of the country's organ transplant policy;[40] the approval of President Clinton's job performance;[41] financial investing styles;[42] school

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(reporting that 33% of whites, 12% of Blacks and 19% of Hispanics, had access to new AIDS drugs).

[37] A poll showed that 41% of whites supported the measure; but that Blacks opposed it 4 to 1. White men were twice as likely as women to support the measure. National Journal Group, Inc., March 25, 1999.

[38] The poll showed that 22% of Blacks and 53% of whites favored the measure. In response to the question whether they would want to be kept alive, no matter what, more than twice as many Blacks than whites answered yes. John Leo, "Dancing with Dr. Death", U.S. News & World Report, Outlook; On Society, March 22, 1999, at 16.

[39] In a poll, 9 out of 10 Blacks believed that the police often engage in brutality. Almost three-quarters of whites interviewed, by contrast, approved of how the Mayor of New York was handling crime. Citizens and the Police", New York Times, March 17,1999, Sec. A, at 20.

[40] A recent Gallup poll found Blacks and Hispanics were more likely than whites to believe that racial discrimination prevented minority patients from receiving the transplants they need and that organs are more likely to go to the wealthy. "U.S. Seeks to Overhaul Organ Transplant Policy, Medicare: Controversial Proposal Emphasizes Need Over Location, Minorities in Particular Could Benefit." L.A. Times, March 1, 1999, Part A, at 1.

[41] Blacks were far more likely than whites to approve of Clinton's job performance, to regard him favorably, to trust him to keep his word, to blame his enemies for his problems and to oppose his resignation or impeachment. The results were: 86% of Blacks and 58% of whites approved of him; 69% of Blacks and 34% of whites viewed him favorably; and 10% of Blacks and 44% of whites would call for his resignation or impeachment. Kevin Sack, "Testing of a President: The Supporters; Blacks Stand by a President Who 'Has Been There for Us'", New York Times, Sept. 19, 1998, at Sec. A., p.1.

[42] Traditionally, Blacks shied away from stocks -- partly out of mistrust of Wall Street. Peter Truell, "Investing It; The Black Investor, Playing Catch-Up", New York Times, Aug. 23, 1998, at Sec.3, p.1.

uniforms;[43] school vouchers;[44] and the receptiveness to new medicines.[45]

II. Proposed Rule Gives Ample Guidance for the Recruitment and Outreach Requirements

Some commenters argue that the proposed rule obligates licensees to engage in recruitment and outreach, but that the requirement "lacks any quantifiable or meaningful objective"[46] and that that the regulatory goal is not defined.[47] One commenter seemed to express incredulity at the idea that equal employment opportunity should be a paramount policy.[48] Equal employment opportunity has long-been a national goal and a means toward the statutory goal of diversity of voices in the mass media. Moreover, the proposed rule gives guidance as to its requirements. It

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[43] The poll showed that 87% of blacks and 74% of Hispanics, compared to 50% of whites, supported mandatory school uniform policies. Clara Hemphill, "Clothes Don't Make the Child", New York Times, at Sec. A, p. 15.

[44] In the first poll, 72% of Blacks were in favor compared to 48% of the general population. In the second poll, 56% of Blacks, 65% of Hispanics, and 47% of whites were in favor. The second poll was conducted by Joint Center for Political and Economic Studies. "Race Relations and Central City Schools...", Brookings Review, March 22, 1998, at 33.

[45] "Many blacks, especially in the south, simply won't take medicines" because they are afraid of being "killed off as part of the master plan" thinking of the Tuskegee trials. A significant number believe that AIDS is a form of genocide. Jeff Stryker, "Ideas & Trends; Tuskegee's Long-Arm Still Touches a Nerve", New York Times, Apr. 13, 1997, at Sec. 4, p.4.

[46] See Comments of Haley Bader & Potts, at 25-26.

[47] See Comments of Haley Bader & Potts, at 18.

[48] See Comments of Haley Bader & Potts, at 25-16.

requires specific and objectively measured conduct, e.g., making contact with recruitment sources likely to include candidates of all races and both genders in their referrals, making contact with existing labor organizations; establishing a monitoring system. The proposed rule, by its clear terms, does not prescribe hiring decisions nor program content.

Finally, so long as ours is a multicultural society, the equal employment opportunity requirements under the proposed rule should remain in place. Even so, nothing in the proposed rule prohibits the Commission from revisiting and revising a rule as to the particular requirements as industry and societal changes occur. In the meantime, the Commission should not shrink from its view of the "[legality] of these regulations by envisioning the most extreme applications conceivable, but [should] deal with those problems if and when they arise."[49]

III. Ultimate Objective to Include the Historically Excluded Does Not Establish a Racial Classification

The proposed rule does not establish an impermissible racial classification, but contains only race-neutral

[49] See Finley, 118 S.Ct. at 2178, quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396 (1969).

measures. In City of Richmond v. J.A.Croson,[50] the plurality of the Supreme Court explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the government entity itself and to prevent the public entity from acting as a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, by allowing tax dollars "to finance the evil of private prejudice."[51] It is beyond dispute that race-neutral measures may be used to address the effects of societal discrimination. That an otherwise race-neutral measure may have as its ultimate objective some benefit to persons of a particular race does not by that alone render the measure unconstitutional. In Croson, the Supreme Court acknowledged the existence of systemic and societal barriers to entry which may have a disproportionate effect on the opportunities open to minority firms.

> Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race.... Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.[52]

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[50] 488 U.S. 469 (1989).
[51] 488 U.S. at 492.
[52] 488 U.S. at 510.

This is precisely what the proposed rule aims at and is calculated to accomplish -- inclusion of all persons in the applicant pool for broadcast job opportunities.[53]

IV. Alternative Proposals Lack Efficacy and are Not Calculated To Achieve the Regulatory Goal

Some commenters have offered counter proposals to the proposed EEO Rule. These proposals range from the adoption of the Broadcast Executive Director's Association (BEDA), Model Broadcast Careers Road Map,[54] to a proposal that licensees should be allowed to design their own EEO programs,[55] to one that substitutes compliance with the

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[53] One commenter, Pacific Legal Foundation ("PLF"), offered a distorted reading of the proposed rule and suggested something sinister in certain of the requirements. For example, PLF states that subsection (c)(2)(vi) of the proposed rule, which requires licensees to offer promotions to qualified minorities and women in a non-discriminatory fashion, "is a plain signal to stations that they are at risk of having their license application denied if they use tests that may put minorities and women at a disproportional advantage". Comments of PLF, at 4. PLF states further that the "FCC makes plain that stations are expected to recruit, hire, and promote minorities and women, even if they do not have the qualifications or pass the tests required of other personnel." Comments of PLF, at 4. These are not fair readings of the proposed rule and PLF's assertions seem powerful reason for a formal rule.

[54] See Joint Comments of 46 Named State Broadcasters Associations, at 14-20; Curators of the University of Missouri, at 12.

[55] See Joint Comments of Evening Post and Great Empire Broadcasting, Inc. at 20 and 21. This commenter asserts remarkably that "[b]roadcasters can, of course, always choose to use targeted recruiting sources and independently seek to advertise positions with female and minority recruiting sources in order to improve their applicant pools, but the decision of exactly how to use what sources should be made by each individual broadcaster, not by the FCC." In other words, Joint Comments seems to argue that if the licensee chooses only to advertise in papers having an all-white circulation, resulting in an all-white applicant pool, it should be the licensee's decision. Virginia Association of Broadcasters ("VAB") argues that a licensee

Office of Federal Contract Compliance Program.[56] All of these lack efficacy and do not reflect the realities of business recruiting. As we offered in our original comments, recent studies have identified business and corporate policies and procedures that inherently operate to set up and perpetuate the effects of a glass ceiling, which blocks entry by minorities and women in given organizations.[57] These studies show that employers typically directed their recruitment at predominantly white labor pools;[58] screened out minorities and women by not advertising in newspapers, recruiting based upon the quality or location of schools and by refusing to use state employment services (which were perceived by employers as referring a disproportionate number of minority candidates);[59] and excluded minorities and women from job

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should have the right to continue "an established relationship with a local college" and recruit exclusively from there. Id. at 11.

As an alternative, one commenter proposed that licensees engage in a form of ascertainment, which would require the Commission to consider soliciting program information from licensees based on the community elements it formerly prescribed for ascertainment. See Comments of Haley, Bader & Potts, at 24. But what would this involve? Would licensees have to go out and ascertain the community? Would such efforts be materially different from requiring licensees (as the proposed rule does) to reach out to members of their community to apprise them of job opportunities.

[56] See Comments of National Association of Broadcasters, at 7.

[57] See R. Thomas, J. Porterfield, J. Hutcheson, C. Pierannunzi, ("Porterfield, et. al."), THE IMPACT OF RECRUITMENT, SELECTION, PROMOTION AND COMPENSATION POLICIES AND PRACTICE ON THE GLASS CEILING (1994).

[58] Porterfield, et. al., supra, note 67, at 11.

[59] Id.

opportunities by informal recruitment through current employees.[60]

The BEDA consists largely of posting job openings on a Web Site.[61] Recent reports show that there is a significant gap in internet access between whites and nonwhites.[62] The cybergap is equally significant with respect to students attending traditionally Black colleges and colleges

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[60] Id. at 11. The authors report that informal recruitment methods, such as small social networks and employee referrals, were by far the most frequently used methods for all types of positions. While executive search and referral firms were often utilized in the case of upper level management positions, they seemed to only add to the practice of exclusive consideration within non-diverse candidate pools, since the majority of the search and referral firms not only failed in the acquisition of a diverse candidate pool, but in many instances were not even aware of the equal employment and affirmative action obligations under the law. This was evident in the fact that none had made any effort to reach out to agencies and/or professional organizations, such as the National Black MBA Association, Hispanic MBAs, and Who's Who Among American Women, which were rich in qualified minorities and women. Id. at 11. The works of several social scientists were reported as finding that informal referral from current employees was still the most salient method of recruitment. Id. at 11. Thus, the use of informal social networks was the primary method employers used to recruit outside individuals for job vacancies. The consequences of informal recruitment policies and practices have proven to be severe for minorities and women, denying minorities and women equal access to valuable informal sources of job information. The authors assert that minority and women job seekers typically hold primary ties to social networks composed of other minorities and women, who generally are not as well situated to know about employment opportunities as the members of social networks used by dominant group members. Consequently, an exclusionary barrier ("social network segregation") has been characteristic of the recruitment phase. Id. at 11.

[61] See Joint Comments of 36 Named State Broadcasters Association at 18-25. See also Comments of Smith & Belendiuk at 4, 24-25 (urging the Commission, not licensees to engage in outreach).

[62] David Kusher, "Shock Value", Village Voice, April 6, 1999, at 32 (reporting the results of a Vanderbilt University study which found that less than one-third of Blacks owned home computers, compared to nearly three-quarters of whites and that 37.8% of white students said that they had used the Web in the previous six months, compared to only 15.9% of Black students. Another report shows 11% of Hispanic homes have internet access. See Take it Personally, April 7, 1999; CNN Moneyline News Hour, April 6, 1999.

generally. Only 10% of Blacks in these institutions regularly use E-Mail or are connected to the internet.[63] The commenters concede as much, but point to Microsoft's Bill Gates pledges of computers to community libraries.

V. Administrative Burdens are De Minimis and Required in the Public Interest

Some commenters complain that compliance with the proposed rule would be burdensome, that keeping documents showing referral sources used to fill job openings, keeping copies of the applications they ask applicants to complete, recruiting from other than at the "local college,"[64] looking outside the organization for employees, answering any questions about the race or gender of persons applying for positions,[65] keeping any documents except those it chooses to keep, would be too much to require of a licensee.[66] Some even suggest that the proposed rule would be useless, since they exercise discretion in the choice of programming in less than 10% of the broadcast day, such that, there is

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[63] "Technology Gap Seen at Black Colleges", Baltimore Sun, April 9, 1999. The story also reported that only 12.5% of students in these colleges have personal computers.
[64] VAB at 11. See note 59, for reports of investigations that such recruitment serves as a mechanism to screen out minorities and women.
[65] VAB at 12-13.
[66] VAB at 13. See EEOC Regulations, 29 C.F.R. §§1602.7, 1602.13 (requiring employers covered by Title VII to file annual employment reports, including records indicating the race and ethnicity of employees.)

little opportunity for the consideration of programming designed to appeal to or reflect the tastes and viewpoints of minorities.[67] The words of former commissioner Kenneth Cox seem particularly apt in response:

> I think he [chairman] overlooks the possibility of requiring broadcasters -- and especially the networks -- to devote reasonable time to the service of minority tastes. Certainly television networking is a highly profitable industry. It is not necessary that a network or a station program its one channel for the mass audience all the time. Clearly, operation in the public interest implies that a licensee will have to do some things which do not maximize audience and profits. All that we, as regulators, must do is to permit our licensees to realize large enough profits to reward them fairly, make broadcasting an attractive field for investment, and insure resources for continued operation in the public interest. * * * [W]e do not claim that the new rule will improve program quality, or even guarantee diversity in types of programming. It should open the market for more diverse programming sources. That should increase the chance that new diverse programming will be developed -- although subject to the economic realities of broadcasting. [68]

VIII. Religious Freedom

Several commenters have raised the question whether the proposed rule infringes on religious liberty. The issue whether the former EEO rules infringed on religious liberty was not ruled on in Lutheran Church, Missouri Synod v.

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[67] See Comments of Haley Bader & Potts, at 22.
[68] 23 F.C.C.2d 382, 423-24, Kenneth A. Cox, concurring.

FCC.[69] While in City of Boerne v. Flores,[70] ("Boerne"), the Supreme Court declared the Religious Freedom Restoration Act ("RFRA") unconstitutional as it applied to the conduct of state governments, it did not address the issue of whether the RFRA had continuing validity as to federal government actions. Since Boerne, federal courts have disagreed on its application.[71] In any event, given the particular provisions of the proposed rule, whether the RFRA is constitutional as to the federal government, makes no difference. First, it is firmly established that religious organizations are not free to discriminate against persons on the basis of race, even if the reasons for doing so are based in religious belief.[72] In this respect, the proposed rule does not alter the existing rights of religious broadcasters. Nonetheless, it is the

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[69] 141 F.3d 344 (D.C. Cir. 1998), reh. denied, 154 F.3d 487 (D.C. Cir. 1998).

[70] 521 U.S. 507 (1997).

[71] See In re The Grand Jury Empaneling of the Special Grand Jury, 1999 U.S. App. Lexis 4797 (3d Cir. March 19, 1999)(raising, but not deciding the question); U.S. v. Grant, 117 F.3d 788, 792, n.6 (5th Cir. 1997)(raising, but not deciding the question); U.S. v. Muhammad, 165 F.3d 327, 336-37 (5th Cir. 1999)(declining to consider the question); U.S. v. Simmons, 1998 U.S. Dist. Lexis 9127 (not deciding whether RFRA constitutional as to federal government); Gunning v. Runyon, 3 F. Supp. 2d 1423 (S.D. Fla. 1998)(question of the constitutionality of RFRA as federal government not clarified); Christians v. Crystal Evangelical Free Church, 141 F.3d 854, 860-61 (8th Cir.), cert. denied 142 L.Ed. 2d 34 (1998)(upholding the Act as to federal government).

[72] Bob Jones University v. U.S., 461 U.S. 574, 604 (1983)(rejecting religious freedom argument, finding an "overriding interest" in eradicating racial discrimination); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984)(finding compelling government interest in preventing discrimination based upon gender).

case that Title VII exempts religious organizations from its prohibitions against discrimination in employment on the basis of religion, although not race,[73] and the proposed rule permits religious broadcasters to require religious affiliation of all its employees as a condition of employment. We believe that the need for sectarian employees by religious broadcasters was fully protected under the King's Garden[74] policy which permitted religious broadcasters to require that all management, programming and administrative employees who dealt with sectarian policies or presentations to be of the licensee's religious persuasion. Equal employment opportunity rules in those stations applied only to positions that did not involve administration, management or decision-making in programming. It is difficult to contemplate that the licensee would require or need to insist that those hired to provide housekeeping services, for example, be church members.

However, since the Commission has indicated in the proposed rule that "religious broadcasters" may require that all station employees share the same religious faith as the licensee, we concur with the recommendations of

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[73] 42 U.S.C.§2000e-1.
[74] King's Garden, Inc. v. F.C.C., 498 F.2d 51 (D.C. Cir. 1974).

National Religious Broadcasters that: (1) no governmental agency should attempt to define what is or is not religious belief or practice, and (2) the Commission staff needs as clear a definition and criteria as possible for determining whether to designate a station as religious. In this respect, the National Religious Broadcasters proposes an alternative definition of "religious broadcaster", namely, an organization or entity that:

> 1) is, or is closely affiliated with, a church, synagogue, or other religious entity, including a subsidiary of such an entity; or
> 2) sets forth a religious purpose in its articles of incorporation, partnership agreement, or similar organic documents; or
> 3) devotes a majority of its airtime to religious programming.

We agree that the three tests recommended by National Religious Broadcasters to be incorporated in the proposed rule are adequate to identify currently licensed religious stations. In the case of new applicants for the designation as a religious station, Test 1, that the applicant be a part of or "closely affiliated with a church, synagogue, or other religious entity, including a subsidiary of such an entity," should be weighted well above the second and third tests. Test 2, that an applicant "sets forth a religious purpose in its articles of incorporation, partnership agreement, or similar organic

documents," should require a clear theological rendition of beliefs and practices and a concrete statement of the religious objectives that would be fulfilled through control of the broadcasting station. Test 3, that the applicant "devotes a majority of its airtime to religious broadcasting," should apply only when the vast majority of the programming is to be religious (not a mere 51 percent) and, preferably, when non-religious programming would be largely informational and news-oriented to serve the public interest needs of listeners. The broadcast of religious music with paid spot announcements should not be accepted as religious broadcasting.

The proposed rule does not otherwise impose a "substantial" burden on the free exercise of religion. To be actionable as such, a governmental action must be shown to significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion.[75]

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[75] See Weir v. Nix, 114 F.3d 817, 820 (8th Cir. 1997); Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995); Rojas v. Cambra, 1997 U.S. Dist. Lexis 7610 (N.D. Cal. May 20, 1997). Under the RFRA, "substantial burden on the free exercise of religion" is "one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits

Nothing in the proposed rule can be said to meet this test. Instead, on the one hand, the proposed rule requires no more than what religious broadcasters are already required to do (refrain from discriminating on the basis of race, color or gender). On the other, the proposed rule requires activities (such as recruitment and outreach) which, to the extent that the religious broadcasters may hire only persons sharing their religious beliefs for all positions, do not inhibit the expression of religious belief, nor force anyone to engage in conduct contrary to their beliefs.[76]

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or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs." Mack v. O'Leary, 80 F.3d 1175, 1178-79 (7th Cir. 1996); see also Sardon v. Romero, 1997 U.S. Dist. Lexis 7419 (N.D. Ill. 1997).

[76] Curators of the University of Missouri argues for an exemption for broadcasters who are universities because "[i]ndividuals attracted to positions at the University's stations frequently possess academic backgrounds and desire employment in an academic setting. The pool of qualified applicants is thus more narrow than that reflected by the FCC population statistics." Curators, at 4-5. Curators states further that "[it is] not in a position to authorize the employment of a number of individuals from the general population who have no experience, background or interest in teaching or working in an academic environment." Id. at 6. Is Curators implying that Blacks, Hispanics, Asians lack sufficient experience, background and interest in teaching or working in an academic environment?

Conclusion

For the foregoing reasons, we urge the Commission to incorporate our concerns and suggestions as stated in our original and in these reply comments in adopting the proposed EEO rule.

Respectfully submitted,

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On behalf of

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National Council of the Churches of Christ in the U.S.A., Communication Commission
Evangelical Lutheran Church of America,
Presbyterian Church (U.S.A.),
United Methodist Church
American Baptist Churches USA
Black Citizens for a Fair Media

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