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

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In the Matter of)	
)	
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 ¹)	
)	
)	
)	

REPORT AND ORDER

Adopted: January 20, 2000;

Released: February 2, 2000

By the Commission: Chairman Kennard and Commissioners Ness and Powell issuing separate statements; Commissioner Tristani approving in part, dissenting in part and issuing a statement; Commissioner Furchtgott-Roth dissenting and issuing a statement.

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I. INTRODUCTION

1. In this *Report and Order*, we adopt a new broadcast equal employment opportunity (“EEO”) Rule and policies,² consistent with the D.C. Circuit’s decision in *Lutheran Church - Missouri Synod v. FCC*,³ amend our EEO rules and policies applicable to cable entities,⁴ including multichannel video programming distributors (“MVPDs”),⁵ to conform them, as much as possible, to the broadcast

² The broadcast EEO Rule, 47 C.F.R. § 73.2080, covers “all licensees or permittees of commercially or noncommercially operated AM, FM, TV, or international broadcast stations.” In addition, pursuant to *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5791 (1997), Digital Audio Radio Service by satellite is also covered by our EEO Rule. Prior to their suspension, discussed below, several different EEO forms were required to be filed by broadcasters, including a Broadcast Station Annual Employment Report (Form 395-B), a Broadcast EEO Program Report (Form 396) filed with a station’s renewal application, and a Broadcast EEO Model Program Report (Form 396-A) filed with an assignment, transfer, or construction permit application.

³ 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh’g denied*, 154 F.3d 487, *pet. for reh’g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) (“*Lutheran Church*”).

⁴ Our cable EEO rules, 47 C.F.R. § 76.71, *et. seq.* (“cable EEO rules”), were implemented pursuant to Section 634 of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), and the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). *See also* 47 C.F.R. §§ 21.920, 25.601, 74.996, 76.1702, 76.1802, and 100.51. Cable entities are required to file Annual Employment Reports (Form 395-A for cable operators and satellite master antenna television systems (“SMATV”) and Form 395-M for multichannel video programming distributors) and are also required to file a Supplemental Investigation Sheet (“SIS” or “SIS form”) every five years.

⁵ “A multichannel video programming distributor is an entity such as, but not limited to, a cable operator, a multipoint distribution service, a multichannel multipoint distribution service [“MMDS”], a direct broadcast satellite service [“DBS”], a television receive-only satellite program distributor, and a video dialtone program service

EEO Rule; establish our authority to retain the anti-discrimination provisions of our broadcast EEO Rule; and terminate MM Docket Nos. 98-204 and 96-16, *Streamlining Broadcast EEO Rule and Policies*, 13 FCC Rcd 6322 (1998) (“*Order and Policy Statement*”). The new broadcast EEO Rule and modified EEO rules for cable entities, adopted herein, emphasize outreach in recruitment to all qualified job candidates and ban discrimination on the basis of race, color, national origin or gender.

2. Pursuant to the Communications Act of 1934, as amended (“Communications Act”), this Commission is charged with the responsibility of regulating “interstate and foreign communications services so that they are available, so far as possible, to all people of the United States, without discrimination on the basis of race, religion, national origin, or sex...”⁶ The Commission is also mandated to license individuals and companies to use the radio spectrum as the “public interest, convenience, and necessity” require.⁷ While we have grappled over the years with the task of giving form and content to that statutory mandate, we have no doubt that it requires us to deny licenses to those who would discriminate on the basis of race, ethnicity or gender. Such persons do not have the basic character qualifications to hold a valuable government license. And the licenses that we grant to broadcasters are not like any others granted by government. They afford licensees the privilege and the power to air programming -- entertainment, news, public affairs, educational -- that exerts a powerful influence on our culture and shared values and helps shape and inform public opinion on myriad issues of public importance. We do not believe that a licensee who discriminates against minorities or women would be able or inclined to fulfill its responsibility as a public trustee to provide a program service that airs diverse viewpoints, enriches public debate, and is responsive to the needs and interests of all sectors of its community. We can expect no less of broadcast licensees or cable entities under the Communications Act.⁸

3. We require more of broadcasters and cable entities in this *Report and Order*, however, than merely refraining from discrimination. We require them to reach out in recruiting new employees beyond the confines of their circle of business and social contacts to all sectors of their communities. We believe that repeated hiring without broad outreach may unfairly exclude minority and women job candidates when minorities and women are poorly represented in an employer’s staff -- particularly when they are poorly represented in the ranks of management employees who make hiring decisions. It is not enough to say that one will not discriminate against anyone who applies for a job when not all have been given a fair opportunity to apply. Outreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process.

provider...” 47 C.F.R. § 76.71(a). The term “cable” in this *Report and Order* includes multichannel video programming distributors that control the programming that they distribute. 47 U.S.C. § 554(h)(1); 47 C.F.R. § 76.71(a).

⁶ 47 U.S.C. § 151, as amended (1997).

⁷ 47 U.S.C. §§ 307, 309.

⁸ See 47 U.S.C. §§ 151, 303(f), (g), (r); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795-800 (1978); *NAACP v. FCC*, 425 U.S. 662, 670 n. 7 (1976) (“*National Citizens*”); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 U.S. 621, 628, 633-35 (D.C. Cir. 1978) (*en banc*) (“*Bilingual*”).

4. These goals would be sufficient in themselves to warrant nondiscrimination and outreach requirements. We believe that such requirements also serve an important, constructive function in fostering greater diversity of viewpoints and programming that is responsive to the interests of a diverse community. As discussed below, we harbor no illusion that members of any group share the same outlook or views. But we do believe that the record in this proceeding and human experience suggest that, if the group of people who make programming decisions at a broadcast station or cable system come from a wider variety of backgrounds with a greater range of human experience and social interactions, their programming decisions will better reflect the diversity of viewpoints in our pluralistic society than would programming decisions made by a homogenous workforce. And we hope and believe that, given the power and pervasiveness of the electronic media in our nation, programming that reflects the diverse views and interests present in our society will increase our understanding of those from different backgrounds, decrease the sense of isolation of minority groups, and help us build bridges across racial, ethnic and socioeconomic divides. We have no doubt that regulations that advance these goals would “encourage the larger and more effective use of radio in the public interest.”⁹

II. SUMMARY

5. The *Report and Order* addresses the concerns of the *Lutheran Church* court regarding the Commission's authority to promulgate an employment nondiscrimination rule. In the *Report and Order*, we confirm the existence of such authority and retain the anti-discrimination provisions of the broadcast and cable EEO rules. The *Report and Order* also discusses the statutory bases for the Commission's authority to promulgate EEO program requirements and describes the regulatory approach that we are adopting towards religious radio broadcasters.

6. The *Report and Order* reinstates the requirement that broadcasters file annual employment reports (Form 395-B), which was suspended by the Commission following *Lutheran Church*, and retains the requirement that cable entities file annual employment reports (Form 395-A or 395-M).¹⁰ The Commission will no longer use the employment profile data in the annual employment reports in screening renewal applications or assessing compliance with EEO program requirements. The Commission will use this information only to monitor industry employment trends and report to Congress.

7. The EEO program requirements adopted in the *Report and Order* require that broadcasters and cable entities widely disseminate information about job openings to ensure that all qualified applicants, including minorities and women, are able to compete for jobs in the broadcast and cable industries. The requirements afford broadcasters and cable entities flexibility in designing their EEO programs while, at the same time, ensuring broad dissemination of information concerning every full-time vacancy, as well as effective enforcement of our EEO rules and policies. To enhance the success of their outreach, broadcasters and cable entities are also required to implement two supplemental recruitment measures: (i) notification of job vacancies to any recruitment organization that requests such notification; and (ii) a certain number of outreach efforts beyond the traditional recruitment

⁹ 47 U.S.C. § 303(g).

¹⁰ The annual employment reporting requirement for cable entities was not suspended following *Lutheran Church*.

that occurs in response to individual vacancies, such as job fairs, internship programs, training programs, mentoring programs, and interaction with educational and community groups.

8. Although all broadcasters and cable entities will be required to widely disseminate information concerning job openings, they may choose not to use the supplemental recruitment measures if they believe that they can accomplish broad outreach without them. However, a broadcaster or cable entity who makes this election will be required to maintain records concerning the recruitment sources, race, ethnicity and gender of applicants so it can monitor whether its outreach efforts have been successful in achieving broad outreach to the community. If the data collected indicates that outreach has not been inclusive, a broadcaster or cable entity will be expected to adjust its outreach program accordingly. Thus, the rules we are adopting require a broadcaster or cable entity to analyze the effectiveness of its outreach program, and address any problems found.

9. As in the past, broadcast station employment units with fewer than five full-time employees and cable employment units with fewer than six full-time employees will not be required to demonstrate compliance with the EEO program requirements. However, all other broadcasters and cable entities must file annually an EEO report in their public file, detailing their outreach efforts during the preceding year and the results of those efforts. Broadcasters also will be required to file a Certificate of Compliance every second, fourth and sixth year of the license term certifying compliance with the EEO Rule. Television stations and every radio station that is part of an employment unit with more than ten full-time employees will be required to file a copy of their EEO public file report midway through the license term with the FCC. This information will be analyzed as part of the Commission's mid-term review of a station's EEO program. Stations will also be required to file their EEO public file report with their renewal application and cable entities will be required to file their EEO public file report as part of the supplemental information required by statute to be filed every five years.

III. BACKGROUND

10. The Commission, in the *Notice of Proposed Rule Making*¹¹ in this proceeding, proposed EEO outreach requirements that would be consistent with the decision rendered in *Lutheran Church*.¹² The Court of Appeals held that the portions of the Commission's regulations requiring licensees to maintain an EEO program to recruit minorities were subject to the strict scrutiny applicable to racial classifications imposed by the federal government under *Adarand Constructors, Inc. v. Peña*.¹³ The court further held those requirements unconstitutional as applied to minorities.¹⁴ The court opined that this regulatory scheme "pressure[s] stations to maintain a work force that mirrors the racial breakdown of

¹¹ 13 FCC Rcd 23004 (1998) (hereinafter *NPRM*). We note that several comments and reply comments were late-filed in this proceeding. However, because we believe that it is in the public interest to do so, we will consider these comments and reply comments as part of the record of this proceeding.

¹² See *NPRM*, 13 FCC Rcd at 23008-23011 (paras. 11-17) for further discussion of *Lutheran Church*.

¹³ 515 U.S. 200, 115 S. Ct. 2097 (1995) ("*Adarand*").

¹⁴ The court declined to evaluate the constitutionality of the EEO program requirements as applied to women, since the issue was not before it. *Lutheran Church*, 141 F.3d at 351, n.9.

their ‘metropolitan statistical area,’”¹⁵ and thus injects racial considerations into hiring decisions. The court did not find that a station would be held in violation of the Commission’s rules based solely on a statistical disparity between its employment profile and the percentage of minorities in the local labor force. However, it concluded that the requirement that stations evaluate the success of their EEO programs based on those statistics, in conjunction with the Commission’s use of those statistics at renewal time, compelled licensees “to hire with an eye toward meeting the numerical target,” and thus resulted in individuals being granted a preference because of their race.¹⁶ In addition, while the court did not question the constitutionality of the Commission’s anti-discrimination rule, it remanded to the Commission the question of its statutory authority to promulgate such a rule.¹⁷ The *NPRM* tentatively concluded that we have ample statutory authority to retain our EEO anti-discrimination rule,¹⁸ and we elaborate further on this view below.

11. On September 15, 1998, the court denied the Commission’s petition for rehearing *en banc*.¹⁹ In doing so, the court issued a supplemental decision in which it indicated that its initial decision in the case should not be read to hold that any regulation encouraging broad outreach to, as opposed to the actual hiring of, a particular race would necessarily trigger strict scrutiny. The court also observed that not all race conscious measures adopted by the government are subject to strict scrutiny.²⁰

12. Against that backdrop, the Commission sought comment on numerous proposals and issues regarding changes to its broadcast EEO Rule and conforming changes to its cable EEO rules. Although the *Lutheran Church* decision did not directly affect cable entities, the Commission’s cable EEO rules contain some of the same provisions that the court invalidated in *Lutheran Church*; therefore, to avoid possible constitutional problems, as well as to emphasize broad and inclusive recruitment outreach, we proposed new EEO provisions for both broadcasters and cable entities, including MVPDs.²¹

13. In the *NPRM*, the Commission tentatively proposed EEO rules which removed all requirements that broadcast licensees and cable entities compare their employment profile with the local labor force. In addition, the Commission indicated that it would no longer compare individual broadcast licensees’ or cable entities’ employment profiles with the local labor force, even as a screening device. We proposed to retain the cable and broadcasting rules’ general EEO policy/program requirements as outlined in 47 C.F.R. §§ 76.73(b) and 73.2080(b), respectively. Further, we proposed to retain most of the cable and broadcasting rules’ specific EEO program requirements.²²

¹⁵ *Id.* at 352.

¹⁶ *Id.* at 354.

¹⁷ *Id.* at 356-357.

¹⁸ *NPRM*, 13 *FCC Rcd* at 23014 (para. 25).

¹⁹ *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487 (1998).

²⁰ *Id.* at 492.

²¹ See 47 C.F.R. §76.71 *et seq.*

²² These require broadcasters and cable entities to: disseminate their equal employment opportunity program to

14. The *NPRM* proposed several alternative recruitment approaches with the objective of ensuring the broadest dissemination of vacancy information. We asked generally for comments on ways the Commission could encourage entities to expand their pools of qualified applicants without creating any incentives to prefer minority and female applicants over other applicants.

15. Further, the *NPRM* proposed that entities be required to analyze their efforts to recruit, hire and promote in a nondiscriminatory fashion and address any difficulties in implementing their EEO programs. We solicited comments on how this analysis should be conducted.

16. The *NPRM* stimulated response from a broad range of commenters, who raised exceptional and thought-provoking ideas and proposals. Having reviewed the entire record in this proceeding, we have constructed a new EEO outreach program which we believe will accomplish our goal of ensuring broad outreach in recruitment while avoiding the constitutional infirmities identified by the court in *Lutheran Church* and reducing recordkeeping burdens to the extent consistent with maintaining an effective, enforceable program.

IV. DISCUSSION

A. Statutory Authority for EEO Program Requirements and Anti-Discrimination Rules

1. Section 634: Explicit Authority to Regulate EEO Practices of Cable Entities, Including Multichannel Video Programming Distributors

17. We noted in the *NPRM* that the court's decision in *Lutheran Church* did not address the validity of our EEO rules for cable entities, which were not at issue in that case.²³ We tentatively concluded that we have ample statutory authority under Section 634 of the Communications Act for the continued enforcement of the cable EEO rules.²⁴ Indeed, we noted that Section 634 *requires* us to enforce EEO rules for cable entities. Nevertheless, because certain provisions in the cable EEO rules are similar to those provisions in the broadcast EEO Rule found to be unconstitutional in *Lutheran Church*, we sought comment on whether the Commission has statutory authority to modify those rules to avoid constitutional problems.

18. We conclude that the Commission is required by Section 634 to enforce EEO rules for the cable industry, but that we have considerable latitude under the statute to revise the cable EEO rules. Congress built into Section 634 flexibility for the Commission to implement the regulatory scheme by granting the Commission rulemaking authority rather than simply prescribing the cable EEO requirements by statute; by stating in Section 634(d)(2) that the "rules shall specify the terms under which" an entity shall

job applicants and employees; review seniority practices to ensure that such practices are not discriminatory; examine rates of pay and fringe benefits for employees and eliminate any inequities based upon race or sex discrimination; offer promotions to qualified minorities and women in a nondiscriminatory fashion to positions of greater responsibility; cooperate with any labor union in the development of programs to assure qualified minority persons or women of equal opportunity for employment; include a nondiscrimination clause in union agreements; and avoid the use of selection techniques or tests that have the effect of discriminating against qualified women and minorities. *NPRM*, 13 FCC Rcd at 23039.

²³ *NPRM*, 13 FCC Rcd at 23022 (para. 46). See 47 C.F.R. §§ 76.71 *et seq.*

²⁴ 47 U.S.C. § 554.

take the actions specified in that section;²⁵ and by providing in Section 634(d)(4) that the Commission may amend the cable EEO rules “from time to time to the extent necessary to carry out the provisions of this section.” We believe that our broad rulemaking authority under Section 634(d)(2) and 634(d)(4) permits us to adopt new, race-neutral, inclusive outreach requirements and to revise the annual employment reports (Forms 395-A and 395-M) and Supplemental Investigation Sheets (“SIS” or “SIS forms”) filed by cable entities to make them consistent with our modified cable EEO rules. Commenters agree that Section 634 explicitly authorizes the Commission to modify its cable EEO regulations to advance the congressional goals identified in the statute.²⁶

19. Additionally, by stating in Section 634(d)(2) that the Commission is to adopt rules implementing the requirements of that section “to the extent possible,” Congress recognized that it may not be possible for the Commission to fully implement all of the provisions in that section. Thus, it only obligated the Commission to implement the listed requirements “to the extent possible,” consistent with other conflicting requirements or limitations. The court’s decision in *Lutheran Church* delineates constitutional limitations with which we must reconcile the cable EEO rules. We believe that Section 634(d)(2) permits the Commission to eliminate those provisions of the cable EEO rules that are similar to those struck down by the court in *Lutheran Church* because it is not “possible” for the Commission to enforce a provision that a court has found unconstitutional. Accordingly, we modify the cable EEO rules in this *Report and Order* to remove provisions similar to those found unconstitutional in *Lutheran Church*. We also revise the annual employment reports and SIS forms filed by cable entities to conform them with our modified cable EEO rules.

2. Broadcasters

20. The court specifically directed us in *Lutheran Church* to consider our authority to promulgate an employment nondiscrimination rule. Further, while the court struck down the broadcast EEO program requirements on constitutional grounds and did not hold that we lack statutory authority to promulgate such rules, it questioned our reliance on our public interest mandate to foster diversity of programming as a basis for the broadcast EEO Rule. Accordingly, we discuss here our statutory authority to retain our anti-discrimination rule and to adopt new EEO outreach requirements for broadcasters.

21. Based on the record in this proceeding, we have concluded that we have ample statutory authority to retain our EEO anti-discrimination rule and, consistent with the constitutional standards established in *Lutheran Church*, to promulgate new EEO outreach requirements. First, Congress has explicitly authorized us to regulate the EEO practices of television broadcasters and ratified the Commission’s authority to adopt EEO rules for radio broadcasters. Second, we have authority to adopt rules fostering equal employment in the broadcast industry in order to further the statutory goal of fostering minority and female ownership in the provision of commercial spectrum-based services, reflected in Section 309(j) of the Communications Act. Finally, equal employment of minorities and

²⁵ In contrast, Section 634(c) simply provides that cable entities “shall” comply with five listed requirements in implementing their EEO programs.

²⁶ Tele-Communications, Inc. (TCI) Comments at 3 (owner of cable systems); Cole, Raywid and Braverman (CRB) Comments at 2-3.

women furthers the public interest goal of diversity of programming, both directly and by enhancing the prospects for minority and female ownership.

a. Section 334: Explicit Authority to Regulate EEO Practices of Television Broadcasters

22. In 1992, Congress enacted Section 334 of the Communications Act as part of the Cable Television Consumer Protection and Competition Act of 1992.²⁷ Section 634 provides that “the Commission shall not revise:”

- (1) the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply to television broadcast station licensees and permittees; or
- (2) the forms used by such licensees and permittees to report pertinent employment data to the Commission.²⁸

The Conference Report accompanying this legislation indicates that Section 634 “codifies the Commission’s equal employment opportunity rules, 47 C.F.R. 73.2080” for television licensees and permittees.²⁹ Section 334 thus grants the Commission explicit authority to regulate the EEO practices of television broadcasters. Indeed, it *requires* the Commission regulate the EEO practices of television broadcasters. Thus, as is the case with respect to cable operators and other multichannel programming distributors, the Commission has express statutory authority to regulate the EEO practices of television broadcasters.

b. Congressional Ratification

23. We noted in the NPRM that the Commission has maintained nondiscrimination and EEO program requirements for broadcasters for over 30 years. In 1968, the Commission adopted a Memorandum Opinion and Order in which it concluded that the national policy against discrimination and the fact that broadcasters are licensed under the Communications Act to operate in the public interest required the Commission to consider allegations of employment discrimination in licensing broadcast stations.³⁰ The Commission expressed its view that deliberate discrimination in employment is inconsistent with a broadcaster’s responsibility to serve all elements of its community.³¹ In 1969, the Commission adopted rules prohibiting broadcast stations from discriminating against any person in employment on the basis of race, color, religion, or national origin, and requiring stations to maintain a program designed to assure equal opportunity in every aspect of station employment.³² It reiterated its

²⁷ Pub. L. No. 192-385, 106 Stat. 1460 (“1992 Cable Act”).

²⁸ 47 U.S.C. § 334(a).

²⁹ Conf. Rep. No. 862, 102d Cong., 2d Sess. 97 (1992).

³⁰ See *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 FCC 2d 766 (1968).

³¹ *Id.* at 770.

³² See *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 18 FCC 2d 240 (1969).

view that discriminatory employment practices are incompatible with a station's obligation to operate in the public interest, and relied on Sections 4(i), 303, 307, 308, 309 and 310 in adopting the new rules. Relying on its authority to license and regulate broadcasters in the public interest, the Commission has revised and extended its rules on numerous occasions since 1969 to, *inter alia*, refine its EEO program requirements, require licensees to file these programs and other statistical employment information with the Commission, and prohibit discrimination against, and require outreach to, women.³³

24. Over the last 30 years, the Commission has vigorously enforced its EEO requirements, sanctioning broadcast licensees in numerous cases for failing to comply fully with those requirements. Commission decisions enforcing the EEO requirements have been challenged both by licensees who have been sanctioned for noncompliance³⁴ and by petitioners who believed that Commission enforcement was not vigorous enough.³⁵ Indeed, the Court of Appeals for the D.C. Circuit held more than 20 years ago that the Commission *must* investigate broadcasters' employment practices and, in assessing the character qualifications of broadcast licensees, consider whether they have engaged in intentional employment discrimination.³⁶ And the Supreme Court observed in the seminal case addressing the scope of an agency's authority to serve the "public interest" that FCC regulation of the employment practices of its licensees "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 ... to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups."³⁷

25. We observed in the *NPRM* that during the three decades that the Commission has administered EEO program requirements and antidiscrimination rules, Congress has repeatedly expressed awareness of the rules and has not only acquiesced in them, but has also referred to them approvingly, confirming our view that the Commission has statutory authority to promulgate these rules.

³³ See, e.g., *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 23 FCC 2d 430 (1970); *Amendment of Part VI of FCC Forms 301, 303, 309, 311, 314, 315, 340, and 342, and Adding the Equal Employment Program Filing Requirement to Commission Rules 73.125, 73.301, 73.599, 73.680, and 73.793*, 32 FCC 2d 708 (1971); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 FCC 2d 226 (1976) ("1976 Report and Order"). See also *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 70 FCC 2d 2320 (1978) [delineating the Commission's investigative jurisdiction and methods of cooperation with the Equal Employment Opportunity Commission ("EEOC")].

³⁴ See, e.g., *San Luis Obispo Broadcasting Ltd. Partnership*, 13 FCC Rcd 1020 (1998); *Valley Television, Inc.*, 12 FCC Rcd 22795 (1998); *Congaree Broadcasting, Inc.*, 5 FCC Rcd 7691 (1990); *South Plains Broadcasting Company, Inc.*, 101 FCC 2d 1364 (1985).

³⁵ See, e.g., *Davidson County Broadcasting Company, Inc.*, 12 FCC Rcd 12245 (1997); *Broadcast Associates, Inc.*, 11 FCC Rcd 15479 (1996); *Buckley Broadcasting Corp.*, 11 FCC Rcd 6628 (1996); *Lanser Broadcasting Corp.*, 10 FCC Rcd 12121 (1995); *Ogden Broadcasting of South Carolina, Inc.*, 7 FCC Rcd 1895 (1992).

³⁶ *Bilingual*, 595 F.2d at 628-29 ("[I]n implementing its anti-discrimination policy, the Commission of necessity must investigate broadcasters' past employment practices. A documented pattern of intentional discrimination would put seriously into question a licensee's character qualification to remain a licensee: intentional discrimination almost invariably would disqualify a broadcaster from a position of public trusteeship.").

³⁷ *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976).

We continue to believe that Congress has ratified the Commission's authority to adopt and enforce EEO requirements against broadcasters under its statutory mandate to license and regulate broadcasters in the public interest.³⁸

26. There is a substantial body of case law establishing the principle that congressional approval and ratification of administrative interpretations of statutory provisions, including those granting jurisdiction to regulate, can be inferred from congressional acquiescence in a long-standing agency policy or practice.³⁹ The inference of ratification from congressional acquiescence in the Commission's exercise of authority to adopt and enforce EEO regulations is particularly strong. As noted above, the Commission has consistently taken the position over a very long period of time -- 30 years -- that it has authority under its public interest mandate to adopt and enforce EEO rules, and the obligations arising under those rules have become a major component of broadcasters' obligation to serve the public interest.⁴⁰ Moreover, as noted above, the Commission has enforced its regulations vigorously. These are not obscure agency rules that could have gone unnoticed by Congress.

27. But congressional ratification of the Commission's authority to adopt EEO rules need not be inferred solely from congressional acquiescence in the Commission's exercise of that authority over a period of many years. Congress has, in two major pieces of legislation, *expressly* approved and ratified the Commission's authority to regulate the EEO practices of its broadcast licensees and other media entities as well.

28. In 1984, Congress enacted Section 634 of the Communications Act⁴¹ as part of the Cable Communications Policy Act of 1984.⁴² Although the Commission at that time already had rules in place regulating the EEO practices of cable operators as well as broadcasters, Section 634 was intended to

³⁸ We note that while Congressional ratification applies equally to radio and television broadcasters -- which have been subject to the same EEO rules for the last 30 years -- it is relevant only to radio broadcasters since Congress enacted Section 334 of the Act, which, as discussed above, *expressly* authorizes the Commission to regulate the EEO practices of television broadcasters.

³⁹ See, e.g., *Haig v. Agee*, 453 U.S. 280, 300-06 (1981) ("*Haig*") (long-standing interpretation by the Secretary of State of its power under Passport Act of 1926 as encompassing the power to revoke passports to prevent damage to national security or foreign policy was ratified by congressional acquiescence, even though Secretary exercised power infrequently); *Lorillard v. Pons*, 434 U.S. 575, 580-85 (1978) ("*Lorillard*") (Congress is presumed to be aware of administrative and judicial interpretations of a statute and to adopt and ratify those interpretations when it re-enacts a statute without change or incorporates in a new law sections of a prior law that have a settled interpretation); *Zemel v. Rusk*, 381 U.S. 1, 9-13 (1965) ("*Zemel*") (Secretary of State's interpretation of Passport Act of 1926 as authorizing him to impose area restrictions was ratified by Congress when it left untouched the Secretary's broad rulemaking authority when it later enacted legislation relating to passports); *Norwegian Nitrogen Products Co. v. U.S.*, 288 U.S. 294, 313-15 (1933) ("administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful").

⁴⁰ See, e.g., *1969 Report and Order*, 18 FCC 2d at 241-42; *1976 Report and Order*, 60 FCC 2d at 229; *Report*, 9 FCC Rcd at 6285-87.

⁴¹ 47 U.S.C. § 554.

⁴² Pub. L. No. 98-549, 98 Stat. 2779 ("1984 Cable Act").

“codif[y] and strengthen[] the Commission’s existing equal employment opportunity regulations.”⁴³ Section 634 granted the Commission broad authority to adopt rules banning employment discrimination by cable operators and requiring cable operators to “establish, maintain, and execute a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of its employment policies and practices”⁴⁴

29. The legislative history of Section 634 makes it unmistakably clear that Congress believed that the Commission already possessed authority to regulate the EEO practices of mass media entities -- broadcast as well as cable. The House Commerce Committee Report on the bill proposing the provisions on which Section 634 was based explicitly confirmed the Commission’s authority to adopt EEO rules. The House Commerce Committee stated:

It is well established that the Commission has the authority to regulate employment practices in the communications industry. Among the Commission’s efforts in the equal employment opportunity (EEO) area over the last several years has been the enforcement of employment standards in the cable industry. Section 634 endorses and extends those standards.

Because of the potentially large impact cable programming and other services provided by the cable industry has on the public, the employment practices of the industry have an importance greater than that suggested by the number of its employees. The committee strongly believes that *equal employment requirements are particularly important in the mass media area* where employment is a critical means of assuring that program service will be responsive to a public consisting of a diverse array of population groups.⁴⁵

30. In addition to the explicit recognition of the Commission’s broad and “well established” authority to regulate employment practices in the communications industry, the legislative history of Section 634 shows that Congress viewed the legislation as codifying, strengthening and building upon the Commission’s pre-existing regulatory scheme, which it viewed as well within the Commission’s statutory authority. For example, the House Report states that the legislation “codifies and strengthens the Commission’s existing equal employment opportunity regulations.”⁴⁶ Further, it states that the statutory definition of the entities that are subject to the EEO requirements “endorses the Commission’s current practice of reviewing compliance with EEO standards by cable systems and other employment units with more than 5 employees, and extends the applicability of EEO requirements to headquarters operations.”⁴⁷ Similarly, it states that the provisions specifying the requirements for Commission EEO

⁴³ H.R. Rep. No. 934, 98th Cong., 2d Sess. 86 (1984), *reprinted in* [1984] U.S. Cong. News 4655. The Senate bill that was ultimately enacted, S. 66, did not contain EEO provisions. The EEO provisions that were eventually enacted as Section 634 originated in Section 635 of H.R. 4103, which is explained in H.R. Report No. 934, discussed below. The Senate adopted the explanation of H.R. 4103 contained in H.R. Report No. 934. *See* 130 C.R. S.14285 (Oct. 11, 1985), *reprinted in* [1984] U.S. Cong. News 4738.

⁴⁴ 47 U.S.C. § 554(b), (c), (d).

⁴⁵ H.R. Rep. No. 934, 98th Cong., 2d Sess. 84-85 (1984) (emphasis added).

⁴⁶ *Id.* at 86.

⁴⁷ *Id.*

rules “conform in large part to the Commission’s required EEO program under existing regulations.”⁴⁸ Clearly, Congress recognized and ratified the Commission’s broad authority to regulate the EEO practices of mass media entities.

31. Additional evidence of congressional ratification can be found in the Cable Television Consumer Protection and Competition Act of 1992,⁴⁹ which further strengthened the cable EEO requirements, extended those requirements to all MVPDs, and codified the Commission’s EEO program and nondiscrimination requirements as applied to broadcast television licensees. In so doing, Congress confirmed the importance of EEO rules for the electronic media generally. Moreover, Congress once again explicitly acknowledged the existence of the Commission’s broadcast and cable EEO requirements and proclaimed that vigorous enforcement of those rules was necessary. Section 22(a) of the 1992 Cable Act provides:

(1) *despite the existence of regulations governing equal employment opportunity, females and minorities are not employed in significant numbers in positions of management authority in the cable and broadcast television industries;*

(2) *increased numbers of females and minorities in positions of management authority in the cable and broadcast television industries advances the Nation’s policy favoring diversity in the expression of views in the electronic media; and*

(3) *rigorous enforcement of equal employment opportunity rules and regulations is required in order to effectively deter racial and gender discrimination.*⁵⁰

By extending the cable EEO requirements to every entity that provides multiple channels of video programming, such as MMDS operators and DBS licensees, Congress was building upon, and filling in the gaps in, the Commission’s regulatory scheme, ensuring that *every* electronic mass media provider would be subject to EEO regulations enforced by the Commission.

32. As noted above, the 1992 Cable Act not only strengthened and extended the cable EEO requirements, it also codified the Commission’s EEO requirements for broadcast television stations in Section 334 of the Act.⁵¹ Section 334 thus explicitly recognizes the existence of the Commission’s broadcast EEO Rule and requires the Commission to keep its EEO requirements in effect for television broadcasters.

33. Furthermore, Section 22(g) of the 1992 Cable Act required the Commission to report to Congress on “the effectiveness of [the Commission’s] procedures, regulations, policies, standards, and guidelines in promoting the congressional policy favoring increased employment opportunity for women and minorities in positions of management authority.” The Commission was required to include in that

⁴⁸ *Id.* at 87.

⁴⁹ Pub. L. No. 192-385, 106 Stat. 1460.

⁵⁰ 1992 Cable Act, Section 22(a) (emphasis added). *See also* H.R. Rep. No. 628, 102d Cong., 2d Sess. 111-17 (1992).

⁵¹ 47 U.S.C. § 334. *See also* Conf. Rep. No. 862, 102d, 2d Sess 97 (1992).

report “such legislative recommendations to improve equal employment opportunity in the broadcasting and cable industries as it deems necessary.” We do not believe that Congress would have directed the Commission to review the effectiveness of its broadcast and cable EEO policies and regulations then in effect, and recommend whether further legislative action was necessary, had Congress not believed that those policies and regulations were within the Commission’s lawful authority.⁵² Thus, Section 22(g) is further evidence of Congress’ affirmative approval of the Commission’s authority to adopt equal employment opportunity requirements for broadcasters.⁵³

34. It is within this historical context that the Commission’s statutory authority to regulate the EEO practices of broadcast licensees must be viewed. As discussed above, the Supreme Court has inferred congressional ratification of administrative action from “nothing more than silence in the face of an administrative policy.”⁵⁴ Here, the inference of congressional ratification rests on far firmer ground, including explicit statements confirming the Commission’s authority to regulate the EEO practices of media companies and legislation that codified and expanded the reach of Commission EEO regulations.⁵⁵ Under these circumstances, the inference of congressional ratification is inescapable.⁵⁶

35. Notably, despite voluminous comments filed in this proceeding, only one commenter challenges the Commission’s position that its statutory authority to regulate the EEO practices of

⁵² We note that the Commission’s EEO rules for broadcasters apply to radio as well as television stations.

⁵³ See, e.g., *Bob Jones University v. United States*, 461 U.S. 574 (1983) (“*Bob Jones University*”).

⁵⁴ *Haig*, 453 U.S. at 300, citing *Zemel*, 381 U.S. at 11 and other Supreme Court cases.

⁵⁵ The facts here give rise to an even stronger inference of congressional ratification than was present in *City of New York v. FCC*, 486 U.S. 57 (1988), for example. In that case, cable television franchisors challenged the Commission’s authority, in adopting regulations establishing cable signal quality technical standards, to forbid state and local authorities to impose more stringent technical standards. In determining that the Commission acted within its statutory authority in preempting state and local standards, the Supreme Court found that Congress in the Cable Act of 1984 endorsed the Commission’s longstanding policy of federal preemption of cable technical standards, and that it was “quite significant” that there was no evidence of any intent by Congress to “overturn the Commission’s decade-old policy without any discussion or even any suggestion that it was doing so.” *Id.* at 67-68. In the case of the Commission’s jurisdiction to regulate in the EEO area, there is affirmative evidence of congressional approval of the Commission’s statutory authority.

⁵⁶ See, e.g., *City of New York v. FCC*, *supra*; *Bob Jones University*, 461 U.S. at 601 (finding that “Congress affirmatively manifested its acquiescence” in the IRS’ statutory interpretation that educational institutions that discriminate on the basis of race are not eligible for an income tax exemption when it enacted a new provision denying tax-exempt status to social clubs that discriminate on the basis of race); *U.S. v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) (“once an agency’s statutory construction has been fully brought to the attention of the public and the Congress and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned”), quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 487-89 (1940); *Lorillard*, 434 U.S. at 580 (where Congress adopted a new law incorporating sections of a prior law, it can be presumed to have had knowledge of and approved the interpretation given to the prior law); *Zemel*, 381 U.S. at 12 (Congress ratified Secretary of State’s authority to refuse to impose area restrictions on travel when “[d]espite 26 years of executive interpretation of the 1926 Act as authorizing the imposition of area restrictions, Congress in 1952, though it once again enacted legislation relating to passports, left completely untouched the broad rule-making authority granted in the earlier Act.”).

broadcasters has been ratified by Congress. Evening Post Company and Great Empire Broadcasting, Inc. (Evening Post) argues that Congress has not ratified the Commission's authority to regulate EEO practices of broadcasters because: (i) Section 334 of the Communications Act is framed in negative terms and thus limits, rather than expands, the Commission's authority; and (ii) Section 334 of the Communications Act was enacted by the 1992 Cable Act, thus somehow diminishing the import of the findings in Section 22(a) of the Cable Act regarding the need for EEO regulation of cable and broadcast television. Evening Post also asserts that "it could be argued" that Congress' grant to the Commission of explicit authority to adopt rules for cable and multichannel video program distributors indicates that it did not intend that the Commission would have statutory authority to regulate EEO practices in the broadcast industry.⁵⁷

36. Evening Post's argument is belied by both the facts and the law. As a general matter, we note first that Evening Post fails to acknowledge congressional acquiescence in the Commission's exercise of its jurisdiction to regulate EEO practices of broadcasters for the past 30 years. More specifically, though it is true that Section 334 is drafted in negative terms, that provision requires the Commission, in substance, to continue applying to television broadcasters the EEO rules that were in effect when Section 334 was enacted. Indeed, the Conference Report on the 1992 Cable Act makes it clear that this was Congress' intent.⁵⁸ However drafted, we cannot see how this provision can be viewed as anything other than an endorsement of the Commission's authority to regulate the EEO practices of broadcast television licensees and a directive that it continue to do so.⁵⁹ Further, we fail to see how the fact that Section 334 of the Communications Act was enacted by the 1992 Cable Act in any way

⁵⁷ Evening Post Comments at 4-6.

⁵⁸ See H.R. Rep. No. 862, 102d Cong., 2d Sess 97 (1992) (section 334 "codifies the Commission's equal employment opportunity rules").

⁵⁹ Smithwick and Belendiuk (S&B) argues that Section 334 forbids the Commission from changing its EEO program requirements. See S&B Comments at 12-15 (law firm representing over 300 broadcast stations). We disagree. As discussed above, while Section 334 is drafted as a prohibition, it requires in essence that the Commission continue applying to television broadcasters the EEO Rule that was in effect on September 1, 1992. Thus, Congress clearly intended that the FCC enforce equal employment obligations against broadcasters. While the Commission cannot continue to enforce those portions of the 1992 EEO Rule that were invalidated on constitutional grounds, the Commission can most faithfully advance the congressional intent underlying Section 334 by adopting new outreach rules to replace those that were invalidated. Section 334 is unlike the statute at issue in *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) ("*MCI*"), cited by S&B. See S&B Comments at 13. In *MCI*, the D.C. Circuit found that the Commission lacked authority to prohibit non-dominant common carriers of interstate telephone service from filing tariffs. The court found that Section 203(a) of the Communications Act explicitly requires the filing of tariffs, and that the Commission's authority to "modify" this requirement pursuant to another statutory provision does not authorize it to forbid the filing of tariffs. There was no indication that Congress intended to relieve common carriers of the tariff-filing obligation, and there was unambiguous language requiring statutory filing, *id.* at 1192. Here, in contrast, Congress clearly intended that the Commission impose equal employment opportunity obligations on broadcasters. Indeed, Congress found the need for such requirements so compelling that it forbade the Commission from revising its EEO rules then in effect. Moreover, in *MCI*, the Commission's abandonment of its tariff requirement reflected a shift in the Commission's previous view of the statutory tariff-filing obligation. *Id.* at 1192-93. Here, the Commission has consistently, since 1969, interpreted its statutory authority as permitting the imposition of EEO requirements on broadcasters, and Congress has acquiesced in, and ratified, that view.

diminishes the import of the findings in Section 22(a) of the Cable Act. On the contrary, it makes even clearer their relevance to the Commission's authority to regulate broadcasters.

37. Evening Post's final argument -- that Congress' explicit grant to the Commission of authority to regulate the EEO practices of cable entities and other MVPDs in the 1992 Act indicates that it "did not intend for the Commission to have statutory authority to take action on broadcast EEO matters" -- is specious and is directly contradicted by the legislative histories of the 1984 and 1992 Cable Acts. Evening Post's argument might have some force if the original Communications Act of 1934 had granted the Commission authority to regulate the EEO practices of certain specified entities but *not* the EEO practices of broadcasters. One could then argue that the omission of authority to regulate broadcasters' EEO practices was intentional. But Congress was not writing on a blank slate when it granted the Commission explicit statutory authority to regulate cable EEO practices in 1984 and expanded that authority in 1992 to include all MVPDs. As discussed above, it *knew* at that time that the Commission had been regulating the EEO practices of broadcast licensees since 1969 and it explicitly *acknowledged* the Commission's statutory authority to do so. As the large body of case law cited above establishes, Congress would have had to affirmatively indicate its *disapproval* of the Commission's long-standing, consistent and vigorous exercise of its authority to regulate the EEO practices of broadcasters in order to avoid the inference of congressional ratification. It did the opposite, recognizing the Commission's "well-established" authority and indicating that its intent was to endorse and strengthen the Commission's EEO regulations. The legislative record thus belies Evening Post's suggestion that Congress did not intend the Commission to have statutory authority to regulate broadcast EEO practices.

38. There is another, particularly compelling reason to find in the current statutory context that Congress has ratified our authority to regulate the EEO practices of broadcasters. In resolving issues of administrative or judicial jurisdiction, the Supreme Court has held that any interpretation of congressional intent that will result in a "bizarre jurisdictional patchwork" is to be disfavored absent legislative history or a persuasive functional argument to the contrary.⁶⁰ In this case, Congress has *explicitly* granted the Commission authority to regulate the EEO practices of television broadcasters, cable entities, and all other MVPDs, including such relative newcomers as DBS and MMDS operators.⁶¹ Thus, rejecting the inference of congressional ratification would leave us in the anomalous situation of having jurisdiction to regulate the EEO practices of broadcast television and cable television providers and MVPDs, but *not* radio broadcasters. There is no indication in the legislative history that this was Congress' intent. On the contrary, Congress has indicated its belief that Commission enforcement of EEO rules for the electronic media is essential and, building upon the foundation established by the Commission's broadcast EEO Rule, Congress enacted legislation to ensure that *every* medium of mass communication is subject to such rules. It would defeat that clear congressional intent and create a "bizarre jurisdictional patchwork" for us to hold that we lack statutory authority to enforce EEO rules against radio stations -- the oldest and arguably the most pervasive of the electronic media.

39. For the foregoing reasons, we find that Congress has granted us explicit authority to regulate the EEO practices of television licensees and has ratified our authority to regulate the EEO

⁶⁰ *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 799 (1985); *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 197 (1980).

⁶¹ 47 U.S.C. §§ 334, 554.

practices of radio licensees. Whatever uncertainty may have existed 30 years ago concerning whether the Commission's public interest mandate was broad enough to authorize EEO regulation has now been resolved by congressional acquiescence and both tacit and explicit congressional approval.

40. Although we sought and received extensive public comment on the nexus between EEO regulation and our public interest mandate to foster diversity of programming, we have concluded that resolution of that issue is not dispositive, in and of itself, of our statutory authority for two reasons. First, as discussed above, Congressional ratification provides an independent basis for our authority. Second, it is clear from reviewing the 1984 and 1992 Cable Acts and their legislative histories that Congress's purpose in granting us authority to regulate the EEO practices of video providers and in ratifying our authority to regulate the EEO practices of broadcasters was partly but not solely to foster diversity of programming. Congress endorsed recruitment and nondiscrimination requirements for two distinct purposes: to foster diverse programming by increasing the number of women and minorities in positions that have an impact on programming decisions, *and* to deter racial and gender discrimination. Both are set forth as express purposes of the cable EEO rule amendments enacted in 1992. As noted above, Congress stated that EEO rules both "advance[] the Nation's policy favoring diversity in the expression of views in the electronic media" and are "required in order to effectively deter racial and gender discrimination."⁶² Congress plainly thought it important to increase the number of minorities and women in upper-level positions in order to further the national policy favoring the expression of diverse views and perspectives in the electronic media.⁶³ But it is also clear that Congress did not limit the EEO requirements to upper-level positions. Section 634(d)(1) required the Commission to amend its cable EEO rules, including its recruitment rules, to "promote equality of employment opportunities for females and minorities in each of the job categories itemized" in section 634(d)(3). Those include *all* categories of employment, including such categories as "semiskilled operatives" and "unskilled laborers" that appear to have no direct influence on programming.⁶⁴ Similarly, the broadcast EEO Rule that Section 334 codified applied to all categories of employment, not just management or program-related positions. We believe that Congress required us to adopt and enforce EEO program requirements with respect to all job categories, including lower-level jobs, because word-of-mouth recruitment practices may be inherently discriminatory when minorities and women are poorly represented on an employer's staff -- particularly when they are scarce in the management ranks where hiring decisions are made. Outreach in recruitment, as well as a nondiscrimination requirement, is necessary to deter discrimination in such circumstances so that the homogenous workforce does not simply replicate itself.

41. Since Congress clearly intends that we apply recruitment and other EEO requirements to *all* job categories in order to deter discrimination, we have concluded that we should apply our new EEO

⁶² 1992 Cable Act, Section 22(a). *See also* H.R. No. 102-628, 102d Cong., 2nd Sess. 111-12 (1992) ("The Committee finds that continued rigorous enforcement of equal employment opportunity rules and regulations is required in order to deter effectively racial and gender discrimination.").

⁶³ *See* 1992 Cable Act, Section 22(a)(2) ("increased numbers of females and minorities in positions of management authority in the cable and broadcast television industries advances the Nation's policy favoring diversity in the expression of views in the electronic media...").

⁶⁴ The 1984 Cable Act required the Commission to adopt EEO requirements for job categories ranging from officials and managers to lower-level positions such as unskilled laborers and service workers. In the 1992 Cable Act, Congress expanded the number of those job categories from nine to 15.

requirements to all job categories even if we were to conclude that some of those categories have no impact on programming decisions. Therefore, we conclude that whether there is a nexus between EEO regulation for all job categories and our public interest mandate to foster diversity of programming is not dispositive of our statutory authority. We nevertheless address in the following sections the nexus between our EEO rules and our statutory mandates to foster diversity of programming and minority ownership because we believe that the rules we adopt today further, and thus find additional statutory support in, those mandates.

c. Section 309(j)

42. In the *NPRM*, we observed that Section 309(j) of the Communications Act establishes a congressional policy favoring the dissemination of licenses among a wide variety of applicants, including members of minority groups and women, as part of a broad policy of fostering economic opportunity.⁶⁵ Section 309(j), as amended in 1997, requires the Commission to award all commercial broadcast licenses for which mutually exclusive applications are filed (except for initial digital television applications) by competitive bidding.⁶⁶ In implementing the competitive bidding requirements, the Commission must:

promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women⁶⁷

Additionally, the Commission must promote “economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women,” and ensure that those entities “are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures”⁶⁸

43. We tentatively concluded in the *NPRM* that Section 309(j) provides statutory authority to implement new EEO rules because the statutory goal of fostering minority and female ownership in the provision of commercial spectrum-based services would be furthered by nondiscrimination and outreach requirements, which are designed to foster equal employment opportunities for minorities and women in the broadcast industry.⁶⁹ We stated our belief that employment in the broadcasting industry provides minorities and women with the skills needed to acquire and operate a broadcast station and may help them in becoming aware of ownership opportunities. Such employment may also facilitate their acquisition of capital needed to purchase a broadcast station, as financing sources are generally more willing to work with borrowers that have a track record in the business they seek to own and operate.

⁶⁵ *NPRM*, 13 FCC Rcd at 23017-18 (paras. 36-37).

⁶⁶ 47 U.S.C. § 309(j), as amended by Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997).

⁶⁷ 47 U.S.C. § 309(j)(3).

⁶⁸ 47 U.S.C. § 309(j)(4).

⁶⁹ *NPRM*, 13 FCC Rcd at 23018 (paras. 37-38).

Furthermore, we noted that we have previously concluded that there is a link between the policies furthered by our EEO rules and the fostering of ownership by minorities and women.⁷⁰ We also noted that Congress appears to have concluded that such a link exists. In codifying the cable EEO requirements in 1984, the House Commerce Committee asserted that “a strong EEO policy is necessary to assure that there are sufficient numbers of minorities and women with professional and management level experience within the cable industry, so that there are significant numbers of minorities and women with the background and training to take advantage of existing and future cable system ownership opportunities.”⁷¹ We asked commenters to submit evidence establishing the nexus between employment opportunities for minorities and women and ownership opportunities.

44. After considering the comments received in response to the *NPRM*, we conclude that Section 309(j) provides statutory authority to implement new EEO rules. We disagree with commenters who maintain that our reliance on Section 309(j) is misplaced because it relates to the use of competitive bidding for commercial broadcast licenses.⁷² As we pointed out in the *NPRM*, the reference in Section 309(j) to tax certificates, a preferential tax treatment available upon the sale of broadcast stations and cable systems to minorities, suggests that Congress did not intend to limit the Commission’s authority under Section 309(j) to measures directly associated with the competitive bidding process.

45. Moreover, we believe that there is a strong nexus between employment of minorities and females and ownership opportunities. Numerous commenters support this view.⁷³ MMTC asserts that employment opportunities help minorities obtain the skills needed to become owners.⁷⁴ AWRT states that increasing the number and type of employment opportunities available for women and minorities will increase the number of women and minorities who seek ownership opportunities because training

⁷⁰ See, e.g., *Report*, 9 FCC Rcd at 6319 (noting that “management positions ... are often stepping stones to ownership.”); *Regulatory Treatment of Mobile Services, Third Report and Order*, 9 FCC Rcd 7988, 8097 (1994) (“EEO rules for commercial mobile radio service (CMRS) providers are appropriate and necessary to achieve the statutory goal of increased ownership opportunities for minorities and women in spectrum-based services. By having EEO rules that apply to all CMRS providers, we will provide increased communications experience for minorities and women. This experience will, in turn, enable them more easily to become owners of communications enterprises.”).

⁷¹ H.R. Rep. No. 934, 98th Cong., 2d Sess. at 84-85 (1984). Congress reiterated this position when it passed the 1992 Cable Act, declaring that “a strong EEO policy is necessary to assure sufficient numbers of minorities and women gain professional and management level experience within the television industry, and thus that significant numbers of minorities and women obtain the background and training to take advantage of existing and future television broadcasting ownership opportunities.” H.R. Rep. No. 628, 102d Cong., 2d Sess. at 114 (1992).

⁷² National Association of Broadcasters (NAB) Comments at 18; Evening Post Comments at 6.

⁷³ See e.g., Minority Media and Telecommunications Council and 29 other organizations (MMTC) Comments at 169; American Women in Radio and Television (AWRT) Comments at 7 (a national, non-profit organization of professional women and men who work in radio, television, cable, advertising and related fields); National Hispanic Foundation for the Arts (NHFA) Comments at 6-10 (non-profit organization whose mission is to improve the image of Latinos in this country by developing a better perception of Latinos in the entertainment industry); NOW Foundation and five other organizations (NOW) Comments at 8-11; U.S. Small Business Administration (SBA) Comments at 1.

⁷⁴ MMTC Comments at 169.

and experience are “critical elements” in deciding to seek ownership of broadcast and cable facilities.⁷⁵ AWRT also states that an informal survey of its membership reveals that those members who are, or have been, owners of broadcast facilities had significant prior experience working in the industry and view their employment experiences as integral to both their decision to move up to ownership and their success as an owner.⁷⁶ According to NOW, the connection between management experience and ownership opportunities is “fundamental.”⁷⁷ NOW posits that “[w]omen and minorities have a particular need for broadcast experience because they typically must be more qualified than their White male counterparts in order to find financial backing. Under-capitalization poses one of the most significant obstacles to women and minorities hoping to purchase mass media outlets.”⁷⁸

46. Commenters also cite the experiences of broadcast station owners and provide affidavits from numerous broadcast station owners as evidence of the nexus between employment and ownership opportunities.⁷⁹ Many of these owners describe how they or their colleagues started in entry-level or even internship positions and worked their way up the ladder to management positions and then to ownership.⁸⁰ In addition, many of the owners attest that employment opportunities provide minorities and women with the skills and training needed to acquire and successfully operate stations;⁸¹ that lack of access to capital is one of the greatest impediments to broadcast station ownership by minorities and women;⁸² and that broadcast experience, particularly management experience, is essential for minorities and women to secure financing to acquire stations.⁸³ Further, a number of the station owners express concern

⁷⁵ AWRT Comments at 7.

⁷⁶ *Id.*

⁷⁷ NOW Comments at 8.

⁷⁸ *Id.* at 10.

⁷⁹ *See, e.g.*, NOW Comments at 12 (citing the experiences of Cathy Hughes, CEO of Radio One, and Joseph Rey, the principal investor in Rainbow Broadcasting Ltd., as evidence of the nexus between employment opportunities for women and minorities and ownership opportunities); NHFA Comments at 6-11 and Testimony of Nely Galán (citing the experience of Nely Galán, President of Entertainment at Telemundo Network Group, LLC, as evidence that a strong nexus exists between hiring minorities and women and promoting ownership opportunities for these groups); MMTC Comments, Vol. III, Exhibits 1, 2, 3, 6, 8, 9, 10, 11, 12, 17, 19, 20, 21 and 22.

⁸⁰ MMTC Comments, Vol. III, Exhibits 1 (Declaration of Alfredo Alonso), 3 (Declaration of W. Don Cornwell), 8 (Declaration of Serena Ferguson Mann), 9 (Declaration of Skip Finley), 10 (Declaration of Ragan A. Henry), 11 (Declaration of Cathy Hughes), 12 (Declaration of Chesley Maddox-Dorsey), 19 (Declaration of Rokia Smith) and 20 (Declaration of Jeffrey H. Smulyan).

⁸¹ MMTC Comments, Vol. III, Exhibits 1 (Declaration of Alfredo Alonso), 2 (Declaration of Thomas Castro), 10 (Declaration of Ragan A. Henry), 11 (Declaration of Cathy Hughes), 12 (Declaration of Chesley Maddox-Dorsey), 17 (Declaration of Russell Perry), 21 (Declaration of Dennis Swanson) and 22 (Declaration of James L. Winston); NHFA Comments, Testimony of Nely Galán.

⁸² MMTC Comments, Vol. III, Exhibits 6 (Declaration of Willie D. Davis), 10 (Declaration of Ragan A. Henry), 12 (Declaration of Chesley Maddox-Dorsey), 17 (Declaration of Russell Perry) and 22 (Declaration of James L. Winston).

⁸³ MMTC Comments, Vol. III, Exhibits 1 (Declaration of Alfredo Alonso), 6 (Declaration of Willie D. Davis),

that, without any EEO outreach requirements, minorities and women will not have the opportunity to obtain the training and experience needed to move up to station ownership.⁸⁴

47. NAB rejects this evidence as “irrelevant or anecdotal at best.”⁸⁵ However, NAB does not explain why it believes that this evidence is irrelevant, nor does it explain why it thinks that the Commission should disregard anecdotal evidence from an array of individuals with extensive experience in the broadcast industry.⁸⁶ Another commenter argues that the proposed broadcast EEO Rule rests upon the unsupported assumption that “all broadcast employees are on a lifetime broadcast career track, from entry level through programming and management ranks to ownership.”⁸⁷ This commenter asserts that many employees in fact leave broadcast stations to go to work for nonbroadcast employers⁸⁸ and cites numerous examples of minority and female employees who left broadcasting to pursue other careers.⁸⁹ This argument misses the point. It is not necessary to find that all minority and female employees, or even a majority of minority and female employees, move up through the ranks to ownership in order to establish a nexus between minority and female employment and ownership opportunities. Rather, we think it is sufficient that the employment of minorities and women in the broadcast industry greatly enhances the opportunities for minorities and women to own broadcast stations and that, without such employment, ownership opportunities for minorities and women will be diminished. Based on the record, we conclude that this is the case.

d. Public Interest Mandate to Promote Programming Diversity

48. An additional statutory basis for new EEO rules is grounded in the Commission’s authority to regulate broadcasting to serve the public interest and promote diversity of programming.⁹⁰ The

11 (Declaration of Cathy Hughes), 12 (Declaration of Chesley Maddox-Dorsey) and 21 (Declaration of Dennis Swanson).

⁸⁴ MMTC Comments, Vol. III, Exhibits 2 (Declaration of Thomas Castro), 6 (Declaration of Willie D. Davis), 11 (Declaration of Cathy Hughes), 12 (Declaration of Chesley Maddox-Dorsey) and 17 (Declaration of Russell Perry).

⁸⁵ NAB Reply Comments at 2.

⁸⁶ See *Mausolf v. Babbit*, 125 F.3d 661, 667-70 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 2366 (1998) (“*Mausolf*”) (regulations promulgated by an agency will be upheld if they are reasonably related to the purposes of the enabling legislation; under rational basis test of 5 U.S.C § 706(2)(A), snowmobiling restrictions were rationally based on biological opinions finding possible adverse impact of snowmobiling on gray wolf population and on anecdotal evidence in record of harassment of gray wolves). Cf. *Schliefer v. City of Charlottesville*, 159 F.3d 843, 849, 850 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 1252 (1999) (“*Schliefer*”) (In the First Amendment context, where government must demonstrate that the recited harms are real, not merely conjectural and that the regulation will in fact alleviate these harms in a direct and material way, the standard “has never required scientific or statistical ‘proof’ of the wisdom of the legislature’s chosen course;” anecdotal evidence cited by the court).

⁸⁷ Haley Bader & Potts (HBP) Comments at 21 (law firm representing owners of 30 radio stations).

⁸⁸ *Id.*

⁸⁹ HBP Comments, Declaration of Harold W. Gore at 2; Declaration of John J. Sowada at 2; Declaration of Eric F. Brown at 2; Declaration of Louis H. Burton, Jr. at 2; Declaration of Mike Boen at 2; Declaration of Dave Vagle at 2.

⁹⁰ We discussed this statutory basis in the *NPRM*, 13 FCC Rcd at 23019-22 (paras. 39-45).

Commission has broad authority under the Communications Act to regulate and license broadcasters as the public convenience, interest, or necessity requires.⁹¹ Moreover, Congress amended Section 1 of the Communications Act in 1996 to make it clear that the Commission's mandate is to regulate interstate and foreign communications services so that they are "available, so far as possible, to all people of the United States, *without discrimination on the basis of race, color, religion, national origin, or sex*"⁹² This recent amendment, which applies to all entities subject to the Communications Act,⁹³ amplifies the Commission's general public interest mandate to ensure that broadcasting and other programming services serve the needs and interests of all sectors of the community, and indicates more specifically that such services shall be provided to all Americans without discrimination on the basis of race or any other suspect classification. Further, in Section 257(b) of the Communications Act,⁹⁴ Congress specifically identifies "diversity of media voices" as one of the "policies and purposes" of the Communications Act.

49. A broadcaster can more effectively fulfill the needs of its community, and therefore serve the public interest, when it provides equal employment opportunity to all applicants and employees regardless of race, ethnic origin, color, or religion. Such a program furthers one of the Commission's main objectives, to promote diverse programming -- programming that airs different points of view and reflects the needs and interests of all sectors of the community, including minorities and women. As the Commission stated in *Streamlining* and the *NPRM*, we do not assume that minority and female employment will always result in minority and female-oriented programming. Nor do we believe that all minorities or all women share the same viewpoints.⁹⁵ Nonetheless, we believe that, as more minorities and women are

⁹¹ This authority is based on several provisions of the Act. For example, Section 301 of the Act provides that no person can transmit radio signals in the U.S. except under a license granted by the Commission. 47 U.S.C. § 301. Section 303 authorizes the Commission to license and regulate use of the radio spectrum "as public convenience, interest, or necessity requires," to "generally encourage the larger and more effective use of radio in the public interest," and to enact regulations to carry out the provisions of the Act. 47 U.S.C. § 303(f), (g), and (r). The Supreme Court has held that Section 303(r) confers authority on the Commission to issue regulations codifying its view of the public interest licensing standard, so long as that view is based on consideration of permissible factors and is otherwise reasonable. *National Citizens*, 436 U.S. at 793. Section 307 directs the Commission to grant and renew station licenses "if public convenience, interest, or necessity will be served thereby." 47 U.S.C. § 307(a), (b). Section 309 directs the Commission to determine whether the "public interest, convenience, and necessity will be served" by the grant of applications for licenses, license modifications, or license renewals. 47 U.S.C. § 309(a). Section 310(d) imposes the same standard on the grant of assignment and transfer applications. *See* 47 U.S.C. § 310(d). The 1996 Act modified the procedures for processing broadcast renewal applications and refined the standard to be applied by the Commission in determining whether to grant renewal applications. Prior to enactment of the 1996 Act, the grant of renewal applications was controlled by the general "public interest, convenience, and necessity" standard set forth in Section 309(a). As amended in 1996, the Communications Act directs the Commission to grant a broadcast renewal application if it finds, with respect to the station at issue, that the licensee has served the public interest, convenience, and necessity; the licensee has not committed any serious violations of the Act or the FCC's rules; and the licensee has not committed a series of violations of the Act or rules that constitute a pattern of abuse. 47 U.S.C. § 309(k). The 1996 amendment thus makes it clear that the public interest standard is broader in scope than compliance with specific provisions of the Communications Act or the Commission's Rules.

⁹² 47 U.S.C. § 151, as amended (1997) (emphasis added) (*italicized clause added by the 1996 Act*).

⁹³ H.R. Rep. 104-458, 104th Cong., 2d Sess. at 143.

⁹⁴ 47 U.S.C. § 257(b).

⁹⁵ *NPRM*, 13 FCC Rcd at 23020 (para. 41).

employed in the broadcast industry, it is more likely that varying perspectives will be aired and that programming will be oriented to serve more diverse interests and needs than would be the case if stations employed few minorities and women.⁹⁶

50. Congress has recognized the nexus between diversity of employment and diversity of programming, as evidenced by the legislative history of the Cable Television Consumer Protection and Competition Act of 1992, where it noted that:

The Committee believes now, as it did in 1984, that increased equal employment opportunities (EEO) for women and minorities, particularly in decision-making and managerial positions, '... is a crucial means of assuring that program service will be responsive to a public consisting of a diverse array of population groups.'⁹⁷

51. Moreover, the Supreme Court has recognized that the FCC has statutory authority to regulate the employment practices of its licensees as a way of fostering diversity of viewpoints in programming. Such regulation, the Court stated, "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 ... to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups."⁹⁸ In addition, in *Metro Broadcasting, Inc. v. FCC*,⁹⁹ the Supreme Court held that two minority ownership policies -- the award of an "enhancement" for minority ownership in comparative proceedings for new broadcast licenses and the minority "distress sale" policy -- were substantially related to the important governmental objective of "enhancing broadcast diversity," and thus survived an intermediate level of equal protection scrutiny. Although the *Adarand* decision reversed *Metro Broadcasting* to the extent that *Metro Broadcasting* held that federal racial classifications are subject to a less rigorous standard of scrutiny than state racial classifications, it did not

⁹⁶ *NPRM*, 13 FCC Rcd at 23020 (para. 41), citing *Streamlining*, 11 FCC Rcd at 5155-56. According to Office of Communication, Inc, United Church of Christ and seven other organizations (UCC), social science studies indicate that "race is relevant to viewpoint." Comments of UCC, Appendix at 24 n.80. UCC also cited a study conducted by the American Bar Association Journal and the National Bar Association Magazine that indicates differing perceptions of Black and White lawyers on the fairness of the judicial system as applied to Blacks. *Id.*

⁹⁷ H. R. Rep. No. 628, 102d Cong., 2d Sess. 111 (1992), quoting, H. R. Rep. No. 934, 98th Cong., 2d Sess. 85 (1984). *Accord*, H. R. Rep. No. 628, 102d Cong., 2d Sess. 114 (1992):

The Courts and the Commission have consistently recognized the increasing amount of programming designed to address the needs and interests of minorities and women is fundamentally related to the number of minority and women employees in the upper-level positions within media companies. In addition, the Committee recognizes that a strong EEO policy is necessary to assure sufficient numbers of minorities and women gain professional and management level experience within the television industry, and thus that significant numbers of minorities and women obtain the background and training to take advantage of existing and future television broadcasting ownership opportunities.

⁹⁸ *NAACP v. FCC*, 425 U.S. 662, 670 n.7 (1976) [citing *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) ("*Office of Communication*")]. *Cf. National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (FCC has authority under its public interest mandate to regulate anti-competitive practices of broadcast networks that prevented networks or licensees from making the fullest use of radio in the public interest).

⁹⁹ 497 U.S. 547 (1990).

alter the recognition that the Commission's statutory mandate includes fostering a diversity of views in the broadcast service.¹⁰⁰

52. Contrary to the views expressed by some commenters, recognizing that there is a nexus between diversity of employment and diversity of programming does not amount to stereotyping. As the Court noted in *Metro Broadcasting*, with respect to the minority ownership policies at issue in that case:

The judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping. Congressional policy does not assume that in every case minority ownership and management will lead to more minority-oriented programming or to the expression of a discrete 'minority viewpoint' on the airwaves. Neither does it pretend that all programming that appeals to minority audiences can be labeled 'minority programming' or that programming that might be described as 'minority' does not appeal to nonminorities. Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. 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 homogeneous group.¹⁰¹

The Court added:

While we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves.¹⁰²

53. Thus, it is well established under *NAACP v. FPC*, *Metro Broadcasting* and Supreme Court decisions that preceded them, that fostering diversity of viewpoints is a goal encompassed by the Commission's public interest mandate.¹⁰³ Indeed, "it has long been a basic tenet of national

¹⁰⁰ According to the Court: "Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission. We have observed that the 'public interest' standard necessarily invites reference to First Amendment principles." *Metro Broadcasting*, 497 U.S. at 567, quoting *National Citizens Committee*, 436 U.S. at 795 and *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973).

¹⁰¹ *Metro Broadcasting*, 497 U.S. at 579.

¹⁰² *Id.* at 582.

¹⁰³ See, e.g., *National Citizens Committee*, 436 U.S. at 795-800; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). See also *Community Television of Southern California v. Gottfried*, 459 U.S. 498 (1983), which held that the FCC did not abuse its discretion when it declined to impose a greater obligation to provide special programming for the hearing impaired on a noncommercial licensee than a commercial licensee, even though the Rehabilitation Act of 1973 applies to the former but not the latter. The Court stated that the FCC cannot permit licensees to ignore the needs of particular groups within the viewing public, but held that the FCC's duty to enforce this obligation derives from the Communications Act, not other federal statutes. Thus, the Supreme Court acknowledged that the Commission's public interest mandate permits and perhaps requires it to determine whether its licensees are providing diverse programming to all sectors of its community. See Comments of UCC, Appendix at 23 and cases cited therein.

communications policy” that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”¹⁰⁴ The Court has noted that the benefits of diversity are not limited to minorities but, rather, redound to all viewers and listeners.¹⁰⁵

54. The courts have also recognized that there is a nexus between the identity of media owners and employees and diversity of programming. The minority ownership policies at issue in *Metro Broadcasting* withstood intermediate scrutiny because the Court found they were “substantially related” to the statutory goal of promoting diversity of information and viewpoints on the air waves.¹⁰⁶ Accordingly, the Court affirmed the FCC’s judgment that there is a nexus between rules fostering minority ownership of broadcast stations and the statutory goal of fostering diversity of viewpoints.¹⁰⁷ Further, in *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, the D.C. Circuit recognized the Commission’s authority to enforce both employment “affirmative action” and anti-discrimination rules in the license renewal context to advance its public interest mandate to foster diverse programming. The court held that the Commission had abused its discretion by unconditionally renewing a broadcast license where a substantial question of fact had been raised regarding whether the licensee had engaged in employment discrimination.¹⁰⁸

55. In *Lutheran Church*, the court concluded that the Commission’s broadcast EEO program requirements were not narrowly tailored to advance the stated interest in diversity because the requirements applied to low-level positions that lack influence over programming. In the *NPRM*, we stated our belief that program content is not determined solely by the individuals at the station with authority to select programming, but may also be influenced by interaction between these individuals and other station employees, which exposes the former to views and perspectives of the latter. We also noted that low-level positions provide a way for individuals with little or no communications experience, including minorities and women, to enter the broadcast and cable industries. This, in turn, could lead to higher-level positions of greater responsibility that could affect programming and/or provide the experience desired by financial institutions to finance ownership in the broadcast and cable industries.¹⁰⁹ We sought comment on these issues.¹¹⁰

¹⁰⁴ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27) [quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)].

¹⁰⁵ *Metro Broadcasting*, 497 U.S. at 568.

¹⁰⁶ *Metro Broadcasting*, 497 U.S. at 569-600. Cf. *National Citizens Committee*, 436 U.S. at 793-802 (recognizing nexus between diversity of ownership generally and diversity of viewpoints and upholding FCC’s broad authority to foster diversity of ownership).

¹⁰⁷ The Court noted that Congress had recognized the nexus between diversity of ownership and diversity of programming. *Metro Broadcasting*, 497 U.S. at 578-79.

¹⁰⁸ *Bilingual*, 595 F.2d at 628, 633-35. See also *National Organization for Women, New York Chapter v. FCC*, 555 F.2d 1002, 1017-19 (D.C. Cir. 1977); *Black Broadcasting Coalition of Richmond v. FCC*, 556 F.2d 59 (D.C. Cir. 1977) (*per curiam*).

¹⁰⁹ *NPRM*, 13 FCC Rcd at 23021-22 (para. 44).

¹¹⁰ *NPRM*, 13 FCC Rcd at 23022 (para. 45).

56. NAB and broadcasters question whether a nexus exists between employment of minorities and ownership opportunities. NAB asserts that the Commission has offered no evidence to support the existence of such a nexus.¹¹¹ In addition, these commenters question whether there is a nexus between minority and female employment and diverse programming.¹¹² NAB notes that the court in *Lamprecht v. FCC*,¹¹³ found the female ownership preference policy unconstitutional because it found no statistically meaningful link between ownership by women and programming of any particular kind, based on the evidence before it.¹¹⁴ According to the court, the only available study, upon which it relied heavily, showed that stations owned primarily by women are just one and a quarter times as likely to broadcast programming targeted at female audiences as are stations owned primarily by men.¹¹⁵ NAB also argues, citing *Lutheran Church*, that the Commission has failed to define “what it means by diverse programming,” and that the *Lutheran Church* court questioned whether “intrastation” diversity is an important interest.¹¹⁶

¹¹¹ NAB Comments at 18; NAB Reply Comments at 2. Institute for Justice (Institute) also argues that the Commission offers no evidence to support its view that increased employment of minorities and women will increase diverse programming. Institute Comments at 9 (public interest law firm whose mission includes advancing the civil rights of citizens).

¹¹² NAB Reply Comments at 2; Camrory Comments at 5; HBP Comments at 6, 20; Delta Radio, Inc. and 11 other broadcasters (Delta Radio) Comments at 11; 46 Named State Broadcast Associations (46 Named StBAs) Comments at 13; 46 Named StBAs Reply Comments at 12-14. HBP supplies declarations from its broadcast clients attesting to this conclusion and to the respondents’ inability “to provide an example of a programming decision that was influenced by the race or gender of a station staff member, whether or not the staff person was in a position to influence programming.” *Id.* at 20. Camrory, HBP and S&B also reject the notion that lower-level employees influence program content. Camrory Comments at 5; S&B Comments at 19; HBP Comments at 21. Camrory argues, however, that a nexus between minority and female employment and diverse programming need not be shown in order to justify the Commission’s EEO programs. According to Camrory, formats are selected based on audience demographics, which also affect hiring decisions. Camrory notes that it is not arguing that “the race or gender of a station employee -- high or lower level -- may not help shape a station’s non-entertainment programming. Thus, since news and public affairs programming is a very important public interest component of overall station operations, diverse employment may well contribute to a Commission-favored diversity of viewpoint at least as to non-entertainment programming.” Camrory Comments at 5-6. Camrory also concedes that “minority managers managing minority-owned stations (for example, an Hispanic-owned, Spanish language radio station) are much more attuned to the Hispanic community than are general market stations.” Camrory Comments at 6.

¹¹³ 958 F.2d 382 (D.C. Cir. 1992)

¹¹⁴ NAB Comments at 20, citing *Lamprecht*, 958 F.2d at 398.

¹¹⁵ *Lamprecht*, 958 F.2d at 397. By contrast, the court found that stations owned primarily by Indians or Alaskans are more than eleven times as likely to broadcast “Indian or Alaskan programming” as are stations with no Indian or Alaskan owners, while the multiplier for Asians or Pacific Islanders is more than eight, for Hispanics more than seven, for Blacks, almost four. *Id.* The Court did not define women’s programming. It noted that the Supreme Court in *Metro Broadcasting* had assumed that there is such a thing as “minority programming,” and it, in turn, assumed the same with respect to “women’s programming” and other distinct programming types. *Id.* at 395 and 395 n.4. It also noted that the study it cited did not define terms such as “women’s programming” or “minority programming” but relied instead on the reporting stations to characterize themselves. *Id.* at 396 n.8.

¹¹⁶ NAB Comments at 21-22.

57. In contrast, a variety of commenters believes there is a nexus between employment opportunities and diverse programming¹¹⁷ and that the Commission has authority to impose equal employment opportunity obligations to foster diverse programming as part of our public interest mandate.¹¹⁸ AFTRA concludes based on its experience administering hundreds of collective bargaining agreements with television and radio stations across the country that a nexus between employment of minorities and females at all levels and program diversity does exist. AFTRA notes that, while it cannot be said that program diversity at those stations results solely from the employment of minorities and females, it is its experience that these employees have considerable influence over programming. It adds that it represents a varied array of broadcast employees, including production assistants, writers, reporters and anchors, all of whom exert considerable influence over the production of programming.¹¹⁹

58. A number of commenters provide anecdotal or other evidence to show that there is a nexus between employment of minorities and women and program diversity. For example, Cathy A. Hughes states that "When we start seeing women in management positions, then we start getting coverage on breast cancer, premature child birth, and issues that are of interest to the overwhelming majority of women;" Paula Madison states that "Diversity plays an important role in how program decisions are made at NewsChannel4....At every point in [the process of developing news stories], there is a diverse group of people making the decisions, and the role of race in any of our stories is discussed regularly and openly throughout our staff;" and Dennis Swanson states "I believe that having a diversified staff at the department head level has helped WNBC be more conscientious towards a wider range of programming and news views. Our news director is an African-American woman, and our station relations director is a Latina woman. Both exert strong influences on our station's on-air content. In addition, minority news reporters, such as Ti Hua Chang, raise our level of sensitivity to minority communities."¹²⁰ The evidence suggests that employment of women and minorities at lower levels also promotes diversity because lower-level employees are sometimes promoted to higher levels.¹²¹ Some commenters furnish affidavits illustrating that

¹¹⁷ American Federation of Radio and Television Artists (AFTRA) Comments at 6 (national labor organization representing 80,000 performers in news, entertainment, advertising and sound recording industries); AWRP Comments at 6; MMTTC Comments at 148-49; UCC Comments at 13-14; NOW Comments at 12-20; NOW Reply Comments at 17-18; NHFA Comments at 6. NOW argues that the EEO rules have resulted in increased employment of women and minorities between 1971 and 1997 (with the percentage of women nearly doubling from 23.3% to 40.8% and the percentage of minorities more than doubling from 9.1% to 19%) and a consequent increase in program diversity. NOW Reply Comments at 19.

¹¹⁸ NOW Comments at 4; Lawyers Committee for Civil Rights Under Law Comments at 3-4.

¹¹⁹ AFTRA Comments at 6.

¹²⁰ MMTTC Comments, Volume III, Exhibits 11, 14, 21. *See also* MMTTC Comments, Volume III, Exhibits 2, 3, 7, 10: Declarations of Thomas Castro ("There is a direct linkage between integrating the work force and the product that goes on the air. . . . An interracial media staff is necessary to tell a facet of great stories that, otherwise, may never be told."); W. Don Cornwell (tie between employment diversity and program diversity); William H. Dilday ("An integrated workforce also works in more direct ways by increasing the availability of employees who can cover minority issues, know what questions to ask, and put a much more balanced story on the air." Black manager at station resulted in more balanced coverage with respect to sports at local Black colleges); Ragan A. Henry ("Minorities in the media will likely serve to broaden the view of managers on their community's perspectives."); Testimony of Nely Galan, NHFA Comments; NOW Comments at 14-20; UCC Comments at 14.

¹²¹ MMTTC Comments, Volume III, Exhibit 3: Declaration of W. Don Cornwell (virtually all managers at his

entry level positions may be stepping stones to higher-level positions that have a clear impact on programming.¹²² While NAB dismisses this evidence as anecdotal or irrelevant,¹²³ it does not explain why it is not relevant. We believe that we can rely in part on anecdotal evidence to establish a nexus between employment opportunity and diverse programming.¹²⁴ We believe that such reliance is particularly justified where the nexus is not easily susceptible to statistical proof because it is impossible to establish from empirical evidence the connection between programming decisions and the backgrounds of the decisionmakers.

59. The comments also indicate that there is an indirect nexus between employment opportunities and diverse programming because employment opportunities are linked to ownership opportunities and increased minority and female ownership leads to increased diversity of programming.¹²⁵ We have already discussed the record evidence of the nexus between employment opportunity and ownership. The comments also indicate that there is a nexus between diversification of ownership and diversity of programming. A number of commenters cite an econometric study by Jeff Dubin and Matthew L. Spitzer that concludes that “increasing the number of minority-owned broadcasting stations increases the amount of minority-oriented programming.”¹²⁶ This study, based on data compiled from a 1987 survey of radio stations conducted by the FCC, concludes:

To sum up the test of our hypotheses, then, we have seen that minority ownership has a distinct and significant impact on minority programming, even after we control for the composition of minorities in the marketplace. Programming does also respond to composition of minorities in the marketplace. The magnitude of the coefficients for Black

broadcasting company got their start in entry level positions). See NOW Reply Comments at 18 (“employees at all levels have the power to influence programming.”). AWRP asserts: “The individuals who hold lower-level positions are the ready pool of people available for internal training and promotion. In some cases, the best means to obtain the requisite experience to hold a position of greater influence, or to understand enough about the business to know what experience is necessary, is by working up from entry level positions.” AWRP Comments at 6. NOW agrees, noting that employees of diverse backgrounds bring different perspectives into the workplace that may influence the otherwise narrow programming choices of decision-makers and that lower-level jobs are also a stepping stone to upper-level employment. NOW cites several examples of upper-level employees who started as secretaries. NOW Comments at 18-19.

¹²² MMTC Comments, Volume III, Exhibits 4 (Declaration of Veronica Cruz), 9 (Declaration of Skip Finley), 10 (Declaration of Ragan A. Henry), 21 (Declaration of Dennis Swanson); NHFA Comments at 12 & Testimony of Nely Galan.

¹²³ NAB Reply Comments at 2.

¹²⁴ See *Mausolf, supra*; *Schliefer, supra*.

¹²⁵ UCC Comments at 13-14; UCC Appendix at 25-26; NOW Comments at 3, 8-9 ; NHFA Comments at 6, 11 and Testimony of Nely Galan; MMTC cites a 1990 survey of twenty Black broadcast station owners “which found that 50% of the owners had prior broadcasting experience before they purchased their first station.” MMTC Comments at 169, citing A. Evans, *Are Minority Preferences Necessary? Another Look at the Radio Broadcasting Industry*, 8 Yale Law and Policy Review 380, 391-92 (1990).

¹²⁶ Jeff Dubin & Matthew L. Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. Cal. L. Rev. 841 (1995).

ownership on Black programming and Hispanic ownership on Spanish programming are significantly larger than the coefficient for female ownership on female programming. We also see, however, that a greater degree of female ownership leads to increases in programming targeted to several other minority groups. Stations with female ownership are more likely to program primarily for females, but are also more likely to increase programming for Blacks, Hispanics, Asians, and American Indians. The combined effects are similar in magnitude to those for the minority group owners taken separately. To increase Black programming, it may be most effective to increase the number of Black owners. To increase minority programming, it would be at least as effective to increase the number of female owners. We did not find that increasing the number of radio stations in a market increased the amount of minority programming, but we did find that radio stations may be using the presence of other stations in the market that program for minorities as a signal to guide the stations in their programming choices. As the percentage of other stations programming for a given minority group increases, the likelihood that the respondent's station will program for that minority group increases as well.¹²⁷

Thus, this study suggests that increasing minority ownership leads to increases in programming directed primarily to members of minority groups. Therefore, contrary to views expressed by some commenters, market demographics do not appear to be the sole determinant of programming.

60. Further empirical evidence for the proposition that "minority ownership increases the net amount of minority-targeted programming" is found in a recent, as yet unpublished, study by Peter Siegelman and Joel Waldfogel.¹²⁸ Siegelman and Waldfogel "show that Black and White (and Hispanic/Anglo) preferences in radio programming are substantially different."¹²⁹ Their research and analysis also suggests that "minority ownership increases the net amount of minority-targeted programming. Even though most minority-targeted stations are White-owned, markets with more minority-owned stations also have more minority-targeted stations, which means that minority-owned stations add to the total programming available to minority listeners."¹³⁰

61. FCC staff analysis using the BIA MasterAccess data also indicates that minority-owned stations program differently, on the whole, from non-minority-owned stations. Over 78% of all minority-owned stations have Urban, Spanish, and Religion formats, compared with only 21% of stations in other small-station groups and 15% of stations in large station-groups.

¹²⁷ *Id.* at 869-72.

¹²⁸ Preference Externalities, Minority Ownership, and the Provision of Programming to Minorities, Peter Siegelman & Joel Waldfogel, mimeo. 27, The Wharton School, January 1999.

¹²⁹ *Id.* at 2. According to Siegelman and Waldfogel, "[w]e find very little overlap in listenership -- by and large, Blacks listen to Black format stations, Whites listen to White format stations, Hispanics to Hispanic format stations." *Id.* at 13. Just over half of Black listening is concentrated in only two formats, Black and Black/Adult Contemporary, which account for less than 2.5% of non-Black listening. *Id.* at 13-14. This study uses a list of 43 formats from Duncan's American Radio, Spring 1993 and 1997. Listening data is from Arbitron's Radio USA, Spring 1993 and 1997.

¹³⁰ *Id.* at 27.

62. Based on the foregoing, we believe that equal employment opportunities for minorities and women further the public interest goal of diversity of programming, both directly and also indirectly by promoting minority and female ownership. Accordingly, we believe that the governmental interest in fostering diversity of programming provides additional authority for reinstating EEO rules.

3. Annual Employment Reports

63. We tentatively concluded in the *NPRM* that we have authority to require broadcasters and cable entities to file annual employment reports to enable us to monitor industry employment trends.¹³¹ We observed that the court in *Lutheran Church* did not conclude that the Commission lacks authority to collect statistical employment data to analyze industry employment trends or to prepare our annual broadcast and cable employment trend reports. Further, we noted that the Commission has broad authority under the Communications Act to collect information and prepare reports.¹³² We also noted that the Commission is *required* by statute to collect employment data for the broadcast television and cable industries.¹³³

64. Although some commenters raised constitutional concerns, as discussed above, regarding the potential use of this data by the Commission and others, none of the commenters challenged our tentative conclusion that we have authority to collect the data.¹³⁴ We conclude that we have authority under the statutory provisions cited above to require broadcasters and cable entities to file annual employment reports to enable us to monitor industry employment trends. We continue to believe that knowledge of these industry trends will assist us in evaluating the effectiveness of, and continued need for, our EEO rules, and in making appropriate recommendations to Congress for legislative change. We note that the legislative history of the 1992 Cable Act indicates that Congress relied on the Commission's employment trend reports in concluding that women and minorities continue to be underrepresented in policy and decision making positions in the cable industry and that modifications of the cable EEO rules were necessary.¹³⁵ Moreover, as discussed above, we do not believe that the filing of annual employment reports will impermissibly pressure broadcasters or cable entities to adopt racial or gender preferences in hiring because the data in the annual employment reports will not be used for screening renewal applications or considered in assessing compliance with our EEO requirements.

¹³¹ *NPRM*, 13 FCC Rcd at 23022 (para. 47). On September 30, 1998, the Commission suspended the requirement for broadcast licensees and permittees to file annual employment reports (Form 395-B) until further notice while it considers the adoption of new EEO rules that address the concerns of the court in *Lutheran Church* and makes any appropriate changes to its data collection procedures. See *Suspension of Requirement for Filing of Broadcast Station Annual Employment Reports and Program Reports*, 13 FCC Rcd 21998 (1998) ("*Suspension Order*"). The annual employment reporting requirements for cable entities have remained in effect.

¹³² See, e.g., 47 U.S.C. §§ 154(k) (annual report to Congress); 308(b); 403.

¹³³ See 47 U.S.C. §§ 334(a)(2) and 554(d)(3).

¹³⁴ See AFTRA Comments at 7; Camrory Comments at 7-8; NHFA Comments at 15; NOW Comments at 28-29; SBA Comments at 1.

¹³⁵ See H.R. Rep. No. 628, 102d Cong., 2d Sess. 111 (1992).