

NOTICE

SHOULD YOU NO LONGER OPERATE THIS EMPLOYMENT UNIT, PLEASE FURNISH THE CURRENT OPERATOR'S NAME, ADDRESS, DATE OF TRANSFER AND RETURN THE FORM 395-A OR 395-M IMMEDIATELY. CALL (202) 418-1450 TO OBTAIN FORMS FOR NEWLY ACQUIRED UNITS OR IF YOU HAVE ANY EEO QUESTIONS.

THE PAYROLL PERIOD, SECTION I(E), IS THE END OF ANY TWO WEEK PERIOD BETWEEN JULY 1 AND SEPTEMBER 30, 2000. IT IS THE DATE USED TO REPORT THE COMPOSITION OF THE UNIT'S STAFF IN SECTION V DURING THE PRECEDING 12 MONTHS.

PLEASE EXPLAIN ANY CHANGES IN POSITION CLASSIFICATIONS FROM LAST YEAR (E.G., FROM TECHNICIAN TO CRAFT WORKER).

RETURN THE COMPLETED FORM IN DUPLICATE INCLUDING ANSWERS TO THE SUPPLEMENTAL INVESTIGATION SHEET (SIS) IF APPLICABLE AS SOON AS POSSIBLE. FOR YOUR INFORMATION, THE UPPER RIGHT HAND CORNER OF THE FORM 395-A OR 395-M WILL BE MARKED WITH AN "X" FOR THOSE UNITS THAT MUST FILL OUT AN SIS. PURSUANT TO SECTION 76.1802 OF THE COMMISSION'S RULES, THE DUE DATE FOR FILING FORMS FCC 395-A AND FCC 395-M IS SEPTEMBER 30 OF EACH YEAR. IN 2000, HOWEVER, SEPTEMBER 30 FALLS ON A SATURDAY. CONSEQUENTLY, WE WILL REQUIRE THAT THE FORMS 395-A AND 395-M FOR 2000 BE FILED NO LATER THAN OCTOBER 2, 2000. ALL REPORTS WILL BE CONSIDERED DELINQUENT AFTER MONDAY, OCTOBER 2, 2000. **UNITS FILING REPORTS AFTER OCTOBER 2, 2000 WILL NOT BE EEO CERTIFIED FOR THE 2000 REPORTING PERIOD.**

**INSTRUCTIONS FOR COMPLETING
FCC FORMS 395-A & 395-M**

**YOU ARE STRONGLY URGED TO CONSULT THE COMMISSION'S CABLE EEO RULES
BEFORE COMPLETING THIS FORM
47 CFR Section 76.71 et seq.**

General Instructions

Supply the requested information for the unit identified by the EEO ID number appearing on the attachment containing the employee data grid (Section V). If the unit is to submit a Supplemental Investigation Sheet (SIS), one will be attached to the form and an X will appear in the brackets before "Supplemental Investigation Sheet Attached" located in the box "For FCC Use Only" on page 1 of the form. If the unit no longer exists due to consolidation with another unit, or is no longer under your control, attach as Exhibit A an explanation and proceed to Section VIII.

Section I

- A. In addition to the unit operator's legal name, supply, if applicable, the name of the MSO owning or controlling the operator.
- B. Supply the address to which you want correspondence sent.
- C. Supply the county and state of the unit's principal employment office.
- D. A full-time employee is one who permanently works 30 or more hours per week.
- E. Insert the payroll period in July, August or September used for this year's report.
- F. Place an X in the appropriate brackets for each possible exhibit.

Section II

Submit as Exhibit A a list of communities added to or deleted from the unit, using the format provided. To obtain this information, review the prior year's form for the unit, noting the communities then comprising the unit, and comparing that list with the names of the communities now comprising the unit.
(NOT APPLICABLE TO MVPD UNITS)

Section III

Carefully answer each of the nine (9) questions by checking either Yes or No. If the answer is No, attach as Exhibit B an explanation. The focus of question three is on whether cable units have engaged in broad and inclusive outreach. The Commission does not require the targeting of certain kinds of sources or organizations. With regard to question five, we clarify that efforts to seek out entrepreneurs should be broad enough to cover all segments of the community, and that no entity should be excluded on the basis of race, national origin or gender. In addition, indicate which option the cable employment unit will utilize for the next 12 months. Our EEO Rule requires cable entities to select from two approaches how they will choose to ensure the success of their outreach. Specifically, as one option, cable entities may adopt two supplemental recruitment measures specified in Section 76.75 of the Commission's Rules. As a second option, cable entities may forego the supplemental recruitment measures and design their own broad and inclusive outreach program, as long as they are able to demonstrate success in achieving broad outreach to all segments of the community, including minorities and females, based upon an analysis of the recruitment source, race, national origin, and gender of applicants attracted by their outreach efforts. See 47 C.F.R. Section 76.75.

Section IV

You may attach as Exhibit C any additional information you believe useful in the FCC's evaluation of your EEO efforts. There is no requirement to provide such information.

Section V

Report all permanent, not temporary, employees, both full-time and part-time, in the appropriate job categories, listed by gender and race, color or national origin.

Job Category Definitions

Officials and Managers -- Occupations requiring administrative personnel who set broad policies, exercise overall responsibility for execution of these policies, and direct individual departments or special phases or segments of a firm's operations or subdepartments of a major department. Incumbents within this category ordinarily exercise authority to hire and terminate employees. This category would include system managers and assistant managers, program directors and assistant directors, office managers, budget officers, promotions managers, public affairs directors, chief engineers and those holding equivalent positions. Employees whose occupations fall within the Corporate Officers, General Manager, Chief Technician, Comptroller, General Sales Manager and Production Manager categories also should be listed under this category.

Professionals -- Occupations requiring either college graduation or experience of such kind and amount as to provide a comparable background. Includes: accountants and auditors, editors, engineers, lawyers and labor relations specialists. This category would include persons engaged in the writing, preparation and reproduction of programming, writers and editors, producers and directors of programs, floor directors, announcers, singers, actors, music librarians and those in similar positions.

Technicians -- Occupations requiring a combination of basic scientific knowledge and manual skill which can be obtained through about 2 years of post high school education, such as is offered in many technical institutes and junior colleges, or through equivalent on-the-job training. Includes: computer programmers and operators, engineering aides, junior engineers and electronic technicians. This category would also include strand mappers, audio and video engineers, camera technicians (live or film), film processors, light technicians, drafters and design personnel, electronic converter repair technicians (technicians who perform more than clear and recycle functions) and advertising sales production personnel.

Sales -- Occupations engaging wholly or primarily in direct selling. This category would include advertising agents, cable service sales personnel (sales representatives), and individuals engaged in direct customer contact for the purposes of product and service promotion. This category includes employees who ordinarily are paid by commissions.

Office and Clerical -- Includes all clerical-type work regardless of level of difficulty, where the activities are predominantly nonmanual though some manual work not directly involved with altering or transporting the products is included. Includes: bookkeepers, cashiers, collectors of bills and accounts, messengers and clerks, office machine operators, stenographers, typists and secretaries, telephone operators, kindred workers, and customer service representatives.

Craft Workers (skilled) -- Manual workers of relatively high skill level having a thorough and comprehensive knowledge of the processes involved in their work. Exercise considerable independent judgment and usually receive an extensive period of training. Includes: hourly paid supervisors who are not members of management, mechanics and repair workers, electricians and motion picture projectionists, and splicers.

Operatives (semi-skilled) -- Workers who operate machine or processing equipment or perform other factory-type duties of intermediate skill level which can be mastered in a few weeks and require only limited training. Includes: apprentices,¹ operatives, truck and tractor drivers, welders, installers, line workers and trenching machine workers.

¹Apprentices -- Persons employed in a program including work training and related instruction to learn a trade or craft which is traditionally considered an apprenticeship regardless of whether the program is registered with a Federal or State agency.

Laborers (unskilled) -- Workers in manual occupations which generally require no special training. Perform elementary duties that may be learned in a few days and require the application of little or no independent judgment. Includes: gardeners and groundskeepers, laborers performing lifting or digging, stage hands and kindred workers.

Service Workers -- Workers in both protective and nonprotective service occupations. Includes: char workers and cleaners, elevator operators, guards and watch workers, janitors, and kindred workers.

NOTE: A person who does more than one job is to be listed in the job category which represents the most frequently performed task by that person; a person is to be listed only once in this section. Specific job titles listed in the categories above are merely illustrative. The proper categorization of any employee depends on the kind and level of the employee's responsibilities.

Minority Group Identification

(a) Minority group information necessary for this section may be obtained either by visual surveys of the workforce, or from post-employment records as to the identity of employees. An employee may be included in the minority group to which he or she appears to belong, or is regarded in the community as belonging.

(b) Since visual surveys are permitted, the fact that minority group identifications are not present on company records is not an excuse for failure to provide the data called for.

(c) Conducting a visual survey and keeping post-employment records of the race or ethnic origin of employees is legal in all jurisdictions and under all Federal and State laws. State laws prohibiting inquiries and recordkeeping as to race, etc., relate only to applicants for jobs, not to employees.

Race/Ethnic Categories

(b & g) White, not of Hispanic Origin -- A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

(c & h) Black, not of Hispanic Origin -- A person having origins in any of the black racial groups of Africa.

(d & i) Hispanic -- A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race.

(e & j) Asian or Pacific Islander -- A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or in the Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippines and Samoa.

(f & k) American Indian or Alaskan Native -- A person having origins in any of the original peoples of North America, and who maintain cultural identification through tribal affiliation or community recognition.

Section VI

Based on the same payroll period used for Section V, report all permanent, not temporary, employees both full-time and part-time, in the appropriate job sub-categories, listed by gender and race, color or national origin.

Job Sub-Category Definitions

Corporate Officers -- An employee who is responsible for setting broad policies for the overall operation of the company and who holds a corporate office as designated in the company's governing regulations (e.g., Articles of Incorporation, Articles of Partnership, By-Laws). Examples of positions falling within this category may include, Chairman of the Board, President and Vice-President.

NOTE: A person whose responsibilities fall within the Corporate Officers category and one of the five succeeding job categories (i.e., Vice President and General Sales Manager) should normally be reported in one of the succeeding categories. A person should be reported in only one sub-category.

General Manager -- An employee who exercises overall responsibility for an employment unit or system. Related title may include "systems manager."

Chief Technician -- An employee who has overall responsibility for the system's technical operations. The incumbent ordinarily oversees technical budgets and expenditures, inventory control and fleet management. Individual ordinarily supervises technical personnel in the installation, service, maintenance and construction departments and/or studio. Category includes related titles such as "Technical Operations Manager," "Technical Manager," "Plant Manager," or "Chief Engineer."

Comptroller -- An employee who manages the activities of the accounting department in the maintenance of the accounting book and other such records.

General Sales Manager -- A senior sales or marketing employee who oversees the marketing functions of the system which may include telemarketing in addition to direct sales.

Production Manager -- A senior employee responsible for advertising and/or production of local community programming.

NOTE: A person is to be listed in the one category which represents the most frequently performed task by that person. Specific job titles listed in the categories above are merely illustrative. The proper categorization of any employee depends on the kind and level of the employee's responsibilities.

Section VII

Provide a list, by job title within each of the 15 job categories, of the employees reported in Sections V and VI. This list should include: the job title, the job category for each job title; the full or part-time status of each position; the gender of the employee holding the position; and the race or national origin of the employee holding the position. Job titles may be listed in any order. Job title data must be provided for all of the 15 job categories. Please list the full title of each position (e.g., Vice President and General Sales Manager).

The total number of positions reported on this list should equal the total number of employees reported in Section V.

Computer-generated lists may be submitted in lieu of the FCC-provided form. However, such lists must contain all of the information requested in these instructions. If you decide to submit a computer-generated list, use the FCC-provided form as a format reference.

Section VIII

Sign and date the form in the spaces provided. Also, print the name of the official signing as well as the title of that person. Return the original and one copy to the Commission by October 2. Retain a copy for your files.

Supplemental Investigation Sheet (SIS)

If required, attach as Exhibits D, E, and F the job descriptions requested in Part I, the responses to the questions checked in Part II, and the EEO public file report requested in Part III.

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT

The FCC is authorized under the Communications Act of 1934, as amended, to collect the personal information we request in this report. We will use the information you provide to determine if the benefit requested is consistent with the public interest. If we believe there may be a violation or potential violation of a FCC statute, regulation, rule or order, your request may be referred to the Federal, state or local agency responsible for investigating, prosecuting, enforcing or implementing the statute, rule, regulation or order. In certain cases, the information in your request may be disclosed to the Department of Justice or a court or adjudicative body when (a) the FCC; or (b) any employee of the FCC; or (c) the United States Government, is a party to a proceeding before the body or has an interest in the proceeding. In addition, all information provided in this form will be available for public inspection. If you owe a past due debt to the federal government, any information you provide may also be disclosed to the Department of Treasury Financial Management Service, other federal agencies and/or your employer to offset your salary, IRS tax refund or other payments to collect that debt. The FCC may also provide this information to these agencies through the matching of computer records when authorized. If you do not provide the information requested on this report, the report may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing information. Your response is required to obtain the requested authority. We have estimated that each response to this collection of information will vary from 10 minutes to 1 hour, 15 minutes. Our estimate includes the

time to read the instructions, look through existing records, gather and maintain required data, and actually complete and review the form or response. If you have any comments on this estimate, or on how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD-PERM, Paperwork Reduction Project (3060-0095/0574), Washington, D. C. 20554. We will also accept your comments via the Internet if you send them to jboley@fcc.gov. Remember - you are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently valid OMB control number or if we fail to provide you with this notice. This collection has been assigned an OMB control number of 3060-0095/0574.

THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974, 5 U.S.C. 552a(e)(3), AND THE PAPERWORK REDUCTION ACT OF 1980, P.L. 95-511, DECEMBER 11, 1980, 44 U.S.C. 3507

FCC FORM 395-M

**Multi-Channel Video Program Distributor
Annual Employment Report 2000**

Not Approved by OMB
3060-0574

Submit the original and one copy by October 2 to:

Federal Communications Commission
Room 3-A625
Washington, D. C. 20554

SECTION I IDENTIFYING INFORMATION

A. Name of Operator:		
MSO Name:		
B. Employment Unit's Mailing Address		
City	State	Zip Code
C. County and State in which unit's employment office is located		

- D. Category of Respondent (check applicable box)
- Fewer than six (6) full-time employees during the selected payroll period: Complete Sections I, II and VIII
 - Six (6) or more full-time employees during the selected payroll period: Complete ALL sections of the Form 395-M and the Supplemental Investigation Sheet, if attached

For FCC Use Only
Emp. Unit ID # _____
<input type="checkbox"/> Supplemental Investigation Sheet (SIS) Attached

E. Pay Period Covered by this Report (inclusive dates)
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- F. Attachments: (Check applicable boxes)
- | | Not Applicable | Attached | Exhibit - For: |
|--------------------------|--------------------------|--------------------------|------------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | A-Section II |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | B-Section III |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | C-Section IV |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | D-SIS-Job Descriptions |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | E-SIS Narrative Responses |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | F-SIS EEO Public File Report |

SECTION II

NOT APPLICABLE TO MVPD UNITS.

SECTION III EEO POLICY AND PROGRAM REQUIREMENTS

Check YES or NO to each of the following questions. If answer to any question below is NO, attach as EXHIBIT B an explanation.

YES NO

- () () 1. Have you complied with the outreach provisions of the FCC's Cable Equal Employment Opportunity Rule, 47 C.F.R. Section 76.75(b) or (f), during the twelve month period prior to filing this form?
- () () 2. Do you disseminate widely your EEO Program to job applicants, employees, and those with whom you regularly do business?
- () () 3. Do you contact minority organizations, women's organizations, media, educational institutions, and other potential sources of minority and female applicants for referrals whenever job vacancies are available in your organization?
- () () 4. Do you undertake to offer promotions to positions of greater responsibility in a nondiscriminatory manner?
- () () 5. To the extent possible, do you seek out entrepreneurs in a nondiscriminatory manner and encourage them to conduct business with all parts of your organization?
- () () 6. Do you analyze the results of your efforts to recruit, hire, promote, and use services in a nondiscriminatory manner and use these results to evaluate and improve your EEO program?
- () () 7. Do you define the responsibility of each level of management to ensure a positive application and vigorous enforcement of your policy of equal employment opportunity and maintain a procedure to review and control managerial and supervisory performance?
- () () 8. Do you conduct a continuing program to exclude every form of prejudice or discrimination based upon race, color, religion, national origin, age, or sex from your personnel policies and practices and working conditions?
- () () 9. Do you conduct a continuing review of job structure and employment practices and maintain positive recruitment training, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility?

RECRUITMENT ELECTION - Please indicate which option the cable employment unit will utilize for the next 12 months:

- () Supplemental Recruitment Measures (Option A) () Alternative Recruitment Option (Option B)

SECTION IV ADDITIONAL INFORMATION

You may provide as Exhibit C any additional information that you believe might be useful in evaluating your efforts to comply with the Commission's EEO provisions. There is no requirement to provide additional data or information.

SECTION VI - EMPLOYMENT DATA FOR UPPER-LEVEL JOB SUB-CATEGORIES

Emp. Unit ID # _____

MALE					
TOTAL (b-k)	White (not Hispanic)	Black (not Hispanic)	Hispanic	Asian or Pacific Islander	American Indian, Alaskan Native
(a)	(b)	(c)	(d)	(e)	(f)

FEMALE				
White (not Hispanic)	Black (not Hispanic)	Hispanic	Asian or Pacific Islander	American Indian, Alaskan Native
(g)	(h)	(i)	(j)	(k)

JOB SUB-CATEGORIES

CORPORATE
OFFICERS

--	--	--	--	--	--

--	--	--	--	--

GENERAL
MANAGER

--	--	--	--	--	--

--	--	--	--	--

CHIEF
TECHNICIAN

--	--	--	--	--	--

--	--	--	--	--

COMPROLLER

--	--	--	--	--	--

--	--	--	--	--

GENERAL SALES
MANAGER

--	--	--	--	--	--

--	--	--	--	--

PRODUCTION
MANAGER

--	--	--	--	--	--

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SECTION VIII CERTIFICATION

This report must be certified as follows:

- A. By the individual owning the reporting system if individually owned;
- B. By a partner, if a partnership; or
- C. By an officer, if a corporation or association.

I certify that to the best of my knowledge, information and belief, all statements contained in this report are true and correct.

Signed	Title
Date	Name of Respondent
Telephone No. (include area code)	

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT
(U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE (U.S. CODE,
TITLE 47, SECTION 312(a)(1), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

FORM FCC 395-A - SUPPLEMENTAL INVESTIGATION SHEETNot Approved by OMB
3060-0095**Part I Employee Job Descriptions**

Give brief job descriptions for employees in the job categories specified below. The number specified in the box indicates the number of different job descriptions that are to be submitted for each category. Job descriptions should include the position title and a brief description of the major duties and responsibilities of the individual(s) in the position.

- | | | | | | |
|-------------------------|------------------------|-------------------------|-------------------------|-------------------------|---------------------------|
| 1. <input type="text"/> | Officials and Managers | 4. <input type="text"/> | Sales Workers | 7. <input type="text"/> | Operatives (semi-skilled) |
| 2. <input type="text"/> | Professionals | 5. <input type="text"/> | Office and Clerical | 8. <input type="text"/> | Laborers (unskilled) |
| 3. <input type="text"/> | Technicians | 6. <input type="text"/> | Craft Workers (skilled) | 9. <input type="text"/> | Service Workers |

Part II Inquiries Concerning EEO Program and Practices

Submit responses to the inquiries indicated by an "X." Responses should be brief, but must provide sufficient information to describe the employment unit's activity and efforts in the area of inquiry.

1. Describe the employment unit's efforts to comply with the outreach provisions of 47 C.F.R. Section 76.75(b) or (f).
2. Describe the employment unit's efforts to disseminate widely its equal employment opportunity program to job applicants, employees, and those with whom it regularly does business.
3. Name the minority organizations, organizations for women, media, educational institutions, and other recruitment sources used to attract minority and female applicants whenever job vacancies become available.
4. Explain the employment unit's efforts to promote in a nondiscriminatory manner to positions of greater responsibility.
5. Describe the employment unit's efforts to encourage entrepreneurs to conduct business in a nondiscriminatory manner with all parts of its operation and provide an analysis of the results of those efforts.
6. Report the findings of the employment unit's analysis of its efforts to recruit, hire and promote in a nondiscriminatory manner and explain any difficulties encountered in implementing its EEO program.
7. Describe the responsibility of each level of the employment unit's management with respect to application and enforcement of its EEO policy and explain the procedure for review and control of managerial and supervisory performance.
8. Describe the manner in which the employment unit conducts its continuing review of job structure and employment practices.
9. Other Inquiries:

Part III EEO Public File Report

Attach a copy of the EEO public file report from the previous year. Cable entities are required to place annually such information as is required by 47 C.F.R. Section 76.1702 in their public files.

EMP UNIT ID:**MSO NAME:****OPR NAME:**

SEPARATE STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

Re: Equal Employment Opportunity Rules and Policies (MM Docket Nos. 98-204, 96-16)

Today we adopt EEO rules for the twenty-first century.

It is very appropriate that we adopt these rules in a week that we began by honoring the life and legacy of Dr. Martin Luther King, Jr.

These rules help further Dr. King's dream of a colorblind society. While many of us share this dream, we are not there yet. If we were there, we would not be having a national dialogue about the virtual absence of minorities in prime time television. The dream will not be realized until women and minorities have an equal opportunity both in front of the camera and behind it, as well as in boardrooms and executive suites.

This order advances the twin goals of prohibiting discrimination in hiring and promoting diversity on the public's airwaves.

The only good approach to discrimination is zero tolerance. I know many broadcasters and cable operators share this approach. I commend them for their efforts and thank them for their support.

But I think it is no mere coincidence that the adoption of EEO rules in 1969 was followed by a steady and very substantial increase among broadcasters in the percentage of upper-level jobs held by minorities and women. The EEO rules before us will continue the Commission's proud tradition of ensuring that broadcasters reach out to all segments of their community when it comes to seeking new hires.

These rules also reaffirm the Commission's long-standing obligation and commitment to ensuring that the public airwaves reflect the diversity of the public itself. The goals of diversity and non-discrimination must be pursued in front of the TV camera as well as behind it.

These rules reflect a common sense manner of pursuing these important goals. These rules also are carefully crafted to follow the letter and the spirit of the court's opinion in the Lutheran Church case.

Broadcasters and cable entities are thus given substantial flexibility to mold an outreach program that fits their individual circumstances and communities. What works in one community might not be effective in another.

But in all communities the outreach must be real, it must be effective, and it must serve the public by being all-inclusive.

I know that there are many who wanted us to go further, or to conduct studies to document the current status of minority hiring and diversity on the air and take any appropriate remedial action.

These parties should note that we are keeping the docket in this proceeding open, so that any relevant studies and information can be filed with us and called to our attention in a specific docketed proceeding.

And while I am pleased that we are moving ahead, I had hoped we could do more.

For example, under the order as proposed, broadcasters who elect Option B must track race and gender data of their *applicants*, but not of those who actually *interview* for the job. Simply tracking who *applies* for a job only gives you part of the picture, because it does not show whether the outreach program is producing qualified applicants from all segments of the community. Obviously it is up to the broadcaster to determine who is qualified, but it is only after the applicant pool is whittled down to a *qualified applicant* pool can the effectiveness of the outreach be determined.

In this respect, we should have gone further.

Separate Statement of Commissioner Susan Ness

Re: Equal Employment Opportunity Rules and Policies (MM Docket Nos. 98-204, 96-16)

We make clear today that discrimination based on race, ethnicity or gender is antithetical to operating a broadcast station, cable system, or other multichannel video programming distribution system in the public interest. I have always advocated equal opportunity and believe that such efforts are critical if women and minorities are to be able to seek and obtain employment, training, promotion – and ownership -- in the mass media and telecommunications industries. The rules we adopt today further this important goal without affecting the ability of broadcasters, cable systems, and other programming providers to hire the most qualified people.

While I disagree with the Court's assessment in *Lutheran Church* that our previous rules violated Constitutional standards, I accept its ruling. I believe that the rules we adopt today respond to the letter and spirit of the Court's opinion.

Significantly, the rules afford licensees flexibility to tailor their outreach programs to the needs of the marketplace. We do not impose a one-size-fits-all regulatory regime but rather allow licensees to select from a long list of supplementary recruitment methods or, if they so choose, to devise their own outreach program. Many broadcasters, for example, have developed creative ways to reach out to minorities and women in their communities and I believe such efforts should be encouraged.

Outreach efforts should be effective, not symbolic. To this end, I do not want licensees to use token gestures in meeting our requirement to "widely disseminate" job listings. Rather, licensees should deploy a variety of methods, including postings on the Internet, advertisements in newspapers, and other notices in their effort to widely circulate information about job openings. Licensees should not rely on only one vehicle for disseminating job vacancy information to the population but should structure their efforts to maximize outreach throughout the community.

I strongly encourage broadcast associations to develop and publicize Internet-based job banks to aggregate and make available as many listings as possible. Such job banks eventually will facilitate a job search, not only in local communities but throughout any given state and, ultimately, throughout the Nation. Before such a tool can be effective, however, we must have a way of ensuring that listings are readily accessible to those who cannot afford a home computer with an Internet connection. Otherwise, our efforts to increase outreach may have the unintended consequence of reinforcing the digital divide.

Finally, I applaud the voluntary efforts by broadcasters and the cable industry to devise training programs that will enhance prospects for women and minorities to gain employment, rise to senior management posts, and position themselves for future ownership opportunities. Our EEO requirements should not represent the upper limit in

this area, and voluntary efforts by employers are critical to achieving true workplace diversity.

STATEMENT OF COMMISSIONER MICHAEL K. POWELL

Re: Report and Order - In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (MM Docket 98-204)

The public benefits of individuals in our society having equal employment opportunities, based on merit rather than discriminatory factors, are so numerous they are impossible to list. I believe few would disagree with this proposition. What is difficult is crafting initiatives designed to foster these ideals that do not run afoul of the Constitution's command that such programs be sufficiently justified and that the means chosen be carefully fitted to the stated purpose. Recognizing that EEO programs crafted to assist one class of persons can accrue to the detriment of another, the judiciary has increasingly demanded stronger justification for such programs. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

Many have bemoaned these developments in equal opportunity jurisprudence. In many ways, however, I think that these developments on balance have been positive. More demanding judicial scrutiny forces those of us who believe in the goals of opportunity and non-discrimination to be more cautious in establishing programs and to be more thoughtful and rigorous in articulating justifying rationales. The decision in *Lutheran Church*¹ forced the Commission to challenge many of its assumptions and to try to craft an EEO program for which the purpose and mechanics rest on more solid footing. It has been a valuable exercise. I think we have largely succeeded in this *Order* for a number of reasons.

First and foremost, we introduce a program that is squarely race and gender neutral and, thus, not constitutionally suspect. At bottom, the adopted EEO rules are merely imperatives to reach out widely in recruiting for employment vacancies. All working Americans, regardless of stripe, benefit from such a program. Moreover, I am comfortable that nothing in this program fairly can be said to coerce or oblige broadcasters to hire any number of minorities or women, which was a central concern with our prior rules to the *Lutheran Church* court. *Cf. Lutheran Church*, 141 F.3d at 351-55.

Second, these EEO rules are limited and permissible measures that facilitate the avoidance of unlawful discrimination. They do not serve in any way to coerce broadcasters to hire any person of a particular race or gender. Requiring stations to recruit broadly is designed to serve as a curb against unintentional discrimination that "could not conceivably be understood as 'obliging' or 'encouraging' the use of any preference. It simply advises a method for increasing vigilance against discrimination" *Lutheran Church*, 154 F.3d at 497 (Edwards, C.J., dissenting) (on suggestion for rehearing *en banc*).

¹ See *Lutheran Church – Missouri Synod v. FCC*, 141 F.3d 344, *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*").

My own support for this item rests most heavily on its anti-discrimination rationale—a basis the Commission did not proffer to the court in defense of its prior rules. I fully recognize that the *Lutheran Church* court cautioned that agencies are not free to police general societal discrimination and that any anti-discrimination rationale the FCC might offer would have to be tied to communications service. *Lutheran Church*, 141 F.3d at 355 (“Thus the FCC can probably only regulate discrimination that affects ‘communication service’-- here, that means programming.”) I believe that the present rules, designed as curbs against discrimination, do relate to communications purposes, though not necessarily diversity of programming, as the court assumed. *Id.*

We are charged with the very unique responsibility of licensing the use of the airwaves. Such a license does not convey a property interest. See *FCC v. Nextwave Personal Communications, Inc.*, --- F.3d ---, 1999 WL 1267039 at * 5 (2nd Cir. Dec. 22, 1999). Instead, precedent holds that the licensee acts as a public trustee promising to operate in the “public interest.” The concept is amorphous and heated debate over its parameters have long raged. I, myself, have frequently criticized its seemingly unbounded reach.² Yet, whatever the standard means, or what weight it can bear, it remains the law that failure to operate in the “public interest” can disqualify a licensee from holding a license. See, e.g., 47 U.S.C. 309(a). As long as the public interest includes some component of worthiness to hold the public trust in the form of a license, it seems absolutely appropriate to condemn discrimination in our licensing policies. See 47 U.S.C. § 308(b).

Moreover, I find nothing in the Constitution that bars the Commission from adopting race and gender neutral outreach measures in order to curb or retard the possibility of discriminatory impacts.³ Indeed, licensees are given authorization to operate under the license for up to eight years before renewal, and most are given an expectancy of renewal.⁴ These measures allow licensees to make substantial investments in their stations. It is an appropriate and efficient response for the government to require limited neutral measures to curtail discrimination on an ongoing basis, rather than await petitions to oppose a license renewal.

Third, though not explored in the *Order*, I would have liked to explore additional bases on which to justify EEO rules that are not hinged on diversity rationales. For example, section 1 of the Communications Act identifies as one the Commission’s responsibilities the regulation of interstate and foreign communications services so as to

² See *Willful Denial and First Amendment Jurisprudence*, Commissioner Michael K. Powell, Speech before the Media Institute, Washington, D.C. April 22, 1998. The most controversial public interest debates arise when the government attempts to direct programming choices. This, of course, raises First Amendment concerns. The “public interest” question at issue here, to my mind, does not run to programming but to the qualifications of a government licensee, a clear communications purpose.

³ It is well established that equitable measures to curb discriminatory impact do not violate the constitution. Such measures are not punitive, but instead equitable responses to business practices that may inadvertently affect suspect class members. This is the foundation of discriminatory impact claims under Title VII.

⁴ See, e.g., 47 U.S.C. § 307(c)(1); 47 C.F.R. § 73.1020.

make them available, "so far as possible, to all people of the United States, without discrimination on the basis of race, color, religion, national origin and sex. . . ." 47 U.S.C. § 151. Though the conveyance of a license does not confer any property interest, a licensee is entitled to build a lucrative business and enjoy the profits exclusively that emanate from the license. I think it legitimate to attempt to widen the circle of those Americans that benefit from the fruits spawned by a license. One clear way to do so is to give as broad a cross-section of the public as possible the chance to work in enterprises built upon these licenses. Requiring a licensee to recruit broadly furthers the Congressional objective of making communication by wire "available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex," without substantially intruding on a licensee's commercial and business judgments. *Id.*

For the preceding reasons, I support this item. I must confess, however, my discomfort about our continued desire to place extraordinary weight on the relatively tenuous nexus between the hiring of low level employees and its impact on diversity of programming.⁵ I am dubious of its validity and deeply worried that the courts have begun to view such rationale with dire skepticism.⁶ I certainly hope that by proffering this rationale (again despite the *Lutheran Church* court's disapproval), we have not invited the judiciary to fracture any remaining legal foundation for diversity objectives.

⁵ I reserve judgment on the nexus between owners (or executive management) and programming. The *Order* frequently blurs the nexus issue between those that involve owners and those that involve employees generally.

⁶ See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602-630 (O'Connor, J., dissenting); *Lutheran Church*, 141 F.3d at 356; *Lamprecht v. FCC*, 958 F.2d 382 (D.C.Cir.1992) (sex-based preference failed when FCC introduced no evidence supporting a link between female ownership and "female programming").

STATEMENT OF
COMMISSIONER GLORIA TRISTANI, DISSENTING IN PART

Re: Equal Employment Opportunity Rules and Policies (MM 98-204, 96-16)

One of the primary foundations of our broadcasting policy is promoting a diversity of viewpoints.¹ Broadcasting, and especially television, is still the means by which most Americans get their news and information. And children, whose values and self-image are still being formed, spend far more time with television than with any other medium.² It is simply unconscionable that a societal force of such reach and impact not be open to, and reflective of, all segments of the community.

Some question the link between EEO rules and diversity of programming. I do not. While not all minorities or all women share the same viewpoint, I believe that a broadcast industry that includes minorities and women would *more likely* air diverse viewpoints than a homogeneous workforce. Congress spoke to this issue in enacting the 1992 Cable Act:

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 responsible to a public consisting of a diverse array of population groups.’³

¹ See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990) (“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”); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (“[I]t has long been a basic tenet of national communications policy” that “the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public”), 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); Communications Act, Section 257 (noting that one of the “policies and purposes” of the Communications Act favors a “diversity of media voices”).

² *Kaiser Family Foundation Report* (1999) (finding that, on average, children watch two hours and forty-six minutes of television a day, compared to 48 minutes spent listening to CD’s or tapes, the second most popular media activity).

³ 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.

Similarly, the Supreme Court has affirmed that the Commission's 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."⁴

I support this item, not because it goes as far as perhaps I would *like*, but because the bulk of it goes as far as I think we *should* in the current legal landscape. I pray that it will be *enough* to create the kind of diversity on the public airwaves that Americans expect and deserve.

There are parts of today's Order that give me hope. One particularly ingenious provision is the "opt in" notification rule under Option A. Under this rule, minority and women's organizations, community groups and others can request that they be notified of any job openings that occur. This is a clearly race-neutral mechanism that could prove effective in ensuring that certain segments of the community are effectively notified of job openings.

Of course, getting the word out is not the same as getting a foot in the door. The Option A framework rests on the assumption that equal information will produce equal opportunity. We need to watch closely to see if this turns out to be true. And we need to continue working on studies that could justify a more race-conscious approach if today's assumptions prove too sanguine.

One area in which I would have gone further is Option B, where I agree with Chairman Kennard that we should have required the tracking of *interviewee* data, and not merely *applicant* data. Interviewee data is clearly superior to applicant data in measuring whether a broadcaster's outreach efforts are effective in reaching qualified applicants from all segments of the community. I am disappointed that a majority of the Commission did not agree. I therefore dissent from this part of the Order.

⁴ *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976).

In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, MM Dockets Nos. 98-204, 96-16.

Dissenting Statement of Commissioner Harold W. Furchtgott-Roth

In *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (1998), the United States Court of Appeals for the D.C. Circuit ruled that this Commission's Equal Employment Opportunity regulations denied the equal protection of the laws to persons seeking employment at broadcast stations. Those regulations also made broadcasters, the Court said, "involuntary participant[s] in a discriminatory scheme." *Id.* at 350. To have established and enforced a program that required regulatees to engage in the most historically odious sort of discrimination against potential employees -- discrimination based on race -- was a most grievous offense.

After careful consideration, I am not persuaded that the Commission's efforts to conform those regulations to the requirements of Equal Protection are adequate. Unfortunately, the revised regulations bear some of the same characteristics that led the Court of Appeals to find the original rules unconstitutional. Because these rules are not clearly constitutional, I cannot support their adoption. Moreover, I have doubts about significant parts of the Commission's theory of statutory authority for the regulations. Accordingly, I cannot support adoption of this Report & Order, however well-intentioned it might be.

I. The Regulations Are Susceptible To Reasonable Constitutional Doubt

The Order's conclusion as to the constitutionality of the outreach rules appears to hinge on the assertion that they are wholly race-neutral and thus not subject to strict scrutiny under *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). See, e.g., Report & Order at para. 210 (arguing that EEO requirements "do not raise equal protection concerns"); *id.* at para. 217 (contending that outreach requirement is "race-neutral and . . . not subject to strict scrutiny" and "raises no equal protection concerns"); *id.* at 218 (asserting that commenters' arguments against race- and gender-targeted recruiting "are moot"). For the reasons that follow, I must question whether this is correct.¹

A. The Regulatory Scheme Is Not Neutral With Respect To Race And Gender

As a factual matter, the instant rules go further than simply requiring outreach to all people, without regard to race. In several places, the regulations expressly employ race-based classifications and require broadcasters to so classify persons for reporting purposes. Moreover, the Commission's enforcement plan undermines the asserted race-neutrality of the outreach requirement. Finally, the impact of the overall regulatory

¹ In this statement, I focus on the broadcast rules. My points as to their constitutionality apply with equal force to the cable rules, however.

scheme on the behavior of broadcasters reaches all the way to hiring, not just recruiting, decisions; the scheme subtly impels broadcasters to make all such decisions with an eye toward achieving some level of racial representation, even “balance,” of employees and applicants.

Under the specific EEO program requirements of Track A, a station potentially must “co-sponsor[] at least one job fair with organizations in the business and professional community whose membership includes substantial participation of women and minorities.” 47 CFR section 73.2080(c)(2)(iii). A station could also be required to “list[] . . . each upper-level category opening in a job bank or newsletter of media trade groups whose membership includes substantial participation of women and minorities.” *Id.* section (c)(2)(xii). Although the Commission discontinues its prior practice of requiring the use of minority- and women-specific referral sources -- suggesting that this action insulates the plan from being described as “targeted” outreach, *see* Report & Order at para. 218 -- these new requirements do essentially the same thing. Broadcasters no longer have to use minority- and women-specific groups as referral sources, *cf. Lutheran Church*, 141 F.3d at 351 (noting minority-specific referral source rule), but the menu of options includes a requirement that they sponsor job fairs and list jobs with such groups.

Pursuant to the alternative recruitment requirements of Track B, a station must maintain “data reflecting the recruitment source, gender, and racial and/or ethnic status of applicants for each full-time job vacancy filled” by the station. 47 CFR section 73.2080(d)(1). In addition, a station is required to include in its public file report “data reflecting, for each recruitment source utilized for any full-time vacancy. . . , the total number of applicants generated by that source, the number of applicants who were female, and the number of applicants who were minority, identified by the applicable racial and/or ethnic group with which each applicant is associated.” *Id.* section (d)(2).

Finally, per the rule reinstated today, all stations must file FCC Form 395-B, the Annual Employment Report. Section V of that document requires the charting of employees by job category and by male and female groupings subdivided into “White (not Hispanic),” “Black (not Hispanic),” “Hispanic,” “Asian or Pacific Islander,” and “American Indian, Alaskan native.” *See* Report & Order, Appendix D. A rule requiring broadcasters to place people in boxes on a chart with race and gender categories on its face uses race-based classifications.

Although the actual mandate that stations widely disseminate vacancy information makes no reference to race or gender, *see* 47 CFR 73.2080(c)(1)(i), the overall scheme adopted today pressures broadcasters to target potential applicants and possibly even employees on the basis of race and gender – whether proceeding under Track A or Track B.

The “self-assessment” rule, which applies under both Tracks, requires a station to “[a]nalyze its recruitment program on an ongoing basis to ensure that it is effective in achieving broad outreach to potential applicants, and address any problems found as a result of its analysis.” *Id.* section (c)(3). Also, in order to have its license renewed, a

station must have complied with all substantive EEO requirements, such as the outreach rules, during the prior license period. The FCC conducts compliance review at the time of license renewal.

By what measure does one test the “effectiveness” of outreach? According to the Order, one gauges the adequacy of outreach efforts by the number of women and minorities in applicant pools, and even in employment profiles.

Specifically, the Order provides that in order to “demonstrate” to the Commission that an outreach program under Track B “is inclusive, *i.e.*, that it widely disseminates job vacancies,” a station must “collect data tracking the recruitment sources, gender, and race/ethnicity of its applicant pools.” Report & Order at para. 104. This information will allow the broadcaster and the Commission to “evaluate whether the program is effective.” *Id.* But “[i]f the data collected does not confirm that notifications are reaching the entire community, [the Commission] expects a broadcaster to modify its program as warranted so that it is more inclusive.” *Id.*²

The Commission noisily disclaims that proportionality with the local labor force will be the exclusive test for adequacy of applicant pool composition. At the same time, it admits that it will have to rely, at least in part, on the numerical representation of minorities and women in applicant pools in order to assess compliance with the outreach rule. *Id.* at para. 120 (denying proportionality requirement for applicant pools but stating that “few or no” minorities or women would indicate inadequate “inclusiveness”).

Clearly, then, applicant pools must achieve some numerical level of minority and women applicants in order for a station’s outreach program to be deemed EEO compliant. The Commission declines to say, however, just what that composition is. Thus, the Commission makes plain its intent to use numerical data on the race and gender of applicants to evaluate outreach efforts -- and even vows to require heightened efforts of broadcasters’ whose data is inadequate – but is strikingly silent on just how many minority and women applicants are enough. Eventually, the Mass Media Bureau will be forced to come up with some kind of processing guidelines for review of outreach programs.

Once one focuses on race and gender statistics, however, it is difficult to come up with anything other than proportionality, or some derivative of proportionality, as a calibrator of adequacy. The only other number with significance I can identify would be zero; one could say that the absence of minorities and women in applicant pools would

² See also *id.* at para. 8 (records concerning the race, ethnicity, and gender of applicants must be maintained in order to “monitor whether. . . outreach efforts have been successful in achieving broad outreach” and “[i]f the data collected indicates that outreach has not been inclusive, a broadcaster . . . will be expected to adjust its outreach program accordingly”); *id.* at para. 105 (describing the possibility of “verifying broad outreach using applicant pool data”); *id.* at para. 113 (describing collection of applicant pool data by station as necessary to “demonstrat[e] that its outreach efforts are inclusive”); *id.* at para. 115 (stating that “applicant flow data. . . will be one source of information concerning a broadcaster’s EEO efforts that we may, as warranted, utilize in determining whether a broadcaster has demonstrated compliance with our EEO rule”).

establish noncompliance. Beyond zero, however, it is hard to say that any one number is materially more meaningful than another. Conversely, whatever the Commission requires to demonstrate “effective” outreach, it surely could not require *more* than proportionality.

Given the lack of any other guidance as to compliance with the outreach rule, rational broadcasters wary of regulatory trouble will strive for some showing of rough proportionality in their applicant pools. At the very least, they will strive to have at least one woman or minority in every pool; while this is not a proportionality requirement, it is a fixed number or quota. *Cf. Lutheran Church*, 141 F.3d at 390 (reasoning that “the fact that the Commission looks at more than ‘numbers’ does not mean numbers are insignificant” since “a station would be flatly imprudent to ignore any of the factors it knows may trigger intense review” and “can assume that a hard-edged factor like statistics is bound to be one of the more noticed . . . criteria”).

The fact that the standard by which Track B outreach programs, neutral on their face, will be judged is by counting minority and female applicants that wind up at the station makes it hard if not impossible to call this regulatory plan truly “race-neutral.” The Commission has built into the back end of its policy what it shrewdly omitted from the face of the dissemination rule – that is, a requirement of some minimum (though vaguely defined) numerical representation of minorities and women in applicant pools.³ *Cf. Lutheran Church*, 141 F.3d at 390 (reasoning that “the Commission has used enforcement to harden the suggestion” in its regulations).

The Commission also makes clear that the records broadcasters must keep under Track A regarding the referral sources of ultimate hires, *see* 47 C.F.R. section 73.2080(c)(5)(ii), (v)-(vi), are “designed to provide a starting point for a broadcaster to analyze the success of its recruitment efforts.” *Id.* at para. 118. But “if it appears that, despite a broadcaster’s outreach efforts, an excessive number of hires or interviewees are coming from inside, ‘word-of-mouth’ recruitment sources, we will expect the broadcaster to consider whether its recruitment efforts are achieving a sufficiently broad outreach.” *Id.*; *see also id.* at para. 115 (stating that “[d]ata as to the recruitment sources of the broadcasters’ interviewees and hires . . . will be one source of information concerning a broadcaster’s EEO efforts that we may, as warranted, utilize in determining whether a broadcaster has demonstrated compliance with our EEO rule”).

Clearly, then, the outreach regulations do *not* stop at the line between recruiting and hiring, as the Commission repeatedly asserts. As I read the plain language of the Report and Order cited above, a broadcaster could engage in every single act of outreach required under Track A but still be deemed noncompliant for failing to hire from referral

³ There are, of course, practical problems with using the number of persons who *apply* for a job to measure the number of people who *received notice* of the job. *Cf. City of Richmond v. J.A. Croson, Inc.*, 488 U.S. 469, 507 (1989) (criticizing the “completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population”). There are virtually infinite reasons why a person who hears about a job might not ultimately apply for it – perhaps they are already employed, or maybe they are not as interested in a broadcasting career (not the most dynamic sector of the communications industry today) as the Commission thinks they should be.

sources with sufficient frequency, instead hiring too many people by word of mouth. Thus it is not just outreach that is required for compliance. Instead, broadcasters operating under Track A must avoid hiring “through an insular recruitment and hiring process,” thereby “replicat[ing]” a “homogenous workforce” in which “minorities and women are poorly represented.” *Id.* at para. 3.⁴ And the data on referral sources of employees will be used to police those hiring decisions.

Thus, under Track A, broadcasters who are not discriminating against anyone in the hiring process – indeed, who have never discriminated against anyone -- are *not* free to decide to hire whoever they want, as the Commission asserts. The Report & Order makes clear that they are expected to hire a certain amount of employees from referral sources. These rules are clearly aimed at a broadcaster’s employment decisions and are meant to affect the racial composition of his staff by preventing the “replication” of “homogenous” staffs. I do not see how this language can be squared with the Commission’s repeated claim that it has no intention of regulating hiring or injecting race and gender considerations into such decisions, and that its rules create no preferential effects whatsoever in hiring.⁵

Another measure of the efficacy of outreach under either Track A or B, according to the Order, is station employment profiles collected on Form 395. In explaining why it collects this expressly race- and gender-based hiring data, the Commission states that the data is necessary “in order to assess . . . the effectiveness of the new rules in achieving our objective[] of inclusive outreach.” Report & Order at para. 164. The Commission further explains that “an increase in the number of women and minorities employed in the broadcast . . . industr[y] would indicate that our EEO requirements are effective in ensuring outreach.” *Id.* If these employment numbers do not prove satisfactory to the

⁴ If the broadcaster refuses to hire applicants because of their race or gender, that is of course another thing, and wholly actionable under employment discrimination laws.

⁵ The breadth of this policy – which limits the ability of broadcasters to hire based on “word of mouth,” without any evidence of past or present discrimination --is remarkable when compared to Title VII. Under Title VII, employment “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.” *Griggs v. Duke Power*, 401 U.S. 424, 430 (1971). The Commission relies on a similar perpetuation-of-discrimination theory in order to tie the outreach rules to the non-discrimination (as opposed to the diversity) rationale. See Report & Order at para. 3 (“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. . . . 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.”). Generally, however, there must first be a showing of “prior discriminatory employment practices,” *Griggs*, 401 U.S. at 430, to warrant the inference of present, continuing discrimination. Yet the Commission presumes present discrimination on the part of those who make hiring decisions whenever minorities and women are “poorly represented” at stations, without *any* evidence *whatsoever* of past or present bad acts. Absent such evidence, the Commission’s policy begins to look like one of “outright racial balancing.” *Lutheran Church*, 141 F.3d at 355. Even on the Commission’s own dubious logic, however, the outreach rules could apply only to stations with “poor representation” of the suspect classes, for only in those circumstances could there be any chance of the “replication” effect that the Commission seeks to prevent.

Commission, it “will not hesitate to propose changes to [the] EEO rules if industry trends suggest that [they] are not effective.” *Id.*

In other words, if broadcasters do not achieve some minimum level of minority and female employment, the Commission will impose added regulation – and thus greater costs -- upon them. I do not think it can be denied that an express threat of greater industry regulation creates a strong incentive to achieve the Commission’s stated desire. Again, left without any clear idea as to what those employment profiles should look like, the rational broadcaster – or industry as a whole – will probably set its sights on something approaching proportionality and, if not that, at least some minimum number of minorities and women.

Finally, the Commission takes the highly irregular step of keeping open the docket in this proceeding, notwithstanding the adoption of final rules and regulations. *See id.* at 229. While it does not “at this time” pursue a direct remedial approach to the employment of minorities and women, the Commission will permit the submission of information “germane” to such regulation, such as a national employment disparity study. *Id.* The Commission “will consider any [such] submissions” and “determine [whether] action is appropriate at a later date.” This action is “to facilitate any additional proceedings upon further Order,” *id.* at para. 238, and to “facilitate the submission of information relevant to employment disparities,” FCC Press Release on EEO Regulations (Jan. 20, 2000).

Again, this none too subtly suggests that if subsequent studies show a “disparity” in the employment of minorities and women -- not of broadcasters’ failure to make job information widely available to any and all persons -- the Commission will take further regulatory action. Indeed, by keeping the docket open in this proceeding, the Commission actively invites such submissions and keeps the possibility of further rulemaking very much alive; no future Commission need obtain a majority vote in order to initiate a rulemaking on this matter. Had the docket simply been closed, as normally occurs when final rules are adopted, nothing would have prevented parties from filing any studies they wish with the Commission. But by leaving the docket conspicuously open, the Commission keeps the motor on this regulatory vehicle running, allowing for immediate reentry onto the regulatory fast track. The drone of that motor is more than background noise for broadcasters; it is a constant reminder of an express threat of more regulation.

In short, the Report & Order attempts to walk an excruciatingly fine constitutional line. It deletes the requirement that broadcasters use minority- and women-specific referral sources, but replaces that with other race- and gender-specific recruiting requirements, such as the job fair and job listing rules. And although the Commission does not use race or gender classifications in the text of the outreach requirement, it makes clear that in enforcing the regulations it will expressly consider the race and gender composition of applicant pools in order to assess the “effectiveness” of a station’s outreach under Track B. Under Track A, the Commission intends to track hiring from referral sources and indicates that a broadcaster’s failure to hire from referral sources

with sufficient frequency will present a regulatory problem. The Commission has also made clear that race- and gender-based employment data will be used to assess the effectiveness of the rules under both Track A and B, promising more regulation and less discretion for broadcasters if the current regime proves to achieve results that are, in its opinion, inadequate. Finally, the Commission declines to close this proceeding, inviting the filing of information on employment “disparities” for minorities and women.

Does this system influence or encourage hiring based on race? A reviewing court very well might find that it does. Given the realities of the overall scheme and the Commission’s self-avowed purpose of influencing the racial composition of broadcast employment ranks, I for one see a real risk that these regulations and the accompanying Order will operate to “pressure--even if they do not explicitly direct or require--stations to make race-based hiring decisions.” *Lutheran Church v. FCC*, 154 F.3d at 491; *see also Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978) (en banc) (discussing the “variety of *sub silentio* pressures and ‘raised eyebrow’ regulation[s]” to which broadcast licensees are subject and holding that facially neutral regulations can be invalid if they increase the likelihood of self-regulation “to avoid official pressure and regulation”); *Writers Guild of America, West v. FCC*, 423 F. Supp. 1064, 1098, 1105, 1117 (C.D. Cal. 1976) (finding that informal “jawboning” by agency officials is judicially reviewable), *vacated and remanded on jurisdictional grounds sub nom., Writers Guild of America v. ABC*, 609 F.2d 355 (9th Cir. 1979) (agreeing that “the use of these techniques by the FCC presents serious issues involving the Constitution, the Communications Act, and the APA”), *cert. Denied*, 449 U.S. 824 (1980). Indeed, one of the stated goals of the regulations is to affect the racial design of the employment force at broadcast stations, as well as the racial composition of station owners, in order to promote “diversity of programming.” *See, e.g.*, Report & Order at para. 59 (asserting nexus between employment and programming diversity).

Even if the regulations do not influence or encourage *hiring* based on race, they certainly impel *recruiting* based on race. This is due to the use of applicant pool data to evaluate the adequacy of outreach programs, as explained above. The Commission has not eliminated race-based decisionmaking under the EEO regulations, rather it has moved such decisionmaking one step back in the employment process.

The Order opines that such decisionmaking is harmless, however, because no one is injured when the pool of applicants is merely expanded. This view goes more to standing than to the merits of the Equal Protection issue. In any event, the substantive problem with this view is that it assumes an infinitely expandable pool of recruits, applicants, and interviewees. That assumption, while not without rhetorical appeal, is open to doubt.

At some point, a broadcast station, just like any other business, must draw the line on how many people it can afford, in terms of time and money, to recruit and interview. And when a station draws that line, these regulations might cause it to leave candidates not of the Commission’s preferred race or gender standing on the other side. Those persons who are not selected as recruits or interviewees stand less of a chance of getting

the job, of course. Thus, a person may be denied an opportunity to compete for the job on the same basis as all others – that is, they may be passed over for an interview or not recruited for a position based on their race. In this way, they have been harmed by a governmental scheme that incents the broadcaster, in order to achieve an acceptable applicant pool composition, to prefer one person as a recruit because of their race. See *Texas v. Lesage*, Sup. Ct. Slip Op. 98-1111 (Nov. 29, 1999) (“[A] plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant injury in such cases is ‘the inability to compete on an equal footing.’”) (quoting *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 667 (1993)); see also Comments of Institute for Justice at 4-5 (explaining harm caused by outreach rule).

For the foregoing reasons, I think the Commission’s outreach rules are not merely cognizant of race and gender in the way that, for example, prohibitions on discrimination are. Instead, they classify people based on their race and gender, require broadcasters to do so, and encourage broadcasters to prefer people of a particular race or gender over others as recruits, and even as employees. This regulatory scheme is not clearly race- or gender-neutral with respect to the distribution of benefits in the employment process.

In contrast to the programs established in the Order, the proposal submitted by the Broadcast Executive Directors Association (BEDA) provides an example of a race- and gender-neutral outreach plan that would present no Equal Protection problem. See Report & Order at para. 82. In its final proposal, BEDA suggested that stations, among other things: post notices of full-time vacancies either directly or through its State Broadcast Association to any group that asks in writing to receive such notification; advertise full-time vacancies over the air, in local newspapers of general circulation, or on the internet; and, if using the internet, promote the website on the air. Stations would not be required to document the race and gender of applicants or interviewees or maintain records as to the source of referrals.⁶

These requirements effect the broad dissemination of information, and they do so without regard to the race or gender of the recipients of that information, job applicants, or ultimate hires. This, in my view, is what the phrase “race-neutral” means. This, in my view, is the kind of plan that doubtless “merely require[s] stations to implement racially neutral recruiting and hiring programs,” *Lutheran Church*, 141 F.3d at 351, and thus does not trigger equal protection concerns. As one commenter succinctly put it, and as BEDA’s plan shows, “broad outreach does not necessitate race-conscious action and can easily be accomplished through race-neutral means.” Comments of Institute for Justice at 9. The Commission, however, never explains why an unquestionably neutral program would be inadequate to meet its stated goals, but instead continues to insist upon the collection and use of race and gender data and race- and gender-specific regulation. To

⁶ See Letter to Chairman William E. Kennard from Richard R. Zaragoza on behalf of the Broadcast Executive Directors Association, in the Matter of Equal Employment Opportunity, MM Docket Nos. 98-204 and 96-16, Dec. 29, 1999.

my mind, a program such as that put forth by BEDA would have been the wiser constitutional course.

B. The Legal Precedent for the Constitutionality of the Rules Is Weak

Upon examination of the cases cited by the Commission as support for the constitutionality of these regulations, that precedent appears relatively weak. At best, the constitutionality of targeted outreach appears to be an open question in the vast majority of federal judicial circuits, including the D.C. Circuit. See *Lutheran Church*, 154 F.3d at 492 (“Whether the government can encourage – or even require – an outreach program specifically targeted on minorities is. . . a question we need not decide.”). At worst, targeted outreach requires race-based decisionmaking, triggering strict scrutiny under the Equal Protection Clause.

Contrary to the assertion in the Order, it is simply not true that “courts have consistently held that recruitment measures designed to *expand* the applicant pool, and that do not favor anyone *in* the applicant pool on the basis of race, are race-neutral and are not subject strict scrutiny.” Report & Order at para. 217 & n. 352.⁷ I address *seriatim* each cite cited for this proposition.⁸

Raso v. Lago neither addressed nor decided the standard of review for targeted outreach programs under the Equal Protection Clause. That case involved the interaction of a Massachusetts law granting a preference to former residents of Boston’s “West End” for apartments in a new housing development, federal housing regulations requiring developers to engage in minority outreach for residents, and an extant consent decree governing the development that required a particular racial composition of residents. The state law preference for former “West Enders,” which was entirely race neutral, had the effect of creating a preference for whites in the new development because most West Enders were white. HUD felt that implementation of the state law preference directly conflicted with its regulations as well as the consent decree, to which it was a party. HUD thus negotiated an agreement whereby the statutory preference for West Enders would be curtailed.

HUD’s targeted outreach regulations were not the focal point of the challenge in that case. As the Court observed, “outreach efforts are not the real source of the plaintiffs’ problem—rather, it is the partial loss of their preference.” 135 F.3d at 17 n. 8. As to the plaintiffs’ ancillary attack on the regulations themselves, the Court rejected it on the ground that it had been “essentially abandoned on appeal.” *Id.* at 17. So, to the

⁷ As discussed above, this characterization of the Commission’s program as not creating pressures to favor any class of persons in the hiring process is subject to dispute.

⁸ Curiously, the Commission characterizes its outreach program as non-targeted, but relies upon cases involving mostly targeted programs. I address the cases in any event, since it appears to me that the regulations are, as a practical matter and as previously explained, specifically aimed at minorities and women.

extent that the outreach regulations were themselves challenged, the Court did not address that claim on the merits but instead found it waived.⁹

Duffy v. Wolle, 123 F.3d 1026 (8th Cir. 1997), did not uphold targeted outreach requirements against Equal Protection attack, or decide the applicable standard for such review, either. Instead, that case involved a reverse discrimination hiring claim under Title VII. Although the Court reasoned that affirmative efforts to recruit minorities and women result in no harm to others, it did so in the course of deciding that the existence of such a program was not enough to support a finding that the defendant employer's asserted reason for hiring someone other than the plaintiff was pretextual. *See* 123 F.3d at 1038 (holding that "we [do not] believe that the [defendant's] alleged interest in obtaining a pool of diverse applicants can support a finding of pretext" in hiring). Because the plaintiff's other evidence of "pretext" was also unpersuasive, the employer was not liable for employment discrimination under Title VII. This case thus did not hold that outreach measures are "race-neutral," regardless of group targeting, and thus not subject to strict scrutiny.

Neither does *Ensley Branch NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994), stand for the asserted proposition. The question presented there was not whether the targeted outreach required by the consent decree in that case was subject to strict scrutiny, but whether the race-based hiring "goals" in the decree violated Equal Protection. In the course of ruling those goals unconstitutional, the court said that the fact that the city had engaged in "race-neutral" efforts to solve its employment problems did not save their hiring goals under strict scrutiny. In describing those prior efforts, the court observed that the city "actively encouraged blacks to apply for jobs" and that "the consent decrees themselves required strengthened recruitment of blacks and women." *Id.* at 1571. Admittedly, the Court described, in *dicta*, targeted recruiting programs as "race-neutral" in the course of evaluating another aspect of the decrees' constitutionality. But it did not decide the question – as no party raised it – whether the targeted recruiting was itself constitutional, or what the applicable standard of review for such a program would be.

The same is true of *Peightal v. Metropolitan Dade County*, 26 F. 3d 1545 (11th Cir. 1994). Again, in the course of determining "whether a race-conscious remedy" – specifically, a hiring preference -- was "narrowly tailored to serve a compelling state interest," the Court undertook the "initial inquiry" of asking whether the government had met its obligation first to consider race-neutral measures. *Id.* at 1557. As in *Seibels*, the

⁹ In response to the primary challenge, the Court of Appeals held that HUD did not violate the Equal Protection Clause when it cut back on the statutory preference for West Enders in order to make housing available to all, regardless of race. There was no record evidence that the HUD plan distributed housing based on any racial classifications. 135 F.3d at 16. Rather, it sought to mitigate the effects of a law that might have subjected HUD to sanctions under the consent decree. *Id.* at 17 ("HUD's concern that the preference, in this instance, if unmodified, would restrict the preference to whites and subject HUD to sanctions under the consent decree" was not an illegitimate, race-based motive). In closing, the Court expressly noted the limited scope of its holding. *Id.* ("[I]t is one thing for HUD to insist that all apartments it subsidizes must effectively be open to all races" but "it would be quite another thing if HUD planned to impose this requirement only where the beneficiaries of the statutory preference were white.").

Court characterized a recruiting program aimed at minorities and women as “race-neutral” and concluded that the city had therefore met its obligation to take such measures before introducing the hiring quotas. *Id.* at 1557-1558. But no challenge was made to the recruiting program itself, and this case therefore never held that such programs are race-neutral for purposes of analyzing their constitutionality under the Equal Protection Clause.

That leaves one district court decision, *Shuford v. Alabama State Board of Education*, 897 F. Supp 1535 (M.D. Ala. 1995). Unlike the foregoing cases, this one does analyze the constitutionality of affirmative outreach programs. And it does reason that procedures that only expand the applicant pool – that are “inclusive” as opposed to “exclusive” -- and that do not affect hiring decisions are not subject to equal protection analysis.

By its own admission, however, the district court’s reasoning “presents a new method of looking at affirmative action.” *Id.* at 1551. The court candidly recognized not just the novelty of its analysis, but that the analysis actually “is a deviation from general affirmative-action case law.” *Id.* at 1556. It is this portion of the opinion that the Order cites. *See* Order at para. 24 n.4. If this is the best case that can be cited for the Commission’s legal theory of the race-neutrality of targeted outreach, then the precedent for that theory is weak, to put it mildly.

Of course, the above-discussed cases are from the lower federal courts. The last word from the Supreme Court on “race-based decisionmaking” is *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The Court has never since suggested that the phrase “race-based decisionmaking,” as used for purposes of Equal Protection analysis, means anything other than what its plain terms indicate: the making of choices -- whether to fire, pass over for a promotion, hire, interview, or recruit a person -- on account of an individual’s race. Of course, the D.C. Circuit has already expressed its skepticism that *Adarand* can be limited to hiring decisions: “Under Title VII, courts have distinguished between ‘preliminary’ and ‘ultimate’ employment decisions. . . . [but] the Equal Protection Clause would not seem to admit such a de minimis exception.” *Lutheran Church*, 141 F.3d at 351.

II. *The Commission’s Theory of Statutory Authority Is Problematic*

The Commission’s argument for statutory authority to regulate broadcast employment appears to rest in large part on a ratification theory.¹⁰ *See* Report & Order at para. 21. Under the cases cited by the Commission, however, *see id.* at para. 26 & n.39, it is not the agency practice itself that Congress blesses *post hoc*, but rather the agency’s construction of a particular statutory provision, pursuant to which it has purportedly

¹⁰ I do not doubt that section 634 of the Communications Act grants the Commission statutory authority to make EEO rules for cable systems, according to the dictates of that provision. Whether the statute itself is constitutional, and whether the Commission has complied with those dictates, are other matters.

acted, that Congress implicitly accepts.¹¹ Thus, although section 334 is indeed an explicit legislative recognition of the Commission's EEO practices at the time of its enactment in 1992, there must have been some other grant of authority under which the Commission promulgated the EEO regulations, the construction of which Congress then ratified when it enacted section 334.

In fact, the express and exclusive provisions relied upon by the Commission in adopting EEO rules were the "public interest" provisions of Title III. *See* Nondiscrimination Employment Practices of Broadcast Licensee, 13 FCC 2d 766 (1968); 18 FCC 2d 240 (1969); 23 FCC 2d 430 (1970); 44 FCC 2d 735 (1974). The Report & Order even acknowledges that the "ratification" argument necessarily relates back to the "public interest" parts of the Communications Act. *See* Report & Order at para. 26 (arguing that Congress has long known of the Commission's position that "it has authority *under the public interest mandate* to adopt and enforce EEO rules") (emphasis added).

Even if accepted as a legitimate method of statutory construction, all that the majority's ratification theory proves is that Congress in section 334 acquiesced in the Commission's historic reading of the public interest language in Title III. Although it is difficult to untangle the Commission's ratification argument from its section 334 argument, it seems that, at bottom, the Report & Order relies upon the "public interest" standard as an ultimate source of asserted authority for these regulations.¹² To the degree that it does so, the Report & Order is not on firm legal ground. And, for reasons described below, section 309(j) does nothing to improve that situation.

A. Both Prongs of the Commission's "Public Interest" Standard Suffer From Legal Flaws

Originally, the EEO rules were adopted in the "public interest" of furthering the general national policy against employment discrimination, as evidenced in Title VII of the Civil Rights Act of 1964. Later, the Commission stated that the regulations were meant to create diversity of programming. *See* 13 FCC 2d 766. *See* Nondiscrimination in Employment Practices (Broadcast), 60 FCC 2d 226, 229 (1976), reversed on other grounds, *Office of Communications of the United Church of Christ v. FCC*, 560 F.2d 529

¹¹ *See Haig v. Agee*, 453 U.S. 280, 300 (1981) (holding that Congress had approved of administrative "interpretation [of the Passport Act of 1926]" as statutory authority for passport regulations); *Lorillard v. Pons*, 434 U.S. 575 (1978) (holding that Congress was presumed aware of the judicial construction of the Fair Labor Standards Act as requiring a jury trial when it incorporated sections of that law in the Age Discrimination in Employment Act); *Zemel v. Rusk*, 381 U.S. 1, 11 (1965) (holding that Congress had approved of administrative construction of the 1926 Passport Act's "broad rule-making authority" as basis for passport regulations); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933) (holding that Congress had acquiesced in administrative practice pursuant to 1922 Tariff Act and explaining that "administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the [statutory] command is indefinite and doubtful," thus presuming a contemporaneous statutory command).

¹² For radio licensees, the public interest language, without any "ratification" of its construction, is all the Commission has; section 334 applies only to television licensees.

(1977). Since then, the Commission has alternated between these goals as independent rationales or cited them as complementary aims.

Most recently, in the *Lutheran Church* litigation, the Commission clung solely to the diversity of programming goal, disavowing any reliance on non-discrimination. See 141 F.3d at 354. Today, it takes the opposite tack, deliberately downplaying the diversity of programming rationale. See Report & Order at para. 4 (non-discrimination goals “would be sufficient in themselves to warrant non-discrimination and outreach requirements” but the rules “also serve an important, constructive function in fostering greater diversity of viewpoints and programming”).

Over time, and as described in detail below, each rationale has been drawn into question by the courts as a basis for employment discrimination rules. This, of course, explains the Commission’s veering back and forth between the Scylla and Charybdis of its “twin aims.” In the end, I am not sure that these regulations – in so far as they derive from the “public interest” sections of the Communication Act--will make it safely through the statutory strait.

1. The Scylla of Non-Discrimination.

As noted above, the original and exclusive policy goal of EEO regulations was founded on a pure nondiscrimination principle. Reliance upon the non-discrimination theory was perhaps fine, as a legal matter, in the 1960s. But reliance upon the goal of non-discrimination pursuant to statutory “public interest” provisions is now questionable under Supreme Court and D.C. Circuit precedent.

In *NAACP v. Federal Power Commission*, 425 U.S. 662 (1976), the Supreme Court held that the “public interest” provision of the Federal Power Act did not confer statutory authority upon the Federal Power Commission to regulate the employment practices of its regulatees. The Court stated that its “cases have consistently held that the use of the words ‘public interest’ in a regulatory statute is not a broad license to promote the general public welfare.” *Id.* at 669.

Under *NAACP v. Federal Power Commission*, then, the Commission can not just promote the policy of nondiscrimination – as laudable a goal as that is – but must promote goals with a “‘direct relation,’” to the purposes of the Communication Act, *id.* (quoting *New York Central Securities Corp. v United States*, 287 U.S. 12, 24-25), such as the efficient distribution of radio spectrum.¹³ Indeed, the Supreme Court went out of its way in that case to characterize the FCC’s employment regulations as tied to the communications policy goal of “ensur[ing] that . . . licensees’ programming fairly reflects the tastes and viewpoints of minority groups,” *id.* at 670 n. 7, as opposed to a non-

¹³ Some of the Commission’s stated goals clearly fail this test. For example, the Commission asserts it belief that the regulations 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.” Report & Order at para. 4. While perhaps part of a broad social or even religious agenda, these are not directly related to communications policy.

discrimination goal. Likewise, in express recognition of the import of *NAACP v. FPC*, the D.C. Circuit has described the Commission's EEO program as regulating "the employment practices of its licensees *only* to the extent those practices affect the obligation of the licensee to provide programming that 'that fairly reflects the tastes and the viewpoints of minority groups,' and to the extent those practices raise questions about the character qualifications of licensees." *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F2d 621, 628 (1977) (emphasis added).¹⁴

Justifying the EEO rules as furthering an aim of nondiscrimination under the "public interest" standard is thus clearly problematic.¹⁵ Indeed, this proposition is so obvious that the *Lutheran Church* court – having undermined the legitimacy of the alternative rationale of diversity of programming -- noted the statutory authority issue *sua sponte* and remanded the question for our consideration. See 141 F.3d at 354, 356.

2. The Charybdis of Diversity of Programming.

In view of the foregoing caselaw on statutory authority to prohibit employment discrimination under the "public interest" standard, the Commission might like to turn to the alternative rationale of programming diversity, as it did in the *Lutheran Church* litigation. But as susceptible as the anti-discrimination rationale is to doubt, the diversity rationale is even more so.¹⁶

First, the *Lutheran Church* court criticized the Commission's vague use of the term "diversity" of programming. The Court of Appeals observed that "[t]he Commission never defines exactly what it means by 'diverse programming.'" 141 F.3d at 354. On remand, this Report & Order provides no clearer a definition of "diversity" than the Commission articulated in that litigation. In fact, the Report & Order does not even attempt to grapple with this issue by, for example, distinguishing between the sorts of "diversity" it might have in mind or explaining how it measures "diversity." Instead, it speaks of promoting programming that is "responsive to the interests of a diverse community," an entirely circular concept. Report & Order at para. 4. This definitional problem remains as real as ever.

¹⁴ Not coincidentally, it was not until 1976 – just months after *Federal Power Commission* was handed down -- that the Commission first articulated an end other than nondiscrimination for its EEO policies. See *Nondiscrimination in Employment Practices (Broadcast)*, 60 FCC 2d at 229 (EEO rules are meant to promote diverse programming).

¹⁵ To the extent that the Commission wishes to rely upon character qualifications, as opposed to pure non-discrimination or diversity of programming rationales, it is hard to see why all holders of Title III licenses would not be subject to this same understanding of character adequate to hold a federal license. Such a definition of "character" seems arbitrarily limited to broadcasters, as opposed to all Title III license holders, of which there are many other than traditional broadcasters.

¹⁶ No doubt this is why the Commission tries to link the outreach rule to the non-discrimination rationale, see Report & Order at paras. 3, 40 (discussing "perpetuation-of-discrimination" theory as basis for outreach rules), as opposed to the diversity rationale. As noted *supra* n. 5, the theory employed to justify the outreach rule as necessary to prevent discrimination goes far beyond even the broadest propositions of employment discrimination law.

Second, as the D.C. Circuit noted the first time around, “[its] opinion . . . undermined the proposition that there is *any* link between broad employment regulation and the Commission’s avowed interest in broadcast diversity.” *Lutheran Church*, 141 F.3d at 356 (emphasis added). Although the Commission cobbles together anecdotal assertions by individual commenters as support for the claimed nexus between the race and gender of station employees and the station’s programming, *see* Report & Order at para. 58, it is highly selective in its choice of quotations; many commenters denied the nexus as a matter of fact, and the Commission never explains why they are wrong or less credible and the others right or more credible. *See id.* at para. 56 & n.112. In any event, this smattering of personal beliefs provides scant support for the proposition that race and gender correlate with programming choices in a statistically significant enough fashion to justify the instant employment regulations. *Cf. Lamprecht v. FCC*, 958 F.2d 382, 393 (D.C. Cir. 1992) (holding that even under intermediate scrutiny “[a]ny ‘predictive judgments’ concerning group behavior and the differences in behavior among different groups must at the very least be sustained by meaningful evidence”).¹⁷

Consider also the overall relationship between the adopted regulations and the ultimate goal of programming diversity. It is even more attenuated than the essential link between the race/gender of employees and programming discussed above. To get from the regulated behavior to the goal of diverse programming requires numerous leaps of evidentiary logic: first, broad outreach will lead to applicant pools with a certain number of minorities women; second, such applicant pools will in turn create interviewee pools with more minorities and women than otherwise would exist; third, the composition of such interviewee pools will then affect the composition of the employees at broadcast stations; fourth, those employees might someday become owners of broadcast properties; and fifth, those owners will then program stations based on their personal race and gender. This is a daisy chain of hypotheticals.

Equally ill-supported is the specific link between the race and gender of low-level employees and programming output. To get from the coverage of non-editorial employees to its diversity goal, the Commission states its “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 the views and perspectives of the latter.” Report and Order at para. 55. Upon what record evidence is this assumption based? None. In fact, the Commission later concedes that “it is *impossible* to establish from empirical evidence the connection between programming decisions and the backgrounds of the decisionmakers.” *Id.* at para. 58 (emphasis added). If it is impossible to establish that connection in an empirical context, it is even harder to establish from an individual’s purely subjective impression of events at a station. *See, e.g., id.* (relying upon commenter who states, without offering supporting facts, “I *believe* that having a diversified staff . . . has helped WNBC be more conscientious towards a wider range of

¹⁷ Even if there were sufficient evidence of such a correlation, the D.C. Circuit has expressed its “doubt . . . that the Constitution permits the government to take account of racially based differences, much less encourage them.” *Lutheran Church*, 141 F.3d at 392.

programming and news views”) (emphasis added). This is agency speculation of the idlest sort. *Cf. Bechtel v. FCC*, 10 F.3d 1875 (D.C. Cir. 1993) (finding preference for owners who manage stations to be without evidentiary foundation and thus arbitrary and capricious). Worse, it is not even speculation about the actual operation and management of broadcast stations; it is conjecture about social science -- namely, the potential psychological effects that exposure to one human being might have on another.¹⁸

Instead of real evidence, the Commission’s assumptions about the relationship of race and gender to an individual’s point of view seem based on impermissible stereotyping. *See generally Lamprecht*, 958 F.2d at 392-394. The Supreme Court has said this about making assumptions about individuals based on their gender: “Discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual capabilities.” *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984). For example, “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted [unlawfully] on the basis of gender.” *Price Waterhouse v. Hopkins*, 490 US 228, 250 (1989).

I think it no less an instance of sex stereotyping to say that women are naturally interested in programming or seeing coverage of topics such as “breast cancer” and “premature child birth.” *See Report & Order* at para. 58 (citing comments of Cathy Hughes as evidence of nexus between employment of women and program diversity). A woman’s pursuit of these topics as a programming executive will depend largely on sex-neutral business factors such as her target audience. A woman’s interest in these topics as a viewer will depend on personal factors such as her age or marital status; or maybe she would simply rather watch a financial report, a political talk show, or a documentary on international relations. I had hoped we were “beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” *Price Waterhouse*, 490 U.S. at 250. The Commission cannot simply assume – or require broadcasters to assume -- that a female station manager would be more likely to take a, say, kinder, gentler, more “feminine” approach to local news or have a certain point of view on political issues. *See Lamprecht v. FCC*, 958 F.2d at 395-396.

Even if it is true that a majority of women are interested in the kind of issues described above, what the law has always respected, whether under Title VII or the Equal Protection Clause, is the abilities and tastes of the *individual*. As Justice Ginsburg put it, “generalizations about ‘the way women are,’ estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average.” *United States v. Virginia*, 518 U.S. 515, 520 (1996). And the

¹⁸ Where our judgments are afforded deference, it is with respect to areas within our agency’s expertise such as, say, the technological nature of digital television. Employment matters do not fall within that zone of expertise and thus deference. *Cf. Bechtel*, 10 F.3d at 881 (stating that where “predictive judgments” underlying a policy concern an area beyond the Commission’s expertise, deference to those judgments is not as warranted).

above-described problems associated with generalizing about people based on immutable characteristics such as gender go to race-based rules with equal force. *Cf. Lutheran Church*, 141 F.3d at 355 (noting that the danger of perpetuation of invidious group stereotypes is “poignantly illustrated by this case,” as “one of the NAACP’s primary concerns was its belief that the Church had stereotyped blacks as uninterested in classical music”).

In short, the diversity of programming rationale is riddled with definitional, empirical and, thus, legal flaws. Yet the anti-discrimination rationale has real problems under the *Federal Power Commission* decision. Choosing between them is like deciding whether to jump into the frying pan or the fire. To the extent that the Commission’s section 334 argument and ratification argument relate back to the public interest language of Title III, those arguments are legally problematic.

B. Section 309(j) Provides No Authority For Employment Regulations

To buttress its statutory argument, the Commission also cites section 309(j) of the Communications Act as authority for the EEO regulations. *See Report & Order* at paras. 42-47. This statute provides no support at all for these rules.

It is true enough that Congress expressed certain policy preferences with regard to minorities and women in this section. *See id.* at para. 42. But those policy preferences are to be implemented, by the plain terms of the statute, “[i]n identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection,” the “competitive bidding” section. 47 U.S.C. section 309(j)(3). This item is not a rulemaking to design systems for license auctions. Indeed, it is not about licensing at all. It is about employment practices of existing broadcasters. Section 309(j) simply has no applicability.

III. Conclusion

As set forth above, there is legitimate reason to doubt the constitutionality of these revised EEO regulations. In essence, the Commission continues to insist on the collection and use of race and gender statistics, whether for assessing applicant pools in order to evaluate the “breadth” of outreach, for assessing the “insular” nature of hiring, or for determining the overall adequacy of the regulations. Although there is no case law squarely against what the Commission has done, neither is there any in direct support of it, as the Commission claims. Even if this cloud of constitutional doubt were removed – for instance, by the adoption of a truly race- and gender-neutral plan such as BEDA’s – the statutory authority for the rules, in so far as it is built on the public interest standard and section 309(j), is quite vulnerable. In the end, I cannot support these regulations.