

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

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

To: The Full Commission

JOINT PETITION FOR RECONSIDERATION AND CLARIFICATION

STATE BROADCASTERS ASSOCIATIONS

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Dated: February 6, 2003

SUMMARY

This proceeding is not about which segment of the communications industry in America has the strongest commitment to nondiscrimination, recruitment outreach, and workforce diversity. Nor is it about what jobs deserve protection against unlawful discrimination. Clearly, they all do. Nor is this proceeding about whether broadcasters must afford equal opportunity in employment to all qualified persons. Clearly, they must. This proceeding is about what mandatory regulations, if any, are warranted, and what set of regulations are rationally the most appropriate, effective, efficient, and least burdensome to all who are to benefit from them, all who are to be regulated by them, as well as to the Commission which is to enforce them.

There is no lack of sympathy for the Commission as it engages in the difficult task of determining and implementing appropriate policies and regulations in this area. The purpose of this Petition is not, for example, to reargue questions which have already been raised in this proceeding, such as the Commission's authority to adopt these regulations or the appropriateness of adopting an EEO rule before the Commission decides whether station attributed, publicly filed FCC Form 395-B reports will be required again. Those types of issues may be for another day. For that reason, the State Associations assume for the sake of argument, and without waiving any rights, that the Commission has the requisite statutory authority to adopt these regulations and that it was not unreasonable for the Commission to move ahead with these regulations before deciding the fate of the 395-B reports.

The purpose of this Petition is to bring to the Commission's attention information that could only have been gleaned as a result of (i) being able to review, for the first time, the detailed regulations actually adopted by the Commission and (ii) receiving feedback from many broadcasters who have, to date, received detailed briefings on the new EEO Rule through seminars

sponsored by the State Associations around the country. The ultimate goal of the State Associations is to try to convince the Commission to make any otherwise lawful EEO regulations more effective, more efficient and less burdensome for the benefit of the public at large, all potential applicants, all referral sources, the Commission and all broadcasters.

Toward that end, the State Associations respectfully ask the Commission to rule on this Petition *favorably* and *expeditiously* because it contains not only many constructive suggestions for improving the new EEO Rule, but also because there are numerous errors, defects and ambiguities in the current EEO rule and related forms that need to be corrected and addressed before the Commission can reasonably expect all segments of the broadcast industry to be able to fully comply and, therefore, before any enforcement of the new rule may reasonably begin. For those same reasons, the State Associations request the Commission to delay the March 10, 2003 effective date of the new EEO Rule while it acts quickly to resolve the many issues raised in this Petition. Under such an approach, the new effective date would be that date which is sixty (60) days after Federal Register publication of the Memorandum Opinion and Order on reconsideration and clarification. As a practical and legal matter, the Commission consciously assumed this risk when it refused to accept the early request of the Minority Media & Telecommunications Council (“MMTC”) to issue a draft set of the new EEO regulations at the same time the Commission was seeking comment on its Notice of Proposed Rule Making in this proceeding.

The State Associations also respectfully request that the Commission immediately and for the indefinite future post on its web site for broadcasters and the public all staff interpretative responses to questions formally and informally raised about the new EEO Rule so that there will be an early level playing field for uniform understanding, and thus less uncertainty, less controversy, and less litigation which will be a drain on the resources of the Commission and others.

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JOINT PETITION FOR RECONSIDERATION AND CLARIFICATION

The State Broadcasters Associations identified in the footnote below (collectively, the “State Broadcasters Associations” or “State Associations”),¹ by and through their attorneys, and pursuant to Section 1.429 of the Commission’s Rules, hereby jointly petition for reconsideration and clarification of the Commission’s *Second Report and Order and Third Notice of Proposed Rule Making*, released in the above-captioned proceeding on November 20, 2002, FCC 02-303 (“*Second R&O*”). The participation of the State Associations on reconsideration and

¹ Alabama Broadcasters Association, Arizona Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, Maryland/DC/Delaware Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Radio Broadcasters Association of Puerto Rico, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, Wisconsin Broadcasters Association and Wyoming Association of Broadcasters.

clarification is without prejudice to any position any of them may take in connection with the *Second R&O* and the regulations adopted thereunder.

INTRODUCTION

This proceeding is not about which segment of the communications industry in America has the strongest commitment to nondiscrimination, recruitment outreach, and workforce diversity. Nor is it about what jobs deserve protection against unlawful discrimination. Clearly, they all do. Nor is this proceeding about whether broadcasters must afford equal opportunity in employment to all qualified persons. Clearly, they must. This proceeding is about what mandatory regulations, if any, are warranted, and what set of regulations are rationally the most appropriate, effective, efficient, and least burdensome to all who are to benefit from them, all who are to be regulated by them, as well as to the Commission which is to enforce them.

As the records in this and related Commission proceedings make very clear, the State Associations have a strong commitment to the goals of nondiscrimination and equal employment opportunity. For many years and continuing, they have worked tirelessly with the radio and television stations within their respective borders to help them fully understand their obligations in this area and to practice nondiscrimination and broad outreach in recruitment. In an effort to promote workforce diversity, the State Associations sponsor Internet-based job banks, job fairs, scholarship programs, internship programs, mentoring programs, and the like. They provide seminars on equal employment opportunity and nondiscrimination for their stations. When the Commission released the 2000 EEO Rule with the “Option A” and “Option B” EEO alternatives, the State Associations promptly provided their members with EEO Legal Guides and seminars to insure timely and full compliance with those new rules. They are hard at work, doing the same thing for the new EEO Rule. Accordingly, no one should doubt the full commitment of the State Associations to the important goals of nondiscrimination and equal employment opportunity.

There is no lack of sympathy for the Commission as it engages in the difficult task of determining and implementing appropriate policies and regulations in this area. The purpose of this Petition is not, for example, to reargue questions which have already been raised in this proceeding, such as the Commission's authority to adopt these regulations or the appropriateness of adopting an EEO rule before the Commission decides whether station attributed, publicly filed FCC Form 395-B reports will be required again. Those types of issues may be for another day. For that reason, the State Associations assume for the sake of argument, and without waiving any rights, that the Commission has the requisite statutory authority to adopt these regulations and that it was not unreasonable for the Commission to move ahead with these regulations before deciding the fate of the 395-B reports.

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Toward that end, the State Associations respectfully ask the Commission to rule on this Petition *favorably* and *expeditiously* because it contains not only many constructive suggestions for improving the new EEO Rule, but also because there are numerous errors, defects and ambiguities in the current EEO rule and related forms that need to be corrected and addressed before the Commission can reasonably expect all segments of the broadcast industry to be able to fully comply and, therefore, before any enforcement of the new rule may reasonably begin. For

those same reasons, the State Associations request the Commission to delay the March 10, 2003 effective date of the new EEO Rule while it acts quickly to resolve the many issues raised in this Petition. Under such an approach, the new effective date would be that date which is sixty (60) days after Federal Register publication of the Memorandum Opinion and Order on reconsideration and clarification. As a practical and legal matter, the Commission consciously assumed this risk when it refused to accept the early request of the Minority Media & Telecommunications Council (“MMTC”) to issue a draft set of the new EEO regulations at the same time the Commission was seeking comment on its Notice of Proposed Rule Making in this proceeding.

The State Associations also respectfully request that the Commission immediately and for the indefinite future post on its web site for broadcasters and the public all staff interpretative responses to questions formally and informally raised about the new EEO Rule so that there will be an early level playing field for uniform understanding, and thus less uncertainty, less controversy, and less litigation which will be a drain on the resources of the Commission and others.

DISCUSSION

A. The State Associations’ Two Prong “Internet Plus” Proposal

As made clear in their initial Joint Comments and Joint Reply Comments in this proceeding, the State Associations fully support the goal of broad outreach for employment in the broadcast industry and have historically assisted radio and television stations to practice, on a voluntary basis, broad outreach in their recruitment efforts. In that spirit, the State Associations proposed in this proceeding a two prong “Internet Plus” broad outreach program combining (i) the routine, well publicized use of the Internet for job postings as the best way to assure direct dissemination of timely information to the general public, including millions of potential

applicants and (ii) a “mailing list” procedure of notices sent to those referral organizations which have affirmatively demonstrated they wish to play a meaningful role in referring potential applicants, including women and minorities (“Eligible Referral Organizations”). This plan would emphasize and promote the critical importance of, real time, convenient, direct communications between the broadcaster and vast pools of potential applicants, while at the same time using the Commission’s own “inclusiveness” device as a “safety valve to ensure that no segment of the community is inadvertently omitted from recruitment efforts.” *Second R&O* at ¶ 106. *Accordingly, the State Association’s proposal was not an “Internet Only” approach.*

Under the State Associations’ “Internet Plus” proposal, every AM, FM, TV, Class A and International broadcast station that belongs to a station employment unit (“SEU”) with five or more full-time employees (“nonexempt SEU”) would be required to: (i) post its full-time job openings (no objection to including all full-time openings so long as they are subject to a properly defined “exigent circumstances” exception) on one or more web sites, such as its own web site, the web site of its State Association, the web site of the National Alliance of State Broadcasters Associations (“NASBA”), the web site of the NAB, etc.; (ii) broadcast announcements urging all listeners or viewers who have an interest in a career in broadcasting to “click on” to the web site or sites the station uses (and whose URL addresses are given in the spot) so that all can learn more about broadcast careers, can check out existing openings and can make their interest immediately known; (iii) give due consideration to all applications and other expressions of interest received by whatever means; (iv) broadcast announcements inviting referral organizations to contact the station if they wish to be included on the station’s “mailing list” of job opening notices; and (v) routinely send those notices to such referral organizations as openings arise. Under this “Internet Plus” plan, every viewer and listener within the service areas of broadcast stations throughout the United States would know where they could

conveniently go, not only to obtain the most up-to-date information on job availabilities, but also to send a resume, application or other expression of interest for immediate consideration. As mentioned, the second prong “safety valve” measure aspect of the proposal would allow all referral organizations requesting job opening information to count on receiving such information on a routine basis for forwarding to the persons they represent. The “Internet Plus” proposal would also work hand in hand with the Commission’s required credit system of menu option initiatives which are “designed to further broaden outreach efforts to reach segments of the labor force who may be inadvertently omitted from vacancy-specific recruitment.” *Second R&O* at ¶ 113.

B. The Arbitrariness of the Commission’s Rejection of the “Internet Plus” Proposal and Adoption of the new EEO Rule

The Commission’s action rejecting the State Associations’ “Internet Plus” proposal and adopting the new EEO Rule was arbitrary and capricious for a variety of reasons and therefore must be reconsidered.

First, the Commission mistakes the State Associations’ current two prong “Internet Plus” proposal for the single prong “Internet Only” approach formerly proposed by the State Associations *prior* to the time that the Commission adopted its former “Option A and Option B” EEO regulations. *Id.* at ¶¶ 95 and 99. Accordingly, the Commission’s rejection of the “Internet Plus” proposal is based on a mistake of material fact.

Second, the Commission’s action arbitrarily subordinates *direct* communications with millions of potential applicants who use the Internet to search for jobs to *indirect* communications with comparatively few potential applicants through intermediary “referral” organizations. The Commission does not dispute the prevalence and efficacy of the Internet for government and private employers, on the one hand, and potential applicants, on the other hand, to communicate directly about jobs. If the Commission intends to adopt regulations that seek to

promote the widest and broadest recruitment outreach, its regulations must be designed to truly benefit the largest number of potential applicants. The Commission's failure to adopt the Internet prong of the State Association's proposal is, therefore, unreasonable on its face.

Third, adoption of the State Associations' two prong "Internet Plus" proposal does not disadvantage any segment of the community. The Commission stated that the "digital divide" is still too wide, and that it does not believe that recruitment outreach through the Internet (even if well-publicized to all listeners and viewers) would be sufficiently "inclusive." *Second R&O* at ¶¶ 95-99. However, this criticism once again mistakenly assumes that the State Associations' "Internet Plus" proposal is an "Internet Only" proposal. As shown in the record and above, the State Associations' proposal includes a companion "safety valve" measure which is the Commission's own device "to ensure that no segment of the community is inadvertently omitted from recruitment efforts." (Para. 106) Either the "safety valve" procedure adopted by the Commission is meaningful or it is not. If it is not, then it should not be a part of the new EEO Rule. If it is meaningful, it is also a sufficient mechanism to insure a reasonably adequate level of "inclusiveness," under the "Internet Plus" proposal. This is particularly true given (i) that the Internet reaches substantially more persons than are represented by any single referral organization or a group of them, (ii) that any organization or chapter thereof, such as NOW, AWRT, or any of the organizations represented by MMTC in this proceeding are free to use their new "must mail" rights to require their names be added to the recruitment mailing lists of any station in the country, and (iii) that the "Internet Plus" plan will also work hand in hand with the Commission's "credit" program which essentially requires broadcasters to do even more in their communities to develop an awareness of broadcasting as a career and to help jump-start careers through working with community *referral* and other organizations, expanding educational

opportunities, and establishing and participating in scholarship, internship, mentoring, and training programs, and the like.

Fourth, the Commission's rejection of the State Associations' "Internet Plus" proposal is inconsistent with these material facts. The Commission's own new EEO Rule states that equal opportunity in employment must be afforded only to "qualified persons." To pursue a career in broadcasting, essentially every person needs to be able to use a computer and access the Internet. In today's information based society, this is quite assuredly a basic qualification. Anyone meeting that qualification should have access to a computer and the Internet. But even if a particular person does not have access to a computer or the Internet for any reason, that person will know, because a broadcaster will have broadcast announcements about its use of the Internet to post its jobs, that he or she may either call the station and ask for information to be sent, or go to the station to find out what openings are available. The only thing standing between such person and the job information would be the need for self-initiative. Accordingly, there is nothing inherently "exclusive" about the two prong "Internet Plus" proposal.

Fifth, in substituting an open-ended intermediary-centric approach for the State Associations' two prong "Internet Plus" proposal, the Commission has chosen a regulatory scheme that is so inherently uncertain on a practical level as well as on a legal level, that no broadcaster can reasonably know when it has complied with the outreach requirements. The Commission compounds the problem by threatening stations for "unintentional discrimination" without either explaining what that means or proving examples. If the Commission has any doubt that there will be litigation over whether a broadcaster's efforts have been sufficiently "broad" and "inclusive," the Commission need only review the legion of cases over the years in this area as well as when community ascertainment was strictly enforced, when no one knew when enough was enough. This environment is not only fundamentally unfair to broadcasters, it

is also unfair to the public and will surely cause a drain on the resources of the Commission, and these constitute material adverse factors totally overlooked by the Commission.

Sixth, this regulatory uncertainty, coupled with the recordkeeping and reporting requirements, will substantially increase the burdens on broadcasters in ways that the Commission has not accounted for. As mentioned, under the new EEO Rule stations are left to wonder when enough is enough. The only way for a broadcaster to try to reduce its risk of being found in violation of this standardless, however laudable, goal is to create huge lists of referral organizations in hopes that if enough organizations are routinely sent job vacancy information no one can reasonably argue that the broadcaster's outreach efforts were not sufficiently "broad" and "inclusive." Thus, the effect of the Commission's dual "no standards for compliance/intermediary" approach is to pressure broadcasters to send their job notices to hundreds of organizations, whether or not each and everyone of them truly intends or is even able to perform a meaningful referral role at the time. The threat of governmental oversight is such a powerful force that no station wants to be the target of an inquiry based on a failure to have done enough. Developing lists of hundreds of referral organizations by contacting them, trying to determine their interest, obtaining permission to fax and/or e-mail notices to them, obtaining permission to make public on the Internet their referral source status as well as the name and telephone number of their "contact person," keeping track of and updating data on all of them, sending notices to them, tabulating all the information, transferring the data reports, etc. will pose huge administrative nightmares that will be exacerbated based on the more openings that a broadcaster has. The fact that FCC Form 396-A warns stations that they may not rely upon nonproductive sources, and that FCC Form 396 requires stations to tell the Commission what problems, if any, they have encountered in their recruitment efforts will expand the work effort even more since stations will have to monitor the performance of every source, discard them if they are

“nonproductive” and add substitute organizations which must, in turn, be qualified, monitored, and weeded out. This process would be ongoing and requires stations to tabulate the referral source of every applicant, not just interviewees, as well as respond to every applicant whose application does not disclose a source.

Added to all of these ongoing tasks would be the need to draft, finalize, file and post the annual EEO Public File Report. The length of time would depend upon the number of openings during the year, the number of referral sources used, the number of times that the referral organization lists changed, the changes in contact information of those sources, and the number of applications received. An SEU would have to take into account that the referral sources used for each opening may be different since there could be additions and subtractions from the master list, as well as changes in contact information between the time the master list was used for one opening and later for another. An SEU would also have to take into account that its Report would be in the public domain for as long as a year since the Report would have to be placed in the SEU’s station public inspection files and be posted on its web site(s). An SEU would know that the Commission or a third party may use the Report to call referral organizations to verify the contact information and the fact that notice of a particular opening was received by it. The potential for disputes over whether a notice was sent versus whether someone at the organization *remembers* receiving it is real and staggering, thereby casting serious doubt on the workability of any requirement that sources are reported or that the contact information for individuals, rather than organizations, be reported. Accordingly, an SEU would also feel pressure, as part of the Report finalization process, to re-check the currency of the individual and other contact information for all referral sources used for all of the openings to reduce the risk that the Commission or a third party would call a particular organization and learn that the contact person is no longer with the organization even though the data in the report

was correct when it was drafted and finalized. Such care would still not eliminate the possibility that the contact person left the organization immediately after the report was updated and finalized. These efforts, depending upon all the factors mentioned above, could substantially increase manpower and the length of time needed to finalize, file, and post each annual EEO Public File Report.

Seventh, the recordkeeping, reporting and enforcement aspects of the new EEO Rule actually create a dynamic which is counterproductive to the ends of the rule. Specifically, each time a non exempt SEU has a full-time opening to fill, the recruitment outreach requirement is triggered along with attendant recordkeeping and reporting requirements and regulatory enforcement risk. As shown in the State Associations' Joint Comments and Joint Reply Comments in response to the *Third NPRM*, this in turn creates a disincentive for stations to practice the widest, most diverse, most frequent outreach, as well as to fill positions. That disincentive would be driven even deeper into staff ranks if the mandatory recruitment, recordkeeping, and reporting requirements of the new EEO Rule were expanded to include part-time positions.

Obviously performance of the many regulatory-induced tasks will require additional heavy and continuous staff time, burdening disproportionately smaller and mid-sized broadcasters. Any benefit/cost/burden/risk analysis under the 2000 rule is inapposite given that "Option B" is not part of the new EEO Rule. Even the most conservative estimates indicate that performance of all of the tasks reasonably related to the requirements of the new EEO Rule will require, on an annual basis, the full-time employment of between 1 and 2 extra full staff persons, including other staff members on an as needed basis. The fact that equal employment opportunity and nondiscrimination are the subject of this proceeding does not excuse the Commission from having to engage in rational decisionmaking. That standard, the State

Associations submit, requires the Commission to reconsider its rejection of their “Internet Plus” proposal and to adopt it along with the other changes and clarifications requested below.

C. The Specific Changes to the New EEO Rule That Are Required

The following is an inventory of the specific changes to the new EEO Rule and policy, and the reasons therefore.

1. Effective Date and Transition Period For Full Applicability of the New EEO Rule

The new EEO Rule is scheduled to go into effect on March 10, 2003. For the reasons detailed above, the Commission should delay the effective date until that date which is sixty (60) days after Federal Register publication of any Memorandum Opinion and Order on reconsideration and clarification.

The Commission should confirm that if a nonexempt SEU had a full-time opening before the effective date, but was not able to fill the position by that date, the SEU may continue to proceed to complete the hiring phase on a pre-effective date basis. Otherwise, application of the new EEO Rule could further slow the process of filling the position. How should the matter be handled in the annual EEO Public File Report since the first such report will cover the period beginning with the effective date?

2. Definition of a “Permanent” Employee

The new rule applies only to "permanent" full-time employee positions and thus not to "temporary" employee positions. The Commission should confirm that a temporary employee is an employee whose term of employment is tied to a one-time event, or whose term is specifically limited in duration, such as in the case of a college student who is hired for the semester or school year.

3. Definition of a “Station Employment Unit”

The definition talks in terms of “commonly owned” stations. The Commission should

confirm that the term “commonly owned” is intended to include "commonly controlled.”

4. Definition of “Exigent Circumstances”

The current definition of “exigent circumstances” is unrealistically narrow and therefore is essentially no exception at all. Rather the Commission should define "exigent circumstances" as follows:

“‘Exigent Circumstances’ shall mean where there is a need to replace an employee and it is not commercially reasonable in the circumstances either (i) to publicize the opening before the person is asked to depart or (ii) to fill the opening after the person departs, even briefly, with one or more other station employees.”

This definition places the goal of recruitment for all full-time openings into a commercially reasonable context, striking an appropriate balance in conflicting considerations.

5. Drafting Issues Regarding Section 73.2080(a) General EEO Policy

In the third sentence of the subsection, the phrase "may not" should be substituted for the phrase "cannot" since "can" connotes ability whereas "may" connotes what is permissible or not. Anyone has the ability to violate the law; no one has permission to do so.

It should be made clear that the right of religious broadcasters to prefer employees who share their religious affiliation or belief, without allowing them to discriminate on any other basis, applies throughout all provisions of the new EEO Rule and related FCC forms, notwithstanding the unqualified terminology of many provisions of the rule. This will eliminate an ambiguity which would prejudice religious broadcasters. Accordingly, it is recommended that the following sentence be added at the end of this Subsection:

"All sections and subsections of this Rule and related FCC Forms shall be qualified by the right of religious broadcasters to prefer employees who share their religious affiliation or belief so long as they do not discriminate on the basis of race, color, national origin or gender from among those who share their religious affiliation or belief."

6. Definition of an “Exempt” SEU for Purposes of Subsections (b) and (c)

This definition needs to be adjusted significantly upward for several reasons. First, under

the pre-Option A/Option B formulation of the EEO regulations, any “station” with less than 5 full-time employees was largely exempt. By substituting the concept of SEU’s, which aggregates stations into a single unit, the Commission has, in effect, substantially reduced the scope of the exemption without any rational basis. There needs to be a corresponding upward adjustment for that reason alone. Second, the scheme of legal uncertainty adopted by the Commission creates pressure on SEU’s to add more and more referral sources, which in turn means more communications with organizations, more data entry, more checking and rechecking, more recordkeeping, more time to complete reporting, etc. Thus, the new level for exemption should be at least “less than 15 full-time employees.” If the requirements of the new EEO Rule were extended to part-time positions, the new level should be at least “less than 20 full-time employees.”

7. Drafting Issues Regarding Section 73.2080(b) General EEO Program Requirements

The requirements of this Subsection are phrased in terms of a broadcast station, where as the requirements of Subsection (c) are phrased in terms of “station employment units.” In order to insure consistency, the matter should be resolved in favor of using the term "station employment unit" in Subsection (b).

8. Drafting Issues Regarding Section 73.2080(c)(1) Specific Program Requirements

Subsection (c)(1) requires each nonexempt SEU to "Recruit for every full-time job vacancy in its operation." The *Second R&O* evidences a Commission intent that there be exceptions for internal promotions and for “exigent circumstances.” In order to eliminate a technical violation of the rule even when an SEU proceeds properly under any of these exceptions, the quoted sentence should be modified to read as follows:

"Recruit for every full-time job vacancy in its operation except in cases of internal promotions and where exigent circumstances exist."

This request is not simply a matter of detail. Financing arrangements with lenders and others

require broadcast borrowers to enter into detailed sets of representations, warranties, and covenants concerning compliance with Commission regulations. No broadcaster wants to be accused of violating any of those provisions simply because the rule does not comport with the Commission's clear intent.

In addition, the Commission should clarify the circumstances under which an SEU may rely upon applications received as a result of “continuous recruitment” without having to recruit for a specific job opening. For example, how far back may an SEU go in its application files without violating the “recruit for every opening” requirement?

The Commission should confirm that “interviewing” includes in person, by telephone, and by e-mail. This is necessary in order not to prejudice anyone who may be unable, because of distance, timing or money, to meet personally with the station’s staff.

Lastly, the reference to religious broadcasters in the same Subsection requires the addition of the words "or belief" at the end of the second sentence so that it is precisely parallel with the language contained in Subsection (a).

9. Reconsideration of Section 73.2080(c)(1)(i)

For the reasons set forth above, this provision should be reconsidered by replacing it with the State Associations’ “Internet Plus” proposal. Subsection (c)(1)(ii) already contains the referral organization prong of the State Associations’ proposal. Accordingly, only the following language would need to be substituted for the current language of Subsection (c)(1)(i):

“A station employment unit shall (i) post all of its nonexempt full-time job openings on one or more Internet web sites which are available to the general public at no charge, (ii) broadcast announcements over its station(s) from time to time advising its listeners or viewers, as the case may be, what URL address or addresses may be used to access the information, and (iii) give due consideration to all employment applications and other expressions of interest received from any source.”

10. Drafting Issues Regarding Section 73.2080(c)(1)(ii)

In the first sentence of the Subsection, the word "written" should be inserted between the words "upon" and "request" to make it clear that unless the SEU has received from an organization a written request to be placed on the SEU's "mailing list" for job openings, the SEU is not legally responsible for giving such organization notice of openings. This will reduce the incidences of controversies in the future. An e-mail request would be deemed a written request.

11. Drafting Issues Regarding Section 73.2080(c)(2) Menu Option Initiatives

As mentioned above, the State Associations are actively engaged in conducting seminars for their stations in order to help them comply with the new EEO Rule. Experience at those seminars has shown that there are a lot of questions and confusion about many of the sixteen menu option initiatives. Thus certain revisions and/or clarifications are necessary or appropriate:

a. The Commission should allow SEU's to mix and match certain of the initiatives to obtain full credits. For example, the Commission will allow an SEU to earn one credit for participation in at least four job fairs, one credit for participation in at least four events sponsored by organizations representing groups present in the community interested in broadcast employment issues, and one credit for participation in at least four events or programs sponsored by educational institutions relating to career opportunities in broadcasting. As each type of "initiative" requires participation in four events, each event is worth a quarter credit. Thus, all of those events are weighted the same. The Commission should allow an SEU to claim one credit, for example, for two job fair participations, one community organization sponsored event and one educational sponsored event. This way, the Commission recognizes that not all communities are the same in terms of size and types of organizations. This flexibility in no way reduces the commitment of broadcasters. Rather, it rewards broadcasters for diversifying the types of events in which they would participate.

b. At (c)(2)(i), an SEU may obtain one credit for participating in at least four job fairs by station personnel who have substantial responsibility in the making of hiring decisions. Many group owners send to national and regional conventions high level personnel who participate in concurrent job fairs. The Commission should allow any SEU which is affiliated with a group owner which, in turn, is represented at such an event by someone with substantial responsibility for hiring decisions within the group, to earn a quarter credit for each affiliated SEU to whom the person has supplied with copies of the resumes received at the event.

c. At (c)(2)(ii), the term "hosting" of job fairs is used. It is not clear whether the Commission would allow an SEU to earn a full credit for "co-hosting" of job fairs and if so, under what limitations if any. An SEU should be able to claim a full credit for "co-hosting" a job fair with one or more other affiliated or unaffiliated SEU's, so long as the participation of each is meaningful. The Commission should favor this interpretation since two or more SEU co-hosts for a job fair will enlarge the exposure of attendees to more station employment opportunities.

d. At (c)(2)(iii), the phrase "whose membership includes substantial participation of women and minorities" is used. First, the phrase "significant participation" should be used rather than "substantial participation" since not all communities in America have the same number of minorities. Furthermore, organizations with "significant" minority participation should be just as valuable resources as those which have "substantial" minority participation. Second, the phrase "women and minorities" should be changed to "women and/or minorities." Otherwise, no credit would be possible for an initiative with an organization that has significant or substantial female participation but no significant or substantial minority participation because the minority population in the particular area is so small. Again, there is not one demographic for America.

e. At (c)(2)(v), the words "establishment" and "community" are used. A number of State Associations have established statewide internship programs. Individual stations, in turn,

accept these interns for placement at their stations. The Commission should confirm that this is acceptable since it is irrelevant who first “established” the program so long as the station provides a meaningful opportunity for its interns who were recruited through the State Association’s internship program. The Commission should also confirm that it did not intend to limit a station's interns to those persons who reside in the local "community." Otherwise, such a lack of geographic flexibility will retard the development of these internship programs.

f. At (c)(2)(vi), the State Associations, NASBA, the NAB, and others have developed Career Page web sites for use on a state by state and national basis. These web sites are valuable resources for people to learn more about careers in broadcasting and the educational and training opportunities for such careers, including scholarships and internships. They also provide opportunities for broadcasters to post their openings and for members of the public to post their resumes so there can be direct communications between the two. On its face, if an SEU posts its job openings on such a web site, it should be eligible for a credit since there is no better example of an employer increasing job opportunities than for that employer to notify the world that it has specific openings. The Commission should confirm this understanding. If the Commission were to adopt the State Associations’ “Internet Plus” proposal, it would be understood that there would not be a separate menu option initiatives credit for such postings.

g. Another question often asked by broadcasters relates to Subsection (c)(2)(vii). What constitutes adequate "participation" in a scholarship program? Is making a donation to the scholarship program sponsored by a State Association or its foundation enough? If not, the Commission should state whether meaningful participation would exist if an SEU were to: (i) make whatever donation is prescribed by the State Association or foundation, (ii) promote the scholarship program over the air, (iii) provide application forms to interested candidates, and (iv) field questions from candidates as they arise. Applicants would be expected to return their

completed applications to the evaluation committee comprised, most often, of educators, not broadcasters.

h. At (c)(2)(ix), mentoring programs are limited to "station personnel." This is unduly limiting. While many mentoring programs are internally oriented, many are externally oriented. Station employees mentor young people in high school and college in order to help them develop a keen interest in broadcasting and to guide them in their academic pursuits and work experiences. Such external mentoring should earn a full credit as well.

i. At (c)(2)(xii), this initiative raises the question whether the Commission expects an SEU will have to pay a fee in order to list its upper-level category openings in job banks and newsletters of the organizations described. Is that the Commission's intent?

j. At (c)(2)(xiii), what is meant by "unaffiliated" non-profit organizations? The State Associations, NASBA and the NAB provide very valuable outreach and job search services with their web site based career pages. An SEU should be allowed to earn a full credit for enhancing that effort, by publicizing the availability of these web sites, etc. This matter would be moot if the Commission were to adopt the State Associations' "Internet Plus" proposal.

12. Drafting Issues Regarding Section 73.2080(c)(4)

Subsection (iv) of this Section makes it appear that each SEU must use print and other media when it recruits and therefore pay for such usage. This is not the State Associations' understanding of what is required. Accordingly, the Commission should remove the ambiguity by rephrasing the requirement to say "Where media is used for recruitment purposes, there shall be no indication...."

In addition, because of the special status of religious broadcasters, the following phrase should be added at the end of the provision: "provided that a religious broadcaster may indicate a preference for a certain religious affiliation or belief."

13. Recordkeeping and Reporting Regarding Race, Ethnicity and Gender

The Commission should make absolutely clear its intention that no station or SEU is required by the new EEO rule or any other FCC regulation to track or report the race, ethnicity or gender of any applicant, interviewee or hiree.

In that regard, it is not clear from the *Second R&O* whether the Commission has (i) adopted the requirement that stations file FCC Form 395-B but suspended the requirement for the time being or (ii) declined to adopt any such requirement at this time or in the future. For example, the Commission states that the data collected in the employment reports “will be used” only to compile trend reports and reports to Congress. In the same paragraph, however, the Commission states that it “will defer action on the issues relating to...workforce data collection requirements and address them in a future report and order.” *Second R&O* at ¶ 17. As a precaution, the State Associations hereby seek reconsideration of any action re-establishing a requirement for the filing of FCC Form 395-B. These reports cannot logically or legally be divorced from the new EEO Rule and related policies. Any FCC requirement for public filing of station attributed 395-B type data, because of the concurrent operation of the new EEO Rule, will pressure broadcasters to recruit and hire based on race, ethnicity and gender. No words of admonition or reassurance from the Commission can negate the true implications of a combined EEO/395-B system. Broad and inclusive outreach will not be enough. Each station will feel governmental pressure to hire based on their race, ethnicity and gender.

14. Reconsideration of Section 73.2080(c)(6)

This provision requires nonexempt SEU's to collate a year's worth of full-time recruitment/interview/hiring data, tabulate it, record it onto an EEO Public File Report, place the final Report in the public inspection files of each station comprising the SEU, and post it on the web sites of each such station. Notwithstanding these recordkeeping and reporting requirements,

such SEU's records remain subject to random inspections and audits. Given the constant threat of such inspections and audits, there is already a strong incentive for stations to widely disseminate job information and to keep adequate records. Accordingly, the Commission should eliminate totally the requirement for EEO Public File Reports. In the alternative, if the Commission insists on retaining the EEO Public File Report requirement, it should make the following changes:

a. SEU's with less than 5 full-time employees are exempt from having to comply with Subsections (b) and (c) of the new rule. As shown above, the incremental work effort required by the recordkeeping and reporting requirements is obvious and substantial. Accordingly, and for all the other reasons mentioned previously, the State Associations request that SEU's with between at least 5 and 15 full-time employees be exempt from the requirement to produce an EEO Public File Report. The requirements of broad outreach and record retention would remain. The Commission can audit a station at any time and every licensee knows it. The Commission represents the public. The public's own input can reasonably occur when an SEU files an application.

b. At the least, the Commission should distinguish between those sources which have asked to be placed on an SEU's "mailing list" ("Eligible Referral Organizations") and those other organizations to whom the SEU job opening notices are sent. In drawing this distinction, the Commission should not require an SEU to identify any of the non-Eligible Referral Organizations. In addition, the Commission should eliminate the need to keep records of the name of the so-called contact person at any Eligible Referral Organization since such people can leave without notice to the SEU. Given the hundreds of organizations which may be listed, there is simply not enough staff or time to keep checking this data. By simplifying all of these tasks, the Commission will have reduced some of the disincentives on SEU's use of more rather than

fewer sources for referrals. SEU's would still be required to keep records identifying all the referral sources they used for each such opening in the event of an audit.

c. This provision requires nonexempt SEU's to place their EEO Public File Reports in their stations' public inspection files and to post them on their stations' web sites "on" the date which is the anniversary date of the deadline for the filing of a station's renewal application. For example, an SEU with stations in Massachusetts would have to place such Report in the public files of its stations and post the Report on its web sites on December 1, 2003. The Report would cover the period March 10, 2003 through November 30, 2003. Realistically, the Commission cannot reasonably expect an SEU to have carefully, and completely prepared such Report, taking into account any hiring activity as late as November 30 and have the report reviewed and approved by higher-ups, including counsel, in such a short time frame. The problem cries out for the Commission to do what it has done for Quarterly Issues/Programs Lists and Annual Children's Television Programming Reports, namely allow a station 10 days from the close of the reporting period to place the reports in the station's public file and to post them on the station's web site. The same issue must resolved for the filing of FCC Form 396.

d. The posting of EEO Public File Reports requirement should be eliminated. The contents of the public inspection file, including the annual EEO Public File Report, are available to the public, thereby providing all potential "interested parties" with sufficient information. At the least, the FCC should allow "PDF" copies of such reports as attachments to the web sites.

e. Religious broadcasters should not have to report the referral sources of their interviewees and hirees. The disclosure of such information will chill a religious broadcaster's exercise of its religious freedom to employ co-religionists and entangle the government in religion.

15. Reconsideration of Statement about “Owner-Employees”

The Commission has concluded that only in narrow circumstances will a position occupied by an owner be exempt from full recruitment. The exemption should be broadened to include any stockholder, partner or LLC member with a 5% or more interest, or any family member of any of such classes of persons. The Commission's holding is another example of the "corporatization" of broadcasting and a further inappropriate turn away from family and locally owned business.

16. Drafting Issues Regarding the FCC EEO Forms

Some of the FCC Forms that the Commission requires SEU's to file contain errors that should be corrected before they may be relied upon.

a. FCC Form 396-A. Legally, the form should expressly state that in the case of a religious broadcaster who is filling out the form, the reference to “religion” in the Section I (General Policy) and Sections I, II and III (Model Program) need not be part of the broadcaster’s policy and program and thus may be deleted.

The requirement in Section V that “nonproductive” sources may not be relied upon should be stricken as inconsistent with the requirement that stations send job notices to all Eligible Referral Organizations. If the Commission is not so persuaded, it must explain what it means by “nonproductive.” Does the Commission mean that a particular source has not referred any or enough persons within a certain period of time? Or that it has not referred enough persons of a certain race, ethnicity or gender within a certain period of time? What length of time does the Commission have in mind?

b. FCC Form 396. The changes urged above in FCC Form 396-A for religious broadcasters should be made on this form as well for the same reasons.

The Commission should clarify whether “Discrimination Complaints” include those

involving allegations of unlawful discrimination based only on race, color, religion, national origin or gender, or on other factors such as age, physical or mental handicap, or other bases.

Under Section II, the Narrative Statement should be stricken. Since stations' public file reports are already attached, the only additional information the file could supply to support a claim of having achieved broad outreach would be information such as the race, gender and recruitment source of applicants and a comparison of that information to the racial and gender profile of the community, all of which have been found unconstitutional. In addition, the Commission requires the filer to explain any "difficulties" experienced in its outreach efforts. Is this intended to elicit whether the filer experienced difficulties in attracting enough applicants overall? Enough applicants overall based on race, ethnicity or gender? Enough from each particular referral source? The Commission needs to make itself clear.

When must a filer report to the Commission a change in the name and/or title of the person responsible for implementation of the SEU's EEO program?

c. FCC Form 397. The first paragraph of the form does not state when a radio filer must file. It is not clear from the second sentence of the first paragraph and the fourth paragraph of the Filing Instructions whether television SEU's with fewer than 5 full-time employees and radio station SEUs with fewer than 10 full-time employees are required to file the form at all, or only the first two pages of the form. Given this confusion how could a licensee certify compliance with these filing obligations, if any, in its license renewal application?

When must a filer report a change in the name and/or title of the person responsible for implementation of the SEU's EEO program?

17. Need for Publication of a Base Forfeiture for EEO Violations

It is not known what the base forfeiture amount will be for a violation of the new EEO Rule. Legal principles of fundamental fairness dictate that the Commission publicly announce

that figure as well as any aggravating and mitigating factors that it will consider.

CONCLUSION

Based on the foregoing, the State Associations respectfully request the Commission to reconsider and clarify the *Second R&O*, including the new EEO regulations, fully consistent with the positions set forth in this Petition.

Respectfully submitted,

STATE BROADCASTERS ASSOCIATIONS

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Dated: February 6, 2003