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October 23, 2002

VIA Electronic Filing

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Re: **In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Notice of Proposed Rule Making, MM Docket No. 98-204, Dec. 21, 2001**

Dear Ms. Dortch:

Pursuant to Section 1.1206(b) of the Commission's Rules, this letter is to provide notice of an *ex parte* meeting with Commission staff in the above-referenced docket. On October 23, 2002, Linda Berg of the National Organization for Women (NOW) and Amy Wolverton of Georgetown University Law Center's Institute for Public Representation, on behalf of NOW, met with Jane Mago, General Counsel, and Louis Peraertz, Special Counsel, to discuss the Commission's rulemaking regarding Equal Employment Opportunity (EEO) Rules and Policies.

During the meeting, representatives of NOW generally discussed the substance of Comments filed with the Commission April 15, 2002 and Reply Comments filed with the Commission May 29, 2002. They noted the continuing need for EEO outreach rules and their confidence in the Commission's authority to promulgate those rules.

NOW's representatives suggested a few modifications to the Commission's EEO proposal, including on-air announcements notifying organizations of their rights to receive vacancy notices and the posting of EEO public file reports on industry websites. Additionally, they agreed with broadcasters that the Internet is a useful outreach tool. However, because almost half of Americans do not use the Internet for job searches, the representatives of NOW requested that the Commission's broad outreach requirement also include more traditional methods such as newspaper advertisements and job fairs.

+Practice Supervised by Members of the D.C. Bar
*Application to the D.C. Bar pending **Admitted to the California Bar only

Furthermore, NOW's representatives expressed their desire for the Commission to take prompt action and simultaneously (1) adopt revised EEO outreach rules and (2) lift the suspension on collection of the Annual Employment Reports. Should the Commission choose to address one of the foregoing items before the other, the representatives of NOW requested that the Commission set a date certain for action on the remaining item, regardless of any pending, related litigation.

Copies of NOW's previously-filed response to the *ex parte* filings of NAB and the State Broadcasters Association and NOW's previously-filed October 17 letter to Commission Kevin Martin were provided at the meeting and are attached to this letter. Pursuant to the Commission's Rules, this *ex parte* notice is being filed electronically through the Commission's Electronic Comment Filing System procedures. Please do not hesitate to contact me at 202-662-9545 should you have any questions regarding this filing.

Sincerely,

Amy R. Wolverton

Attachment

cc: Linda Berg, Political Director (NOW)
Jane Mago, General Counsel (FCC)
Terry O'Neill, Vice President (NOW)
Louis Peraertz, Special Counsel (FCC)

NOW *ET AL.'S* RESPONSE TO *EX PARTE* FILINGS OF NAB AND STATE BROADCASTERS ASSOCIATIONS

The National Organization for Women, NOW Legal Defense and Education Fund, Feminist Majority Foundation, Philadelphia Lesbian and Gay Task Force, and the Women's Institute for Freedom of the Press ("NOW *et al.*") emphasize the continuing need for EEO rules and the retention of the Annual Employment Report (FCC Form 395-B) in response to the *ex parte* letters and further comments of the National Association of Broadcasters ("NAB") and the State Broadcasters Associations ("State Broadcasters").[1]

First, NOW *et al.* call attention to recently released studies illustrating the continued under-representation of women in the broadcast and cable industries, indicating the continuing need for EEO rules. Second, NOW *et al.* address NAB's claim that the *Lutheran Church* decision somehow limits the Commission's authority to require Annual Employment Reports. Finally, NOW *et al.* direct the Commission to their earlier comments which address the State Broadcasters recently proposed draft rule.

Recent Studies Illustrate the Continuing Need for EEO Outreach Rules

Contrary to NAB's assertions,[2] both *en banc* hearing testimony and recent studies show that women are still underrepresented in the broadcast and cable industries. The Annenberg Public Policy Center recently released a report highlighting the sparse number of women in management positions of communications companies.[3] Former FCC Commissioner Susan Ness said, "With few exceptions, we have not moved beyond tokenism in the number of women in top leadership positions or serving on the boards of communications companies."[4] The report finds that among the presidents and chief executive officers of over 120 broadcast television and cable networks, only sixteen percent (16%) are women, and only one in five heads of local television stations and cable systems are women.[5]

Similarly, the Most Influential Women in Radio ("MIW") summary released August 7, 2002 shows that opportunities for women in radio are "still far below the management opportunities for men."[6] According to this study, the percentage of female general managers has not increased from last year and the percentage of stations with female general sales managers has actually decreased during this past year.[7] Beth Gerber, the President of the Southern California

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[1] *Ex parte* letter from NAB to Commission, Aug. 13, 2002 ("*NAB Letter*"); *Ex parte* letter from State Broadcasters to Commission, August 6, 2002 ("*State Broadcasters' Letter*").
[2] *See* NAB *EEO Views & Proposal*, Attachment to *Notice of ex parte Communication*, Aug. 26, 2002 (relying on a "lack of evidence of discrimination or homogeneity in the record").
[3] *See* Annenberg Public Policy Center, *The Glass Ceiling in the Executive Suite: The 2nd Annual APPC Analysis of Women Leaders in Communication Companies* at 4 (2002), *available at* http://www.appcpenn.org ("*Report*").
[4] *See* Press Release, Annenberg Public Policy Center, Women Fail to Crack the Glass Ceiling In Communication Companies (Aug. 27, 2002) *available at* http://www.appcpenn.org; Former Commissioner Susan Ness Remarks (revealing that fewer than one in five board members of the largest communication companies are women).
[5] *See Report*, *supra* note 3, at 4.
[6] Press Release, Most Influential Women in Radio, Annual Gender Analysis Released by MIW's (Aug. 7, 2002), *available at* http://www.radiomiw.com/pr_cmfl/pr_020808.cfm (analyzing M Street Trend Report on the status of women managers in the radio industry).
[7] *Id.*

Broadcasters Association, attributes this lack of progress to a deficiency in the number of outreach programs specifically for women.[8] Thus, these recent studies, supplemented by the findings presented in NOW *et al.'s* earlier comments and *en banc* testimony confirm that under-representation of women in the communications industry continues to be a problem to be addressed by sound EEO rules.

The Commission has the Authority and Obligation to Maintain the Annual Employment Report

Contrary to NAB's repeated assertions, nothing in the *Lutheran Church* decision requires the Commission to abandon the Annual Employment Report. The Commission itself has repeatedly rejected NAB's argument that *Lutheran Church* prohibits collection of employment data.[9] As explained more fully in NOW *et al.'s* previous comments,[10] Section 334 of the Communications Act requires the Commission to retain the Annual Employment Report by prohibiting revisions to "forms used by such licensees and permittees to report pertinent employment data to the Commission."[11]

Lutheran Church does not undermine the Commission's obligation to retain the Annual Employment Report. In fact, *Lutheran Church* did not address use of the Annual Employment Report solely for the purpose of industry trend analysis and assessment, and the decision does not negate the Commission's obligation to retain the report in accord with Congressional directives.[12] *Lutheran Church* was concerned not with the report itself, but rather with the use of the report for purposes of evaluating broadcast entities on their efforts to recruit and hire women and minorities.[13] The Commission has fully responded to the court's concern by prohibiting the use of this data in assessing compliance by any station or entity. In its *Report and Order* issued after the decision, the Commission specified that the Annual Employment Report was to be used for purposes of monitoring industry trends, assessing the overall effectiveness of the rule, and reporting to Congress, but not for assessing an individual licensee's compliance with the EEO requirements.[14] The Commission specifically stated that it would only "use the data only in aggregated form for trend reports and to report to Congress" because it has a "continuing

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[8] *Id.*

[9] *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, Report and Order*, MM Dkt. No. 98-204, 15 FCC Rcd 2329, 2394-2400 ¶¶ 63-64, 163-178 (2000) *("Report and Order")*; *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, Partial Reconsideration and Clarification*, 15 FCC Rcd 22559 ¶ 37-39 (2000) ("*Recon*").

[10] *See* Comments of NOW *et al.*, MM Dkt. No. 98-204, filed April 15, 2002, at 27-30 (*"NOW et al.'s Comments"*).

[11] 47 U.S.C. § 334 (2002); H.R. CONF. REP. NO. 102-862, at 97 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1279. The Conference Report states that Section 334 incorporates the Annual Employment Report (Form 395) into the Communications Act. The report also provides that the form is to be filed "in the same manner, with the same format and content and same terms and conditions as in effect [in 1992]." Because Section 334 prohibits revision of "forms used by licensees and permittees to report pertinent employment data to the Commission" that were in effect on September 1, 1992, the Commission is obligated to supply the data on an annual basis.

[12] *Report and Order*, 15 FCC Rcd at 2394-95 ¶ 164 (citing H.R. Rep. 628, 102 Cong., 111, 112 (1992) and noting that "Congress clearly contemplated continued Commission monitoring of employment trends"); *Recon*, 15 FCC at 22558-59 ¶ 35-37; *see also* Note to 47 C.F.R. § 73.3612 (2002).

[13] *See Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998).

[14] *Report and Order,* 15 FCC Rcd at 2358 ¶ 64; *Recon*, 15 FCC Rcd at 22558-59 ¶ 35.

responsibility to assess whether [its] policies are working."[15] In fact, the Commission assured that it would "summarily dismiss pleadings alleging EEO violations" based on data from the report.[16] Thus, despite NAB's contentions, the Commission has not ignored the court's ruling in *Lutheran Church*; it has directly responded with constitutionally permissible, tailored rules and policies.

The Annual Employment Report May be Severed from the EEO Outreach Rules

Because the Commission has revised its rules in accord with *Lutheran Church*, no further analysis regarding the severability of Section 334's mandate for the EEO rules from the mandate for Annual Employment Reports is necessary as NAB suggests.[17] Nevertheless, both the *Chadha* and *Denver* tests proposed by NAB for determining severability support NOW *et al's* position that the report can and should be maintained.[18]

In *Chadha*, the Supreme Court declared that one statutory provision may be severed from another if "what remains after severance 'is fully operative as law.'"[19] Because the Annual Employment Report is intended for the purpose of collecting employment data for industry trend analysis rather than for the purpose of evaluating the outreach efforts of individual entities, it can survive as a fully operative and workable mechanism apart from the EEO outreach rules themselves.

Further, the Annual Employment Report may be maintained irrespective of the EEO outreach provisions because it serves congressional intent to foster equal employment opportunity on its own. The Court in *Denver Area Telecommunications Consortium* held that if Congress would have passed one provision even knowing that the others would be invalidated, then that provision may be separately maintained.[20] In *Denver*, the Court held that because one of the challenged provisions of the Cable Television Consumer Protection and Competition Act of 1992 concerned programming of leased access channels while another concerned programming of public, educational, and governmental channels, one could be severed without undermining the other or the overall objective of protecting children.[21] Similarly, because the Annual Employment Report concerns the analysis of industry employment trends, while the EEO rules concern promotion of entity outreach, severing the two provisions would not

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[15] *Report and Order*, 15 FCC Rcd at 2395 ¶ 164-65.
[16] *Recon*, 15 FCC Rcd at 22559 ¶ 35, 39-40 (explaining that the Commission will "not use the employment data as a means for processing or screening renewal applications or mid-term reviews" or "as a basis for conducting audits or inquiries"); *Report and Order*, 15 FCC Rcd at 2417-18 ¶ 225-26.
[17] *See NAB Letter*.
[18] *See id.* (citing *INS v. Chadha*, 462 U.S. 919 (1983) ("*Chadha*") and *Denver Area Education Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) ("*Denver*")).
[19] *Chadha*, 462 U.S. at 935 (quoting *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932) finding that the administrative process enacted by Congress authorizing the Attorney General to suspend an alien's deportation as entirely independent from the rejected one-house veto).
[20] *Denver*, 518 U.S. at 767 (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985)).
[21] *Id.* at 767 (explaining that one provision has little if any effect on the other and thus, the absence of one, could not make a significant difference).

undermine Congress' basic objective in implementing either provision or its overall objective of achieving effective equal employment opportunity in the broadcasting and cable industries.[22]

Moreover, despite NAB's assertions, the Commission's suspension of the Annual Employment Report did not undermine or recant its authority to retain the report. Commenting on the suspension, Chairman William E. Kennard said, "I anticipate that the Commission will want to continue to collect industry trend data to monitor the participation of women and minorities in broadcasting, something we unquestionably have the authority to do."[23] The Commission reasoned that suspension was advisable while it considered adoption of new EEO rules that properly addressed the court's concerns and made any appropriate revisions to its data collection procedures.[24] Chairman Kennard clarified that the suspension would be used an opportunity for the Commission to focus on promptly developing revised rules responsive to the concerns of the court while at the same time ensuring that the rules' critical public interest goals were achieved.[25]

The opportunity for focused reflection to permit expeditious revision to the rules did not undermine the Commission's authority or obligation to collect data. In fact, the D.C. Circuit did not question Commission's authority impose such reporting requirements even after this temporary suspension of the rules when it rejected a claim by broadcasters that the requirements create an arbitrary and capricious regulatory burden.[26] Accordingly, the Annual Employment Report could be maintained even without the Commission's EEO outreach rules.

The State Broadcaster's Proposed Draft Rule Fails to Further the Commission's Outreach Goals

Not only are the EEO rules and the Annual Employment Report still necessary and legally justified in accord with *Lutheran Church*, they are essential to achieve the Commission's goal of broad outreach. The State Broadcasters' August 2002 *ex parte* filing of a proposed draft rule merely encapsulates the State Broadcasters' previously filed comments into specific requirements that would fail to further this broad outreach goal and would actually perpetuate the very insular hiring practices the Commission seeks to guard against. Specifically, their proposal potentially excludes half of the industry vacancies, relies too heavily on the Internet, eliminates public access to broadcast and cable entity information, and provides exemptions that essentially thwart the entire purpose of the rules. In response, NOW *et al.* respectfully refer the Commission to its previously filed reply comments[27] which address these and other concerns with NAB and the State Broadcasters' proposals.

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[22] *See Report and Order*, 15 FCC Rcd at 2336-37 ¶ 21. *Compare* 47 U.S.C. § 334(a)(1) *with* 47 U.S.C. § 334(a)(2) (referring to 47 C.F.R. § 73.2080 and 47 C.F.R. § 73.3612, respectively).
[23] *Suspension of Requirement for Filing of Broadcast Station Annual Employment Reports and Program Reports*, 13 FCC Rcd 21998 (1998), Statement of Chairman William E. Kennard.
[24] *Id.*, Memorandum Opinion & Order text.
[25] *Id.*, Statement of Chairman William E. Kennard.
[26] *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 17-18 (D.C. Cir. 2001) ("*Association*"); *see Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Notice of Proposed Rulemaking*, 16 FCC Rcd 22843, 22858 ¶ 51 ("The Court did uphold all of the reporting requirements adopted by the Commission in the *Report and Order*, including the requirement for filing FCC Form 395-B.").
[27] *Reply Comments of NOW et al.*, MM Dkt. No. 98-204, filed May 29, 2002, at 12-27.

In sum, NAB and the State Broadcasters' *ex parte* filings fail to advance any convincing arguments for elimination or reduction in the EEO rules. Recent studies emphasize the continuing need for EEO outreach rules, and the Annual Employment Report is essential for collection of congressionally mandated industry trend data. Moreover, NOW *et al.'s* earlier comments address the State Broadcasters' proposed draft rule, which would certainly fail to meet the Commission's outreach goals.

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October 23, 2002

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: **In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Notice of Proposed Rule Making, MM Docket No. 98-204, Dec. 21, 2001**

Dear Commissioner Martin:

The National Organization for Women (NOW), NOW Legal Defense and Education Fund, Feminist Majority Foundation, Philadelphia Lesbian and Gay Task Force, and the Women's Institute for Freedom of the Press ("NOW *et al.*") would like to briefly respond to a question you raised during NOW's September 17th meeting at the Commission regarding the sufficiency of the Equal Employment Opportunity Commission's ("EEOC") Employer Information Report ("EEO-1") for Commission purposes.

The EEO-1 is not suitable for Commission purposes. The Commission has specified that its primary purpose in collecting employment data from Annual Employment Reports (395 forms) is to monitor industry trends. *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, Report and Order*, MM Dkt. No. 98-204, 15 FCC Rcd 2329, 2358 (2000) ("*Report and Order*"). The EEO-1 data is used by the EEOC for the entirely distinct purpose of investigating unlawful employment practices. *See EEOC v. Shell Oil Co.*, 466 U.S. 54, 80 (1984).

EEO-1 data is not sufficient for several reasons. First, only employers with 100 or more employees must submit EEO-1 reports whereas the Commission collects similar data from

broadcasters with more than five full-time employees and cable entities with more than six full-time employees. Thus, reliance on the EEO-1 would exclude employment data from approximately *90% of broadcast and cable entities*, [28] without which the Commission will be unable to continue any sort of meaningful analysis or even denote any trend whatsoever. Clearly, the EEO-1 data would not suffice to permit the Commission to accurately continue its requisite trend analysis, and the Commission needs to retain the Annual Employment Report.

Second, EEO-1 data cannot be accurately compared with data the Commission has previously collected from the Annual Employment Reports. Although the Annual Employment Report, like the court-sanctioned EEO-1,[29] collects information on the race and gender of employees in the same nine specified employment categories, the Annual Employment Report distinguishes between part-time and full-time employees. *Report and* Order, 15 FCC Rcd at 2395. Because the Commission uses only the full-time data to produce its broadcast trend reports, EEO-1 data will not provide an accurate measure of past or future full-time employment trends. *Id.*

Third, because the EEO-1 does not contain the requisite sub-category information included on the Annual Employment Report that the Commission uses to monitor trends in various subgroups, such as commercial broadcast radio or TV,[30] the EEO-1 data would not permit the Commission to continue monitoring and reporting on subgroup specific trends. *See Report and Order*, 15 FCC Rcd at 2396.

Finally, you also expressed concern that third parties may use data from the Annual Employment Report in discrimination suits in other forums. However, those other forums, not the Commission, are responsible for determining what weight, if any, to give the data. For all these reasons, the Commission should maintain the Annual Employment Report. Unlike the EEO-1, the Annual Employment Report is specifically tailored to the Commission's trend analysis objectives and duties.

If you have any questions or we can be of further assistance, please do not hesitate to contact us. You can reach Amy Wolverton at (202) 662-9545, and Terry O'Neill and Linda Berg at (202) 628-8669.

Sincerely,

Amy R. Wolverton

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[28] *See* U.S. Census Bureau, U.S. Department of Commerce, *United States County Business Patterns for the United States* (2000), *available at* http://www.census .gov/pub/epcd/cbp/view/us00/txt (last visited Oct. 14, 2002).

[29] *U.S. v. New Hampshire*, 539 F.2d 277, 279-80 (1st Cir. 1976) (rejecting constitutional challenge to the EEO-1 equivalent State and Local Government Information Report on grounds that it is essentially "raw statistical data…a rather neutral entity which only becomes meaning when interpreted").

[30] Broadcast Stations completing the Annual Employment Report must specify which among the following sub-categories they fall into: (1) Commercial Broadcast Radio Station; (2) Commercial Broadcast TV Station; (3) Commercial Broadcast Low Power TV Station; (4) Commercial Broadcast International Station; (5) Noncommercial Broadcast Radio Station; (6) Noncommercial Broadcast Educational TV Station; (7) Headquarters. *Broadcast Station Annual Employment Report (Form 395-B).*

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Terry O'Neill (NOW)
Linda Berg (NOW)