

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

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

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

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EXECUTIVE SUMMARY

In *MD/DC/DE Broadcasters Associations v. FCC* (“*Association*”), the U.S. Court of Appeals for the District of Columbia Circuit held that the Commission’s previous equal employment opportunity (“EEO”) rules unlawfully imposed pressure on broadcasters to focus their recruitment efforts on minorities and women, at the expense of other job candidates. The “pressure” of concern to the D.C. Circuit stems from the Commission’s authority over broadcast stations’ licenses and its power to investigate stations that did not hire a sufficient percentage of minorities and women.

In the *Second Notice*, the Commission bases its alleged authority to craft new EEO rules on a desire to prevent discrimination in the broadcasting industry, and to counteract the replication of a supposedly homogeneous workforce of the industry. However, nowhere in the *Second Notice* does the Commission point to any evidence, statistical or otherwise, sufficient to demonstrate the existence of any such discrimination or homogeneity. Parties filing comments in support of the Commission’s EEO proposal attempt to show these circumstances, but their “evidence” consists largely of dated, isolated anecdotes, irrelevant data concerning a supposed lack of programming content diversity, and pure speculation on broadcasters’ attitudes to hiring minorities and women.

The Commission’s authority to re-regulate in this area therefore is far from certain, and the Commission should be extremely cautious in crafting new EEO rules in order to avoid yet another rejection by the D.C. Circuit. In this vein, the Commission should take great care not to adopt unduly rigid or burdensome rules that may only serve to raise the legal bar the Commission faces in creating new regulations. The Commission also should disregard most of the suggestions offered by certain parties filing comments in support of the Commission’s

proposal, as these comments reveal a clear desire merely to reprimand broadcasters for alleged past discrimination. For example, AFTRA, NOW and others urge the Commission to require that stations file their Annual EEO Public File Report with the Commission four times more frequently than the Commission proposes, and that stations track and report the recruitment sources that refer every hired employee. Adopting any of these suggestions most certainly will increase the legal vulnerability of any new EEO rule.

NAB believes that the comments of the Commission's supporters reveal their true aim; that is, they urge changes to the Commission's proposal designed to ease their examination of broadcast stations' workforce compositions for purposes of filing subsequent challenges to license renewal applications of stations with staffs these parties deem insufficiently diverse. NAB strongly encourages the Commission not to assist in these efforts.

On the other hand, NAB proposed in its comments a comprehensive, alternative EEO plan. Unlike the Commission's proposal, NAB's plan is based on a station's good faith performance of a continuous pattern of broad, general outreach. NAB believes that such outreach is the most successful, efficient way of attracting and identifying superior job candidates, and typically makes job-specific recruitment a needless waste of resources. NAB's plan also provides broadcast stations the maximum flexibility to select from multiple options for fulfilling their outreach obligations, as chosen from a menu of options, many of which NAB members already have proved successful. Finally, under NAB's plan, stations will be able to focus their efforts and resources on expanding and improving their outreach ventures instead of burdensome administrative paperwork requirements. NAB thus believes that its plan is far superior to the Commission's EEO proposal, and would be far more likely to withstand court scrutiny.

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I. INTRODUCTION & BACKGROUND

The National Association of Broadcasters (“NAB”)¹ submits its reply comments in the above-captioned rulemaking proceeding.² In the *Second Notice*, the Commission proposed new regulations intended to enhance equal employment opportunity (“EEO”) in the broadcasting and cable television industries. The Commission acted in response to the U.S. Court of Appeals for the District of Columbia Circuit’s finding in *MD/DC/DE Broadcasters Association v. FCC* that the Commission’s previous EEO rules were unconstitutional,³ the second such time the D.C. Circuit rejected Commission EEO rules.⁴ In *Association*, the court held that the prior EEO rules

¹ NAB is a nonprofit, incorporated association of television and radio stations and broadcasting networks that serves and represents the American broadcast industry.

² *Second Notice of Proposed Rule Making* in MM Docket No. 98-204, 16 FCC Rcd 22843 (2001) (“*Second Notice*”).

³ 236 F.3d 13 (D.C. Cir. 2000) (“*Association*”), *petition for rehearing and rehearing en banc denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied sub nom.*, *MMTC v. FCC*, ___ U.S. ___, 122 S.Ct. 920 (2002).

⁴ *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998) (“*Lutheran Church*”), *petition for rehearing and rehearing en banc denied*, 154 F.3d 487 (D.C. Cir. 1998).

impermissibly pressured broadcasters to focus their recruitment efforts on minorities and women, at the expense of other job candidates, given the Commission's authority to investigate broadcasters who failed to attract a sufficient proportion of minority and female employees.⁵

In the *Second Notice*, the Commission stated its intent to foster "broad outreach in recruitment practices...[to]... ensure fairness to all potential applicants, including all races and both genders, without infringing on the rights of any group."⁶ The Commission's EEO plan therefore sets forth specific, quantifiable requirements for its proposed scheme to attract and identify candidates through both job-specific recruitment and non-job-specific, general outreach.⁷ The Commission also expressed its intent to reduce the recordkeeping and reporting obligations associated with the EEO rules.⁸ As a result, the Commission's latest proposal represents an attempt to promote EEO through rules that, to a certain extent, focus on broadcasters' efforts to perform job-specific recruitment and non-job-specific outreach, instead of regulations that place pressure on licensees to hire a particular percentage of women and minorities.

However, parties filing comments ostensibly in support of the Commission's EEO proposal reveal an unmistakable desire for rules that simply punish broadcasters for alleged past discrimination and a hypothetical deficiency of minorities and women employees in the broadcasting industry. For example, MMTC states: "[S]ome believe...[that]...most broadcast personnel do not encounter discrimination. While some job applicants and employees will not

⁵ *Association*, 236 F.3d at 21.

⁶ *Second Notice*, 16 FCC Rcd at 22847.

⁷ *Id.* at 22851-22853.

⁸ *Id.* at 22855-22857.

face discrimination, most will encounter it, either as a victim or beneficiary.”⁹ MMTC also accuses the Commission: “An exhaustive record in this proceeding documents that throughout most of its history, the Commission systematically facilitated intentional discrimination by its licensees. Indeed, the weight and sufficiency of the evidence of the Commission’s assistance to discriminators and suppression of minority participation, well into the time period where present-day effects remain powerful, is a proper subject of official notice.”¹⁰ No evidence supports these bare assertions. Instead of suggesting ways to improve the broadcasting industry’s recruitment and outreach, these commenters focus on ways to increase the industry’s recordkeeping and reporting obligations. The underlying aim of these parties is clear; that is, they seek changes to the Commission’s proposed rule that would facilitate their examination of broadcast stations’ workforce compositions for purposes of subsequently filing challenges to license renewal applications of stations whose staffs they deem insufficiently diverse. As a result, these commenters expect that the Commission will be able to hold the feet of broadcasters to the fire, or in less colloquial terms, impose on broadcasters the exact “pressure” to focus their recruitment efforts on minorities and women proscribed by the court in *Lutheran Church* and reinforced in *Association*. Therefore, assuming the Commission wants to avoid another rejection

⁹ Comments of Minority Media and Telecommunications Council, *et al.* in MM Docket No. 98-204, filed April 15, 2002 (emphasis in original) (“MMTC Comments”) at 22; *see also* Comments of National Organization for Women, *et al.* in MM Docket No. 98-204, filed April 15, 2002 (“NOW Comments”); Comments of American Women in Radio and Television in MM Docket No. 98-204, filed April 15, 2002 (“AWRT Comments”); Comments of the American Federation of Television and Radio Artists in MM Docket No. 98-204, filed April 15, 2002 (“AFTRA Comments”); Comments of the Lawyers’ Committee for Civil Rights Under Law and People for the American Way Foundation in MM Docket No. 98-204, filed April 15, 2002 (“LCCR Comments”); Comments of the National Association for the Advancement of Colored People in MM Docket No. 98-204, filed April 15, 2002 (“NAACP Comments”).

¹⁰ MMTC Comments at 22-23.

of its rules by the D.C. Circuit, NAB encourages the Commission to disregard the suggestions of these parties.

On the other hand, NAB offers a comprehensive alternative to the Commission's EEO plan. The overarching difference between the EEO proposals of the Commission and NAB is that the former requires a station to both affirmatively recruit for every job vacancy *and* perform a certain number of outreach projects, while the latter relies on a station's performance of a continuous pattern of broad, general outreach. NAB's plan also provides stations with the maximum flexibility to implement an EEO plan most appropriate to a station's particular resources, hiring needs, and other circumstances. Also unlike the Commission's EEO proposal, NAB's plan enables stations to focus their attention on conducting successful outreach, instead of fulfilling unnecessary or burdensome recordkeeping and reporting obligations, such as the continued filing of FCC Form 395-B (Annual Employment Report). NAB thus strongly encourages the Commission to fully consider NAB's EEO plan, and either adopt it in place of the Commission's proposal, or embrace its important aspects to improve the Commission's plan.¹¹

II. NAB'S EEO PLAN IS SUPERIOR TO THE COMMISSION'S PROPOSAL

As mentioned above, NAB has offered its own far-reaching EEO plan as an alternative to the Commission's proposal. The Commission's plan requires that a broadcast station both recruit for each and every job vacancy, *and* perform a certain number of outreach projects. Such job-specific recruitment would consist of (1) the wide dissemination of information about job vacancies to the station's entire community and (2) providing notification of job vacancies to

¹¹ Comments of National Association of Broadcasters in MM Docket No. 98-204, filed April 15, 2002 at 3-4 ("NAB Comments").

organizations involved in assisting job seekers.¹² NAB's proposal is superior because, unlike the Commission's plan, it relies on a station's performance of a continuous pattern of broad, general outreach, without the need to conduct typically fruitless campaigns of recruitment. Several problems exist with respect to the Commission's proposed recruitment rule. First, the experience of NAB's members is that broad, general outreach almost always yields a better pool of available candidates than job-specific recruitment, thus rendering a station's recruitment efforts moot.¹³ Second, despite entreaties from NAB and others, the Commission has never sufficiently defined what would constitute the "wide dissemination" of job vacancy information.¹⁴ For example, stations would be left to speculate whether a classified advertisement in the most widely read newspaper in the state would suffice, and if so, how long such an advertisement would have to run. Stations have no control over who applies for an open position, and the Commission's recruitment process would leave stations vulnerable to accusations of discrimination if not enough minorities or women applied for a particular vacancy. Moreover, job-specific recruitment may be a complete waste of time and resources in certain situations. For instance, stations located in regions with low minority populations are even more at risk, since it often can be impossible for these employers to attract and identify minority job candidates.¹⁵

Job-specific recruitment is also unsuitable in other common situations faced by broadcasters. The Commission in the *Second Notice* describes certain specific circumstances when recruitment would not be required, and also offers a catch-all exemption for "exigent

¹² *Second Notice*, 16 FCC Rcd at 22847-22848.

¹³ NAB Comments at 38.

¹⁴ *Id.* at 39.

¹⁵ *Id.*

circumstances,” but does not define what might constitute these sort of circumstances.¹⁶ NAB has argued that recruitment is also inappropriate when a station seeks to replace an existing employee whose skills or position is unique. Stations would face great difficulty, for example, maintaining the confidentiality of its efforts to replace a General Manager or on-air news anchor if the Commission required the station to post such a vacancy in a newspaper or on an Internet job board. Publicizing such a vacancy also would offend the current employee, especially if the station, as is common, is only exploring the possibility of replacing such a person or is actually trying to attract a particular candidate at a competing station.¹⁷

Based on the experience of NAB members, it is clear that a continuous pattern of broad, general outreach is the much more efficient, successful means of attracting and identifying job candidates. However, this is not the only reason that industry favors NAB’s EEO proposal. NAB’s plan is also more flexible and responsive to the real-world demands on broadcast station’s often limited resources, as well as stations’ changing typical hiring needs. Under NAB’s plan, stations would enjoy the option of selecting from among three avenues for fulfilling their outreach obligations, depending on whether a station is a federal contractor or participates in their state broadcasting association’s “Broadcasting Careers Program.” If a station decides to effect compliance by performing the requisite number of NAB’s menu of outreach options, many such options are available.

Also unlike the Commission’s EEO proposal, NAB’s plan allows stations to focus their attention on conducting successful outreach, instead of fulfilling unnecessary and unduly burdensome recordkeeping and reporting obligations. Under NAB’s proposal, licensees still

¹⁶ *Second Notice*, 16 FCC Rcd at 22850-22851.

¹⁷ NAB Comments at 47.

would be required to record and make available all pertinent information about their outreach efforts, but they would not be required to file this information with the Commission on an overly burdensome schedule, nor place it in their public inspection file or post it on their Internet web sites.

NAB thus believes that its alternative EEO plan is far superior to the Commission's proposal. NAB's plan takes account of the many demands on broadcasters' often limited resources – particularly small stations -- and, to the maximum degree, allows broadcasting managers to conduct broad, general outreach most suitable to their individual circumstances. As a result, stations would be able to conduct the most outreach endeavors possible and execute each endeavor to its fullest potential, thereby benefiting potential job applicants with expanded and enhanced information about the broadcasting industry and its career opportunities.¹⁸

III. THE COMMENTS DO NOT JUSTIFY NEW EEO RULES

As discussed in NAB's initial comments, the Commission's authority to re-regulate equal employment opportunity is far from certain.¹⁹ Over the years, the Commission has changed its rationales for regulating EEO. The Commission first grounded its EEO rules in a desire to enhance the diversity of programming content through the expansion of workplace diversity.²⁰ However, the D.C. Circuit Court rejected this rationale in *Lutheran Church*, stating that it could

¹⁸ Comments of National Association of Broadcasters in MM Docket No. 98-204, filed April 15, 2002 at 3-4 (“NAB Comments”).

¹⁹ NAB Comments at 63-72. *See also* Joint Comments of the Named State Broadcasters Associations in MM Docket No. 98-204, filed April 15, 2002 at 11-35 (“NASBA Comments”).

²⁰ *Lutheran Church*, 141 F.3d at 354.

not find support in the Constitution for permitting the Commission to take account of racially-based differences in viewpoints when crafting rules designed to enhance ownership diversity.²¹

As a result, the Commission changed course and based subsequent rules, as well as the current EEO proposal, on a goal of preventing discrimination. Specifically, the Commission expressed a need to restrain the broadcasting industry's allegedly "homogeneous" workforce from replicating itself through "an insular recruitment and hiring process,"²² such as through "word-of-mouth" recruitment practices.²³ However, the Commission in the *Second Notice* conspicuously fails to cite any evidence of discrimination or homogeneity in the broadcasting industry, nor does it question the industry's on-going efforts to enhance workplace diversity in the absence of rules.²⁴

Thus, commenters in support of the Commission's EEO proposal attempt to demonstrate past discrimination and a lack of diversity in the broadcasting industry. However, their arguments prove transparent and unconvincing. MMTC, for one, essentially accuses the

²¹ *Id.* at 355.

²² *Second Notice*, 16 FCC Rcd at 22844.

²³ *Report and Order* in MM Docket Nos. 98-204 and 96-16, 15 FCC Rcd 2329, 2345 (2000) ("*EEO Report and Order*").

²⁴ In fact, as mentioned in NAB's Comments, the Commission has admitted that no pattern of discrimination exists in the broadcasting industry. For example, the 1996 Telecommunications Act directed the Commission to grant a broadcast renewal application only if it finds that the applicant, in addition to serving the public interest, convenience and necessity, has not committed a series of violations of the Act or rules that constitute a pattern of abuse, including a pattern of discriminatory hiring. 47 U.S.C. § 309(k). Given the extremely rare situations when the Commission has addressed alleged patterns of abuse, it is evident that the Commission concedes that no pattern of discrimination has existed in the broadcasting industry. *NAB Comments* at 67 n.140.

broadcast industry of widespread discrimination based on pure conjecture.²⁵ MMTC, for instance, supposes that “10% of broadcasters are discriminators,” based on the results of 12-year old “testing” studies in wholly unrelated industries.²⁶ MMTC asserts that given this amount of discrimination, there is a 50% probability that a job applicant who submits applications to seven broadcast stations will be subject to discrimination during her job search, and an 80% probability for an applicant submitting 15 job applications.²⁷ MMTC then characterizes these figures as “evidence” that “it is all but certain that hundreds (or more) broadcasters discriminate regularly. . . ,”²⁸ and thus urges the Commission to cure the industry. MMTC’s figures, however, do not constitute “evidence” of discrimination in the broadcasting industry, or of anything else for that matter. MMTC’s statistics concerning the behavior and attitudes of broadcasters are pure speculation. The Commission should discard these allegations.

MMTC and other commenters also strive to demonstrate homogeneity and discrimination in the broadcasting industry based on data of the Equal Employment Opportunity Commission (“EEOC”).²⁹ These parties note that EEOC data for the Year 2000 shows that minorities and women were 22.5% and 41.5% of the reporting broadcasting companies’ workforce,

²⁵ MMTC Comments at 37. MMTC also essentially accuses anyone who seeks an exemption from the Commission’s EEO rules of being immoral: “[T]he very concept that broadcasters should be ‘exempt’ from EEO compliance is morally unsound. . . .” *Id.* at 99.

²⁶ *Id.* at 39 n.109 (citing a 1990 study using White and Black “testers” vying for similar employment in non-broadcasting industries).

²⁷ *Id.* at 21-22.

²⁸ *Id.* at 39.

²⁹ *Id.* at 47-48; NOW Comments at 3.

respectively,³⁰ and argue that these figures support their assertions that the broadcast industry is still too homogenous.³¹ The only explanation for this circumstance these commenters offer is widespread discrimination by broadcasters.³²

NAB agrees with the comments of Golden Orange Broadcasting and others that, not only does the EEOC data fail to support allegations of homogeneity or discrimination in the broadcasting industry, but that instead they prove the exact opposite.³³ While these figures may not suit the tastes of MMTC, NOW and certain other commenters, NAB believes it is undeniable that an industry workforce consisting of almost one-quarter minorities, and more than 40% women, is far from “homogeneous.” Homogeneity commonly implies a “uniform makeup,” which simply is not present in this case.³⁴ Golden Orange, for one, correctly notes that nowhere in the *Second Notice* does the Commission endorse this assertion, and that the Commission makes no attempt to offer any evidence of any alleged “homogeneity” based on its own records.³⁵

The University of Missouri agrees, stating that the record “indicates no need for FCC re-regulation in EEO enforcement. . . . [T]he FCC has not demonstrated any detriment to the public interest from the absence of a [EEO] rule. In fact, the vast majority of licensees. . . recognize

³⁰ See, e.g., MMTC Comments at 48 n.116, citing 2000 EEO-1 Aggregate Report, SIC 483: Radio and Television Broadcasting.

³¹ NOW Comments at 3; MMTC Comments at 35-43.

³² MMTC Comments at 35 and 47-50.

³³ Comments of Golden Orange Broadcasting, Inc. in MM Docket No. 98-204, filed April 15, 2002, at 9-13 (“Golden Orange Comments”); Comments of the Local Television Group in MM Docket No. 98-204, filed April 15, 2002, at 5-11 (“LTVG Comments”).

³⁴ Webster’s II New Riverside Dictionary, Revised Edition (Boston, MA 1996).

³⁵ Golden Orange Comments at 12-13.

their responsibility to uphold equal employment opportunity. . . . It is incumbent upon the FCC to recognize that times change and what may have been good regulation at one time may no longer serve a purpose.’³⁶

In addition, neither the Commission nor private supporters of stringent EEO regulations take the obvious step of comparing the EEOC data on the broadcasting industry’s diversity to that of the nationwide workforce. As mentioned, EEOC data shows that for the Year 2000 the broadcasting industry consisted of 22.5% minorities and 41.5% women, compared to 29.2% minority and 47.1% women for the nationwide workforce.³⁷ Although NAB concedes a slight gap among these figures, NAB believes that the difference can hardly be called “huge” or “overwhelming,” as MMTC suggests.³⁸ MMTC would have the Commission believe that these minor discrepancies are concrete evidence of undue and persistent homogeneity in the broadcasting industry, and that widespread discrimination can be the only explanation.³⁹ NAB believes otherwise, however, and agrees with LTVG’s statement that these numbers are “far from sufficient to support a rational conclusion that the broadcast workforce is effectively, when compared to the overall workforce, a ‘homogeneous’ collection of ‘white males.’”⁴⁰

³⁶ Comments of the Curators of the University of Missouri in MM Docket No. 98-204, filed April 15, 2002 (Univ. of MO Comments) at 4.

³⁷ 2000 EEO-1 Aggregate Report: Occupational Employment in Private Industry by Race/Ethnic Group/Sex, and by Industry, United States, 2000.

³⁸ MMTC Comments at 37.

³⁹ *Id.* at 41-44 (offering nine hypotheses for the Commission’s rare findings of discrimination by broadcasters). LCCR also alleges that the broadcasting industry, “in particular,” of having a “long history of exclusion of minorities.” LCCR Comments at 16. However, LCCR offers no support -- legal, factual, anecdotal or otherwise -- for this bald accusation, or seeks to show any present effects of long-ago abandoned practices.

⁴⁰ LTVG Comments at 9.

Some commenters also argue that minorities constitute a relatively low proportion of management positions in broadcasting. However, these parties do not consider the fact that broad advancement of minorities in any industry necessarily depends on the expansion of educational and entry-level professional opportunities that unfortunately began in earnest too few decades ago. It simply takes some period of time before any industry, including broadcasting, can produce a breadth and depth of executives of a particular ethnicity, and that is the process the industry is undergoing right now.

The progress of women in broadcasting illustrates this point. For example, surveys conducted by NAB reveal that the numbers of women television station general managers has grown steadily and impressively over the past four years. According to NAB's data, there were 131 such GM's in 1998, 181 in 1999, 224 in 2000, and 242 in 2001, for an 85.7% increase in only three years.⁴¹ EEOC data also supports this development. According to the EEOC, women made up 37% of the broadcasting industry's "Officials & Managers" and "Professionals" in 1990, 38.8% of these employment categories in 1994, and 39.2% in 1998. Again, women are steadily increasing their ranks at the highest level of broadcast stations, just as minorities have begun to demonstrate, and will continue to demonstrate in the coming years.

MMTC also argues discrimination in the broadcasting industry is evidenced by the relatively low percentage of female broadcasting engineers as compared to women in the work force nationwide.⁴² NAB, however, believes that any such discrepancy may simply be due to societal circumstances, and not discriminatory hiring practices, and the Supreme Court

⁴¹ See Exhibit A, *Women TV GMs Take Another Leap Forward*, NAB, October 2000. NAB continued the survey in 2001 to determine that there were 242 women GMs in that year, but did not release another press release.

⁴² MMTC Comments at 40.

apparently would agree. For example, in *City of Richmond v. J.A. Croson Co.*,⁴³ the Court addressed the city's plan requiring that prime contractors awarded city construction contracts must subcontract at least 30% of each contract to one or more "Minority Business Enterprise." The city argued that minority firms received a relatively small percentage of prime contracts, and white prime contractors would not award subcontracts to minority firms unless they were so compelled. The Court stated that the city's reliance on the disparity between the number of contracts awarded to minority firms and the minority population of the city was misplaced.⁴⁴ The court stated that, while "gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination. But it is equally clear that '[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.'"⁴⁵

Even more relevant to MMTC's assertions, the Court also noted that "[i]n the employment context, we have recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of discrimination."⁴⁶ However, "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities

⁴³ 488 U.S. 469 (1989).

⁴⁴ *Id.* at 726.

⁴⁵ *Id.*, citing *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-308 n.13.

⁴⁶ *Id.*, citing *Teamsters v. United States*, 431 U.S. 324, 337-338 (1977).

qualified to undertake the particular task.’⁴⁷ Thus, NAB believes that MMTC’s arguments regarding women engineers are misplaced. Any disparity between the numbers of women broadcast engineers and women in the nation’s work force has little probative value. If, for some reason, there were fewer women engineers in the broadcasting industry compared to women engineers in other industries, that could demonstrate a pattern of discrimination. But that is simply not the case. As shown above, women have made great strides in the broadcasting industry, from obtaining entry-level employment to reaching the management ranks, as well as solidifying and expanding their ranks among the industry’s engineers and technical personnel. NAB believes it should be obvious to the Commission (as well as to MMTC) that, given the importance of proper engineering of broadcast stations, any broadcaster exercising sound business judgment is going to hire the best available engineer, regardless of gender, rather than risk the operation and license of his or her station.

The critical point is that any number of reasonable explanations could be relevant to an alleged lack of diversity in the broadcasting industry, instead of intentional discrimination, and it is incumbent upon the Commission to clearly support -- with facts, not anecdotes -- any action it may take based on a findings associated with the composition of the broadcasting industry’s workforce.⁴⁸

Furthermore, the Commission must demonstrate a record of evidence that the broadcasting industry recruits through “an insular process,”⁴⁹ such as through “word-of-mouth”

⁴⁷ *Id.*, citing *Hazelwood*, 433 U.S. at 308.

⁴⁸ *See, e.g., Sinclair Broadcasting Group, Inc. v. FCC, et al.*, 2002 U.S. App. LEXIS 5965 (D.C. Cir. 2002) at pp. 6 and 9 (the Commission must be able to “fill the evidentiary gap” and describe how its chosen path will repair the alleged problem).

⁴⁹ *Second Notice*, 16 FCC Rcd at 22844.

recruitment practices.⁵⁰ Certain parties attempt to assist the Commission in this endeavor, but fall short. AFTRA, for one, claims that in recent years there has been a “return of insular, ‘word-of-mouth’ hiring practices that historically excluded women, minorities and others from applicant pools.”⁵¹ AFTRA also states that “[i]t has now become widely perceived that only candidates with some ‘inside’ connection to networks and stations will have any chance to compete for an available position.”⁵² However, nowhere in its comments does AFTRA offer any evidence to support these assertions, instead referring merely to un-cited “member reports” and irrelevant studies concerning, for example, the percentage of news stories about Latinos on evening network newscasts.⁵³ NAB believes that AFTRA’s suppositions are far from sufficient to demonstrate the broadcasting industry’s widespread use of insular recruitment practices, and as mentioned above, if the Commission intends to create regulations designed to deter alleged “word-of-mouth” recruitment in the broadcasting industry, it is imperative that the Commission possess concrete, systematic evidence that such recruitment in fact is dominant in the industry and results in a widespread lack of diverse employment before adopting a rule.

Moreover, the Commission should recognize that insular recruitment is not necessarily unlawful or unwise. As stated in NASBA’s comments, the Commission may only act to deter intentional discrimination.⁵⁴ Word-of-mouth recruitment by itself does not represent intentional discrimination; in fact, it may be an entirely reasonable method given a particular station’s

⁵⁰ *EEO Report and Order*, 15 FCC Rcd at 2345.

⁵¹ AFTRA Comments at ¶17.

⁵² *Id.* at ¶18.

⁵³ AFTRA Comments at ¶75.

⁵⁴ NASBA Comments at 33, *citing Washington v. Davis*, 426 U.S. 22 (1976).

circumstances.⁵⁵ As NASBA explains, “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.”⁵⁶ In this vein, NASBA notes that “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 had not been found to have violated the civil rights laws.”⁵⁷ Even MMTC has recognized that “[W]ord-of-mouth’ recruitment may continue if the broadcaster also attempts to reach those not within the usual word-of-mouth circle.”⁵⁸

Moreover, aside from whether broadcasters actually use word-of-mouth recruitment, and whether it is permissible, the allegations of MMTC, AFTRA and others regarding discrimination in the broadcasting industry ring hollow. As demonstrated in NAB’s initial comments, the broadcasting industry has a long-held, dynamic commitment to workplace diversity.⁵⁹ This commitment involves numerous far-reaching endeavors designed to inform the public of the benefits of a career in the broadcasting industry, and to identify and attract female and minority

⁵⁵ *Id.*, citing *EEOC v. Consolidated Service Systems*, 989 F.2d 233 (7th Cir. 1993).

⁵⁶ *Id.* at 34 (emphasis in original), citing *Alexander v. Sandoval*, 532 U.S. 275, 284 n.6 (2001) (other cites omitted).

⁵⁷ *Id.*, citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577-578 (1978)

⁵⁸ MMTC Comments at 57-58 (emphasis in original), citing *Memorandum Opinion and Order* in MM Docket Nos. 98-204 and 96-16, 15 FCC Rcd 22548, 22551 (2000) (“*EEO Recon Order*”). MMTC also urges the Commission to add a separate requirement that licensees certify that they do not “recruit applicants primarily by word-of-mouth.” MMTC Comments at 72. NAB believes this suggestion is unnecessary since any such obligation seemingly would be included within the Commission’s ultimately adopted EEO rule.

⁵⁹ NAB Comments at 4-11.

candidates for positions at all levels of the industry. NAB and individual broadcast stations sponsor, administer, and participate in a wide variety of such programs, including: job fairs; internships, mentorships; scholarships; Internet job banks; and training programs for employees at all levels, as well as prospective station owners. NAB and individual stations also cooperate extensively with organizations that represent the interests of females and minorities in order to identify potential job candidates. These efforts have enabled the industry to make great strides in expanding diversity at all levels.

NAB also disputes the charges by AFTRA that broadcast licensees have “sharply reduced their participation in job fairs and other outreach and recruitment efforts.”⁶⁰ Again, AFTRA cites only “member reports” and no data or even persuasive anecdotal information. NAB’s extensive experience reveals quite the contrary. For example, the Radio and Television Career Fair, operated by the NAB Career Center and held in conjunction with NAB’s recent annual convention in Las Vegas on April 7, 2002, was an overwhelming success.⁶¹ The 2002 Career Fair attracted approximately 1800 job seekers, or 20% more than the 1500 attendees in 2001, and 28.6% more than the 1400 attendees in 2000. Moreover, compared to what one might expect given the dramatic downturn in the nation’s economy, the number of entities staffing booths remained fairly steady. This is just one example of broadcasters’ efforts to reach out to their communities, as well as across the entire nation, to attract and identify prospective employees. The industry has made great strides in this regard in recent years, and will continue to do so going forward.

⁶⁰ AFTRA Comments at ¶19.

⁶¹ See Exhibit B, NAB press release describing the event.

Moreover, it is important to highlight that none of these on-going ventures have been forced upon the industry by government, since it has been almost four years since the *Lutheran Church* decision vacated the prior EEO rules. For a broadcaster, a continuous pattern of broad, meaningful outreach simply makes good business sense, because the outcome of such outreach -- a highly qualified, diverse workforce -- creates the best possible product.

Finally, it is vital for the Commission to keep in mind that its EEO rules have been in effect for more than 30 years.⁶² Absent any evidence to the contrary, these policies must be presumed to have been successful, as the broadcasting industry's long-standing principles of non-discrimination and affirmative action have produced a workforce that reflects the gender and racial make-up of all broadcast stations' communities. Even if the industry were to replicate itself through insular recruitment, such as word-of-mouth contacts, no discrimination or disproportional representation of any particular societal group should result, assuming *arguendo* that those are legitimate goals for the Commission's EEO proposal.

The Commission thus must tread very lightly in this proceeding, as its authority to re-regulate equal employment opportunity in the broadcasting industry stands on shaky ground. Nowhere does the Commission point to any evidence of a pattern of past or present discrimination in the broadcasting industry, and the commenters in support of the Commission's plan offer only anecdotes, speculations, or worst of all, fabrications. It is imperative that the Commission collect or produce a persuasive record of discrimination or homogeneity in the broadcasting industry, if it aims to adopt a regulation intended to address such an ill. It is long-standing precedent that, in crafting regulations, the Commission must examine the relevant data and articulate a satisfactory explanation for its action, including a "rational connection between

⁶² *Second Notice*, 16 FCC Rcd at 22844, citing *Nondiscrimination in Employment Practices*, 18 FCC 2d 240 (1969).

the facts found and the choice made.’⁶³ Moreover, the Commission will only further raise the legal obstacles it faces by creating rules that are needlessly burdensome or unduly focused on the quantitative results of its rules. Accordingly, the Commission must take great care to craft policies that are flexible, and accommodate the resources and hiring needs of all broadcasters, and at the same time economize the effort required of stations to demonstrate their compliance.

IV. THE COMMISSION’S EEO PROPOSAL IS NOT LEGALLY JUSTIFIED, AND ITS SUPPORTERS’ SUGGESTIONS WOULD MAKE IT EVEN LESS SO

In the *Second Notice*, the Commission recounted the D.C. Circuit’s decisions in *Lutheran Church and Association* to strike the previous EEO rules. In the former, the court rejected the Commission’s guidelines for selecting stations for in-depth EEO review when their licenses came up for renewal. The court held that “[n]o rational firm...welcomes a government audit,” and therefore the guidelines induced “an employer to hire with an eye towards meeting the [Commission’s] numerical target.’⁶⁴ The court thus determined that the EEO rules violated the equal protection clause of the Fifth Amendment’s Due Process Clause because they pressured stations to make “race-based hiring decisions.’⁶⁵

The Commission attempted to accommodate the *Lutheran Church* decision in its next effort to craft EEO rules, described in the *EEO Report and Order*. Former Option A of these rules focused on recruitment and outreach by broadcast stations. Option B, however, required broadcasters to report the race, sex and referral source of each applicant. The court determined that this provision placed pressure on broadcasters to focus their recruitment efforts on minorities and women, at the expense of other persons, because the Commission might investigate any

⁶³ See, e.g., *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

⁶⁴ *Second Notice*, 16 FCC Rcd at 22844, citing *Lutheran Church*, 141 F.3d at 354.

⁶⁵ *Id.*, citing *Lutheran Church*, 154 F.3d at 491.

station whose efforts attracted few minorities or women.⁶⁶ The *Association* court thus found that, like the prior EEO rule, Option B was a race-based violation of the Constitution's equal protection provision, and vacated the entire rule after concluding that Options A and B were not severable.⁶⁷

NASBA explains that the "pressure" of concern to the D.C. Circuit stems from the Commission's licensing power. NASBA notes the court's description of the Commission's licensing power in *Head v. New Mexico Bd. of Exam'rs in Optometry* as hanging "like a constant Damocles' sword over broadcasters."⁶⁸ In fact, the Commission itself has recognized this power:

"The licensing authority of the FCC is indeed a powerful tool; the FCC exerts a great deal of influence over holders of broadcasters and can revoke a license where a licensee fails to comply with the agency's rules and policies....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."⁶⁹

Accordingly, the Commission must be absolutely certain that any EEO regulation it ultimately adopts does not place any pressure on broadcast licensees to make race-based hiring decisions.

Nevertheless, despite the court's admonishments, the Commission in the *Second Notice* proposes to impose recordkeeping and reporting obligations that NAB believes will have the inevitable effect of pressuring broadcast stations in the exact manner rejected by the D.C.

⁶⁶ *Second Notice*, 16 FCC Rcd at 22846, *citing Association*, 236 F.3d at 21.

⁶⁷ *Association*, 236 F.3d at 18.

⁶⁸ NASBA Comments at 40.

⁶⁹ *Id.*, *citing* the government's Response to Petitions for Rehearing and Petitions for Rehearing *En Banc* in *Association* at 9.

Circuit. The Commission's proposed requirements are largely identical to those included in the prior EEO rule that the D.C. Circuit rejected in *Association*, and include:

- Annual Public File Report: Stations must prepare a report concerning their outreach efforts and place it in the station's public file annually on the anniversary of the station's license date, including information on all jobs filled during the prior year and the recruitment sources used to fill those vacancies.
- Statement of Compliance: Licensee must file FCC Form 397, re-named "Broadcast Mid-term Report," in the fourth year of their license term, and attach most recent copy of Annual Public File Report.
- EEO Program Report: stations must file FCC Form 396 with license renewal applications.
- Model EEO Program Report: applicants for new broadcast stations or for assignment/transfer of an existing station must file FCC Form 396-A describing the EEO program they intend to implement.
- Annual Employment Report: stations must file FCC Form 395-B, consisting of data on the ethnicity and gender of the reporting entity's workforce.⁷⁰

Moreover, commenters in support of the Commission's EEO proposal urge the Commission to expand and increase these already burdensome and unnecessary obligations, inviting further conflict with the court's decisions in *Lutheran Church* and *Association*. For example, AWRT requests that the Commission mandate a station's submission of its Annual Public File Report to the Commission as often as annually, instead of every four years, or that the Broadcast Mid-term Report should attach all of a station's Annual Public File Reports for the previous four years.⁷¹ AFTRA advocates that stations should be required to update their Annual Public File Report continuously,⁷² rather than once a year, and that the report be expanded to include the number of interviewees for a station's vacancies during the previous year, copies of

⁷⁰ *Second Notice*, 16 FCC Rcd at 22853-22858.

⁷¹ AWRT Comments at 15.

⁷² AFTRA Comments at ¶ 45.

all job advertisements and notices used in attempting to fill job vacancies, and a list of all organizations that requested copies of such notices.⁷³ NOW would add to the Annual Public File Report a duty to track the number of interviewees for each vacancy, and the recruitment source that referred each hired employee.⁷⁴ In addition, these parties seek requirements that stations put all of their EEO information in the public inspection file and on their Internet web sites,⁷⁵ while some urge the Commission itself to establish and maintain a web site that displays all of this information.⁷⁶ Finally, all of the commenters in support of the Commission's EEO proposal also urge the Commission to continue the required filing of the FCC Form 395-B (Annual Employment Report).⁷⁷

NAB believes that the Commission's proposed recordkeeping and reporting rules are inappropriate and unnecessary, and escalating these obligations as suggested would be both unlawful and untenable. More importantly, NAB believes that these parties' suggestions reveal their underlying goal for any new EEO rule; that is, to facilitate their ability to examine the workforce composition of broadcast stations for purposes of potentially challenging the license renewal applications of stations with staffs they deem to be insufficiently diverse. Their own statements leave little to the imagination as to their intentions. For instance, NOW urges the Commission to make all stations' EEO public file reports available on a Commission web site so that the reports would be "totally accessible to members of the public who want to ... make

⁷³ *Id.* at ¶ 40.

⁷⁴ NOW Comments at 14.

⁷⁵ *See, e.g.*, AWRP Comments at 16; MMTC Comments at 128-131; NOW Comments at 17.

⁷⁶ *See, e.g.*, AWRP Comments at 17; NOW Comments at 17.

⁷⁷ *See, e.g.*, NOW Comments at 27-30; AWRP Comments at 16-17; AFTRA Comments at ¶¶ 46-47; MMTC Comments at 131-134.

comparisons among stations or entities.”⁷⁸ NOW further states that “[i]f the EEO public file reports were available on the Commission’s site, the public would have easier access to these reports and would be able to better assist the Commission in monitoring compliance with EEO provisions.”⁷⁹

MMTC asserts that, without its proposed recordkeeping and reporting obligations, which are far more stringent than even the Commission’s, “it would impossible for ... the public to evaluate what the [station’s] EEO program attempted to do, much less what it achieved. All discriminators would go free.”⁸⁰ With respect to reporting information on which particular community organization referred which interviewees and hires, MMTC states that, “[w]ithout applicant source data, verification that broadcasters recruited at all would be impossible.”⁸¹

MMTC further contends that “[f]ailure to maintain [EEO] records can give rise to an inference of discrimination.”⁸² In support of this proposition, MMTC states that “[f]ailure to keep appropriate records may constitute ‘spoliation’ -- especially if maintenance of the records is mandated...,”⁸³ and cites *Rogers v. Exxon Research & Engineering Co.*⁸⁴ MMTC’s proposal should be rejected. First, there is no mention of the term “spoliation” in *Rogers*. Second, and even more vexing, the portion of *Rogers* referenced by MMTC discusses the plaintiff’s

⁷⁸ NOW Comments at 17.

⁷⁹ *Id.*

⁸⁰ MMTC Comments at 120.

⁸¹ *Id.* at 141.

⁸² *Id.* at 120-121.

⁸³ *Id.* at 121 n. 255.

⁸⁴ 550 F.2d 834, 843 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) (“*Rogers*”).

intentional destruction of diaries, after commencing litigation and after he had already shown them to his attorney. Indeed, quite different from MMTC's "paraphrasing," the opinion actually states: "[T]he *destruction* of the records could reasonably raise an unfavorable inference."⁸⁵ "Spoliation" commonly refers to the intentional destruction, or significant and meaningful alteration of, evidence.⁸⁶ For spoliation to raise a negative inference, a party must demonstrate an actual or attempted destruction of evidence, or at a minimum, negligent alteration of documents.⁸⁷ The mere absence of documents in no way implies that the record-keeper is purposefully hiding evidence of sinister actions. For present purposes, it is vital that the Commission recognize that in the rare instance when a broadcast station is unable to produce complete EEO records, no inference of discrimination should attach.⁸⁸

This substantiates broadcasters' fears concerning the intentions of certain commenters regarding new EEO rules. That is, these parties seek expanded EEO recordkeeping and reporting requirements, and enhanced access to those records, for the purpose of placing pressure on broadcast executives to hire more women and minorities. Their goal actually has little relevance to the Commission's aim of expanding equal employment opportunity for all potential job candidates. Instead, their objective is to pressure broadcasters into focusing their often limited

⁸⁵ *Rogers*, 550 F.2d at 843 (emphasis added), citing *Stoumen v. Commissioner of Internal Revenue*, 208 F.2d 903, 907 (3rd Cir. 1953).

⁸⁶ Black's Law Dictionary, Fifth Edition, West Publishing Co, St. Paul, MN 1979.

⁸⁷ See, e.g., *James T. Seigfreid Article on Spoliation of Evidence*, Baker Sterchi Cowden & Rice, LLC, Kansas City, MO, http://www.bscr-law.com/Seminars/Spoliation_of_Evidence/spoliation_of-evidence.html; *Don't Be a Spoiler*, Merri A. Baldwin and Tara-Nicholle B. Nelson, Rogers Joseph O'Donnell & Phillips, San Francisco, CA, <http://www.rjop.com/publish36.htm>.

⁸⁸ NAB notes that this is just one of multiple attempts by MMTC to assign evil intentions, attitudes or behaviors to broadcasters concerning EEO, without any factual or legal support.

resources on recruiting women and minorities, at the expense of other persons, which of course, is unlawful.

The Commission must be certain that any new EEO policy focuses not on the resulting numerical diversity of the industry or individual stations, but rather on whether a licensee has made the requisite effort to expand equal employment opportunity through broad, general outreach. This is the only manner in which the Commission can hope to achieve its dual goals of improving EEO, while also crafting a rule that will withstand court scrutiny.⁸⁹

NASBA illuminates the Commission's predicament, noting that the Commission in the *Second Notice* seeks comment not on ways to increase the hiring of women and minorities, but instead on how to achieve "broad outreach."⁹⁰ This type of outreach "is dependent only on choosing appropriate means for recruiting, such as the Internet, not on measuring the resulting composition of the workforce."⁹¹ So long as the Commission is able to confirm that a broadcast station has performed broad, general outreach on a consistent basis, this should be sufficient. As NASBA states, "[a]ny further requirement that a station [or the Commission, or a third party for that matter] 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...."⁹² However, such a tracking requirement is a constitutionally "slippery slope" for the Commission because the Commission somehow must determine what is

⁸⁹ See, e.g., *Second Notice*, 16 FCC Rcd at 22850.

⁹⁰ NASBA Comments at 41, *citing Second Notice*, 16 FCC Rcd at 22853-22854.

⁹¹ *Id.*

⁹² *Id.* at 41-42.

a sufficient number of representatives of a particular group, and reaching such a calculation inevitably calls for a “system of head counts that ultimately amounts to nothing more than a minimum quota.”⁹³ The predictable result, of course, will be the exact “pressure” prohibited under *Lutheran and Association*.

In addition, separate and distinct from the inevitable pressure on broadcasters that the Commission’s proposed paperwork requirements will cause, there is the untenable administrative burden of those rules. Multiple commenters express concern, including Broward County, which notes that its noncommercial education television station already must comply with extensive equal employment opportunity requirements under various federal and state regulations, and already devotes tremendous resources to disseminating information regarding job openings. Broward County is particularly concerned that the Commission will impose recordkeeping and reporting duties that duplicate other obligations the stations already faces under school board or county policies. The Commission should not subject broadcast stations to redundant rules. As Broward County states, the data collection and review process that public broadcast stations already must undertake “should more than suffice in order to achieve the FCC’s goals” for EEO.⁹⁴

Thus, NAB urges the Commission to strongly consider its proposed EEO alternative. As described in its initial comments, NAB’s alternative EEO proposal relies on a broadcast station’s performance of a continuous pattern of broad, general outreach. Under NAB’s plan, a station would certify to the Commission every four years its compliance with one of the three EEO

⁹³ *Id.* at 42.

⁹⁴ Comments of the School Board of Broward County, Florida, in MM Docket No. 98-204, filed April 15, 2002 (“Broward County Comments”) at 1-5. *See also* Univ. of MO Comments at 3; Comments of the Association of Public Television Stations in MM Docket No. 98-204, filed April 15, 2002 (“APTS Comments”) at 2.

outreach options set forth by NAB: (1) compliance with the affirmative action requirements of the Office of Federal Contract Compliance Programs (“OFCCP”); (2) completion of the obligations under NASBA’s Model Broadcast Career Program; or (3) completion of the EEO outreach requirements under NAB’s proposed EEO plan. Licensees also would submit a list and detailed narrative description of its EEO outreach endeavors during the relevant period, as well as retain all relevant documentation in between submissions to the Commission and make it available to the Commission upon request. Under NAB’s proposal, stations would not be required to place an EEO report in their public inspection files.⁹⁵ NAB also seeks the elimination the Annual Employment Report.⁹⁶

Unlike the recordkeeping and reporting rules proposed by the Commission and by commenters in support of the Commission’s plan, NAB’s suggested obligations would not implicate either *Lutheran Church* or *Association*. NAB’s plan centers on a broadcast station’s good faith execution of broad, general outreach intended to inform the public about the benefits of a career at particular stations, as well as in the broadcasting industry generally. NAB’s proposed information collection rules will ensure this outreach effort by requiring the public filing of a detailed narrative description of a station’s outreach endeavors. The breadth and depth of outreach under NAB’s plan most assuredly will result in an expanded, diverse pool of potential job candidates, which in turn, will cause a more diverse collection of job interviewees and ultimately, industry workforce.

However, it is the effort to reach out to the community that is absolutely mandated and measured under NAB’s plan, not some fixed means of attracting and identifying job candidates.

⁹⁵ NAB Comments at 27-28.

⁹⁶ *Id.* at 60-62.

NAB's EEO proposal allows stations the flexibility to choose the methods of reaching out to their community most suitable to their resources and hiring needs. Most importantly, there would be no mandate to submit any information that might pressure on broadcast stations to make any race-based hiring decisions, such as the number of interviewees referred by various community organizations, the organization which referred the person ultimately hired, or the filing of FCC Form 395-B.

NAB's plan will more than achieve the Commission's goals for equal employment opportunity by providing broadcast licensees the flexibility and discretion to continue and expand their outreach efforts that have proved successful over many years, as described in NAB's initial comments.⁹⁷ NAB's plan takes account of the many demands on broadcasters' limited resources and, to the extent possible, enables broadcasting executives to make appropriate judgments in addressing their hiring needs for various jobs. In contrast, the rigid, paperwork-focused rules proposed by the Commission, and the extensions of those rules favored by some commenters, would do little to engender a culture or custom of outreach, but much to foster a culture of regulatory box-checking. NAB's proposed rule thus would do more to achieve the Commission's goals for EEO than even the Commission's own proposal.

V. THE INTERNET IS A SUFFICIENT RECRUITMENT TOOL

In the *Second Notice*, the Commission notes its previous conclusion that use of the Internet as a recruiting method was promising but, as of the *EEO Report and Order*, could not be relied upon by itself to widely disseminate job information. The Commission then requested comment on whether use of the Internet has expanded to a level for it to change this previous

⁹⁷ *Id.* at 4-11.

decision.⁹⁸ Specifically, the Commission seeks comment on use of the Internet to fulfill its proposed requirement that broadcast stations “widely disseminate information concerning each full-time job vacancy.”⁹⁹

Although NAB and most commenters endorse use of the Internet as the sole, or primary, tool for disseminating job vacancy information,¹⁰⁰ certain others disagree.¹⁰¹ For the most part, the latter group recognizes the explosive growth of the in recent years, but contends that the time is not yet ripe to sanction the Internet alone as a sufficient recruitment method because not enough Americans use the Internet on a regular basis.¹⁰² They claim that a certain proportion of potential job candidates may be left out of applicant pools. AWRT, for example, “believes that there is and will remain a ‘digital divide’ that should not be leveraged to foreclose employment opportunities to those who may not have ready access to the technology.”¹⁰³ Also, AWRT adds

⁹⁸ *Second Notice*, 16 FCC Rcd at 22851.

⁹⁹ *Id.* at 22850.

¹⁰⁰ *See, e.g.*, NAB Comments at 40-43; NASBA Comments at 42-48; Comments of Various Radio Licensees in MM Docket No. 98-204, filed April 15, 2002 at 4 (“Radio Licensees Comments”); Comments of Cox Communications, Inc. in MM Docket No. 98-204, filed April 14, 2002 at 1-4 (“Cox Comments”).

¹⁰¹ *See, e.g.*, AFTRA Comments at ¶ 32; AWRT Comments at 11-12; NOW Comments at 6-8; MMTC Comments at 104-115.

¹⁰² *See, e.g.*, AFTRA Comments at ¶ 32; AWRT Comments at 11.

¹⁰³ AWRT Comments at 11. AWRT cites no support for its assertion that a “digital divide” can be expected to continue in perpetuity. NAB does not understand AWRT’s assertion that a the digital divide, presuming it exists, “should not be leveraged to foreclose employment opportunities.” NAB wants AWRT to rest assured that the broadcasting industry has no interest in using the Internet to impede anyone’s access to job vacancy information. Such a strategy would contradict a station’s own best interests since logic dictates that expanding the pool of potential job applicants will only serve to benefit broadcast stations by enhancing their chances of identifying and attracting the best possible candidates, which of course results in the best possible new employee.

that the broadcasting industry's dissemination of job vacancy information solely through the Internet may discourage employers from using AWRT as a candidate referral source because AWRT's job bank operates only by fax-on-demand.¹⁰⁴ NOW generally agrees with these views, but also urges the Commission to require that broadcasters post job vacancy information on some central Internet web site, such as the broadcaster's state or national association's web site. NOW believes this will enhance job seekers' convenience, and in turn, the effectiveness of Internet recruitment.¹⁰⁵

MMTC makes several claims concerning use of the Internet, some relevant to the current proceeding and others not. For example, MMTC argues that: (1) too few state broadcasting associations have Internet job banks, and that of these, not enough sites post a substantial number of job vacancies; and (2) the Internet sites for NASBA and NAB, while showing promise, are not yet adequate.¹⁰⁶ In addition, MMTC boldly asserts that too few job vacancies (in its own view) are posted on broadcast-related Internet sites because of broadcasters' "disinterest" in EEO and broad recruitment.¹⁰⁷ MMTC offers no evidence or support for this accusation; in fact, the only cite MMTC provides for this assertion is to its own interpretation of its own examination of various state broadcasting associations' web sites.¹⁰⁸

¹⁰⁴ *Id.*

¹⁰⁵ NOW Comments at 6-7.

¹⁰⁶ MMTC Comments at 107-109.

¹⁰⁷ *Id.* at 110.

¹⁰⁸ *Id.* at 111 (contending, without basis, that a large proportion of job vacancies posted on state association web sites are attributable to only a few broadcast stations that are well known as equal opportunity employers).

MMTC also believes that the Internet should not be relied upon as an employer's sole recruitment source because "passive Internet postings" can never "substitute for the personal touch." MMTC is concerned that use of the Internet somehow will isolate broadcasters from their communities.¹⁰⁹ MMTC states that Internet recruitment will deter those job seekers who need counseling, advice and mentoring.¹¹⁰

The concerns of these commenters are either irrelevant to the Commission's purpose, or simply mistaken. As described in NAB's initial comments, the Internet already is a successful, effective recruitment tool of broadcasters, and is gaining more acceptance every day.¹¹¹ For example, NAB's Career Center operates an Internet job bank that currently averages receives approximately 20,000 individual visits from job seekers each month. The website publicizes job openings at radio and television stations nationwide, for all types of positions, from general managers to on-air anchors to engineers. The website also offers guidance on securing one's first job in the broadcasting industry, enables job seekers to post their resumes on the site, and guides visitors towards other helpful sources, such as other association's job banks, and the home pages of individual stations and station groups, as well as numerous minority, women and community organizations.¹¹²

Similarly, NASBA's electronic job boards are an overwhelming success. Last year, NASBA's job postings attracted almost 200,000 page views, and traffic is up dramatically this

¹⁰⁹ *Id.* at 105.

¹¹⁰ *Id.* at 114.

¹¹¹ NAB Comments at 40-43.

¹¹² *Id.* at 40.

year to about 25,000 page views every month.¹¹³ NASBA also notes that all state broadcasting associations either maintain a web presence providing online job recruitment resources or have such a site under construction. All of these sites report the gradual migration of a substantial portion of stations' recruitment activities to the Internet,¹¹⁴ while some already receive as many as 50,000 hit per month.¹¹⁵ NAB believes that, to argue its point, MMTC is merely nitpicking those state broadcasting association web sites that are still in the growth stage, without regard for the undeniable acceptance these resources will achieve in the near future.

Moreover, many of these websites are interconnected. For example, 47 of the 49 state broadcasting associations currently send job vacancy announcements to NASBA's Internet career site, and the vast majority of these associations also send such notices to NAB, a wide array of fraternal associations representing various segments of the community, and to general interest job portals.¹¹⁶ In addition, the vast majority of these sites are promoted and publicized through various means, including on-air announcements, in newspaper classified advertisements, and directly to colleges and universities.¹¹⁷

All of this evidence leads to a conclusion that the time is indeed ripe for the Commission to approve the Internet as a primary, if not sole, recruitment tool of broadcasters. Furthermore, if the Commission sanctions the Internet for broadcasters' recruitment, on-line job and resume

¹¹³ NASBA Comments at 22.

¹¹⁴ *Id.* at 22-23.

¹¹⁵ *Id.* at 27 (referring to the California State Broadcasting Association's online job bank).

¹¹⁶ *Id.* at 14.

¹¹⁷ *Id.* at 24.

postings will expand at an even greater rate. In fact, such a rule would be the greatest impetus for expanding on-line recruitment.

Finally, NAB is perplexed by MMTC's contentions that recruitment via the Internet "lacks the personal touch" and will somehow deter candidates needing job counseling or advice. NAB believes that, on the contrary, expanded Internet recruitment will enhance potential job candidates' access to, and information on, broadcast stations. First, the Internet is a convenient, 24 x 7 venue that can publicize job openings across the nation. Thus, a small radio station in North Dakota seeking an engineer can promote the opportunity to radio engineers everywhere in the United States rather than only within the boundaries of the largest newspaper in the state, for example. Second, a station obviously can provide a much fuller description of its operation, audience, location and other important factors on an Internet site than in a newspaper classified ad.

Third, it is much easier to include relevant contact information on a station's Internet site than any other avenue. Any potential job candidate who would like to speak with a personnel manager at a station would have the person's contact information handy, as compared to a classified advertisement which typically may indicate only a telephone number. The Internet, if anything, can only serve to facilitate a candidate's connection with station personnel to seek job counseling, career advice, or any other information. The Internet, like a newspaper classified ad or any other way a station may promote a job vacancy, is only a jumping off point for a candidate. What MMTC fails to recognize, however, is that it is by far the best such point among all available alternatives.

VI. REQUESTING VACANCY NOTICES SHOULD BE THE RESPONSIBILITY OF COMMUNITY ORGANIZATIONS

In the *Second Notice*, the Commission’s proposed “Prong 2” requires broadcast stations to provide notice of job vacancies to recruitment organizations that have requested such notice.¹¹⁸ However, AWRT among others urge the Commission to go further and “impose an affirmative obligation on broadcasters...to publicize the availability of such information and actively solicit requests from recruitment resources...[such as]... through periodic on-air announcements, periodic newspaper advertisements, direct solicitation by telephone, mail or email...”¹¹⁹ These parties apparently want broadcast stations to seek out community and other organizations to notify them of their rights to this information. MMTC would go even further, as it requests a policy which expects stations to “cultivate” and “be creative” in seeking out new organizations to receive vacancy announcements.¹²⁰

These parties ignore several key considerations. First, there does not appear to be any need for such a requirement. Even in the absence of EEO rules during the past two years, many broadcast stations already send copies of vacancy announcements to requesting organizations as a matter of course, and to NAB’s knowledge, this process has worked fine from the viewpoint of the requesting organizations. Organizations interested in receiving this information seemingly have no problem with the process as it works now.

Second, these commenters are urging the Commission to substantially change the nature of the original proposal. Specifically, the Commission proposes to require that broadcasters “provide notification of full-time job vacancies to organizations involved in assisting job seekers

¹¹⁸ *Second Notice*, 16 FCC Rcd at 22847-2848.

¹¹⁹ AWRT Comments at 12-13. *See also* NOW Comments at 10-11.

¹²⁰ MMTC Comments at 84-86.

upon request by such organizations.”¹²¹ This language, specifically the phrase “upon request,” makes clear the Commission’s intent to place the onus of participation on the shoulders of community organizations. There is no mention of mandating that broadcasters convince or persuade organizations to request this information, nor “cultivate” additional organizations. Moreover, the proposed provision clearly intends to cover only those community organizations “involved in assisting job seekers.” Thus, expanding the rule to force broadcasters as suggested by MMTC would be a frivolous exercise because any organization already in the business of helping job seekers presumably would be well aware of their ability to request job vacancy notices from broadcasting employers.

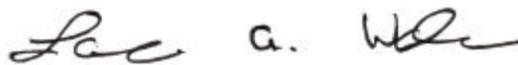
¹²¹ *Second Notice*, 16 FCC Rcd at 22851-22852.

VII. CONCLUSION

NAB and the broadcasting industry have a long-standing commitment to workplace diversity. NAB recognizes both the humanitarian and economic benefits of equal employment opportunity. In fact, the broadcasting industry has taken great strides in recent years to identify and attract qualified employees of all backgrounds. The EEO rule in NAB's initial comments will more than fulfill the Commission's goals for EEO, but through more efficient means. NAB requests that the Commission adopt its EEO plan, or modify the Commission's EEO proposal to include the important aspects of NAB's plan.

Respectfully Submitted,

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May 29, 2002

EXHIBIT A

Women TV GMs Take Another Leap Forward
NAB News Release
November 1, 2000



NATIONAL ASSOCIATION OF BROADCASTERS, 1771 N STREET, NW, WASHINGTON, DC 20036-2891

FOR IMMEDIATE RELEASE

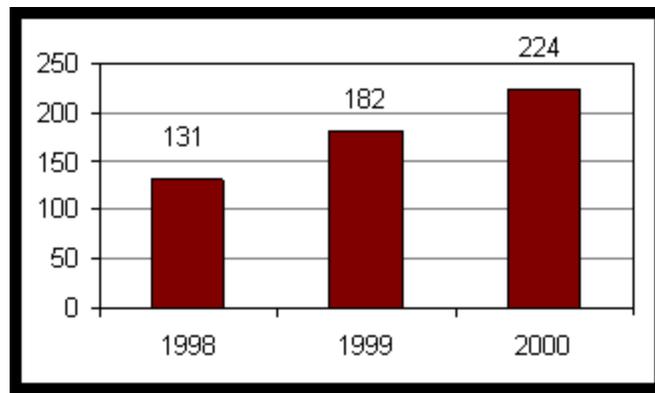
WOMEN TV GMs TAKE ANOTHER LEAP FORWARD

- Number increases by 23 percent from last year -

WASHINGTON, DC, November 1, 2000 - The National Association of Broadcasters announced today that the number of women serving as general managers of television stations increased by 23 percent during the one-year period ending October 2000. NAB began tracking this number in 1998.

As of today, 42 more women hold the general manager position at TV stations than did one year ago, following an increase of 51 during the previous year. "The number of women managing television stations has increased, on average, once a week for the past two years," said NAB President/CEO, Edward O. Fritts.

**Number of Women TV General Managers
1998 - 2000**



"Television groups and stations are demonstrating their dedication to diversity by filling top positions with people from underrepresented groups," he said. "Given the strong and growing talent pool of women and minorities in broadcasting, we expect this trend to continue," he said.

NAB serves and represents America's radio and television stations.

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EXHIBIT B

Broadcast Job Opportunities to be Featured at Career Fair in Las Vegas
NAB News Release
February 15, 2002



Conferences: April 6-11 • Exhibits: April 8-11 • Las Vegas, Nevada

Convention NEWS

IMMEDIATE RELEASE

BROADCAST JOB OPPORTUNITIES TO BE FEATURED AT CAREER FAIR IN LAS VEGAS

WASHINGTON, D.C., February 15, 2002 – Job seekers and broadcasters will take part in the Radio and Television Career Fair, held in conjunction with the National Association of Broadcasters (NAB), Broadcast Education Association (BEA) and the Radio Television News Directors Association (RTNDA) annual conventions on April 7, Noon – 5 p.m., at the Las Vegas Convention Center.

Representatives from radio and television stations seeking employees for jobs ranging from entry-level to management positions will be on hand to accept resumes and discuss career opportunities. Admission is free to all job seekers and registrants of the NAB2002, BEA2002 and RTNDA@NAB2002 conventions.

Job seekers, particularly minorities and women, may register on-site but are encouraged to post their resumes at www.nab.org/bcc. Table reservations for recruiters at the Career Fair are due by March 18. Immediately prior to the Career Fair, the NAB/BEA/RTNDA Career Employment Seminar will feature industry experts discussing the current job market and new career opportunities.

NAB2002 takes place April 6 - 11 in Las Vegas (exhibits open April 8). It is the world's largest trade event covering the convergence of broadcasting, multimedia and the Internet, audio and video communications, and telecommunications. Complete NAB2002 details are available at www.nab.org/conventions/.

NAB serves and represents America's radio and television stations.

BEA2002, the leading academic convention for those involved in educating future electronic media professionals in colleges and universities worldwide, takes place at the Las Vegas Convention Center April 5 – 8. Details about this year's convention " BEA2002: The Future is Now," are located online at www.beaweb.org.

BEA is the non-profit organization for professors, students and professionals involved in teaching and research related to radio, television and electronic media.

RTNDA is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news executives in broadcasting, cable and other electronic media in more than 30 countries. Visit www.rtnda.org for RTNDA@NAB updates.

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