Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

TO THE COMMISSION

PARTIAL OPPOSITION TO THE NATIONAL ASSOCIATION OF BROADCASTERS' PETITION FOR PARTIAL RECONSIDERATION AND CLARIFICATION

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Minority Business Enterprise Legal Defense and Education Fund
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National Association of Black Owned Broadcasters
National Association of Black Telecommunications Professionals
National Association for the Advancement of Colored People
National Association of Black Journalists
National Bar Association
National Council of La Raza
National Hispanic Federation for the Arts
National Hispanic Media Coalition, including its Los Angeles, New York, Chicago, Tucson, Albuquerque, Phoenix and San Antonio Chapters
National Latino Telecommunications Taskforce
National Urban League
People for the American Way
Project on Media Ownership
Puerto Rican Legal Defense and Education Fund
Rainbow/PUSH Coalition
Telecommunications Advocacy Project
Telecommunications Research and Action Center
Women's Institute for Freedom of the Press

April 18, 2000

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SUMMARY

The NAB's petition contains four categories of proposals:

1. Constructive suggestions that could be adopted without weakening civil rights enforcement. These include:
   a. eliminating recruitment requirements for secretaries and janitors;
   b. clarifying Form 397 (biennial certification) filing dates;
   c. assuring that EEO records not be maintained with individual persons' names in them;
   d. clarifying that federal data collection procedures regarding race should preempt state laws; and
   e. affording regulatory credit for job fairs, mentoring and training for all stations in a group that benefit from these activities.
2. Proposals that are premature now, but might be justified when the industry is sufficiently desegregated to generate its own opportunities for minorities and women without the need for material federal intervention. These include:
   a. eliminating recruitment requirements for job categories in which the effects of past discrimination have been remedied on an industrywide basis;
   b. relaxing "Option A" (flexible, multple-element broad recruitment) menu choices for some smaller broadcasters;

c. affording regulatory credit for some Internet recruitment; and

d. adopting a sunsetting procedure.

3. Proposals whose adoption could expose the rules to constitutional challenges. These include:

a. relaxing recruitment obligations on a station-by station basis, depending on the number of minorities or women the station employs;

b. reinstating the 5% minority population exemption for minority recruitment; and

c. creating a "safe harbor" for compliance.

4. Proposals that would severely weaken antidiscrimination enforcement. These include:

a. reducing recordkeeping obligations;

b. eliminating certain public file retention requirements;

c. eliminating Form 397, the biennial certification;

d. eliminating Form 395-B, the annual employment report;

e. eliminating zero tolerance nondiscrimination enforcement;

f. concealing the identities of Form 395-B filers; and

g. creating a recruitment exemption for "special talent hires" (with extremely rare exceptions, such as a once-in-a-lifetime opportunity to engage a competing station's lead evening news anchor).

We note with disappointment that the NAB continues to deny that there is any evidence that the broadcasting industry ever discriminated. Overwhelming evidence, in the record of this proceeding and in history, shows that broadcasting is not the sole exception to the American nightmare of institutionalized discrimination in business. Nonetheless, we acknowledge that the NAB did not rail hysterically against the constitutionality of these rules, nor did it suggest that these rules have no place in the FCC's regulatory scheme. That is a refreshing departure from the NAB's traditional views, a development we note with respect and appreciation. See Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 13 FCC2d 766 (1968) (in which the NAB was the only opponent of the creation of the nondiscrimination rule). Alhough we disagree sharply with the majority of the NAB's proposals, we commend the NAB for taking a modest step toward the mainstream of American civil rights jurisprudence.

* * * * *

INTRODUCTION

The 31 organizations listed on the cover hereof ("MMTC et al."), pursuant to 47 C.F.R. §1.429(f), respectfully oppose, in part, the March 16, 2000 "Petition for Partial Reconsideration and Clarification of the National Association of Broadcasters" ("NAB Petition").1/

The NAB Petition includes several suggestions whose adoption would weaken the rules announced in Broadcast and Cable Equal Employment Rules and Policies (R&O), FCC 00-20 (released February 2, 2000) ("R&O"). We endorse those suggestions by the NAB which would not weaken the rules. The NAB's other propopsals should be rejected, as they are based entirely on speculation that the benefits of some aspects of the rules might not outweigh the costs.2/

Many of the NAB's objections to portions of the new rules are premature at best. The rules should be given a chance to work. At the same time, the Commission should look for ways to delete unnecessary requirements, and to strengthen rules found by experience to be too weak. For that reason, in its Comments, MMTC proposed

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1/ The views expressed in this Partial Opposition are the institutional views of the parties hereto, and do not necessarily reflect the views of any particular individual officer, director or member of any of the parties hereto.

2/ From its thousands of members, and notwithstanding its considerable resources, the NAB was able to collect exactly two statements in support of its Petition. The NAB gamely states that these two statements "are not the only examples of the real world impact of the increased regulation [sic] on broadcasters." Petition at 1 n. 3. Perhaps weakening the EEO rules has relatively low priority for the rank and file of the NAB's membership.

the creation of a Task Force on Equal Opportunity.[3/]

Now that the issues joined in this proceeding have been initially resolved, and a regulatory structure has been agreed upon by four commissioners, the Commission should recognize that many of the practical implementation issues would best be resolved by establishing a task force or advisory committee. Since the Commission takes advisory committee recommendations quite seriously, the committee members would have every incentive to make the committee achieve results. Some of the NAB's suggestions should be referred to such a committee, including its important proposal to sunset the formal recruitment process for certain types of jobs. A task force or advisory committee could consider whether some job categories' recruitment markets are local, regional or national; whether the broadcast workforce in each job category is desegregated; and whether minorities or women in each category are

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3/ MMTC envisioned a task force, possibly created pursuant to the Federal Advisory Committee Act, "with membership drawn from industry, community groups, the EEOC, the U.S. Commission on Civil Rights, the Civil Rights Division of the U.S. Department of Justice, the National Telecommunications and Information Administration, and the Commission's staff ex officio. The Task Force would monitor and refine EEO enforcement over time and marshall the collective resources of the industry and the civil rights community to foster equal employment opportunity." Such a task force "could assist the Commission by recommending policy in emerging areas of civil rights jurisprudence for the media and telecommunications. It can also work with industry and the public to promote diversity through nonadversarial programs and initiatives....Using industrywide (Form 395 and other) data and commissioned research, it could provide significant input into the Commission's systemic review of how to tailor and refine its EEO policies, with an eye to achievment of their goals and ultimate sunsetting of the regulations." Finally, it "could resolve enforcement and implementation issues which are outside the scope of this proceeding or which the Commission might not fully resolve at this time." Comments of the Minority Media and Telecommunications Council et al. (filed March 5, 1999) ("MMTC Comments") at 334-35 (fns. omitted).

trending toward greater or reduced representation. Answering these questions will require expertise, research, judgment and dialogue. Through dialogue, the parties can avoid the need for further litigation and develop procedures based on trust and consensus.

I. WITH MODEST EXCEPTIONS, THE RULES SHOULD NOT BE RECONSIDERED

A. The Commission Should Require Recruitment For Each Top-Four Category Vacancy

The NAB proposes that broadcasters not be required to recruit for each vacancy.[4/] The NAB offers no guidance as to which vacancies broadcasters could recruit by word-of-mouth without risk of discrimination.

The NAB's proposal is poorly taken. If preventing discrimination is a worthwhile law enforcement objective, there is no rational reason to leave the recruitment process unprotected some or any of the time.

There are two risks attendant to any potential relaxation of the 24-year old recruit-for-every-vacancy requirement.[5/] One risk is obvious: that some broadcast managers, carrying stereotypical views of the types of jobs interesting to minorities or women, might choose not to recruit widely for positions in management, on-air talent, sales or technical positions.

4/ NAB Petition at 3-4.

5/ This policy was first articulated in Sande Broadcasting Co., 58 FCC 139 (1976). More recently, the Commission held that "a general notification unrelated to particular job openings is not a substitute for recruitment contacts with sources designed to elicit minority and female applicants as each vacancy occurs." KTEH Foundation, 11 FCC Rcd 2997, 2997 ¶23 (1996).

The other risk is more subtle: that well-intentioned broadcast managers might eschew broad recruitment based on the number of minorities and women they happen to have on staff at a given time. They might reason that word-of-mouth recruitment is discriminatory only when the staff spreading the word of job openings is homogeneous.[6/] Thus, if the sales department is desegregated, a broadcaster might reason that posting a job notice on the sales bulletin board will result in desegregated networking among potentially qualified candidates and provide a fair chance for minorities to apply. However, if a broadcaster's sales staff composition changes, he would have to develop new procedures. For most broadcasters, this would not be difficult. However, ideological EEO opponents would surely claim that broadcasters might hire unqualified minorities or women just to secure the "reward" of being relieved of broad recruitment obligations.[7/]

6/ See Walton Broadcasting, Inc., 78 FCC2d 857, 865, 875, recon. denied, 83 FCC2d 440 (1980); see also Jacor Broadcasting Corp., 12 FCC Rcd 7934, 7939 ¶14 (1997).

7/ This hypothetical constitutional question is far-fetched, given the low cost of broad recruitment relative to the very high financial exposure created by hiring noncompetitive employees. However, even remote risks of "reverse discrimination" give rise to judicial scrutiny. See Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir.), rehearing and rehearing en banc denied, 154 F.3d 487 (D.C. Cir. 1998) ("Lutheran Church"), in which the court felt that broadcasters might decide to hire unqualified minorities in order to avoid the FCC's application of its processing guidelines at renewal time. This decision was rendered even though there are only two instances of record in which broadcasters actually misinterpreted the Commission's rules by discriminating against Caucasians. Alabama/Georgia Renewals, 95 FCC2d 1, 9 (1983); Bennett Gilbert Gaines, 10 FCC Rcd 6589, 6593 (ALJ 1995) ("Gaines"). In both cases, the Commission took pains to emphasize that race-conscious hiring was not only not required, it was unlawful. Nonetheless, the Lutheran Church panel found that a rational broadcaster might decide to hire minorities only to forestall Commission scrutiny. The Lutheran panel had Alabama/Georgia Renewals and Gaines before it (in the NAACP's brief) but did not discuss them.

Thus, any exemptions to broad recruitment requirements should be based only on industrywide trends, as derived from the Commission's review of annual industrywide Form 395-B data.[8/] Reviewing these trends, the Commission could find that minority and female representation in a job category has stabilized, over time and across regions, at a level for which word-of-mouth recruitment would naturally include the collegial networks of minority and female employees. Based on such a finding, the Commission could sunset the recruitment rules for that job category. In two job categories -- secretarial and janitorial -- we believe the Commission could make that finding now.[9/]

However, the Commission should proceed very cautiously before rendering such a finding for any of the top four job categories. By 1997, in sales, women had generally achieved national workforce parity, but minorities have far to go. In technical jobs, minorities have generally achieved national workforce parity, but women have far to go.[10/] For some types of jobs, parity has been attained and has held for several years in some, but not all broadcast markets.

Because of structural deregulation, the broadcast job market is changing rapidly. For some jobs, recruitment, formerly done

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8/ This data is being sought for precisely this purpose -- gathering industrywide data. See R&O at 2395 ¶164.

9/ See MMTC Comments at 48 ("[s]ecretarial positions no longer require very much FCC EEO enforcement. Indeed, continued emphasis on secretarial or janitorial hiring could mislead broadcasters into thinking that the hiring of a minority or female secretary, receptionist or janitor immunizes them from the consequences of their failure to recruit for or hire minorities and women in the top four category positions.")

10/ See MMTC Comments at 47, Table 2.

locally, is now done regionally or nationally, owing to the scarcity of talent capable of operating in a multistation platform environment. For other jobs, the reverse may be true. In very large markets, local recruitment is often sufficient for most positions, while in smaller markets, regional or national searches are often a necessity.[11/] Yet during the past three years, when the broadcast employment market has been changing structurally, we have had no Form 395-B data. Thus, the Commission should proceed cautiously, obtaining at least two years of Form 395-B data and consulting with a task force or advisory committee before deciding whether to reduce or eliminate recruitment requirements for any top-four job category positions.

B. The Commission Should Not Change The "Option A" Requirements

The NAB speculates that small broadcasters would not choose recruitment Option A.[12/] We predict that the exact opposite will happen. Small broadcasters historically have been more resistant to the traditional regulatory approach embodied by Option B. Thus, Option A seems tailored for them. Sending job notices to organizations requesting them can be done by blastfax or e-mail at little or no cost, and participation in four job fairs over a two-year period is not burdensome for any broadcaster. The extent of a company's participation will naturally be tailored to the company's size and capabilities. For example, MMTC conducts about

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11/ See, e.g., Letter of Robert Pricer, CEO, WCLT Radio, Inc., March 15, 2000, at 1 ¶6 (appended to NAB Petition) (station in the Newark, Ohio market recruits at colleges throughout Ohio.)

12/ NAB Petition at 4-5.

ten job fairs each year, and has found that large and small broadcasters are equally eager to participate. Small broadcasters seem to appreciate job fairs more than some of their larger counterparts. In our experience, small broadcasters seldom see job fairs as burdensome; instead, they see job fairs as an opportunity to come into contact with a wide variety of good job candidates -- all at once -- who might otherwise not consider seeking employment at a small station.

Like the question of recruitment for each vacancy, this issue is suitable for discussion by a task force or advisory committee.

C. The Commission Should Not Reinstate The 5% Minority Population Exemption

The 5% minority population exemption was in effect for 28 years, generating little controversy. We sympathize with the NAB, which made a fair point.[13/] Unfortunately, the reinstatement of the 5% exemption would prompt ideological EEO opponents to invoke another hypothetical constitutional dilemma. They would claim that a 5% exemption inherently requires a comparison of minority and female representation in station workforces with minority and female representation in the community. Such a comparison was fatal to the former rules.

The NAB's objection can be addressed through a clarification. If there are few minority organizations in a community capable of referring qualified candidates, a broadcaster's otherwise substandard recruitment efforts should not be faulted. This clarification would be a rule of reason applicable to most broadcasters in small markets with very few minorities.

13/ See NAB Petition at 5-6.

D. The Commission Should Not Give "Regulatory Credit" For Internet Recruitment

The NAB's proposal for "regulatory credit" for Internet recruitment should be rejected. The NAB believes that the Internet is accessible to "anyone who is truly interested in pursuing a career in broadcasting."[14/] But given the huge digital divide by race, most minorities must be far more than "truly interested" in a broadcast career. They must venture to a library daily for job searches, at their own time and at their own expense, while most nonminorities can do their searches on the job or at home at their leisure. Until the digital divide closes, Internet recruitment will only enhance the segregation of the broadcast workforce.

The NAB appears to have misinterpreted NTIA data showing that minorities are more likely than Whites to use the Internet in schools, libraries or community centers, and to use the Internet more for job searches. See NAB Petition at 7. Of course minorities are more likely to use the Internet in schools and libraries, since minorities are far more likely not to have the Internet at home, where it could be accessed anytime and in privacy. It is interesting but irrelevant that minorities are more likely to use the Internet for job searches. Minorities are more likely to use any sources for job searches, since minorities' unemployment rate is about three times that of Whites, and minorities endure many times more job discrimination than do Whites. The Internet has not been shown to be relatively more useful than other sources as a means of contacting minorities.

14/ NAB Petition at 7.

Although the Internet can deliver many things, civil rights is not yet one of them. Before broadcasters should get "regulatory credit" for using the Internet, the digital divide will need to close dramatically. A task force or advisory committee might be an appropriate venue for a dialogue on that question.

E. Recordkeeping Requirements Should Not Be Reduced

The Commission should not dwell long on the question of recordkeeping. Thirteen of the fourteen EEO cases that went to hearing since 1971 involved stations whose own records showed that they may have discriminated in employment. In the past, the Commission too readily permitted EEO-noncomplying licensees to use poor recordkeeping to immunize themselves from major sanctions or a hearing.[15/] Far too many broadcasters did not keep (or perhaps managed to lose) their EEO records, gladly accepting a conditional renewal or forfeiture rather than the loss of license that could have resulted from an examination of station records.

In any meaningful regulatory system, universal recordkeeping is the only evenhanded way to ensure accountability and protect the public from bad apples. Responsible drivers accept emissions testing as a minor inconvenience needed to prevent pollution. Responsible broadcasters seldom quarrel with recordkeeping to prevent discrimination. Those who view equal opportunity only as a "burden" will grumble about these or any rules. Those burdened by

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15/ See, e.g., CRB of Florida, Inc., 6 FCC Rcd 2303, 2304 ¶¶10-11 (1991) (licensee reported no minority referrals for 16 vacancies and maintained no records, but its license was renewed with a $7,500 forfeiture); Sarasota Renewals, 5 FCC Rcd 5683, 5685-86 ¶¶22-25 (1990) (licensee did not know the referral sources of most applicants or the number of minority interviewees for most positions, but its license was renewed with only a $2,000 forfeiture).

discrimination are relieved that the FCC adopted meaningful recordkeeping requirements.[16/]

F. The EEO Public File Report Should Be Retained

The only rational objections to placing information in a public file are privacy and protection or trade secrets. To its credit, the NAB raises no such objections. However, it is surprising that the NAB would advocate "regulatory credit" for recruitment over the Internet and simultaneously denounce licensee accountability over the Internet.[17/] Broadcasters, who are in the business of expanding the range of information available to the public, ought to embrace the widest availability of EEO compliance information. Wide dissemination of this information will help the public separate rule-compliers from discriminators, and will thus hasten the day when the rules will no longer be necessary.[18/]

The NAB suggests that no one but a local resident should be interested in whether a business is complying with a civil rights regulation.[19/] Actually, many national civil rights organizations

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16/ The only substantive objection raised by the NAB is that "broadcasters cannot force applicants to designate their race and/or gender." NAB Petition at 10. Most businesspeople can tell a boy from a girl, and most of the time they can tell a minority from a White person. When they genuinely cannot tell, no one has ever complained. There were no cases on this point in nearly 30 years of EEO jurisprudence. The NAB has proposed a solution in search of a problem.

17/ See NAB Petition at 11-13. The NAB says it wonders why the reverse is true -- why they cannot get "regulatory credit" for Internet recruiting while they must use the Internet for other purposes. NAB Petition at 13. The answer is that there is a digital divide among new entrants and job applicants who must make multiple searches for jobs over a period of time, but there is no digital divide impediment to those who want to make a one-time inspection of EEO compliance records.

18/ See p. 14 infra.

19/ See NAB Petition at 12.

track this information systematically as a service for their local chapters, who often have too narrow a universe for comparison with industry standard practices. Broadcast employees, who consider relocating their families to work for a broadcaster in another city, often found EEO compliance information helpful in providing reassurance that they would be working for a fair company.

The NAB also contends that website costs are too high for some broadcasters, who can only afford to maintain a static page. The answer is simple: the page can refer the reader to another website (the NAB's, or a state association's, or the parent company's) where the information is posted. Scanners and e-mail render these postings inexpensive.

G. The Biennial Certification Should Be Retained

The NAB urges the Commission to dispense with Form 397.[20/] Public file and Internet postings of annual compliance reports are not a good substitute for Form 397, as these forms have different purposes. The public file report shows what steps were taken to comply with the rule, and Form 397 shows what paradigm for rule compliance the broadcaster has selected based on its experience in the previous two years. These requirements are not redundant.

H. Form 395-B Should Be Retained

The NAB speculates that if the industry as a whole is slow to employ minorities and women, individual broadcasters might hire unqualified persons in order to avoid additional EEO regulations, raising constitutional questions.[21/] If that is true, then Title VII, every other nondiscrimination law, and the Thirteenth

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20/ NAB Petition at 14-15.

21/ NAB Petition at 15-16.

and Fifteenth Amendments are unconstitutional because their goal is to ensure that all Americans receive the same fair chance enjoyed by White males to work where they are qualified, send their children to decent public schools, reside, shop, dine and be entertained where they wish and vote for whom they choose.

This proposal assumes that an individual broadcaster -- one among twelve thousand -- would hire an unqualified person, hoping that doing so might help stave off more intensive regulation. That is absurd: hiring an unqualified person is too expensive for any business. The NAB's theory is Lutheran Church "pressure" run riot.

Fearing misuses of Form 395-B data "either by the Commission or by other parties", the NAB also suggests that stations should not be identifiable on their Form 395-B reports.[22/] These fears are misplaced. The Commission could not have been more emphatic in pledging not to use this data to evaluate compliance,[23/] and no rational citizens group would use it for that purpose now that the Commission has foreclosed such a use.

The NAB's argument assumes that the only reason the government provides for public disclosure of statistical data is to promote private litigation. Actually, most such statistical reporting serves nonregulatory purposes, such as research and public accountability. These are the reasons why the the Federal

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22/ See NAB Petition at 16.

23/ See R&O at 2418 ¶225-25 ("[w]e also state in the clearest possible terms that we will not use the data to assess broadcasters' or cable entities' compliance with our EEO rules ....Of course we cannot guarantee that no third party will file a petition against a broadcaster based on the Form 395-B employment profile data -- or some other equally inadequate basis, for that matter. But we will dismiss any such petition summarily" (emphasis in original).

Election Commission requires disclosures of political donations, and it is why the Internal Revenue Service requires nonprofit organizations to include reports on their funding sources and staff compensation in a public file. Similarly, there are three nonlitigation-related reasons why the Commission should not bowdlerize Form 395-B by excising respondents' identities.

First, scholars can only conduct meaningful research on employment trends (including research that has nothing to do with race and gender) if the respondents are identifiable. Without being able to go back to the source of data, social science researchers cannot validate the data or ask clarifying questions of the respondents. As the Commission noted in denying a motion for stay of the rules, it "decided not to separate the identity of the station from its annual employment report so that it can follow up with the station should its filing, upon review, prove incomplete, and so that it can analyze trend data for subcategories of stations, such as by market size or station size."[24/]

Second, civil rights organizations often use this data to assist in the proper evaluation of individual discrimination complaints (under Title VII or 47 C.F.R. §73.2080(a)) that have

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24/ Joint Petition by 50 Named State Broadcasters Association for Stay of New Broadcast EEO Rule (Memorandum Opinion and Order), FCC 00-132 (released April 7, 2000) at 5 ¶13.

nothing to do with the recruitment regulations.[25/]

Third, as noted above, broadcast employees often examine EEO compliance data before relocating their families so that they can accept a new job in a new city. Just as no broadcaster would purchase a station without seeing its financial balance sheet, many broadcast professionals would not think of relocating without seeing their future employer's civil rights balance sheet.

The new EEO rules are designed to prevent discrimination. Form 395-B's wide availability will contribute to that purpose.[26/]

I. A Sunsetting Procedure May Soon Be Acceptable

In a footnote, the NAB laments that the rules contain no sunset date.[27/] Baseline industrywide EEO data will help illuminate the desirability of some degree of sunsetting. In its Comments, MMTC proposed criteria for developing sunset dates for

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25/ A good example of this was Beaumont NAACP v. FCC, 854 F.2d 501 (D.C. Cir. 1988) ("Beaumont NAACP"), in which a radio licensee defended its sudden firing of all eleven of its minority employees by pointing to the fact that it had also hired a minority secretary. Review by the NAACP of that licensee's employment history and EEO program, and the employment histories and EEO programs of other stations in the same community and similar stations elsewhere, were persuasive in showing that the licensee had actually engaged in prohibited race discrimination. Indeed, without FCC EEO compliance data, the case could never have been brought and the minority employees in that case (and in three other cases with similar facts between 1985 and 1998) would never have received the substantial relief ultimately provided to them by the discriminators.

26/ The NAB also urges that Form 395-B should be made available only every two years, pointing out that ownership reports are filed only that often. NAB Petition at 16. While we would have preferred that both reports be filed annually, it is fair to note that a station's employment roster changes far more frequently than does its ownership. Furthermore, if the NAB is confident that industry trends will show a need for reduced regulation, it should endorse an annual database, which can disclose a trend in less time than a more sporadically available database.

27/ See NAB Petition at 16 n. 5.

portions of the rules.[28/] The sunsetting issue can be addressed by a task force or advisory committee.

J. Strong Enforcement Is Needed Now More Than Ever

The NAB acknowledges that strong rule enforcement "might be necessary if there were substantial evidence that the broadcasting industry as a whole had a history of discrimination."[29/] Before the former EEO rules were adopted, the broadcasting industry compiled an exceptionally malodorous 50-year record of systemic, intentional discrimination.[30/] After 1971, rampant discrimination

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28/ See MMTC Comments at 41 (recommending that rules be sunsetted "when discriminatory practices are no longer able materially to distort the free marketplace and deny equal opportunity to all Americans", a time when "common discriminatory practices such as word-of-mouth recruitment from a homogeneous workforce will cease to be a useful tool for maintaining discrimination.")

29/ NAB Petition at 17.

30/ Dr. Jannette Dates, Dean of the School of Communications at Howard University and Chair of the Black College Communications Association, explains:

> All of the Black college broadcasting programs came into existence after 1971 -- in large part because the FCC adopted its EEO Rule. Howard University created the first such program that year. No such program existed before that, because unchecked discrimination in the industry was so extensive then that it would have been absurd for Black college administrators to promise Black college broadcasting graduates that broadcasting careers awaited them....
>
> Equal opportunity in broadcasting is still a fairly new concept. Most of those who entered the industry in the 1970's (the first decade of FCC EEO enforcement) have yet to attain ownership and senior management positions in broadcasting companies. Therefore, this year's class of Black college graduates still lacks access to any significant networking and alumni support from Black broadcasting managers with hiring authority. It will probably take another generation of strong FCC EEO enforcement before the networking opportunities typically enjoyed by students at predominately White institutions are available to students at HBCU's.

[n. 30 continued on p. 16]

continued to work its will underground when the FCC was asleep.[31/] A reputation for EEO noncompliance so deeply infects the broadcasting industry today that for several months, several of the organizations herein (led by the NAACP) seriously considered an unprecedented national boycott of one of the big-four television networks. It is truly unfortunate that the NAB has joined the ranks of discrimination-deniers.

Although the majority of broadcasters were EEO compliers when the rules were in effect, recent data suggests that since the rules were suspended, broadcast employment of minorities and women has

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30/ [continued from p. 15]

Declaration of Dr. Jannette Dates, January 27, 1999, in MMTC Comments, Vol. III, Exhibit 5 (emphasis in original).

MMTC has documented the FCC's deep complicity in the maintenance of Jim Crow employment practices in the broadcasting industry. See MMTC Comments at 104-116. A recently published treatise on broadcasting in the World War II era describes how the federal government's then-extensive authority over broadcast content was intentionally and systematically used to exclude African Americans from the radio airwaves. Barbara Diane Savage, Broadcasting Freedom: Radio, War, and the Politics of Race, 1938-1948 (University of North Carolina Press, 1999). Dr. Savage has documented how the Office of War Information and the War Department produced only "a relatively limited amount of radio programming about race relations or African Americans" because of their "trepidation about how to break the sanctioned political silence about African Americans and their place in the nation...they did not want to endorse the racial reforms blacks sought for fear of offending whites, especially southern congressmen." Id. at 107. One result of the government's failure to integrate its own radio operations was that almost no minorities could develop the expertise to work in radio until the war was over. It was not until 1945 that WMCA, New York City, became "the first major station in the country to hire an African American staff announcer." Id. at 258.

31/ This history is described in detail in the MMTC Comments at 114-115 n. 189.

continued at token levels or has dropped sharply and still appears to reflect widespread discrimination.[32/]

Discrimination must be rooted out irrespective of the number of discriminators. Although most Dennys' restaurants did not discriminate in serving customers, a few did, and that hurt the reputation of the innocent Denny's'. Most police do not plant guns or shoot unarmed men, but a few do, and that has hurt the reputation of innocent police. Most broadcasters check daily to be sure their towers are lit, but if one broadcaster ever neglected to do this and an airline disaster resulted, the industry would never live it down.[33/]

32/ For example:

- A survey compiled by the Beverly Hills/Hollywood Branch of the NAACP and the Coalition of African American Television Writers reported that out of 839 writers employed on primetime network series, only 69 were minorities.
- Hispanics and Asian Americans make up only two percent of all evening news correspondents for CBS, ABC and NBC, according to an annual study this summer the College of Mass Communication and Media Arts at Southern Iillinois University.
- The annual RTNDA/Ball State University study on women and minorities in the nation's newsrooms showed that minorities in TV journalism slid from 21% in 1997 to 19% in 1999, and minorities in radio journalism fell from 16% to 11% during this period.
- A study by the International Women's Media Foundation found that 61% of women journalists believe they still face barriers to advancement that their White and male counterparts do not, with 51% saying they suspect that discrimination in promotion has hampered their professional advancement.

MMTC ex parte letter to Chairman William Kennard, December 10, 1999 (filed in this proceeding). We are certain the the NAB would not view these as positive developments.

33/ For a recent example of the FCC's zero tolerance approach to tower lighting, see David R. Price, 7 FCC Rcd 6550 (1992).

Thus, the Commission should not change its "zero tolerance" policy. There is no rational reason why a federal agency should accommodate any particular quantum of lawbreaking. The FCC never should have tolerated this nonsense before, and thank goodness it intends to stop.

II. SOME OF THE NAB'S PROPOSED CLARIFICATIONS ARE NONCONTROVERSIAL

We do not object to the NAB's proposed clarification of the Form 397 filing dates.[34/] We also agree that EEO records should not be published with persons' names in them, for privacy reasons.[35/] And we agree that well-established federal data collection procedures regarding race should preempt any conflicting state laws.[36/] Finally, we agree that if a commonly-owned group of stations wants to host a job fair in the stations' common market, the job fair should be attributable to all the stations (assuming they recruit together and share job applicants) because each of the stations will have benefitted from the job fair.[37/]

We object to two proposed clarification points. First, under no circumstances should the Commission propose a "safe harbor" for compliance.[38/] Inevitably, a regulatee will claim that it misinterpreted a "safe harbor" to be a minimum or quota, as some

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34/ See NAB Petition at 18-21.

35/ See NAB Petition at 23.

36/ See NAB Petition at 23-24.

37/ See NAB Petition at 24. By the same token, if a group owner sponsors a mentoring or training program open to all employees, but the training only takes place at certain stations, only the stations conducting the training should receive credit because only those stations would benefit.

38/ See NAB Petition at 21-22.

observers felt the former "zone of reasonableness" standard could have been misinterpreted. A "safe harbor" would also undermine the spirit of experimentalism and voluntarism underlying the new rules.

Second, we object to the use of "special talent hires" as recruitment exemptions.[39/] "Special talent hires" are already notorious venues for customer preference discrimination.[40/] The only "special" recruitment exception should be a once-in-a-lifetime chance for a television station to hire the leading news anchor at a competing station in the same town, or a radio station's chance to bring its own former top morning drive host out of retirement.

Finally, we object to the proposed clarification that would authorize a recruitment exemption when an incumbent employer is being replaced without being notified in advance. Confidential "blind box" searches are commonly used for such occasions, and

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39/ See NAB Petition at 24-25.

40/ "Customer preference" discrimination occurs when an employer rationalizes preferential hiring by race or gender on the basis that his customers prefer to be served by members of that race or gender. The leading case is See Diaz v. Pan American World Airways, 442 F.2d 385, 386 (5th Cir. 1971) (rejecting airline's defense of its females-only hiring policy for "stewardesses" on the theory that male passengers prefer to be served by women); see also Chaline v. KCOH, Inc., 693 F.2d 477 (5th Cir. 1982) (upholding trial judge's finding that a Black-formatted radio station discriminated against a White announcer notwithstanding his "mastery of the voice and idiom" of Black radio; we note that this appears to be the only reported "reverse discrimination" case in the history of broadcasting); cf. Beaumont NAACP, 854 F.2d at 509 (rejecting the FCC's ratification of a licensee's terminations of Black employees when the radio station's format changed from rhythm and blues to country and western). Today, customer preference discrimination is broadcasting often arises when stations hire news reporters, anchors, announcers and program hosts according to their race or gender. This brazen practice almost always works to the detriment of minorities and women, e.g., when a television station is uncomfortable having a Black man paired with a White woman as anchors; or when a television station that would use a White man/White woman anchor team will not use a Black man/Black woman team; or when a country/western radio station will not interview Black or Hispanic candidates for announcing and sales positions.)

minority publications offer such blind-box job listings as well as general market publications. This helps explain why, for 28 years, this issue has never arisen in FCC EEO litigation.

CONCLUSION

Embedded throughout the NAB's Petition is the assumption that the broadcasting industry, unlike the rest of America, is a color-blind racial paradise in which preventing discrimination is no longer necessary. Certainly the contributions of broadcast journalism in exposing race and gender injustice have been invaluable. But at bottom, the NAB is as mistaken in its illusion of desegregation as were the northern liberals who, for years, treated segregation as a "southern" problem and not their problem too. As the violent reaction to Dr. King's northern fair housing crusade made clear, few Americans are immune from the foul odor of race prejudice or its effects. As Dr. King said in 1963:41/

> You must defeat segregation in Chicago because the de facto segregation of Chicago is as bad as the de jure segregation of Birmingham. We're through with tokenism and gradualism and see-how-far-you've-come-ism. We're through with we've-done-more-for-your-people-than-anyone-else-ism. We can't wait any longer. Now is the time.

Respectfully submitted,

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41/ Dr. King was quoted in "Races: The Revolution," Time, June 7, 1963, pp. 17-18, cited in Leonard Steinhorn and Barbara Diggs-Brown, By the Color of their Skin: The Illusion of Integration and the Reality of Race (Plume ed., 2000) at 115.

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 18th day of April, 2000 delivered by U.S. First Class Mail, postage prepaid, a copy of the foregoing "Partial Opposition" to the following:

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