BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

To: The Commission

JOINT COMMENTS OF THE NAMED STATE BROADCASTERS ASSOCIATIONS

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EXECUTIVE SUMMARY

State Broadcasters Associations, representing broadcast stations in all fifty states, the District of Columbia and Puerto Rico, strongly believe that any form of illegal employment discrimination is noxious and intolerable – and that all broadcasters should be equal opportunity employers.

Through extensive efforts by the Associations and their members, even in the absence of FCC equal employment opportunity rules over the past two-and-a-half years, the broadcasting industry has continued to move forward increasing the breadth and depth of its outreach so that everyone seriously seeking employment in the industry can get timely information to pursue their goals, without regard to race, sex, or cultural heritage. These efforts include wide adoption of Internet-based job recruiting methods which have become a great leveler in the employment market, with 90 percent of all Americans under 18 now regularly using computer technology – including those of modest income. As these Americans enter the labor force, they will find that information barriers that once may have hindered job searches have been virtually eliminated by the hyperlinked ease of Internet recruiting. The broadcasting industry has adopted technology in a way that should become a model for American industry generally; these efforts have made it possible to pursue a career in broadcasting – without barriers.

Given this record, the Commission has no factual or logical basis to re-regulate. As no evidence indicates that the broadcasting industry is a discriminator, it would be inappropriate for the Commission to re-regulate. Other effective methods, including a host of federal and state anti-discrimination laws, already deal with the isolated bad actor. Indeed, the federal Equal Employment Opportunity Commission, similar state agencies, and Courts have much experience handling such cases – expertise that the FCC lacks. Therefore, the Commission should defer to

these experts. The Commission can apply sanctions under its character policy should a licensee be guilty of egregious conduct that violates anti-discrimination laws.

The Commission also lacks statutory authority to re-regulate. The Court of Appeals found no statutory bar to vacating parts of the Commission's previous equal employment opportunity rules, and the Commission itself found no statutory requirement that it maintain those parts of the rules that the Court of Appeals had not vacated when the FCC suspended them. Therefore, the FCC is certainly not required to re-regulate and, given the aforementioned lack of factual or logical basis for re-regulation, any Commission re-regulation in this area would be arbitrary, capricious and contrary to law.

The Associations believe, however, that the Commission still has an important role to play both in monitoring industry and bolstering industry efforts to further broaden and deepen recruiting outreach. The Commission should leverage its own formidable Internet presence to make job hunting and recruiting outreach even more effective. It can achieve this by creating a job bank portal at its own web site with links to the job banks of all media that the FCC regulates, including broadcasting, cable, DBS and 3G wireless. The nation should expect no less from the communications center of the world's most technologically advanced country.

Although the Associations believe the FCC should not re-regulate here, if any regulation emerges from these proceeding, it should only require measurably broad outreach – a quest made simpler by increasing the kind of skillful technological adaptations that the broadcasting industry has already put to work in its recruiting efforts. Such skillful use of technology can help meet the Commission's policy goals here, without trampling the Constitution. The Constitution forbids the Commission from imposing rules that tally the number of job seekers from particular groups and, therefore, pressure employers to meet goals or quotas. To avoid such constitutional

infirmity, the Commission must focus only on making outreach as broad and deep as possible, so that job information is available to all who seek it.

Therefore, the only rules that the FCC should contemplate imposing on stations include:

- Internet job bank postings of at least 50 percent of jobs, including requirements to report the ways stations promoted their web-based recruiting efforts;
- Additional outreach through referral organizations, either directly or through an arrangement under which such third parties as state broadcasters associations act as clearing houses for the information;
- Document retention limited to the job postings themselves and any promotional copy designed to attract individuals and referral organizations, with access to such documentation only for the Commission ;
- Any Commission request for information about discrimination complaints lodged with government agencies or courts would be limited to final, adjudicated decisions and must not include pending complaints.

The position of the Associations represents a path that avoids Constitutional pitfalls while protecting the ultimate goal of all equal employment opportunity programs: eliminating barriers and *finding real jobs for real people.*

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JOINT COMMENTS OF THE NAMED STATE BROADCASTERS ASSOCIATIONS

The Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, Maryland/DC/Delaware Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters,

Radio Broadcasters Association of Puerto Rico, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and the Wyoming Association of Broadcasters (collectively, the "Associations"), by their attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§1.415, 1.419, hereby jointly comment (these "Joint Comments") in response to the *Second Notice of Proposed Rule Making* (the "*Second NPRM*"), 67 Fed. Reg. 1704 (January 14, 2002) in the above-captioned proceeding. These Joint Comments, which are being tendered with the Commission on April 15, 2002, are timely filed by virtue of the extension of time granted by Order of the Commission adopted February 20, 2002 and released February 22, 2002 (DA 02-400).

INTRODUCTION

A. The Associations' Role and Regulatory Viewpoint

As the records in this and other proceedings before the FCC make clear, each State Broadcasters Association has been established to advance and protect the best interests of the free, local, over-the-air, full service, radio and television broadcast industry within its borders and at the Federal level. One aspect of this mission is to help broadcast stations better serve the public. Another aspect is to help create and maintain a business and regulatory environment that will allow broadcasters to remain financially healthy and to optimize their competitive position in the media marketplace so that they can continue to effectively serve the public.

Because of this dual mission, the Associations routinely participate in Commission proceedings. Many Associations joined in the filing of comments in FCC proceedings examining, for example, issues of preemption, main studio and public inspection file requirements, establishment of a micro-radio service, FCC regulatory fees, the practice of cable systems to override emergency broadcasts by television stations, "must carry" for digital signals, the Satellite Viewer Home Improvement Act, digital public interest obligations, standardized disclosure requirements for television, children's television obligations for DTV, EAS, and the Emergency Petition concerning EchoStar. As evidenced by these filings, the Associations are dedicated to advocating positions that serve and protect their members so that they, in turn, can continue to serve the public.

The Commission's records also reflect that the Associations have consistently participated in Commission rule makings involving the subjects of nondiscrimination and equal employment opportunity. Such involvement dates as far back as 1994 when many of the Associations filed Joint Comments and Reply Comments in MM Docket No. 93-94. They also filed Joint Comments and Reply Comments in the initial phase of this proceeding on March 1, 1999 and April 15, 1999, respectively. *Notice of Proposed Rule Making* (the "*NPRM*"), 63 Fed. Reg. 66104 (1998). As the Commission is also aware, the Associations have gone to court where they felt that such action was necessary and appropriate to be faithful to their missions. *DC/MD/DE Broadcasters v. FCC*, 236 F.3d 13, *reh'g & reh'g in banc denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 920 (2002) ("*Broadcasters*"). Once again, those filings show that the Associations are dedicated to serving and protecting their members so that they, in turn, can continue to serve the public.

The EEO-related positions that the Associations have taken in the past have always begun with the premise that all forms of unlawful discrimination in employment are noxious and should not be tolerated. The Associations have consistently advanced this proposition. The Associations have also been in favor of, and indeed have long, actively promoted, voluntary efforts by broadcasters to recruit employees from the entire labor pool, regardless of their race, ethnicity or gender. In short, the Associations expect all broadcasters to be Equal Opportunity Employers. However, the Associations have had, and continue to have, a strong difference of opinion with the Commission concerning the agency's regulatory role in this area.

The following principles and concerns have guided, and continue to guide, the Associations in this area of FCC regulation. First, the Commission should, as a threshold matter, consider whether any re-regulation in this area is truly necessary to serve the public interest. For some three decades, the FCC regulated heavily in this area. As a result of the Court of Appeals decisions in *Broadcasters* and *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, *reh'g denied*, 154 F.3d 487, *reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) ("*Lutheran Church*"), those regulations have either been vacated or suspended in large measure. This hiatus provides the Commission with a unique opportunity to measure the need for industry-wide re-regulation. Such inquiry requires the Commission to determine whether the broadcast industry is already customarily engaged in activities reasonably calculated to achieve the same ends sought by proposed regulations and, if so, to limit the FCC's intervention. In short, the government should first inform itself and then rely upon a proven course of industry conduct, if it appears to be serving the same beneficial end, before embarking on any regulations that may overshoot or undershoot the mark. The Associations believe that the Commission has failed to observe this

principle in its past actions in this area and is hopeful that the outcome of this proceeding will be fully consistent with this principle.

Second, the Associations believe that compliance with the law and the Constitution is a duty imposed on all entities, public and private. Just as private regulatees are required to obey the law, so too are governmental agencies; the FCC is required to abide by the Constitution when it considers imposing new regulation. Such adherence to constitutional strictures must conform to the D.C. Circuit's holdings in *Lutheran Church* and *Broadcasters*, 236 F.3d at 16-19, concerning governmental pressure for race-based employment decision-making and the Fifth Amendment's equal protection clause. The Court of Appeals found no statutory bar to vacating the Commission's former EEO regulatory structure. In suspending those parts of the former rules that the court did not vacate, the Commission itself then found no statutory bar, otherwise it could not have suspended them in good faith. In its proposal to re-regulate, any FCC action in this area must comport wholly with the Court of Appeals's unequivocal holdings – and not some imagined statutory mandate.

A third guiding principle for the Associations is that the Commission should adopt no regulation that unfairly places a broadcaster in the position of having either (i) to certify compliance with regulations that vague with the concomitant risk, at renewal time, of being charged with the character violation of misrepresentation, notwithstanding any genuine misunderstanding of the duties required, or (ii) to bear unreasonable burdens in compliance which have the counterproductive effect of undermining the ultimate policy objective which, in this area, is *finding real jobs for real people*. In this regard, the FCC should not require broadcasters to "certify" compliance when the standard of compliance is unknown and unknowable. Any rule that requires such certification in the absence of clear criteria allows third

parties to use the rules for private ends by accusing broadcasters of misrepresentation and "gaming" the regulations by filing or threatening to file abusive complaints, petitions and oppositions. Such a regulatory scheme ends up transforming good intentions into a risk laden and burdensome process that creates unwarranted proceedings, disproportionate sanctions and a "greenmail" arcade. The Commission's law library is filled with such cases, particularly in the area of EEO.

B. The Associations' Position in this Proceeding

The record demonstrates that even in the absence of enforceable regulations following the Court of Appeals decisions in *Lutheran Church* and *Broadcasters*, the broadcast industry broadened and deepened its outreach efforts without incurring the substantial regulatory burdens and costs associated with the previous rules. In a study conducted at the request of a United States Senator and certain members of the House of Representatives from Texas, the Texas Association of Broadcasters (the "TAB") surveyed costs of regulatory paperwork before the *Lutheran Church* case. The 1994 study estimated a $14.8 million paperwork burden for the state's broadcasters in just a single year. Moreover, the TAB estimates that the cost of recruiting declined by more than a million dollars as stations relied more heavily on the TAB's no-charge job bank and job fair program.[1] As will be demonstrated below in Sections I and V, these cost savings arose even while the depth and breadth of broadcasters' outreach increased through sound adoption of new recruiting technology. In the absence of regulation, broadcasters have demonstrated how forward-thinking policies can better meet the goal of enhancing workforce opportunity for everyone, rather than continuing to rely on regulatory models from the last

[1] *TAB pumping $300 million into broadcast industry*, TABulletin (Texas Association of Broadcasters), Feb. 2002, at 1, 6.

century. The Commission should follow suit, especially because the record does not support re-regulation. Still, the Commission can play a very important leadership role. It can use its leadership position most effectively by expanding the use of its own web site to include the posting of jobs by all entities regulated by it and by generally encouraging the broader use of the Internet to meet the need for broad and deep job recruitment outreach, as well as to monitor industry practices.

Through these Joint Comments, the Associations hereby continue their participation in this proceeding. Their positions, which are described and supported in detail herein, may be summarized as follows:

1. The Associations and their member stations remain strong adherents to the fundamental principle that employment discrimination is noxious and contrary to the fundamental law of the land.
2. They also fully appreciate the benefits of a diverse workplace and the need to recruit employees from the entire labor pool. As a result, they helping stations pursue that goal.
3. The Associations urge the FCC not to engage in any re-regulation in this area since such re-regulation is unnecessary and not within the Commission's authority. The Associations believe that such re-regulation also poses a high risk of another collision with the United States Constitution – this time, with possible widespread fatal implications for other EEO-related laws and regulations.
4. The Associations continue to believe, as explained in their comments on the earlier *NPRM*, that the FCC must defer to the United States Equal Employment Opportunity Commission ("EEOC"), courts and state EEO agencies for initial fact-finding and resolution of employment discrimination complaints.

5. If the Commission insists on re-regulating in this area, the Commission must steer completely clear of placing any *pressure* on broadcasters to recruit or hire on the basis of race and should only support an outreach program that is inarguably designed to notify the population generally, such as by the broadcast career web sites of the various Associations, the National Alliance of State Broadcasters Associations ("NASBA") (formerly named the Broadcast Executive Directors Association or "BEDA"), the National Association of Broadcasters (the "NAB") or individual radio and television station licensees, rather than emphasize contact with particular races, genders or groups as was true of the Commission's prior programs in this area. The adoption of such a policy would be commensurate with the effective job-search and recruitment realities of today's marketplace. The facts bear out that the Internet is fast becoming a great leveler in American society, with about two-thirds of all Americans now using computers, either at home, work, school, libraries and community centers.[2] Demographically, Internet usage growth among Blacks and Latinos has increased more than fifty percent faster than among Whites and Asians who have traditionally been more likely to have computer access. Moreover, in the employment field, the Internet is rapidly becoming a primary job search and recruiting venue. With 88 percent of human resources professionals using Internet job boards to find candidates,[3] online job recruiting expanded 40 percent last

2 U.S. Department of Commerce, Economics and Statistics Administration and National Telecommunications and Information Administration. *A Nation Online: How Americans Are Expanding Their Use of the Internet*, Executive Summary, at 1 (Feb. 2002).

3 *Off The Board*, Dallas Morning News, Sept. 2, 2001 at 9L. (quoting an Aug. 2001 survey by the Society for Human Resource Management.)

year.[4] Indeed, online job recruiting has already proven successful for the broadcast industry. Only by leveraging the trends favoring this race and gender-neutral technology can the Commission avoid the serious constitutional issues posed by the court in *Broadcasters* and in *Lutheran Church*.

6. In order to avoid such constitutional concerns, the FCC must certainly refrain from re-instituting a scheme whereby publicly available, station attributable Annual Employment Reports ("Form 395-B") are required. If the Commission believes that it must conduct annual surveys of industry employment profile trends, it can do so by having a reputable third party act as a clearing house for the aggregation of such data on an *anonymous*, non-attributable basis.

7. If the Commission were to adopt a requirement for dissemination of information about job vacancies, the Commission should focus on the means by which a station disseminates job vacancy information to the population in general, such as the use of the Internet-based job banks noted above, rather than measuring whether certain segments of a community have been targeted by the station for such information. Accordingly, the Commission should avoid any requirement that recruitment must turn on the irrationally vague concept of "community." *Second NPRM* at ¶ 23. The use of such a term in a Commission rule implies that everyone agrees what "community" means. But no such

[4] Maria M. Perotin, Knight Ridder News Service, *Recession makes online job hunt longer, harder, more frustrating,* Fort Worth Star-Telegram, Feb.13, 2002 (quoting statistics compiled by Forrester Research of Cambridge, MA).

general agreement or definition exists; the term means different things to different people in different contexts. In the face of such vagueness, any rule relying on outreach to a "community" would leave broadcasters unable to determine whether they are doing what is required. There are simply no bounds on the number of groups and types of individuals comprising a "community" and, thus, no reasonably sure method for a broadcaster to know if it has reached all components or segments of a "community." As a result, broadcasters will be subject to constant unfair attacks that they are leaving out some particular group in the community and, thus, failing in their obligations. The concern takes on life and death consequences at license renewal time when the FCC requires a broadcaster to certify its compliance with such a vague requirement.

8. The Associations are unable to find any valid reason for re-regulation in this area. Instead of continuing to focus on constitutionally defective regulatory solutions of the past, the FCC's objective should be to engage the broadcast industry to find forward-looking means to facilitate successful job searches and recruiting efforts, irrespective of gender, race or ethnicity, such as the Internet initiatives mentioned above and discussed below. The FCC should not weigh down both the industry and the Commission with bureaucratic paper burdens that only serve to take away from the key objective: *finding real jobs for real people*. To this end, the Commission should use its considerable persuasive power to foster adoption of proven new recruiting technologies to broaden and deepen outreach by expanding its own online recruiting efforts. Instead of only posting Commission jobs at its official web site, the FCC should use its formidable Internet presence to create a nationwide portal linking any job seeker to a wide array of sources listing job openings in broadcasting and all other industries regulated by the

FCC. The broadcast industry will partner enthusiastically with the Commission to promote vigorously this new national resource.

DISCUSSION

I. THE RECORD IN THIS PROCEEDING DOES NOT ESTABLISH THAT EEO RE-REGULATION IS NECESSARY TO ENSURE THAT THE BROADCAST INDUSTRY SERVES THE PUBLIC INTEREST; THE FCC SHOULD INSTEAD PUBLICLY APPLAUD AND FULLY SUPPORT SUCCESSFUL ONGOING INDUSTRY EFFORTS

The Commission has long honored the principle that unnecessary regulations should be rooted out. In the 1980's, the Commission set out to eliminate "regulatory underbrush," and successfully defended these anti-underbrush policies numerous times and in numerous ways, including a case before the United States Court of Appeals for the District of Columbia Circuit.[5] Such policies continue to have currency today, as Commissioner Martin has noted: "Government should . . . endeavor to remove regulatory underbrush - burdensome regulations that may no longer serve compelling purposes."[6] The goal is to create a regulatory framework based on rules that are actually needed.[7] An obvious logical corollary duty is that the Commission must refrain

5 *Elimination of Unnecessary Broadcast Regulation*, 57 R.R. 2d 913, *recon. denied*, 58 R.R. 2d 864 (1985), *aff'd, sub nom. Telecommunications Research and Action Center v. FCC*, 800 F.2d 118 (D.C. Cir. 1986).

6 *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion,* Third Report, CC Docket 98-146, FCC 02-33, 2002 FCC LEXIS 655 (rel. Feb. 6, 2002) (Commissioner Martin concurring).

7 *See 1998 Biennial Regulatory Review — Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 11349 (1998) at Appendix A (noting that the FCC seeks "to assure that its rules and processes are no more regulatory than necessary to achieve Commission goals"); *see also 1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, 13 FCC Rcd 23056 at Appendix B; *1998 Biennial Regulatory Review — Amendment of Part 73 and Part 74 Relating to Call Sign Assignments for Broadcast Stations*, 13 FCC Rcd 14392 (1998) at Appendix A.

from adding new regulations that are not necessary. This proceeding tests the Commission's willingness to fulfill those duties and maintain those policies enunciated by Congress and the Commission – and upheld under judicial review.

The reason the Commission and Congress have sought to eliminate unnecessary regulation is because such regulation creates burdens without any legitimate purpose. But, in proposing EEO re-regulation, the Commission threatens to do exactly what it and Congress have spent the better part of two decades attempting to undo; it proposes here to create unnecessary regulations – unnecessary because the broadcast industry's existing practices already reflect the intended desired behavior. The broadcast industry has been pursuing these practices even in the absence of EEO regulation for the past two-and-a-half years since the Commission vacated its previous EEO rules following the Court of Appeals decision in *Lutheran Church.*

Like any industry, the broadcast industry has a strong, inherent incentive to create an active recruiting pipeline to attract a robust stream of qualified men and women from all racial and ethnic backgrounds. Since *Lutheran Church,* the Commission has not produced – and cannot produce – any evidentiary record of industry-wide problems relating to broadcast industry recruitment even though broadcasters have been operating without an explicit FCC mandated EEO outreach requirement. The Associations and their members have continued broad outreach efforts because, as a good business practice, it is in the stations' interests. Consequently, the Commission has no basis for re-regulating in this area. *See Time Warner Entertainment Co., L.P. v. FCC,* 240 F.3d 1126, 1130 (D.C. Cir. 2001), *cert. denied sub nom., Consumer Fed'n of Am. v. FCC, 122* S. Ct. 644 (2001) (FCC must demonstrate that supposed harms are real, not merely conjectural, and must have a record that validates the regulations). As noted above, the costs of regulation are substantial and should not be imposed without an adequate foundation

based on an evidentiary finding of true "need." In this area, the encouragement and facilitation of private beneficial efforts is the best policy. *See* Schuck, *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Policy Rev. 1 (2002) (advocating allowance of voluntary affirmative action by private institutions but not by the government). Indeed, as mentioned previously, in the three decades in which the FCC's former EEO rules were continuously in place, the Commission never took up any inquiry into the continuing need for such rules, despite the development of broad and deep recruitment efforts initiated by the Associations and their member stations – efforts that are working today to make job opportunities increasingly available to the entire workforce.

In Comments also filed today, the NAB shows what it, the Broadcast Education Association, the Radio Advertising Board (the "RAB"), the television networks and others are doing voluntarily and on an institutional, nationwide basis to effectively promote and afford equal employment opportunity. At the state level, the Associations and their member stations are sponsoring or co-sponsoring career-related educational partnerships with high schools, trade schools, colleges and universities. The Associations underwrite scholarship programs that provide hundreds of thousands of dollars in scholarship assistance to students pursuing careers in broadcasting. They sponsor internship programs. They promote mentorship and training programs at stations. They sponsor, co-sponsor and participate in job fairs around their states and across the nation. A growing number of these job fairs take place in cooperation with the Army National Guard of the various states. Additionally, stations and station groups are increasingly conducting their own job fairs with commercial sponsorships, thereby further assuring that such fairs will continue. More specific examples of these extensive and sustained practices include:

- ONLINE JOB BANKS: Among the 49 Associations representing stations in all 50 states and the District of Columbia,[8] 47 Associations or 96 percent currently send job seekers either directly from their web sites to the national NASBA CareerPage.org. online job bank or maintain their own statewide online job banks. The vast majority provide their own statewide job banks also provide additional links to national job search tools such as NASBA's CareerPage.org,[9] to the National Association of Broadcaster's Career Center, to a wide array of fraternal associations representing various segments of the media community, or to general interest job portals. Two Associations without a current presence on the World Wide Web have sites under construction,[10] and plan to offer online job information once thy are up and running. To inform the public of these resources, the Associations have taken two different approaches. Almost half the Associations either promote or plan to soon begin promoting their job banks through broadcast spots and announcements or newspaper advertisements, while others rely on stations to promote the availability of job opportunity information.

8 Delaware, the District of Columbia and Maryland broadcasters are represented by a single association covering all three jurisdictions. The Radio Broadcasters Association of Puerto Rico is the only named association currently without a presence on the World Wide Web.

9 The online job bank of the Nebraska Association of Broadcasters is currently under maintenance, a task made more difficult by the recent and tragic death of the organization's president. Efforts are underway to bring reestablish a full service online presence.

10 The Maryland/DC/Delaware Broadcasters Association and the Utah Broadcasters Association.

JOB FAIRS: 29 Associations either sponsor, co-sponsor or significantly participate in major job fair activities in their respective jurisdictions, with several distributing spots and copy for on-air promotion to member stations. For example, the Texas Association of Broadcasters conducts at least two major fairs every year in the state's major population centers, with on-air promotions to inform job seekers of the opportunities present. Such association activities are additional to the much more numerous job fairs sponsored by stations and station groups. Even when not sponsoring such career events, these associations represent the broadcast industry in their states at various job fairs, including those targeted to minorities and/or women. Many associations also provide material support, such as give-away items and information packets for stations participating or sponsoring such employment fairs.

- INTERNSHIP PROGRAMS: At both high school and college levels, broadcasters and their Associations are giving students first-hand and hands-on experience in all aspects of broadcasting. In a number of states, internship programs involve even greater job-like experience as they include a stipend. The Arkansas Broadcasters Association provides $500 stipends for 65 student interns each year; the Indiana Broadcasters Association provided $30,000 in sponsored internships last year; the Alaska Broadcasters Association currently offers 15 grants of $1000 each year; the Illinois Broadcasters Association provides stipends of between $1200 and $1600 to participants in its minority internship program who learn while they work at member stations; the Tennessee Association of Broadcasters provides a $1500 internship stipend; the Kansas Association of Broadcaster provides paid internships both for students and for educators; the South Dakota Broadcasters Association offers $400 to

individual students, a stipend that is usually matched by the local station hosting the intern; the Maryland/DC/Delaware Broadcasters Association also provides paid internships and encourages career development opportunities found at high school and college radio stations by waiving registration fees for many student broadcasters to attend the Association's annual convention; the Kentucky Association of Broadcasters co-sponsored the Kentucky High School Journalism Association's internship placement efforts; the Wisconsin Broadcasters Association underwrites a high school internship program especially designed for minority students; the Virginia Association of Broadcaster places 30 high school students in broadcasting internships each summer; the Utah Broadcasters Association sponsors a minority internship program; The New York State Broadcasters Association is directly sponsoring 15 internships this year and co-sponsoring another 30 internships with the New York State Office of Children and Family; the Nevada Broadcasters Association has partnered with various chambers of commerce around the state to provide internships and related "job shadow" days for students to become familiar with the kind of work done in the industry.

- MENTORING PROGRAMS: The Associations in Wisconsin, Tennessee, New Hampshire and Minnesota have made major commitments to mentoring programs with broadcast station personnel providing guidance and leadership for youths in their respective states; the Maryland/DC/Delaware Broadcasters Association is a major supporter and participant in American Women in Radio and Television's mentoring program.

- OTHER TRAINING PROGRAMS: The Alabama Broadcasters Association provides students interested in media sales with fee paid enrollment at association-sponsored professional sales training seminars where they learn alongside station sales staff; the Oregon Association of Broadcasters similarly offers cost-free enrollment to college students enrolling in its professional sales training program; the Louisiana Association of Broadcasters also waives all fees for college students attending any of the Association's conventions and professional training seminars; the Iowa Broadcasters Association sponsors a summer broadcast workshop for high school students; the Oklahoma Association of Broadcasters provides 20 full scholarships for high school students to spend part of their summer vacations participating in a university-based broadcasting institute; the Illinois Broadcasters Association underwrites an annual summer broadcast workshop for minority high school students; the Vermont Association of Broadcasters provides grants to several colleges in the state so that they can better train the media professionals of the future; the Michigan Association of Broadcasters is currently developing a high school apprenticeship program to help prepare the broadcasters of tomorrow.
- EDUCATIONAL SCHOLARSHIPS AND FELLOWSHIPS: By providing scholarships and fellowships, many Associations have found an important way to nurture talent and increase opportunity in their respective states. Nearly two-thirds of the Associations provide such opportunities. For instance: the Iowa Broadcasters Association has provided $80,000-to-$90,000 in scholarships and grants in each of the past few years; the Hawaii Association of Broadcasters is providing $58,000 in scholarships this year; the Kansas Association of Broadcasters is provided $44,500 in

scholarships last year; the Florida Association of Broadcasters this year provided $30,000 for scholarships administered through the Florida Independent College Fund, and grants its own annual Leroy Collins Memorial Scholarship to a college senior majoring in Communications or a related field; the South Carolina Broadcasters Association is providing $30,000 in scholarships and endowment support this year; The Washington State Association of Broadcasters is providing $14,000 in scholarships this year, with three grants reserved for women or minority students; the Texas Association of Broadcasters is providing eight college scholarships this year; the Pennsylvania Association of Broadcasters awards fellowships to faculty members to help them keep abreast of the industry and improve their abilities to train students to enter broadcasting careers; the Oklahoma Association of Broadcasters is providing six student scholarships and one faculty fellowship this year; the Arkansas Broadcasters Association provides for seven scholarships at six different state universities; the Montana Broadcasters Association provides two full-tuition scholarships and three matching scholarships to students at state colleges and universities, the Minnesota Broadcasters Association is providing ten college scholarships this year; the Massachusetts Broadcasters Association is providing three college scholarships this year; the Maine Association of Broadcasters provides at least $10,000 in scholarships; the Indiana Broadcasters Association is providing $15,000 in scholarships this year; the Idaho State Broadcasters Association provides several $3000 scholarship grants each year based on the number of viable applicants; the Georgia Association of Broadcasters is providing several $1000 scholarships this year; the Connecticut Broadcasters Association, the California Broadcasters

Association and the Colorado Broadcasters Association are each providing four scholarships this year; the Alabama Broadcasters Association is providing eight scholarships this year; the Tennessee Association of Broadcasters will provide 12-15 grants for college and trade school students this year; the West Virginia Broadcasters Association provided 13 college scholarships last year through an affiliated foundation; the Wyoming Association of Broadcasters will be offering five-to-seven scholarships to students at one of the state's most respected college broadcasting programs; the Illinois Broadcasters Association is in the midst of a five-year-long effort to provide endowments to various colleges in the state for a self-sustaining scholarship for a student in a broadcast-related field; the Arizona Broadcasters Association provides both direct scholarships and support for a state university scholarship endowment; other Associations providing scholarship support include Alaska, Nebraska, New Jersey, North Carolina, Ohio, Oregon, Vermont, and Virginia.

- PARTNERSHIPS WITH LOCAL ORGANIZATIONS: The Texas Broadcasters Association works with the Urban League and other organizations that specialize in targeted outreach to minorities. The TAB also participates in four-to-eight college job fairs, often at predominantly minority campuses, and purchases booths and encourages Texas broadcasting stations to send recruiters to job fairs organized by such minority-oriented media organizations as UNITY: Journalists of Color, Inc., the National Association of Black Journalists and the National Association of Hispanic Journalists; The Nevada Broadcasters Association has partnered with the Hispanic Chamber of Commerce, the Las Vegas Inner City Games, the Las Vegas Chamber of

Commerce and the Clark County School District, among others, in creating career development programs around the state; the Arkansas Broadcasters Association places all jobs listed on its own online job bank on the state employment service's job bank available both on the Internet and at unemployment offices statewide; the Oklahoma Association of Broadcasters participates in the state's "school-to-work" program and partners with the Urban League's efforts to open employment opportunities to all Oklahomans; the Associations in Indiana, Kansas and Minnesota distribute videos to schools and colleges describing and promoting careers in broadcasting; the Indiana Broadcasters Association also provides major support for the state's Black Expo job fair, among other things, through distribution of spots broadcast without charge on stations across the state; the Iowa Broadcasters Association sponsors the Future Farmers of America broadcasting career development program; the Associations in both Michigan and Indiana have partnered with museums to promote broadcasting careers through special exhibits.

- EFFORTS TO DIVERSIFY OUTREACH THROUGH REFERRAL ORGANIZATIONS: Associations in both New Mexico and New Jersey air spots on stations around their respective states soliciting referral organizations to receive the associations' job bank listings; the New Jersey Broadcasters Association further acts as a clearing house ensuring and certifying that some 700 referral organizations receive station job listings; the Washington State Association of Broadcasters publishes a well used directory listing more than 250 female and minority-oriented recruitment sources to assist stations with their hiring efforts; the Associations in Alaska, Arizona, Massachusetts and New Hampshire similarly provide referral lists

for station outreach efforts. The Missouri Broadcasters Association maintains a dynamic outreach link from its online job site so that when a station posts a job opening at the site, the job listing is automatically faxed to over 50 regional recruiting services, many with significant constituencies among women and minorities; the Montana Broadcasters Association collects names of referral groups from local college job placement offices to ensure that all job postings on association-sponsored job banks are also dispatched to these groups.

As noted above, virtually all of the Associations have either established their own online job banks, or links from their web sites to NASBA's national online job bank. Others are in the process of implementing such efforts. Those that have Internet recruiting in place are finding that these online job postings are very effective. As one station's general manager wrote to the Iowa Broadcasters Association:

> You guys did such a wonderful job for me that I have to ask you to pull my job opening from your listing. I have had a GREAT response....and have hired two on air part time employees from it with over a dozen names for future contacts. This is a fantastic venue for anyone interested in the broadcasting industry. I'll definitely post job openings on the IBA web again. But please pull my ad....I don't think my computer can handle all the email enquiries!

As their goal, the Associations want everyone in America to know that if a person is serious about a career in broadcasting, all that person needs to do is log-on to the Internet and they will find many web sites that (i) present the person, directly or through links, with information on virtually every full-time radio and television station employment position available in America and (ii) afford the person the opportunity, free of charge, to send his or her resume electronically to a particular station as well as to post his or her resume on the World

Wide Web for broadcasters to consider as they look for new potential employees. The association in Michigan even enables job seekers to upload digital audio files to its job bank so potential employers can sample air checks and auditions. Such innovative web-based recruiting should become a model for all industries in America and the Commission should applaud these efforts.

In its own effort to provide a central portal for broadcasting jobs, NASBA has maintained a national on-line job bank[11] since 1999. This web site contains job listings and links to other sites with additional listings, so that it serves as a portal to information on job vacancies throughout the broadcast industry. These links include the on-line job banks of the various state broadcasters associations, the NAB, and America's Job Bank which is the nationwide job search site provided by the U.S. Department of Labor and state government employment agencies. Last year, NASBA's postings drew a total of 193,689 page views. So far this year, traffic at the site is up dramatically with about 25,000 monthly page views at the NASBA's CareerPage.org – about half again as much as in 2001. NAB's online career center has also proven quite effective – drawing an average of some 16-thousand visits per month. On April 10, 2002, the category that includes media jobs at America's Job Bank contained 5,646 job listings including postings placed by radio and television stations. America's Job Bank also contains links to station groups, such as CBS Radio.[12]

The Associations' online job banks have been similarly successful. All state associations either maintain a web presence providing online job recruiting resources or have such a web site

[11] Found at <http://www.careerpage.org>.

[12] <http://www.americasjobbank.com/seeker/search/> (visited Apr. 10, 2002)

under construction that will soon do so.[13] This represents a nearly universal adoption of Internet technology. The Rhode Island Broadcasters Association, located in a small state surrounded by larger states, has chosen to make online job recruiting available to its members at a regional media web site containing job listings for a six state area,[14] instead of its own single-state site. Many of these online job banks allow job seekers to post resumes for station hiring officials to review. As noted above, the Michigan Broadcasters Association even enables job seekers to upload digital audio files to the job bank so hiring officials can hear air checks or auditions. These online recruiting efforts have changed the face of recruiting.

One medium market television station in the southwest reports that 85 percent of its job applicants came through Internet-based recruiting last year and, as a result, it filled 26 positions, from entry-level to skilled engineering positions through such web-based recruiting. Even a small market radio station in the nation's heartland reports that it now fills most of its jobs through the Internet. A mid-western network affiliate that has been posting jobs on the Internet for the past five years reports that it now receives 80 percent of its resumes via online recruiting efforts. With the job market migrating online, the Associations are committed to creating a job portal second to none, allowing broadcasting job seekers and recruiters alike to pursue their goals fairly and efficiently.

These on-line job banks are promoted in a number of ways. Some are advertised statewide during broadcasts on member stations. For instance, the Iowa Broadcasters Association supplies the following spot to its members:

13 The Radio Broadcasters Association of Puerto Rico is the only named association without a presence on the World Wide Web.

14 The Rhode Island Broadcasters Association's web presence is through the New England Electronic Media Association's web site <http://newenglandmedia.com>.

ARE YOU LOOKING FOR A REWARDING CAREER IN BROADCASTING? IF SO...YOUR BEST RESOURCE FOR FINDING JOB OPPORTUNITIES IN IOWA BROADCASTING IS ON THE WEB AT **WWW.IOWABROADCASTERS .COM** LOG ON AND ADVERTISE YOUR AVAILABILITY FREE OF CHARGE! THIS MESSAGE IS BROUGHT TO YOU BY THE IOWA BROADCASTERS ASSOCIATION AND THIS STATION. AN EQUAL OPPORTUNITY EMPLOYER.

As noted, almost half of the Associations either are already engaged in similar efforts to advertise the industry's online job banks or are developing such on-air promotions to bring even more job-seekers to the industry's online job banks, while other associations rely on extensive efforts at the local level to achieve the same goals. Some associations are also mixing traditional and forward-looking technologies. The Associations in New Hampshire and Massachusetts advertise their respective online job banks in local newspapers' help wanted classifieds. Indiana, Kansas and Minnesota begin planting the seeds of broadcasting careers early by distributing a broadcasting careers video widely to schools and colleges so that people at the cusp of career choices have better information about the world of broadcasting.

The Associations and NASBA also remain committed to the "Model Broadcast Career Road Map" ("Model Program") which is attached to these comments as Exhibit A. The history and general outlines of the Model Program are described at ¶¶ 17-30, found at pages 15-26 of the Associations' Comments on the *NPRM* dated March 1, 1999, and are attached hereto as Exhibit B. Both NASBA and the Associationzxs further intend to take steps ensuring that broadcast job banks on the Internet, and the information and services they provide, become even better known to potential job applicants of all races and cultural backgrounds, both male and female, throughout the nation.

Another significant effort has been to establish links directing people from other job-oriented websites to and from the NASBA and Association online job banks. NASBA and the

Associations have already established links to the following general interest broadcasting job banks:

- National Association of Broadcasters Career Center <http://www.nab.org/bcc/JobBank/other/>
- Radio and Television News Directors Association <http://www.rtnda.org>[15]

NASBA and many Associations have also broadened the reach of their online recruiting effort by establishing hyperlinks with job banks of particular interest to minority group members and women, including:

- The Black Broadcasters Alliance <http://www.thebba.org/Jobs.html>[16]
- Native America Journalists Association <http://www.naja.com>[17]
- National Association of Hispanic Journalists <http://www.nahj.org/career.html>
- National Association of Minorities in Communications <http://www.namic.com>
- National Association of Minority Media Executives <http://www.namme.org/links.asp>
- American Women in Radio and Television <http://www.awrt.org/Industry_Links.html>
- Journalism and Women Symposium <http://www.jaws.org/jobs.shtml>

15 RTNDA has committed to cross-linking with NASBA's CareerPage.org, although the link from RTNDA to CareerPage.org may not yet be established as of the date of this filing.

16 Although a cross-linking arrangement has been made, the BBA has yet to place a hyperlink to NASBA's CareerPage.org on its web site.

17 NAJA is currently developing its cross-linking capacity. NASBA has submitted links.

- Minorities in Broadcasting Training Program

  <http://www.thebroadcaster.com/LINKS-NEW.html>

It is hoped that participation in this proceeding will lead to even more hyperlinking. These voluntarily established on-line job banks represent the single most effective solution to the Commission's long-standing concern over the difficulties job seekers face in identifying opportunities in broadcasting *before* positions are otherwise filled. Such on-line activity represents a convenient, 24x7, real-time tool to disseminate timely information about job openings across the country. The goal of every state association is for stations within their jurisdictions not only to regularly post the vast majority of their full-time job openings on these web sites, but also to promote over the air whatever online job banks they use, including these. This will help ensure that anyone interested in a broadcasting career will know where to find the information needed to pursue a thorough job search.

Internet-based recruiting is not only the great equalizer for those who are seeking a job in broadcasting; it is also the great equalizer for smaller broadcasters that do not have the resources of group owners. Internet-based recruiting is particularly helpful for the broadcaster who is located in an area of the country which is less racially and ethnically diverse. For that broadcaster, Internet-based recruiting allows him or her to overcome the inherent geographic and demographic limitations of such traditional outreach methods as local job fairs. In reality, Internet-based recruiting is a 24x7 job fair. From the standpoint of the person looking for a job, these Internet-based job fairs are always open for business, present many more job opportunities than a local job fair, are convenient "to attend" and provide an easy way for the person to learn more about the particular job opportunity (the station can post a full job description), about the station (the station's web site can be expected to contain that information) and about the

community where the person may be working and living (the Internet provides much of that information.) From the standpoint of the station, these Internet-based job fairs guarantee that the pool of potential applicants will be much larger than might be expected at a local job fair. And as colleges and universities around the nation are quick to acknowledge, the more people that apply, the more qualified the applicant pool will be – thus increasing the likelihood that the incoming pool of entrants will meet the school's needs in every way. In short, Internet-based recruitment creates national reach, increasing stations' ability to attract qualified employees from all segments of society.

Indeed, these online efforts have already proven their worth in markets both large and small. For instance, in 2001-2, the California Broadcasters Association received an average of some 50,000 hits each month at its online statewide job bank; the Texas Association of Broadcasters site has received an average of 10,000 hits a month so far this year, while the Vermont Association of Broadcasters online job bank has received nearly 700 visits each month. These job postings represent a wide variety of opportunities in the broadcast industry. For instance, about half of the jobs posted by members of the New Jersey Broadcasters Association to NASBA's national online job banks were for "top 4" positions, including station officials and managers, professionals, sales staff and technicians.

In the interests of promoting broadcasting as a possible career choice, particularly for minorities and women, and to insure even greater reliance on the Internet as a recruitment tool by stations and as a recruitment resource for the public, the FCC can – and should – establish its own one-stop national on-line job vacancy portal to further facilitate job hunting by those interested in broadcasting careers. Indeed, given the increasing convergence among once discrete media, a Commission-sponsored job portal should also include information about job

opportunities in the entire range of FCC-regulated media activities, such as cable television, satellite services and 3G wireless. In this way, the public will have access to the most efficient media job search tool available. By creating such a portal, the Commission would encourage the widest possible dissemination and outreach. Such an effort would wholly comport with other federally-sponsored job recruiting and placement efforts on the Internet that involve cooperation with the private sector, most notably, the "America's Job Bank" web site.[18] It would similarly mirror efforts by the broadcasting industry. For instance, the association in Rhode Island, representing broadcasters in a small state, has expanded its recruiting reach by participating in a regional media job bank <http://newenglandmedia.com>, rather than establishing its own state specific job bank, so that job seekers can arrive at a single site and find more job opportunities at the single web site.

Such efforts by the Commission to emulate initiatives by the Labor Department would leverage widely accepted voluntary broadcast industry efforts that are reasonably calculated to achieve continuous, broad and deep recruiting outreach. Given these well-documented industry efforts, no proven need exists now to re-regulate in this area. Short of re-regulating in this area, the Commission still has an important, albeit measured, role to play in continuing to encourage desired outreach conduct. In addition to the Commission establishing the national on-line job

[18] America's Job Bank describes itself online as "the biggest and busiest job market in cyberspace. Job seekers can post their resume[s] where thousands of employers search every day, search for job openings automatically, and find their dream job[s] fast. Employers can post job listings in the nation's largest online labor exchange, create customized job orders, and search resumes automatically to find the right people fast. Guided by the vision of America's Labor Market Information System, the U.S. Department of Labor (DOL) has developed America's Career Kit in partnership with the states and private sector organizations." <http://www.ajb.dni.us/html/about.html> (visited Apr. 10, 2002).

portal described above, the Associations believe that the broadcast industry would respond very favorably to a statement from the Commission that not only compliments the broadcast industry for the steps that it continues to take, but also encourages all broadcast stations, the Associations, the NAB and others to continue expanding their exemplary efforts in this area by further increasing their use of these web sites to post full-time job vacancies. It is understood that the Commission will be ready to act when expert agencies and/or courts determine that unlawful discrimination has taken place.

II. THE COMMISSION LACKS ADEQUATE LEGAL JUSTIFICATION FOR RE-REGULATING IN THIS AREA

Even apart from the lack of a factual record warranting re-regulation, no legitimate *legal* rationale exists for re-regulating in this area. The Commission has abandoned its former rationale of promoting diversity, for good and sufficient reasons. The new goal, to "deter discrimination,"[19] postulated by the Commission in the *Second NPRM*, is both factually and legally defective. These points are well supported by a historical review of the Commission's EEO regulations.

In adopting prior EEO rules, the FCC relied heavily on its goal of promoting "diversity of programming," "different points of view," varying perspectives," and "diverse programs." *See, e.g., Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Process,* Report and Order, (the " *EEO Report and Order*"), MM Docket Nos. 96-16, 98-204, FCC 00-20, 15 FCC Rcd 2329 at ¶¶ 2, 4,20, 21, 40, 48-62, 182, 185. The Commission has also frequently cited the dictum in a Supreme

[19] *Second NPRM* at ¶5.

Court opinion stating that FCC regulation of the employment practices of its licensees "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934... to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976). But the Commission has not mentioned this diversity rationale in the *Second NPRM*, nor did it do so in briefs defending its former rules during the *Broadcasters* case. The Commission, thus, has now abandoned its former reliance on a presumed link between programming viewpoint and race, gender or ethnicity. This abandonment occurred, no doubt, in response to (1) the decision by the United States Court of Appeals for the District of Columbia Circuit that such diversity, especially in the form of "intra-station diversity," is a concept "too abstract to be meaningful," *Lutheran Church*, 141 F.3d at 354, and (2) Justice O'Connor's opinion that this type of diversity provides "no legitimate, much less important reason to employ race classifications apart from generalizations impermissibly equating race with thought and behavior." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 615 (1990) (O'Connor, dissenting). Justice O'Connor found that the interest in broadcast diversity is "too amorphous, too insubstantial," *id.* at 612, to rule out the possibility of racial preferences or prejudices. She noted that the FCC might illicitly use this alleged interest to identify a "black" or "Asian" or "Arab" viewpoint and then require stations to take steps that the Government deems likely to result in the presentation of a favored view under the guise of such diversity. *Id.* at 615. A generalized interest in diversity would allow what Justice O'Connor termed "great and indiscriminate use of racial classifications not just for particular purposes and a limited time, but for all purposes and for all time." *Id.* at 614.

It is important to note that once the FCC abandoned this "diversity" rationale – for good and sufficient reasons – the dictum in *NAACP v. FPC* concerning "programming" no longer

provides any support for the Commission to regulate broadcasters' employment practices. The Commission can no longer claim that a statement in a Supreme Court decision justifies such regulations.

The FCC would now like to claim instead that regulation of broadcaster licensees' recruitment and hiring practices is necessary "to effectively deter discrimination and ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process." *Second NPRM* at ¶5. But any claim that Congress has ratified this new rationale is unsupportable in light of Congressional silence on the matter since the Court of Appeals decisions in *Lutheran Church* and *Broadcasters*. Congress could have created a statutory program or mandated a new regulatory approach in this area – but it did not. Indeed, the Court of Appeals found no statutory bar to vacating the Commission's former EEO regulatory structure, and the Commission itself then found no statutory bar to suspending those parts of the former rules that the court did not vacate, otherwise it could not have suspended them in good faith. In its proposal to re-regulate, any FCC action in this area must comport wholly with the Court of Appeals's unequivocal holdings – and not some imagined statutory mandate.

Lacking a statutory crutch, the Commission must provide compelling facts and logic that support re-regulation in this area. But, both the factual predicate and logic of the FCC's new rationale for re-regulating are dubious. There is no evidence that the nondiscrimination laws on the books at the federal, state and local levels of government are inadequate to "deter discrimination." There is also no evidence that word-of-mouth recruitment (done in conjunction with other recruitment steps such as use of the Internet job banks, over-the-air advertising, job fairs, etc.) is more extensive than in other industries, much less that it is an inherently

discriminatory practice or has led to discriminatory practices by broadcasters in general. Indeed, broadcasters have a strong incentive to practice broad outreach through, for example, the Internet, job fairs, and newspaper advertising, so as to expand the pool of potential employees. This incentive has created strong programs, leveraging new technology to improve outreach efforts through Internet-based recruiting – a tool the FCC itself uses to broaden and deepen its own recruitment of agency employees.[20] As noted, the broadcasting industry continued to broaden and deepen its outreach over the past two-and-a-half years, even in the absence of regulation after the FCC vacated its former EEO rules. Rather than allow its outreach efforts to atrophy or abandon them, the industry has strengthened them completely at its own initiative, without threat of government sanction. Therefore, it cannot be emphasized too strongly that no evidence on the record establishes any legitimate need for re-regulation in this area.

Moreover, it simply makes no sense for the FCC to regulate the industry's recruitment and hiring practices to prevent some imagined homogenous workforce from "replicating" itself. Certainly, there is no evidence that the broadcast industry as a whole is somehow a "discriminator" or that specified recruiting practices must be imposed as "remedies" for such discrimination, much less any FCC findings to that effect. Indeed, as noted, employment market realities point to the opposite conclusion. Given the lack of evidentiary support for any claim about self-replicating "homogeneity," much less discrimination by the industry, any such FCC requirement based on such supposed claims would be arbitrary and capricious and contrary to law as the Commission has not and cannot "cogently explain" its choice. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983)). (citing *Atchison, T. & S. F. R.*

[20] As noted, the Associations hope the FCC will also broaden its job bank to serve not only its own recruiting needs, but those of all media industries that it regulates.

Co. v. Wichita Bd. of Trade, 412 U.S. 800 at 806; *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972); *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443 (1965)); *see also AT&T Wireless Servs. v. FCC,* 270 F.3d 959 (D.C. Cir. 2001) ("basic principles of administrative law require the agency to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made") (citing *U.S. Telecom Ass'n v. FCC*, 227 F.3d 450, 461 (D.C. Cir. 2000) and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43 (1983)).

Furthermore, the Commission has not defined, in any meaningful way, what it means by "homogeneity." Does it refer to racial, ethnic or cultural homogeneity? Or does it refer to some other element or combination of elements? Even if a reasonable, workable definition existed, the Commission has not explained how anyone, including its own staff, can identify where unacceptable "homogeneity" ends and acceptable "heterogeneity" begins. Moreover, any attempt to establish lines of demarcation must involve the government setting standards to determine how many employees with a particular racial, ethnic or cultural characteristic will create a level of *acceptable* heterogeneity so employers can avoid running afoul of rules and policies. But once the Commission creates such standards, such action will again entangle it in precisely the same constitutional protection defects that led the Court of Appeals to find that the Commission's former EEO rules were unconstitutional in the *Lutheran Church* case.

As for the Commission's claim that broadcasters must eschew word-of-mouth hiring and instead take mandated recruitment steps to "deter discrimination," it is axiomatic that only *intentional* discrimination is prohibited by the Constitution, *Washington v. Davis*, 426 U.S. 229 (1976), or even by Title VI of the Civil Rights Act of 1964. *Alexander v. Choate*, 469 U.S. 287, 293 (1985). And reliance on word-of-mouth to obtain new employees does not constitute

intentional discrimination or even give rise to an inference of discrimination; indeed, it may be an appropriate and efficient method of hiring. *EEOC v. Consolidated Service Systems,* 989 F.2d 233 (7th Cir. 1993). It is surely strange, to say the least, for the FCC to contend that regulations *prohibiting* word-of-mouth recruitment are necessary to "deter discrimination," when anti-discrimination law *permits* such word-of-mouth recruitment. *Cf. Alexander v. Sandoval*, 532 U.S. 275, 284 n.6 (2001) (making similar point about disparate impact regulations under Title VI); *Cutting the Gordian Knot of Affirmative Action: Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1988)*, 22 Harv. J. L. & Pub. Pol'y, 339, 344-345 (1998) ("[u]se of racial preferences in an attempt to prevent future instances of discrimination subverts the goal of abolishing racial classifications."). Indeed, even under Title VII of the Civil Rights Act of 1964, an employer cannot be required to stop its reliance on word-of-mouth hiring and adopt what the Government views as the "best" hiring procedures when that employer has not been found to have violated the civil rights laws. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577-578 (1978). The FCC has certainly not shown that it has authority to require steps that courts cannot mandate even under the disparate impact standards of Title VII. The only logical conclusion, then, is that the Commission lacks any legal justification for this proposal – and lacking justification, the FCC cannot impose such procedures.

The point is not that the Associations and their members necessarily disagree with the Commission's views about the "best" hiring procedures, but rather that the FCC cannot *impose* such procedures without legal justification. An essentially remedial regulation for an industry that has never been found to be a discriminator is unjustified and inappropriate.

III. THE COMMISSION SHOULD RELY ON THE EEOC, COURTS AND STATE EEO AGENCIES FOR RESOLUTION OF DISCRIMINATION COMPLAINTS

Although the record indicates that broadcasters are acting in the public interest in their hiring and recruiting activities and, therefore, as explained in Section II, the public interest does not require that the Commission adopt its own industry-specific EEO regulations, the Associations understand the sentiment expressed by then Commissioner Powell: "If the public interest means anything at all it cannot possibly tolerate the use of a government license to discriminate against the citizens from whom the license ultimately is derived." *NPRM,* 63 Fed. Reg. 66104 (1998) (Separate Statement of Commissioner Michael Powell). To ensure that an isolated bad actor does not sully the industry's otherwise good record, the Associations urge the Commission to rely on experts from the EEOC, courts and state agencies to resolve employment discrimination complaints, whether such complaints allege that an individual or a group has been the subject of unlawful discrimination. Indeed, given the lack of evidence supporting FCC re-regulation here, such deference is required under the Congressionally-mandated principle that the Commission should only regulate where necessary.

Even if the Commission wants to be on the record by adopting its own nondiscrimination rule, it must defer to the EEOC, the courts or state EEO agencies to resolve cases relating to discrimination complaints, whether the complaints involve discrimination against an individual or allegations of a "pattern and practice" of discrimination. Such regulation would comport with the greater public interest by ensuring that tribunals with both real expertise and adequate resources determine whether allegations of discrimination are valid and should be pursued. If the EEOC, an expert state agency or a court makes a final determination that a broadcaster has in fact discriminated, the FCC can then determine whether additional sanctions on the licensee would be appropriate.

It would be contrary to the public interest for an agency, like the FCC, that lacks expertise in a complicated area of law to adjudicate complaints of this kind, especially when expertise exists at other agencies whose particular missions are to enforce anti-discrimination statutes and rules and to adjudicate those kinds of cases. Historically, the FCC has not handled many discrimination cases and has litigated very few such cases over the years. In stark contrast, the EEOC is the federal agency charged with enforcing the principal federal statutes prohibiting employment discrimination, including: Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex or national origin, the Age Discrimination in Employment Act of 1967, the Equal Pay Act of 1963, Title I of the Americans with Disabilities Act of 1990, Section 501 of the Rehabilitation Act of 1973 and Title I of the Americans with Disabilities Act, and sections of the Civil Rights Act of 1991. The EEOC can perform its functions not only in Washington, D.C. but also at fifty field offices around the country. The EEOC receives between 75,000 and 80,000 charges each year,[21] and manages many more, including many complex charges of "patterns and practices" of discrimination. In 2001, state fair employment practices agencies resolved 54,851 charges under contract with the EEOC;[22] these were in addition to any charges brought solely under state law. Courts have very substantial experience and expertise, as they are responsible for resolving equal employment

21 Source: EEOC Enforcement Web Page <http://www.eeoc.gov/enforce.html> (visited Apr. 15, 2002).

22 *Id.*

litigation brought both by private parties directly and by the EEOC and/or state fair employment agencies.

In analogous situations involving anti-competitive conduct and antitrust violations, the Commission has acknowledged the expertise of other agencies and deferred to those agencies for the determination as to whether there has been wrongdoing. The Commission has explained its rationale for doing so by noting that while violation of the antitrust laws:

> may have a potential bearing on the applicant's character, we do not believe it appropriate or necessary to engage in the initial investigation or enforcement of the antitrust laws. As we have observed in the *Underbrush* proceedings, other government agencies – most notably the Department of Justice and the Federal Trade Commission -- have been given primary responsibility in policing antitrust and anti-competitive activity. In addition, individuals or corporations can bring lawsuits alleging violation of antitrust or anticompetitive laws. In this regard, we are of the view that, for the purposes of a character determination, consideration should be given only to adjudications involving antitrust or anticompetitive violations from a court of competent jurisdiction, the Federal Trade Commission, or other governmental unit charged with the responsibility of policing such activity. We find this approach strikes an appropriate balance between the need to consider the relevancy of such activity, our desire not to duplicate the adjudicative functions of the court o[r] other government agencies and our concern with the basic fairness of our proceedings to participating litigants.

Character Qualifications, 102 F.C.C. 2d 1179, 1202-1203 (1986).

Such deference to sister agencies with expertise is not unusual. The FCC routinely relies on Federal Aviation Administration expertise to shape rules, regulations and policies regarding tall antenna structures,[23] the Environmental Protection Agency on broadcasting-related

[23] *See e.g.* 47 C.F.R. §17.23 (lighting and painting of antenna towers to protect aviation safety).

environmental effects,[24] and the State Department for fulfillment of U.S. obligations pertaining to international telecommunications treaties and agreements.[25]

The rationale for deference to authorities with jurisdiction to enforce anti-discrimination laws is surely as compelling as the rationale for relying on other government agencies with special expertise in these other areas – if not more so. The Commission should, therefore, not just have a policy of "generally deferring" to the EEOC or other agencies, as it proposes in ¶19 of the *Second NPRM*; it should incorporate such deference into any *rule* it implements, just as it does in the antitrust, aviation safety, environmental and international relations contexts. The FCC has not explained why it should take complaints itself, rather than requiring them to be filed at the expert agency; nor has it described the factors the Commission would use to guide its proposed "discretion" to adjudicate such complaints.

The FCC apparently also proposes to defer to expert agencies only complaints of discrimination against *individuals,* and to adjudicate itself allegations of *patterns* of discriminatory behavior. *Second NPRM* at ¶19, citing *NPRM* at ¶69. But, no good reason exists for this distinction. Indeed, if anything, it is *more* important to defer to the expert agencies on "pattern and practice" complaints. The EEOC, for example, has substantial experience in adjudicating "pattern and practice" discrimination complaints, which can raise exceptionally complex and technical questions of both fact and law. *See, e.g. Local 28 of the Sheet Metal Workers Int'l v. EEOC*, 478 U.S. 421 (1986) (upholding finding of pattern and practice discrimination by the EEOC); *EEOC v. O&O Spring and Wire Forms Specialty Co.*, 38 F.3d 872

24 *See e.g. OET BULLETIN 65, Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields* (Aug. 1997).

25 *See e.g. Loral Spacecom Corp,* 13 FCC Rcd 16438 (1998).

(7th Cir. 1994), *cert. denied*, 513 U.S. 1198 (1995); *EEOC v. Roadway Express, Inc.*, 261 F.3d 634 (6th Cir. 2001) (ordering company to comply with EEOC subpoena); *EEOC v. Rodriguez*, 1994 U.S. Dist. LEXIS 19839, 66 Fair Empl. Prac. Cas. (BNA) 1649 (E. D. Cal. 1994) (finding hiring pattern and practice of car dealership group amounted to illegal racial discrimination). It should be noted that the 1985 *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 51 Fed. Reg. 21798 (1986), correctly made no distinction between individual complaints and those involving employment patterns and practices. Instead, the agreement contemplated that the EEOC would adjudicate *all* complaints within its jurisdiction.

IV. ANY NEW RULE MUST NOT PRESSURE BROADCASTERS TO MAKE EMPLOYMENT DECISIONS ON THE BASIS OF RACE

Assuming that the Commission believes that there is a true need to re-regulate in this area, the FCC is certainly constrained by controlling precedents in the Supreme Court and circuit courts of appeal and, therefore, any re-regulation should be narrowly tailored.

The United States Court of Appeals for the District of Columbia Circuit has twice vacated as unconstitutional FCC regulation of the employment practices of broadcasters. In *Lutheran Church,* the Court of Appeals held that the FCC's then-EEO rule was an unconstitutional race-based classification because it pressured broadcasters to *hire* employees based on race and could not survive strict scrutiny. In *Broadcasters*, the court of appeals held that the FCC's renewed attempt to regulate broadcasters' employment practices created pressure to *recruit* on the basis of race and was, therefore, also a race-based classification violating the equal protection component of the Fifth Amendment's Due Process Clause.

Both decisions by the Court of Appeals were based on the *pressure* that the FCC is able to impose on its licensees, including *sub silentio* pressures and "raised eyebrow" regulation.

Broadcasters, 236 F.3d at 19 (quoting *Community Service Broadcasters of Mid-America, Inc. v. FCC*, 539 F.2d 1102, 1116 (D.C. Cir. 1978); *see generally Head v. New Mexico Bd. of Exam'rs in Optometry*, 374 U.S. 424, 436-437 (1963) (quoting commentators stating the "licensing power of the FCC...hangs like a constant Damocles' sword over broadcasting" and that the FCC's informal powers resulted in "regulation of programming by raised eyebrow.") As the United States itself said in its Response to Petitions for Rehearing and Petitions for Rehearing *En Banc* in *Broadcasters* (at 9):

> The licensing authority of the FCC is indeed a powerful tool; the FCC exerts a great deal of influence over holders of broadcast licenses and can revoke a license where a licensee fails to comply with the agency's rules and policies.... Under the Communications Act, the FCC has the responsibility of controlling radio and television channels, and the power to license their use for limited periods of time. The FCC establishes qualifications for broadcasters, can compel the disclosure of certain information from them, and may grant or deny license applications in the public interest. The FCC may alter, suspend, or revoke a license subject to certain procedural safeguards. Indeed, a decision by the FCC to revoke a station's license will essentially render the station inoperable and likely put the broadcaster out of business.

Any FCC rule must acknowledge the power and dangers of the Commission's "Damocles' sword over broadcasting." The regulation therefore must steer *completely* clear of any pressure on broadcasters to make employment decisions based on race.

Moreover, in *Broadcasters*, the Court of Appeals stated that Option A of the then-EEO Rule did not pressure broadcasters into *recruiting* on the basis of race, but the court also expressly *reserved* the question as to whether the regulation "create[d] pressure to *hire* those women and minorities who are recruited" and was therefore unconstitutional. *Broadcasters*, 236 F.3d at 18 (emphasis added). Any new FCC regulation must be promulgated with the

understanding that the constitutionality of Option A, or any requirement substantially similar to Option A, remains very much an open question – explicitly reserved by the court of appeals. It should be noted that the Associations maintained both in their comments at the Commission on the *NPRM* and in the court of appeals, that Option A – especially when coupled with an FCC requirement of public filing of Forms 395-B with detailed, station attributed, information about the race and gender of full-time and part-time employees – in fact pressured broadcasters to hire on the basis of race and was, thus, unconstitutional. The Associations continue to believe that the Commission's proposal in the *Second NPRM* contains the same constitutional infirmities, and thus oppose any effort to essentially re-enact Option A with publicly available station attributed Forms 395-B.

The Associations also oppose any requirement that broadcasters track the recruitment sources of their interviewees and/or hires. The Commission asks for public comment on whether it should require such tracking to ensure that stations "are in fact achieving broad outreach." *Second NPRM* at ¶32. But true "broad outreach" is dependent only on choosing appropriate *means* for recruiting, such as the Internet, not on measuring the resulting composition of the workforce. If the Commission knows that a job has been posted on the Internet and that the station's audience has been told that the station regularly posts its openings on a particular web site or web sites, then the Commission knows that there has been the broadest outreach geographically possible. If the Commission also knows that the station either directly or through a reliable third party regularly sends notices of its openings to referral organizations that have asked for such notice, then the Commission knows that there has been broad outreach on a local organization level. Under those circumstances, any further requirement that a station evaluate whether its efforts are achieving broad outreach can mean only one thing: the FCC wants the

station to track how many minorities and women are actually responding to these outreach efforts so that the public and the FCC can measure the station's interviewing and hiring of various groups and, specifically, minorities and women. However, an explicit or even implicit tracking requirement is a constitutionally very slippery slope for the Commission. The notion of "tracking" is based on an assumption that some valid means exists for anyone, whether regulator or regulatee, to determine when and whether an "adequate" number of a particular type of person has either applied for a job or been hired. As with determining an acceptable level of "homogeneity" and "heterogeneity" discussed above in Section II, the Commission would first have to determine a regulatory standard for what is "adequate." There is no way to make such a finding without establishing a system of head counts that ultimately amounts to nothing more than a minimum quota. Even if the Commission does not choose to characterize this standard as a "quota," it will result in pressure on stations to hire people because of their race, ethnicity or culture to avoid running afoul of Commission rules and policies. As noted above in Section II, this is precisely the kind of regulatory structure that the Court of Appeals has held to be contrary to the Fifth Amendment. The tracking of referral sources is no less vulnerable under the Fifth Amendment since it is clear that such sources are only useful as proxies for persons of certain races, ethnicities and genders.

V. WELL PUBLICIZED INTERNET-BASED RECRUITING IS THE BEST WAY TO AVOID CONSTITUTIONAL INFIRMITY

Instead of re-enacting Option A or tracking interviewees or hires, the Commission should consider, at most, a refined version of the proposal made by NASBA, formerly BEDA, in its

comments on the earlier *NPRM* in this proceeding.[26] The general framework of this proposal, which is *inarguably* race and gender neutral, is that (a) stations be required to post at least 50 percent of their full-time vacancies on the Internet (either on the station's own web site, an Association's web page, the NASBA CareerPage, the NAB's Career Center or other employment and recruitment web site) and (b) stations be required to promote over the air these web sites as well as provide notices of openings to referral organizations that request notice of job listings, either directly or through their state associations or other third parties. Stations would not be required to track the race or gender of interviewees or hires or the source of each specific job referral. Nor would stations be required to provide the government with a breakdown of their employees.

Such a requirement would acknowledge the dramatic changes that have transformed the business of filling jobs over the past half-decade. The Internet is fast becoming a great leveler in American society. About two-thirds of all Americans now use computers in a variety of settings: at home, work, school, libraries and community centers;[27] ninety percent of all American children, between ages 5 and 17, use computers. Demographically, Internet usage growth among African-Americans and Latinos is increasing more than fifty percent faster than it is among whites and Asians who have traditionally been more likely to use such resources. Furthermore, among the nation's lowest wage earners, Internet use has recently been increasing at a 25 percent annual rate.[28] Although the "digital divide" may have been pronounced in the early years of

26 The proposal is found at ¶¶ 31-35 (pages 26-29) of the Associations' Comments submitted on March 1, 1999, and attached herewith as Exhibit C.

27 U.S. Department of Commerce, Economics and Statistics Administration and National Telecommunications and Information Administration. *A Nation Online: How Americans Are Expanding Their Use of the Internet*, Executive Summary at 1 (Feb. 2002).

28 *Id.*

mass commercialization of the Internet, and may have encouraged reliance upon older methods of recruiting, these statistics demonstrate that the divide has so rapidly narrowed today that many commentators are now describing it as a lingering myth rather than reality.[29] In any event, the "digital divide" is not relevant in this context. Here, the broadcast industry and the Commission are focusing on people who have a genuine desire to pursue careers in broadcasting. These are the types of people who want to work at a professional organization, people who are motivated enough to use the Internet for that purpose – whether they receive access at home, at their current places of employment, , in community centers or in public libraries.

This proceeding stands as an opportunity to help further close whatever divide may exist. The most effective engine to quicken the pace of penetration of new technology is to continually increase its relevance to everyone. By applauding the broadcast industry's efforts to offer continuous Internet-based job fairs, the Commission will increase the number of broadcast job postings on the Internet which, in turn, will increase the number of persons finding job opportunities over the Internet which, in turn, will increase the number of people being hired by stations based on communications initiated over the Internet. The utility of a new technology is the strongest driver of that new technology. By placing greater emphasis on Internet job recruiting, this proceeding offers the Commission a rare opportunity to further increase penetration of the Internet throughout the nation.

The marketplace is already doing an excellent job at recognizing how useful the Internet can be since the Internet is rapidly – and measurably – becoming a primary job search and recruiting venue. For example:

[29] *See e.g.* Robert J. Samuelson, *Debunking the Digital Divide*, Washington Post, Mar. 20, 2002, at A33.

- Online job recruiting expanded 40 percent last year.[30] The online job recruiting industry is expected to continue growing by 40-50 percent a year.[31]
- 88 percent of human resources professionals use Internet job boards to find candidates.[32]
- Sales of newspaper help-wanted ads declined 32 percent last year, while Internet-based recruiting grew, despite the recession. For instance, the employment site, CareerBuilder.com, reported that it "had 50 percent more job-posting orders in the fourth quarter [of last year]."[33]
- Career sites attracted 19.8 million job seekers in October 2001, 16 percent more than visited such web sites a year earlier.[34]
- Monster.com, the largest online job search and recruiting site, contains voluntarily submitted resumes and employee profiles for at least 13 percent of the U.S. workforce[35] and, according to independently derived statistics released in January, it had over 41 million unique visits per month.[36] Web-based job sites, such as

30 Maria M. Perotin, Knight Ridder News Service, *Recession makes online job hunt longer, harder, more frustrating,* Fort Worth Star-Telegram, Feb.13, 2002 (quoting statistics compiled by Forrester Research of Cambridge, MA).

31 Mylene Mangalindan, *E-Business: Online-Jobs Niche Sparks Yahoo's Bold Move*, Wall Street Journal, Dec. 24, 2001, at B4.

32 *Off The Board*, Dallas Morning News, Sept. 2, 2001 at 9L. (quoting an Aug. 2001 survey by the Society for Human Resource Management.)

33 Justin Pope, *Online job sites face changed landscape,* The Associated Press, Feb. 20, 2002.

34 *Id.* (quoting statistics compiled by the Internet research firm, Jupiter Media Metrix of New York, NY).

35 Peter Capelli, *Making the Most of On-Line Recruiting*, Harv. Bus. Rev., Mar. 2002.

36 Source: I/PRO.

Monster.com are now such powerful job search and recruiting tools, that a major civil rights organization, The National Urban League, acts as a partner to Monster.com, in lieu of posting jobs on its own site, by providing a link from its home page to a special Monster.com job search area devoted to workplace diversity. The NAACP has a similar arrangement with another online job listing provider operating under the banner of "Bestdiversityemployers.com."[37]

- The number of people visiting "USAJOBS," the U.S. government's web site aggregating federal job listings via a single web site, increased 65 percent between October 2001 and January 2002.[38]

The major "downside" reported concerning online recruiting is that it makes job hunting so efficient, many hiring officials say they receive far more resumes for each job opening than they did using traditional recruitment techniques and, therefore, can sometimes become stretched in their efforts to keep up with the sheer volume of applicants.[39] However, for the Commission's purposes, this supposed downside would represent fulfillment of a core goal: to make it simpler for anyone interested in the industry to find out about and then apply for jobs in broadcasting.

37 The proliferation of partnerships between leading civil rights groups and for-profit job-sites unfortunately keeps these organizations from providing links to such non-profit endeavors as CareerPage.org and the foundations and associations that the NASBA job banks links to and from.

38 U.S. Office of Personnel Management, *Citizen Interest in Public Service Careers Grows*, News Release (Feb. 20, 2002), available at <http://www.opm.gov/pressrel/2002/MO-PublicInterest.asp> (visited Mar. 6, 2002)

39 *See* Capelli, *supra* n.35; *See also News Briefs*, HRFocus, May 2000 at 8 ("respondents said they are being "inundated" and "overwhelmed" with a larger number of online applicants) and *Online recruiters don't guarantee reply,* Toronto Star, Feb. 16, 2002, at X31 (quoting one hiring official who found that "[w]ithin four hours of posting the job, we received 200 resumes . . . and within ten days we had almost 1000").

As demonstrated in Section I, above, Internet recruiting in the broadcast industry is on a similar upward trajectory. Both NASBA's help wanted web site, and those of various Associations, are receiving an increasing number of site visits – and attracting an increasing percentage of job applicants. Given the demographic trends indicating widespread Internet use among all segments of society, and the business trends discussed above, the Commission should not look backward to recruitment methods appropriate to the challenges and technologies of the 20th Century. Instead, if the Commission chooses to re-regulate – and, as the Associations have demonstrated above, such re-regulation is neither necessary, nor appropriate, nor constitutionally justified – it should seek to harness current technologies in a manner consistent with today's real world job-hunting and recruiting experience, which increasingly relies on the Internet.

In creating a forward-looking regulatory scheme, the Commission should set a threshold standard – a percentage of jobs, for example– at which a station is deemed to have provided adequate recruiting outreach through online posting. Thus, a station that that meets its requirement to post at least 50 percent of its jobs on the Internet need not be burdened with the expense and effort of justifying why it chose certain jobs for online recruiting, and not others. Such an effort would also aid the Commission's goals of efficient regulation by diminishing disputes over the *bona fides* of a station's decision to exempt any particular job posting from online dissemination, cutting down the need of Commission staff to investigate and adjudicate disputes and the costs of litigation to stations. Moreover, since no station knows in advance when it will need the flexibility to rapidly and confidentially fill a job without posting (as key positions can come open without notice, filling particular positions might require complete confidentiality, or format changes might necessitate quick changes in the skill sets of on-air personalities), every station will have a numerical incentive to place as many job openings on the

Internet as possible, thereby saving exigent circumstance exemptions for those occasions when they are truly needed. Accordingly, stations will still have the incentive to hire with full Internet recruitment except in those exigent circumstances. This will encourage and make online posting the rule, rather than the exception, as stations preserve their options for those times that they truly need to narrow recruiting efforts.

By creating such incentives to make posting the rule rather than the exception, the Commission will do much to benefit the public interest underlying any EEO re-regulation. The Associations are mindful that the Commission may be reluctant to engage in numerical line-drawing. The suggestion here is to provide stations, the public and the Commission with easily ascertainable criteria. It is true, however, that no set of numbers can eliminate the possibility that a station may still need to exceed the exception limits in which case there would be a resort to some definition of exigent circumstances. The hope is that if percentages were used as an initial threshold, the need to rely on such definitional line-drawing would at least be diminished, albeit not totally eliminated. The Associations look forward to commenting upon any definitions of exigent circumstances that may be offered in this proceeding.

VI. ANNUAL EMPLOYMENT PROFILE REPORTING SHOULD NOT BE REQUIRED

As noted above, the FCC's goal here should be *finding real jobs for real people*, not to count the mere numbers of women or minorities at stations in a supposed effort to hold stations "accountable" to meet a quota or goal. The Commission should not impose any requirement that broadcasters maintain and publicize Annual Employment Reports (Form 395-B), which contain detailed data as to the racial, ethnic and gender compositions of stations' workforces, because such filings will impose unconstitutional governmental pressure on stations to recruit and hire on the basis of race and sex. This will be the case even if the Commission pledges not to use the

data *directly* to measure a station's performance because the reports will be used by *third-parties* in a way that will either lead to governmental involvement and, thus, unconstitutional pressure, or threaten to lead to those outcomes. Interestingly, the Commission no longer claims in the *Second NPRM* that it will not use the Form 395-B data to assess compliance with any new EEO regulations. In any event, such a claim by the Commission would ring hollow as it did under its initial *EEO Report and Order* in this proceeding.

As the Minority Media & Telecommunications Council ("MMTC") Intervenors' brief in *Broadcasters* pointed out (at 6-7), the Commission has been making claims since at least 1970 that data in annual employment reports is primarily intended to show "industry employment patterns." But the United States Court of Appeals for the District of Columbia Circuit nonetheless correctly found in *Lutheran Church*, 141 F.3d at 353, that the reports *in fact* put pressure on broadcasters to use racial classifications in hiring. Moreover, the court found that the pressures on stations to hire based on race were significant because of the dangers of attracting third-party attention. *Id.* This reality cannot change as long as any rule mandates publicly-available Annual Employment Reports.

Given the sword of Damocles that the FCC pendulously wields over its licensees, no words of assurance are legally adequate to eliminate the clear "pressure" on broadcasters to recruit and hire based on race and gender that public filing of such reports would create. Indeed, the *Second NPRM* effectively invites pressure by third-parties (with FCC participation) to hire "enough" minorities, by stating at ¶38: "the annual public file report is useful as a means of facilitating public input into the EEO process. If current information is available concerning an employment unit's EEO program, members of the public will be in a position to make known any problems they may perceive in a timely manner." In its brief to the court of appeals in

Broadcasters (at 50-51), the FCC acknowledged that the public may "use the data [reporting the race and gender of employees in the Annual Employment Reports] to criticize a broadcaster's employment practices or even to bolster a claim of employment discrimination brought to the EEOC."

It is crucial to note that the Minority Media Telecommunications Council ("MMTC") stated in its comments on the earlier *NPRM* in this proceeding (at 315) that it would review the Annual Employment Reports and would "liberally draw inferences from statistics" in investigating whether broadcasters have discriminated. In performing statistical comparisons of the broadcasters' employees with the local workforce, MMTC made clear its position that a difference of two standard deviations from the makeup of the local market will be enough to create a "presumption of discrimination." (MMTC Comments on the *NPRM* at 315 n.459). Moreover, the National Organization for Women ("NOW"), as intervenors, acknowledged in their brief to the court in *Broadcasters* (at 26-27) that the Annual Employment Reports will make each station "more accountable to the community." Given the imprecision inherent in the term "community," as discussed fully in Section VII below, it is simply too easy to use Annual Employment Reports for the improper purpose of comparing the racial, ethnic or gender composition of some hypothetical labor pool and then use such statistics to make claims that a station's recruitment efforts are impermissibly inadequate or that the station engages in discrimination. All of those comparisons amount to one essential claim: the station has not hired enough women and/or minorities.

The Government can also openly or surreptitiously use data in Annual Employment Reports as a basis to *audit* stations' performance. The pressure placed on stations to hire based on race and gender to avoid audits therefore remains; as the Court of Appeals stated in *Lutheran*

Church, 141 F.3d at 353, "[n]o rational firm – particularly one holding a government license – welcomes a government audit." Unlike the earlier NPRM in this proceeding, the Commission gives no assurances in the *Second NPRM* about the limited role of these reports, thereby illustrating the ephemeral quality of governmental promises and how quickly the government can change its tune.

For all these reasons, the FCC *should not require* Form 395-B or any similar report. If the Commission believes it must gather information on national trends (and we note that the FCC suspended the requirement on its own motion notwithstanding Congress's desire for annual reports), reports on the racial, ethnic or gender profile of stations should only be filed with a reputable third party that will compile the data and only provide it to the government *in anonymous aggregated form.* Indeed, the Court of Appeals questioned FCC counsel during oral argument in *Broadcasters* as to why the FCC could not use an independent third party to collect the employment statistics gathered via submission of Forms 395-B. The question to counsel was surely a forewarning to the Commission that Form 395-B business as usual will no longer be permitted.

VII. THE COMMISSION'S PROPOSAL THAT BROADCASTERS BE MEASURED ON WHETHER THEY HAVE RECRUITED THROUGHOUT "ENTIRE COMMUNITIES" IS UNCONSTITUTIONALLY VAGUE AND FRAUGHT WITH UNWARRANTED PERIL FOR STATIONS

If the Commission were to engage in recruitment re-regulation, the Commission should focus on the means by which a station disseminates job vacancy information to the population in general, rather than on whether certain segments of a "community" have been targeted by the station for such information. Accordingly, the Commission should also avoid any requirement that recruitment be based on the vague concept of "community," *Second NPRM* at para. 23, as the use of such a term in a Commission rule implies that everyone agrees what "community"

means and which groups are representative of a particular community. But, the term "community," means different things to different people in different contexts and is, therefore, irrationally vague. As a result, a "community" defined requirement would leave broadcasters unable to determine whether they are doing what is truly required. There are simply no bounds on the number of groups and types of individuals who may be said to constitute a "community," and thus no method for broadcasters to use to make reasonably sure that they have reached all the groups and types of people that the Commission may believe constitute a particular station's "community."

History teaches that broadcasters will be subject to constant unfair attacks that they are leaving out some particular group in the "community" and, thus, are failing in their obligations. The concern takes on life and death consequences at license renewal time when the FCC requires a broadcaster to certify its compliance with such a vague requirement. Indeed, it was just this kind of vagueness that led the Commission to abandon its ascertainment process in the early 1980s. That process, which had required licensees to ascertain 21 different community groups, led to unfair attacks that licensees had omitted particular groups. As the Commission itself noted when eliminating the now-discredited former ascertainment procedures: "[T]he Pike and Fischer Radio Regulation Digest currently contains over sixty pages of ascertainment annotations, most of which relate to disputes over mechanistic aspects of the process. Indeed, we candidly have characterized ascertainment proceedings as 'litigation over trivia.'" *The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations,* Notice of Proposed Rulemaking, 94 FCC 2d 678 (1983) at ¶42 (*citing Revision of Application for Construction Permit for Commercial Broadcast Station*, 50 RR 2d 381, 383 (1981)).

By the Commission's own estimates, such pleading wars over trivia proved far from trivial when both economic and social costs were taken into account. "There are numerous instances where both Commission and applicant time and resources are needlessly devoted to this requirement." *Revision of Application for Construction Permit for Commercial Broadcast Station*, FCC 81-278, 50 RR 2d 381, 383 (1981) at ¶8. The classic example of such resource squandering occurred not long before the Commission reformed its discredited ascertainment requirements when a battle over ascertainment compliance held up – for almost six years – an application to construct a new station serving a small town in rural Mississippi; it was a dispute that long deprived the town's approximately 3,000 citizens of their first local nighttime radio service. *A.C. Elliott, Jr., Quitman, Mississippi,* Decision, FCC 79-552, 46 RR 2d 225 (1979) (prior history omitted). The Commission soon thereafter began eliminating formal ascertainment requirements because the ultimate costs harmed the public interest generally, much as they harmed the specific interests of the citizens of Quitman, Mississippi.

VIII. ANY RULE SHOULD AVOID UNNECESSARY PAPERWORK

Whatever the Commission does in this area, it should not impose bureaucratic paper processes that serve only to take away from the key objective: *finding real jobs for real people.* As the NAB's Comments in this proceeding well document, the annual reports proposed in the *Second NPRM* at ¶¶33-47 and the requirement to transfer the information on those reports to web sites are unnecessary, inappropriate and particularly burdensome. As already noted, the Commission is constitutionally barred from using a paperwork requirement to pressure broadcasters into hiring any particular group in greater or lesser numbers. The specific reporting requirements will, therefore, do nothing to further any legitimate Commission efforts, but will increase the amount of money and effort that stations must expend on compliance. The Federal

Paperwork Reduction Act of 1995 seeks to avoid and eliminate unnecessary paperwork and make any remaining information gathering as cost-effective as possible.[40] The Commission must follow this Congressional mandate and not impose such a burden here when it will not serve the ultimate policy goal: *finding real jobs for real people.*

Any new regulations in this area should not exceed the following:

1. Every four (4) years on the anniversary of its license renewal, each non-exempt[41] station shall file with the Commission a certification that: (a) it has a publicly available e-mail address; (b) that, subject to an exception for "exigent circumstances," it posted at least 50% of its total full-time job vacancies on either its own web site, or the online job bank of a state broadcasters association, NASBA, the NAB, or other; (c) that it generally promoted over the station the URL address(es) of the web site(s) that it has used during the prior four (4) years; (d) that it sent, or caused to be sent by a third party, job vacancy information for at least 50% of its full-time openings to those referral organizations that requested such information; and (e) that it generally promoted over the station the address of the station or other entity whom such organization should contact if it wished to receive such information about the station's full-time job openings. It would be understood that a broadcaster may rely on a competent third party, such as an Association, to provide such notices to such referral organizations in which case the station would provide the Commission with a pertinent statement from that third party. Even in the absence of a formal rule, the Maryland/DC/Delaware Broadcasters Association is evaluating the use of established third parties so that stations can be

40 *See* 44 U.S.C. Sec. 3501 *et seq.*

41 Stations with five or more full-time employees under current rules.

assured that they have made the widest productive outreach possible among referral organizations. By formally permitting verification of outreach by such third parties, the Commission would be following a longstanding tradition of the FCC "partnering" with and relying upon the Associations to help assure rule compliance as evidenced by the Alternative Broadcast Inspection Programs operated by the Associations. In these programs, the Associations have proven themselves strong and reliable partners with the FCC in improving compliance, and the Commission should find no reason to hesitate in broadening these relationships into another area as a means to ensure improved regulatory efficiency.

2. Non-exempt stations would be required to retain documentation evidencing their use of the Internet, as described in ¶1 above, to recruit to fill their full-time job openings over the prior four (4) years and preserve such records for a period ending one year after they have filed the quadrennial certifications described in ¶1. Such records would be limited to copies of the job vacancy announcements posted on the Internet and sent to the referral organizations, and copies of the over-the-air promotional announcements advertising the web sites used and the availability of job notices to referral organizations, the dates and times when the announcements ran and including the names and addresses of the referral organizations requesting such notices.

3. The supporting documentation described in ¶ 2 would not be available to the public but would be made available to the Commission on a privileged and informational basis, in the event of an audit by the Commission.

4. For the reasons described above in Section VI, the Commission would not require the filing of Form 395-B or similar documentation.

5. Any request for information about discrimination complaints against a station would only relate to "pending" complaints of which the licensee has notice or complaints resolved adversely to the station during the license term. The FCC noted in the *Second NPRM*[42] that the complaint-related question on the earlier FCC Form 396 EEO Program Report referred to "pending" complaints, and this qualification should be clearly stated in the instructions accompanying any form that might arise from this proceeding. Licensees should not have to report complaints that were resolved in their favor or complaints that were dismissed without any action. Such complaints are difficult to track, especially in the case of licensees with multiple offices, and can create a trap for the unwary by requiring them to report on the identity of *every* such complaint.

42 *Second NPRM* at ¶35.

CONCLUSION

The Associations respectfully urge the Commission to act in this proceeding fully consistent with these Joint Comments.

Respectfully submitted,

Alabama Broadcasters Association,
Alaska Broadcasters Association,
Arizona Broadcasters Association,
Arkansas Broadcasters Association,
California Broadcasters Association,
Colorado Broadcasters Association,
Connecticut Broadcasters Association,
Florida Association of Broadcasters,
Georgia Association of Broadcasters,
Hawaii Association of Broadcasters,
Idaho State Broadcasters Association,
Illinois Broadcasters Association,
Indiana Broadcasters Association,
Iowa Broadcasters Association,
Kansas Association of Broadcasters,
Kentucky Broadcasters Association,
Louisiana Association of Broadcasters,
Maine Association of Broadcasters,
Maryland/DC/Delaware Broadcasters Association,
Massachusetts Broadcasters Association,
Michigan Association of Broadcasters,
Minnesota Broadcasters Association,
Mississippi Association of Broadcasters,
Missouri Broadcasters Association,
Montana Broadcasters Association,
Nebraska Broadcasters Association,
Nevada Broadcasters Association,
New Hampshire Association of Broadcasters,
New Jersey Broadcasters Association,
New Mexico Broadcasters Association,
The New York State Broadcasters Association, Inc.,
North Dakota Broadcasters Association,
Ohio Association of Broadcasters,
Oklahoma Association of Broadcasters,
Oregon Association of Broadcasters,

Pennsylvania Association of Broadcasters,
Radio Broadcasters Association of
Puerto Rico,
Rhode Island Broadcasters Association,
South Carolina Broadcasters Association,
South Dakota Broadcasters Association,
Tennessee Association of Broadcasters,
Texas Association of Broadcasters,
Utah Broadcasters Association,
Vermont Association of Broadcasters,
Virginia Association of Broadcasters,
Washington State Association of
Broadcasters,
West Virginia Broadcasters Association,
Wisconsin Broadcasters Association, and
Wyoming Association of Broadcasters

By: _____
Richard R. Zaragoza
Barry H. Gottfried
Kathryn R. Schmeltzer
Michael W. Richards

Their Attorneys

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2300 N Street, NW
Washington, DC 20037
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Dated: April 15, 2002

EXHIBIT A

"MODEL BROADCAST CAREER ROAD MAP"

BROADCAST EXECUTIVE DIRECTORS ASSOCIATION'S
"MODEL BROADCAST CAREERS PROGRAM ROAD MAP"

WHEREAS, the success and vitality of our nation's radio and television broadcast industry as a whole are founded upon the dedication and accomplishments of numerous outstanding men and women, including many from culturally and racially diverse backgrounds;

WHEREAS, the broadcast industry, through the National Association of Broadcasters, has recently reaffirmed to the Federal Communications Commission (the "FCC"), the industry's continuing commitment to non-discrimination and workplace diversity;

WHEREAS, the Broadcast Executive Directors Association ("BEDA") and its members are committed to the following goals:

1. Promoting non-discrimination in all employment actions as well as diversity in the workplace;

2. Maximizing the pools of qualified applicants, including those from culturally and racially diverse backgrounds, for all job openings at participating stations;

3. Promoting broadcasting as an exciting and rewarding career;

4. Expanding the availability of education courses and experience opportunities helpful for a career in broadcasting;

5. Providing user friendly, up-to-date information on all job openings at participating stations;

6. Insuring that all interested applicants have a convenient, rapid and inexpensive way to alert participating stations of their interest in a particular job opening;

7. Training employees for increased responsibilities; and

8. Educating stations throughout each state and territory on the subjects of non-discrimination in employment and recruitment outreach;

WHEREAS, the FCC has encouraged state broadcasters associations to play an even larger roll in helping to promote non-discrimination in employment and workplace diversity; and

WHEREAS, consistent with its purposes, BEDA wishes to help its member associations to continue to improve their customs and practices by, in this instance, exploring ways, including possibly harnessing high technology, to expand the recruitment of qualified full-time and part-time employees at participating stations.

NOW, THEREFORE, to reach these "goal" destinations, BEDA has developed a number of "highways." While BEDA encourages each State Broadcasters Association (the "Association") to travel along all of the "highways" identified below, it is recognized that each Association has distinct needs and resources. Accordingly, the Associations should view each "highway" as a separate path to be used as their needs evolve and resources permit.

❑ **A Highway for Expanding Education Courses and Experience Opportunities for Broadcast Careers**

The Association recognizes that the broadcast industry's success in recruiting qualified employees is, in important part, a product of whether educational institutions perceive the industry as a rewarding career for their students and whether those institutions provide courses and experiences that will be helpful to students who may choose a career in broadcasting. Toward that end, the Association would endeavor to develop active partnerships with high schools, colleges, universities and trade schools throughout the state, and with their respective associations, e.g., BEA. Some examples include:

- jointly evaluating with them their respective "communications," "broadcast," "radio and television" and related curriculums
- developing more interest in broadcast careers at the undergraduate and graduate school levels for business students
- developing teams of broadcast professionals who are qualified to work with educators and academics as speakers, seminar panelists, classroom instructors and members of professional advisory boards
- meeting with high school students to encourage them to pursue a curriculum in college that will prepare them for a career in broadcasting
- sponsoring workshops for persons interested in a broadcast career
- offering education scholarships
- sponsoring its own
  - internships
  - mentoring programs
  - fellowships
  - apprenticeships
  - training programs
- helping stations to develop their own programs for
  - scholarships
  - internships
  - mentoring
  - fellowships
  - apprenticeships
  - training

- ❑ underwriting various courses and programs, e.g., Five Points Media Center in Denver, Colorado
- ❑ other efforts _____

❑ **A Highway for Educating Stations on Non-discrimination in Employment and Recruitment Outreach**

The Association recognizes its on-going responsibility, as the principal organization in the state representing the broadcast industry, to educate its members in the subjects of non-discrimination in employment and effective recruitment outreach. To meet this obligation and to further assist stations in their recruitment outreach efforts,

- ❑ The Association would regularly conduct seminars on these subjects.
- ❑ Participating stations would be encouraged to commit to attending such seminars.
- ❑ The Association, using information supplied by the NAB and other sources, would compile information on national, statewide and local area referral sources and distribute it to all stations in the state, whether or not they participate in the Association's Careers Program.
- ❑ The directory would be updated periodically.
- ❑ The Association would work with, and urge participating stations to work with, minority and female targeted organizations and others to help stations expand their outreach as well as to encourage those organizations to inform their membership about career opportunities in broadcasting.

❑ **A "High Technology" Highway for Recruitment Outreach**

- ❑ In addition to other recruitment outreach programs sponsored by the Association, such as Career Fairs, the Association would maintain a 24 hours per day, 365 days per year

Internet World Wide Web site. The URL address for the Web site would be "http://www._____ assnofbroadcasters.org." The Web site would provide various types of information and services, including a Broadcast Careers Web Page. The Broadcast Careers Web Page would be linked to the Broadcast Careers Web pages of the other state broadcasters associations as well as to the NAB's Careers Center Web page which the Association would also promote.

- The Association's Broadcast Careers Web Page would list full-time and part-time job openings, categorized by radio and television, in the following ways: (1) by type of position - management, on-air/writer/producer, sales/marketing, engineering/technical and clerical/administrative; and (2) by city and station.

- As a non-exclusive recruitment outreach technique, participating stations would be encouraged to commit to timely posting each of their full-time and part-time job openings on the Association's Broadcast Careers Web Page unless a particular opening were sensitive and not publicized at the station. The Association would evaluate whether to charge a fee for non-members. By using a proprietary code, stations themselves could post their job openings. They would be responsible for the currency and accuracy of their job opening information.

- Participating stations would be encouraged to commit to being an Equal Opportunity Employer and using the "EOE" designation on all postings on the Broadcast Careers Web Page as well as in all advertisements for their full-time and part-time job openings.

- Participating stations would be encouraged to commit to timely advising their current full-time and part-time employees of all Broadcast Careers Web Page postings by the station.

❑ Participating stations would be encouraged to commit to using a common information form for posting their job openings on the Association's Broadcast Careers Web Page. See Attachment A which is the NAB's current version for the position of Account Executive.

❑ Participating stations would be encouraged to commit, taking into account the exigencies of a particular situation, to keeping each job position posted on the Association's Broadcast Careers Web Page for at least a reasonable number of days to afford interested persons an opportunity to learn about the opening and to apply for the job. The stations would also be responsible for promptly removing the job postings that they have filled. If a posting had not been "re-posted" by the station within thirty (30) days of the original posting, it would be automatically purged from the Broadcast Careers Web Page.

❑ Participating stations would be encouraged to commit to providing the station's current telephone number, e-mail address and/or fax number in all postings to enable any person wishing to respond to a job opening to do so quickly, by e-mailing or faxing a completed, "common" job resume form to the station. An example of such a form, which the NAB uses, is attached as Attachment B. Members of the public could browse through the Association's Broadcast Careers Web Page at no charge.

❑ Participating stations would be encouraged to commit to considering the resumes received in response to a job posting and, as time constraints and resources permit, to interviewing a number of qualified candidates, including culturally and racially diverse applicants.

❑ Participating stations would be encouraged to promptly inform the unsuccessful candidates of the station's hiring decisions and, subject to the permission of the candidate, to circulate the resumes of these candidates to the Association to be made available to other stations for their consideration.

❑ Any member of the public would be able to post on the Association's Broadcast Careers Web Page, free of charge, his or her resume, preferably using the "common" job resume form, so that stations could quickly become aware of and contact persons who have the qualifications that the station needs for a particular position.

❑ **A Highway for Encouraging Station Participation in the Association's Broadcast Careers Program**

❑ Stations that participate in the Association's Careers Program would receive a "Broadcast Careers Program Certificate of Performance" which they could use to promote themselves to their employees, to the public at large (including advertisers) and to federal, state and local governments.

❑ An Annual Broadcast Careers Awards Program would be implemented, recognizing participating stations, schools and universities, referral organizations and others for their leadership in helping to achieve the goals of the Association's Careers Program, e.g., participation by senior management in the Broadcast Careers Programs of their station and the Association, the development of innovative outreach practices beyond traditional techniques and the training of employees, particularly women and minorities, for increased responsibilities.

❑ **A Highway for Promoting Awareness of the Association's Broadcast Careers Program**

❑ Information about the Association's Careers Program, including its workings and benefits, could be disseminated to broadcasters and the general public in a variety of ways. Some examples include:

To all Stations that are Members of the Association

- ❑ on the Association's Web site
- ❑ on the Web sites of participating stations
- ❑ in special Association mailings
- ❑ in Association newsletters and other publications
- ❑ at Association sponsored seminars and conventions
- ❑ at Association sponsored Career Fairs
- ❑ in other ways _____

To any Stations that are not Members of the Association

- ❑ on the Association's Web site
- ❑ on the Web sites of participating stations
- ❑ in special Association mailings
- ❑ in Association newsletters and other publications
- ❑ at Association sponsored conventions and seminars
- ❑ at Association sponsored Career Fairs
- ❑ in other ways _____

To the Broadcast Industry at Large

- ❑ on the NAB's Web site
- ❑ in NAB newsletters and other publications
- ❑ at NAB sponsored conventions and seminars
- ❑ at Career Fairs sponsored by the NAB and RAB
- ❑ in other ways _____

To the General Public

- ❑ on the Association's Web site
- ❑ on the Web sites of participating stations
- ❑ on the Web sites of other state broadcasters associations
- ❑ on the NAB's Web site
- ❑ in promotional spots developed by the Association and/or the NAB and aired over participating radio and television stations
- ❑ in Association sponsored "Broadcast Careers" ads published in local newspapers throughout the state
- ❑ in Association sponsored "Broadcast Careers" ads published in university, college and trade school newspapers throughout the state
- ❑ in Association sponsored "Broadcast Careers" ads published in the Yellow Pages under Employment Services
- ❑ in Association sponsored "Broadcast Careers" videos distributed to libraries and video stores throughout the state for "free" rental
- ❑ via Association sponsored scholarships
- ❑ via Association sponsored internships
- ❑ via Association sponsored mentoring programs
- ❑ via Association sponsored fellowship programs
- ❑ via Association sponsored apprenticeship programs
- ❑ via Association sponsored training programs
- ❑ at Association sponsored Career Fairs
- ❑ at Career Fairs sponsored by the NAB, RAB and others
- ❑ at conventions sponsored by minority and female targeted organizations and others

whose attendees are likely to be, or refer, applicants

- ❑ in Association and/or NAB sponsored "Broadcast Careers" letters to high schools, colleges, universities and trade schools
- ❑ in Association and/or NAB sponsored "Broadcast Careers" letters to minority and female targeted organizations
- ❑ in Association and/or NAB sponsored "Broadcast Careers" letters to private and governmental employment services and agencies
- ❑ at Association sponsored conventions and seminars
- ❑ at NAB sponsored conventions and seminars
- ❑ on the Web sites of AWRT, the NAACP, NOW, Rainbow-Push Coalition, the Urban League and others
- ❑ in notices posted in the lobbies of participating stations
- ❑ during interviews of prospective employees when the applicant did not learn about the job opening through the Broadcast Careers Web Page.
- ❑ in other ways _____

❑ **A Highway for Evaluating a Broadcast Careers Program**

As with any program, from time to time the results of an Association's Broadcast Careers Program must be ascertained to determine whether the original goals are being met. The Association would plan to survey the results of its Careers Program on an annual basis and to make changes to the program as appropriate to insure its continuing effectiveness.

February 5, 1999

EXHIBIT B

(HISTORY AND GENERAL OUTLINES OF THE MODEL PROGRAM FROM PAGES 15-26 OF THE ASSOCIATIONS' COMMENTS ON THE *NPRM* DATED MARCH 1, 1999)

C. STATION PARTICIPATION IN A STATE BROADCASTERS ASSOCIATION'S INTERNET BROADCAST CAREERS PROGRAM SHOULD CONSTITUTE COMPLIANCE WITH ANY NEW EEO REQUIREMENTS

17. Even before the Court of Appeals decision in *Lutheran Church*, the umbrella organization of the state broadcasters associations, the Broadcast Executive Director's Association ("BEDA"), was at work developing the "Model Broadcast Careers Road Map,"

("Model Program ") which is attached to these Comments as Exhibit 1. The Model Program was informally presented to the Commission. The Chairman's Office made a number of constructive comments which were incorporated into the program.

18. The Model Program is actually an outgrowth of a series of meetings between broadcast industry representatives and representatives of various public interest, minority and female organizations. Those meetings were held between March and the summer of 1997 at the urging of Mass Media Bureau Chief Roy Stewart and then Deputy Chief Renee Licht. While those meetings did reflect a common commitment to the goals of nondiscrimination and workplace diversity, they did not result in any consensus on how best, on a regulatory level, to achieve those goals. However, the state associations found the meetings important and helpful in emphasizing the need to find new ways to pursue these goals. Thus was born the Model Program with the help of a taskforce of state association executive directors and the NAB.

19. The Model Program represents the continuation of the proactive efforts by the state associations in assisting their members to enhance access by minorities and women to increased employment opportunities at broadcast stations nationwide. Many state associations, in cooperation with the NAB and others, have for many years regularly conducted continuing education programs on the topic of EEO at annual conventions and special seminars. The FCC has supported these efforts by sending its own staff to participate on panels. The subject of EEO is also addressed in regular and special newsletters of the various associations. The associations urge their members to seek counsel in this important area from the NAB, the FCC or from attorneys in private practice. Some of the state associations have set up legal hot lines to help

their members on this subject and others. Most have job banks and an increasing number have placed their job banks on the Internet.

20. As mentioned, the Model Program reflects the efforts of the state broadcasters associations to explore new, nontraditional ways to encourage men and women of all races and ethnicity to consider careers in broadcasting. The initiative reflects these facts: 1) the broadcast industry competes with many other industries for both entry level and upper level employees; 2) to compete effectively, the broadcast industry must promote, on an ongoing basis beginning in high schools, a strong interest in a career in broadcasting, as well as provide educational and experience opportunities for a career in broadcasting; 3) the industry must make it as convenient as possible for any person to learn about a job opening and to send his or her resume to the station for consideration; 4) the industry must promote training and upward mobility for all workers, including minorities and women; and 5) the industry must work with educational institutions and general and targeted organizations to accomplish these goals.

21. The Associations are gratified that the Commission has stated in the *NPRM* that the BEDA program offers sound guidance for the type of outreach program that broadcasters should design. *NPRM* at ¶ 91. The Associations believe that the BEDA's Model Program, and in particular its broad, race-neutral outreach to persons who might not learn of job positions at broadcast stations through word-of-mouth, represents the sort of nondiscriminatory recruitment programs that the Court of Appeals held would not implicate the guarantee of the Equal Protection Clause of the Fifth Amendment. *Lutheran Church*, 141 F.3d at 351. The Associations therefore submit that the Commission should rely on use of the Model Program rather than on the constitutionally problematic affirmative action requirements proposed in the *NPRM* and

discussed above. It is crucial to note that the Supreme Court has stressed the importance of examining whether the government has looked first at race-neutral measures such as the Model Program in judging whether the government can establish that racial classifications are actually narrowly tailored to advancing an identified compelling interest and therefore valid. *City of Richmond v. J.A. Croson, Inc.*, 488 U.S. 469, 507 (1989).

22. The Model Program reaffirms the FCC's goals of non-discrimination in all employment actions as well as diversity in the workplace. The Model Program acknowledges and responds to the need to interest more people of all races and ethnicities in careers in the broadcast industry -- including minorities and women -- in order to ensure broadcasting's continued vitality and success. To this end, the Model Program focuses on a variety of steps that will enhance the attractiveness and availability of broadcast employment including:
(a) educating people, particularly young people, about the rewards of a broadcasting career; (b) expanding educational courses and experience opportunities, including scholarships and paid internships, to learn about the industry; (c) maximizing the pools of qualified applicants, including those from culturally and racially diverse backgrounds, for all job openings at participating stations by promoting awareness of a wide variety of programs such as web sites, job fairs and others; (d) training employees for increased responsibilities in the broadcast industry; and (e) educating the broadcast industry about their responsibilities in this area. The Model Program provides each state association with a framework for analyzing its efforts to help member stations recruit prospective employees, including minorities and women. The program also suggests numerous proactive ways an association can increase its effectiveness, subject to the evolving needs and resources of the association.

23. The key element in the Model Program, for the Commission's purposes in designing a nondiscriminatory outreach rule that clearly complies with the Fifth Amendment, is the state associations' sponsorship of their own Broadcast Careers Web Pages, as well as BEDA's Broadcast Careers Web Site, which is expected to be operation in March 1999. Using these Internet pages and site, which will be available 24 hours per day, 365 days per year, broadcasters will encourage potential applicants of all races and genders for jobs in the broadcast industry to post their resumes, *free of charge*, so that member stations will have a ready source of job applicants of all races and genders. The state associations' Broadcast Careers Web Pages will contain not only resumes of potential applicants, but also notices of *job openings* at stations that will list full-time and part-time job openings, categorized by radio and television, in the following ways: (1) by type of position - management, on-air/writer/producer, sales/marketing, engineering/technical and clerical/administrative; and (2) by city and station. BEDA's national Broadcast Careers Web Site will also allow for postings of both resumes and notices of job openings, and will be available for job postings especially by stations whose state associations may not yet have a web site. The BEDA Broadcast Careers Web Site will also publicize each state association's web page to ensure that applicants willing to re-locate to a different area have access to job postings throughout the country. The state associations' Broadcast Careers Web Pages and BEDA's Broadcast Careers Web Site will also be linked to the NAB's Careers Center Web Page, which the Associations will also promote. Under the BEDA Model Program, every member station is encouraged to post both their full-time and part-time job vacancies on the site, an announcement of which then becomes available to the general public, in effect creating a vast national "job bank."

24. There are 50 state broadcasters associations which include all of the states, the District of Columbia and Puerto Rico. 66% of the state associations have formally adopted a Broadcast Careers Program. See, for example, the Broadcast Careers Program of the Massachusetts Broadcasters Association, attached hereto as Exhibit 2. The rest are considering doing so. 86% of the state associations already have web sites. Of that number, 70% have web pages devoted to job vacancy listenings and 43% already have sites that accept resumes of persons interested in positions. Many more associations expect to have web sites and Broadcast Careers Web Pages up and running by the end of 1999. Those state associations that cannot afford to install and maintain their own web sites are expected to promote the use of the BEDA Broadcast Careers Web Site by their member stations and by the general public in their states.

25. As a non-exclusive recruitment outreach technique, participating stations will be encouraged to commit and timely post each of their full-time and part-time job openings on the state associations' Broadcast Careers Web Pages and/or the BEDA Broadcast Careers Web Site unless a particular opening is sensitive and not publicized at the station. By using a proprietary code, stations themselves will be able to e-mail their job openings directly to the appropriate Broadcast Careers Web Page for posting. Stations will be responsible for the currency and accuracy of their job opening information. Participating stations will be encouraged to commit to being Equal Opportunity Employers and using the "EOE" designation on all postings on the Broadcast Careers Web Pages as well as in all advertisements for their full-time and part-time job openings. Participating stations will be encouraged to commit to timely advising their current full-time and part-time employees of all Broadcast Careers Web Page postings by the station. Participating stations will be encouraged to use a common information form for posting their job

openings on a state association's Broadcast Careers Web Page or on the BEDA Broadcast Careers Web Site. Participating stations will be encouraged to commit, taking into account the exigencies of a particular situation, to keeping each job position posted on the Internet pages and site and open for at least a reasonable number of days to afford interested persons an opportunity to learn about the opening and to apply for the job. The stations will also be responsible for promptly removing the job postings that they have filled. If a posting has not been "re-posted" by the station within 30 days of the original posting, it will be automatically purged from the Internet job bank. Participating stations will be encouraged to commit to providing the station's current telephone number, e-mail address and fax number in all postings to enable any person wishing to respond to a job opening to do so quickly, by e-mailing or faxing a completed "common" job resume form to the station.

26. Members of the public will be able to browse through the state associations' Broadcast Careers Web Pages and BEDA's Broadcast Careers Web Site at no charge. Participating stations will be encouraged to commit to considering the resumes received in response to a job posting and, as time constraints and resources permit, to interviewing a number of qualified candidates, including culturally and racially diverse applicants. Participating stations will be encouraged to promptly inform unsuccessful candidates of the station's hiring decisions (by indicating on the Internet job bank that this position has been filled) and, subject to the permission of the candidate, to circulate the resumes of these candidates to the state associations to be made available to other stations for their consideration unless the resume is already posted on the Internet. Any member of the public will be able to post on the state associations' Broadcast Careers Web Pages and/or on BEDA's Broadcast Careers Web Site, free of charge, his

or her resume, preferably using the "common" job resume form, so that stations can quickly become aware of and contact persons who have the qualifications that they need for particular positions. The state associations expect to promote the availability of their Broadcast Careers Web Pages and the BEDA Broadcast Careers Web Site, over the air, in print media, at job fairs, through minority and female targeted organizations, and in other ways.

27. The potential impact of this service in eliminating word-of-mouth recruitment as the sole or even primary means of finding qualified applicants is enormous. The Commission is well aware that use of the Internet is spreading rapidly in the United States, and the World Wide Web is fast becoming the primary medium Americans use for research and information gathering. According to an October, 1997 survey, one in five households then used the World Wide Web in their homes, and almost as many also had access to the Web at their school or place of employment. *The Wirthlin Report Online: Who's Online? A Profile of U.S. Internet Users,* 1998.[4] The number of individuals who use the Internet has been growing and continues to grow at a rate of 67,000 per day, and the Web's demographics are flattening to resemble those of the population at large as an increasing number of minorities use the Internet. According to a study by the Harris Survey Unit of Baruch College, men and women use the Internet almost equally, and the racial composition of U.S. Web users is "statistically indistinguishable from Census data for the general population." David Birdsell, *The Public Perspective*, April/May 1998. Even for those Americans who do not have residential Internet access, the number of schools and libraries offering free access continues to increase. According to a recent survey, 83.6% of public libraries in the U.S. are connected to the Internet, and 73.3% of public libraries offer public

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[4]A copy of this Report is available online at ww.decima.com/publicns/report/wr9803.htm.

access to the Internet. *See* 1998 National Survey of Public Libraries Outlet Internet Connectivity, American Library Association, Office for Information Technology Policy. That study notes that because the public Internet access rate is about equal in poverty and non-poverty areas, public libraries are helping to bridge the gap between those who have Internet access in the home and those who do not. *Id.* It should be noted that Internet access at public libraries, and the resulting availability of the Internet to all demographic groups, will increase because of new initiatives. For example, the Gates Learning Foundation has established a goal of connecting all public libraries to the Internet by 2003, supported by the donations of billions of dollars by Bill and Melinda Gates. "Gates's Library Gifts Arrive (Windows Firmly Attached)," *New York Times*, February 21, 1999 at A1. Thus far that foundation has donated money for the wiring of public libraries to the Internet and the purchase of public access computers in Alabama, Louisiana, and Mississippi, with Arkansas, Kentucky, West Virginia and New Mexico scheduled to receive funds next. *Id*

28. Congress took a proactive role in assuring that all students will have access to the Internet by providing for universal service support mechanisms for schools and classrooms as a part of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 110 (1996), and gave the Commission a primary role in implementing that universal service initiative.[5] The Commission has itself recognized the value of the Internet in bringing information to the public in other contexts, and has established a Web site that allows members of the public to read FCC

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[5]Congress directed the Commission to "establish competitively neutral rules . . . to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries." 47 U.S.C. §254(h)(2)(A) (1998).

documents online (*see* "FCC Information is Available Online," *Public Notice*, April 6, 1995), listen to FCC meetings in real time (see "New FCC Site for Audio Broadcast over the Internet Established," *Public Notice*, December 13, 1996), and file comments electronically (*In the Matter of Electronic Filing of Documents in Rulemaking Proceedings,* GN Docket No. 97-113, *Report and Order*, 13 FCC Rcd. 11322 (1998) ("*Electronic Filing Proceeding*"). In the *Electronic Filing Proceeding*, the Commission expressed its belief that electronic filing would encourage "greater and more diverse public input." *Id.* at § 4. The Commission also noted that "[e]very commenting party supported the concept of filing,"and noted that the National Association for the Deaf observed that "the deaf and hard of hearing community relies on the Internet as an important form of communication." *Id.*

29. In parallel with the growth of the Internet, more Americans are turning to Internet recruiting services as a source of career information. According to an American Management Association report, 70 percent of companies in the U.S. were actively using the Internet to advertise jobs and recruit employees in 1998, a large jump from the 51 percent in the previous year. According to one study, more than half of the general public planned to use the Internet to look for a job at some point in the future.[6] In addition to the posting of job openings on individual company web pages, a substantial industry has sprung up in recent years to provide job information. Forrester Research has estimated that spending on online recruitment will grow from $105 million in 1998 to $1.7 billion by 2003. Among the dozens of online job search sites are Monster.com (www.monster.com), which recently had a highly-praised and prominent advertisement on the Super Bowl. Monster.com boasts of more than 170,000 online job postings

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[6]Study conducted by J. Walter Thompson's Specialized Communications Group, 1998.

and more than a million online resumes. The Commission has joined the many businesses, organizations, and government entities that distribute information concerning job openings via the Internet, and now publicizes FCC job vacancies on its Employment Opportunities Web page. (*See* www.fcc.gov/jobs.) An increasing number of states are also creating their own career Web pages on the Internet, allowing employers to post job vacancies online and job seekers to post their resumes (*see, e.g.*, Maryland CareerNet, www.careernet.state.md.us; Missouri Works! Web site, www.works.state.mo.us/mw2.htm; Ohio Job Net Online, www.state.oh.us/obes/ job_net.htm; Arkansas's "whatajob.com"). Many states now offer Internet access to job seekers, who can walk into state employment agency offices to use computers to search for job openings online. For example, the Wyoming Department of Employment offers Internet access for job seekers in twenty cities across the state. *See* Wyoming Department of Employment Web page, wyjobs.state.wy.us/kiosk.htm. And the State of Idaho offers Internet access to job seekers through 418 computer stations located in the 24 Idaho Job Service offices across the State. "Idaho Job Service Offices Transformed Into High-Technology Career Centers," *Idaho Business Review*, August 31, 1998, at 5A.

30. Based on these developments, it is clear that through use of the Broadcast Careers Web Pages and BEDA Broadcast Careers Web Site, a substantial and increasing part of the population of all races and genders will have virtually immediate access to information about job openings in broadcasting throughout the nation in the medium to which Americans are increasingly turning to find jobs. Both BEDA and the state associations intend to take steps to ensure that the broadcast job bank on the Internet, and the information and services it provides, becomes well known to potential job applicants of all races and genders throughout the nation.

BEDA and the state associations are, for example, committed to developing radio and television spots that will be distributed statewide and nationally which will inform the public of the state associations' Broadcast Carriers Web Pages and the BEDA Broadcast Careers Web Site. It is contemplated that these Internet locations will be hyperlinked to the web sites of other organizations like the FCC, NAB, BEA, RAB, AWRT, the NAACP, NOW, the Rainbow-Push Coalition and the Urban League, as well as the state and local chapters of these organizations, as well as to a number of Web sites have been created specifically to assist minority job seekers, such as Diversity Careers, www.diversitycareers.com, and the National Urban League Career Mosaic Career Center, www.careermosaic.com. The Associations are also committed to placing advertisements in newspapers of general circulation in their states. Copies of advertisements that have already been placed by the New Hampshire Association of Broadcasters and Massachusetts Broadcasters Association in newspapers are attached hereto as Exhibit 3. A representative advertisement states:

> WANTED
> Applicants for Broadcast Industry Opportunities - All Positions. The Members of the Massachusetts Broadcasters Association (MBA) are committed to the FCC's goals of non-discrimination and affirmative action. Post resumes on the MBA web page at www.massbroadcasters.org. Or mail resumes to : Massachusetts Broadcasters Association, Attn; Job Bank c/o Bedford Granite Group, 10 Chestnut Drive, Bedford, NH 03110. Also available at www.massbroadcasters.org, a listing of open positions in Massachusetts broadcasting. The members of the MBA are equal opportunity employers. PLEASE SPECIFY THE POSITION(S) YOU WISH TO BE CONSIDERED FOR.

The Associations will also promote the web pages at job fairs and conferences that the Associations, the NAB, BEA, AWRT and others conduct as part of their efforts to attract qualified applicants of all races and genders to the broadcast industry so as to enhance the

industry's future. The Commission's goal to eliminate "sole reliance on word-of-mouth recruiting where an employer's workforce is predominantly white male" (*NPRM* ¶ 62), will therefore be fulfilled through this dramatic new undertaking by broadcasters to make nondiscriminatory outreach efforts to the potential workforce.

EXHIBIT C – STATE BROADCASTERS ASSOCIATION WEB SITES

Alabama	http://www.al-broadcasters.org
Alaska	http://www.akbroadcasters.org
Arizona	http://www.azbroadcasters.org
Arkansas	http://www.arkbroadcasters.org
California	http://www.cabroadcasters.org
Colorado	http://www.e-cba.org
Connecticut	http://www.ctba.org
Delaware	http://www.mdcd.com
District of Columbia	http://www.mdcd.com
Florida	http://www.fab.org
Georgia	http://www.gab.org
Hawaii	http://www.hawaiibroadcasters.com
Idaho	http://www.idahobroadcasters.org
Illinois	http://www.ilba.org
Indiana	http://www.indianabroadcasters.org
Iowa	http://www.iowabroadcasters.com
Kansas	http://www.kab.net
Kentucky	http://www.kba.org
Louisiana	http://www.broadcasters.org
Maine	http://www.mab.org
Maryland	http://www.mdcd.com
Massachusetts	http://www.massbroadcasters.org
Michigan	http://www.michmab.com
Minnesota	http://www.minnesotabroadcasters.com
Mississippi	http://www.msbroadcasters.org
Missouri	http://www.mbaweb.org
Montana	http://www.mtbroadcasters.org
Nebraska	http://www.ne-ba.org
Nevada	http://www.nevadabroadcasters.org
New Hampshire	http://www.nhab.org
New Jersey	http://www.njba.com
New Mexico	http://nmba.vm-net.net
New York	http://www.nysbroadcastersassn.org
North Carolina	http://www.ncbroadcast.com
North Dakota	http://www.ndba.org
Ohio	http://www.oab.org
Oklahoma	http://www.oabok.org
Oregon	http://www.theoab.org
Pennsylvania	http://www.pab.org
Rhode Island	http://newenglandmedia.com
South Carolina	http://www.scba.net
South Dakota	http://www.sdba.org
Tennessee	http://www.tabtn.org
Texas	http://www.tab.org
Utah	http://www.utahbroadcasters.com
Vermont	http://www.vab.org
Virginia	http://www.vab.net
Washington State	http://www.wsab.org
West Virginia	http://www.wvba.com
Wisconsin	http://www.wi-broadcasters.org
Wyoming	http://www.wyomingbroadcasting.org