

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

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

TO THE COMMISSION

**PETITION FOR CLARIFICATION, OR, IN THE
ALTERNATIVE, FOR PARTIAL RECONSIDERATION**

The organizations listed in Annex 1 below (collectively, the "EEO Supporters"), pursuant to 47 C.F.R. §1.106, respectfully seek clarification or, in the alternative, partial reconsideration of Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second Report and Order), 17 FCC Rcd 24018 (2002) ("Second R&O").^{1/} We generally applaud and endorse the Second R&O, and raise here only two issues in need of repair.^{2/}

**1. The Commission Should Reaffirm Its Willingness To Consider
Statistical Evidence Of Industrywide EEO Noncompliance**

To document continuing EEO noncompliance and intentional discrimination in the broadcast and cable industries, the EEO supporters presented extensive evidence, including a landmark Ford Foundation-supported study of industrywide intentional discrimination (the "Blumrosens Study").^{3/} Written by leading scholars in the field, the Blumrosens Study concluded that 19% of cable and other pay-TV services discriminate intentionally against women,

^{1/} The views expressed herein are the institutional views of the commenting organizations, and are not intended to reflect the individual views of each of their officers, directors or members.

^{2/} If it is not possible to handle this petition under the Commission's power to clarify previous rulings, it should be treated as a petition for reconsideration under 47 C.F.R. §1.106. All procedural requirements for petitions for reconsideration have been met.

^{3/} The Reality of Intentional Job Discrimination in Metropolitan America - 1999 by Alfred W. Blumrosen and Ruth G. Blumrosen (Rutgers University, 2002) (the "Blumrosens Study"), discussed in the EEO Supporters October 1, 2002 Ex Parte Letter, pp. 12-17. The EEO Supporters also provided MMTC's research showing that 42% of broadcast job postings on state association job sites actually went to the trouble to delete the formerly ubiquitous "EOE" (equal opportunity employer) tag. EEO Supporters Reply Comments, pp. 28-30.

36% against African Americans and 20% against Hispanics; and that 15% of broadcasters discriminate intentionally against women, 20% against African Americans and 24% against Hispanics.^{4/}

The Commission did not analyze this evidence in its decision.^{5/} Instead, in a footnote (“Footnote 110”) it mentioned but declined to credit the Blumrosens Study.^{6/} The Commission stated that it had not had sufficient time to review the study,^{7/} and added that “we are not convinced that deviations below the average employment rate can be equated with intentional discrimination.”^{8/}

This holding is inconsistent with well-established civil rights jurisprudence and practice. It is axiomatic that statistical data often discloses the presence of discrimination.^{9/} In one of many recent examples involving aggregate industrywide data, professors at the University of Chicago

^{4/} Blumrosens Study, pp. 204-205, reported in the EEO Supporters October 1, 2002 Ex Parte Letter. Citing extensive case precedent, the Blumrosens Study attributes these results to intentional discrimination. While the word “intentional” grates on the ears of decent people, the Blumrosens note that the courts presume that intentional discrimination is present “when an establishment is more than two standard deviations below the average among its peers...an evidentiary principle designed by the Supreme Court to flush out ‘clandestine and covert’ intentional racial discrimination against minorities.” Blumrosens Study, p. 35, discussing Teamsters v. U.S., 431 U.S. 324, 335 n. 15 (1977). Additional authorities are provided in the Blumrosens Study, p. 228 n. 169.

^{5/} However, the Commission found that its rules continued to be necessary to prevent discrimination. Second R&O, 17 FCC Rcd at 24039 ¶¶57-58. Thus, the Commission concluded that based on past or present discrimination in the industry, or on both, there is a material risk of future discrimination -- a risk that regulation can reduce. Id., ¶58.

^{6/} Id., 17 FCC Rcd at 24039 n. 110.

^{7/} Id. We encourage the Commission to take this opportunity to carefully review the Blumrosens study, which provides the first-ever aggregate examination of discrimination in broadcasting. The study is exceedingly valuable because discrimination is disqualifying, see, e.g., Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621, 628-29 (D.C. Cir. 1978). An authoritative study whose findings suggest that one out of four licensees possibly should not be licensees should not be dismissed in a footnote for any reason! The Blumrosens have graciously indicated that they will make themselves available to visit with the staff or commissioners.

^{8/} Second R&O, 17 FCC Rcd at 24039 n. 110.

^{9/} See, e.g., State of Alabama v. U.S., 304 F.2d 586 (5th Cir. 1962) (“[i]n the problem of racial discrimination, statistics often tell much, and courts listen.”)

and at MIT found that “help wanted” advertisers were 50% more responsive to identically worded resumes with “White” sounding names as those with “Black” sounding names.^{10/} Indeed, the Commission has repeatedly emphasized the probativeness of industrywide statistics.^{11/} Several parties in this proceeding invoked industrywide statistics either to show that the industry is discriminating^{12/} or that it is not doing so.^{13/} However, it appears that under the approach taken in Footnote 110, neither type of evidence could be considered as the

^{10/} Marianne Bertrand and Sendhil Mullainathan, “Are Emily and Brendan More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination,” University of Chicago Graduate School of Business and Massachusetts Institute of Technology (November 18, 2002) (available on request from undersigned counsel). In this carefully controlled statistical study, the authors sent nearly 5,000 resumes in response to 1,300 “help wanted” advertisements in Boston and Chicago. Each resume was randomly assigned either a very African American sounding name or a very White sounding name. White names elicited about 50% more callbacks than African American names. Further, for Whites, higher quality resumes elicited 30% more callbacks, while for African Americans, the higher quality resumes did not elicit significantly more callbacks; thus, African Americans appear to benefit little if at all from improving their credentials. Interestingly, employers who listed “Equal Opportunity Employer” in their ads discriminated as much as did other employers. The authors cite several similar research studies which isolated intentional discrimination as virtually the only possible cause of race-conscious, anti-minority behavior by employers.

^{11/} See, e.g., Broadcast and Cable Equal Employment Opportunity Rules and Policies (R&O), 15 FCC Rcd 2329, 2358 ¶64 (2000) (“2000 EEO R&O”), recon. denied, 15 FCC Rcd 22548 (2000), reversed in part on other grounds sub nom. MD/DC/DE Broadcasters Ass’n. v. FCC, 236 F.3d 13, petitions for rehearing and rehearing en banc denied, 253 F.3d 732 (D.C. Cir. 2001), cert. denied, 534 U.S. 1113 (2002) (“MD/DC/DE Broadcasters”) (“knowledge of these industry trends will assist us in evaluating the effectiveness of, and continuing need for, our EEO rules, and in making appropriate recommendations to Congress for legislative change.”)

^{12/} See, e.g., EEO Supporters Comments, pp. 37-40 and 47-49 (citing several studies that found statistical underinclusion of minorities and women so extreme that they are not explainable except as the product of intentional discrimination). In addition, the EEO Supporters discussed a 1999 survey, by the National Association of Minorities in Communications (NAMIC), which disclosed that 20% of the NAMIC membership consistently perceive forms of discrimination to occur at their companies, with 20% of minorities and 22% of women perceiving that their respective personal attributes have a negative impact on opportunities at their companies. Id. at 37-38 fns. 106-107 (discussing Alisse Waterston et al., “A Look Toward Advancement: Minority Employment in Cable,” NAMIC Research and Policy Committee, August, 1999).

^{13/} See, e.g., NAB Reply Comments, pp. 9-10. Many leading conservatives would prefer to have racial statistics available. For example, John H. McWhorter, author of Losing the Race: Self-Sabotage in Black America (2001) recently declared that “[w]e need to collect data based on racial categories because so much of the news is good. Black poverty continues to shrink, the number of Black people getting college degree continues to increase, the number of Black people off welfare and working continues to grow.” Trevor W. Coleman, “Race Matters,” The Crisis, November/December, 2002, pp. 20, 24 (citing the publication Black Issues in Higher Education).

Commission reviews the effectiveness of its regulations. Given the unique difficulties in securing reliable anecdotal evidence of discrimination in a close-knit industry, the literal application of Footnote 110 would leave the Commission with virtually no means to fine-tune its EEO regulations in the future. Indeed, to our knowledge, except for Footnote 110, no pronouncement by any federal agency in the past 40 years has ever suggested that statistical evidence cannot be probative of intentional discrimination -- either in the aggregate or in specific cases.^{14/}

Consequently, the Commission should reaffirm that aggregate statistical data is indeed probative of the EEO performance of an industry, including, in some instances, the extent of intentional discrimination.

2. When It Completes Its Broadcast Ownership Proceeding And Secures New Industrywide Form 395 Data, The Commission Should Revisit Its Unfortunate Decision To Provide Only Second-Class EEO Protection To Rural Americans

The Second R&O created a loophole under which rural Americans will be denied the same level of EEO outreach protection as urban Americans.^{15/} This loophole will permit even very large broadcasters serving rural Americans to perform only two, rather than four, of the sixteen possible outreach initiatives every two years. The only other broadcasters allowed to dispense with half the standard number of outreach activities are broadcasters with fewer than ten fulltime employees, which have limited resources.^{16/}

This exemption would withhold first-class EEO outreach protection from the majority of those living in such southern states as Louisiana, Mississippi, Alabama, and Georgia, South Carolina and Kentucky, and from all of those living in such rural states as Montana, Idaho, Wyoming, North Dakota and South Dakota.

^{14/} The extent to which statistics can be used as evidence in company-specific cases is not at issue yet. It will be addressed soon, when the Commission reviews the future of FCC Form 395. See Second R&O, 17 FCC Rcd at 24024-25 ¶17.

^{15/} Second R&O, 17 FCC Rcd at 24071 ¶170. Those affected are residents of MSAs of less than 250,000 population, roughly equivalent to the 100th market, and those not in MSAs. Id.

^{16/} Id. at 24070 ¶166.

The 250,000 population size cap roughly corresponds with the 100th market by size. No party proposed this 250,000 population number. While agencies cannot avoid drawing some lines and may do so if they provide reasoned explanations,^{17/} the Commission did not explain why it chose to draw a line in such a way that those served by an 80-employee broadcaster in Market #110 are entitled to less EEO outreach protection than they would receive from an eight-employee broadcaster in market #90.

Many commenters, including the EEO Supporters, NOW, the Lawyers Committee for Civil Rights, AFTRA, and the NAACP, all pointed out that minorities and women commonly get their start in small markets.^{18/} These arguments were not mentioned in the Second R&O.

Never in 32 years of EEO regulation has the Commission contemplated that residents of several states must resign themselves to having less EEO outreach protection than other Americans. Yet no explanation for this change in policy was offered in the Second R&O -- again contrary to well established case precedent.^{19/}

In fact, the Commission lacks authority to reduce EEO protections. The Commission's original EEO rules applied to all markets.^{20/} That policy was in effect in 1992, when Congress adopted Section 334 of the Communications Act. As the Commission has recognized, Section 334 requires the Commission to "continue applying to television broadcasters and cablecasters

^{17/} See, e.g., Sinclair Broadcast Group, Inc., 284 F.3d 148, 162 (D.C. Cir. 2002), reh'd denied August 13, 2002.

^{18/} See Second R&O, at 24070 n. 240. For example, the EEO Supporters explained that "the broadcasting industry's personnel ladder is structured in a way that drives entry level personnel into small markets for their initial in-service training...[w]hen minorities and women are denied a meaningful opportunity to enter [the] small-to-large market or small-to-large station pipeline, the larger stations will inevitably be forced to hire from smaller pools of experienced persons." EEO Supporters Comment, p. 98 n. 209 and p. 99.

^{19/} See, e.g., Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.), cert. denied, 403 U.S. 923 (1971) ("[a]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.")

^{20/} See Petition for Rulemaking to Require Broadcast Licensees To Show Nondiscrimination in their Employment Practices (R&O), 18 FCC2d 240 (1969).

the EEO Rule that was in effect on September 1, 1992.”^{21/} Consequently, while the Commission was obliged to, and twice did correct its rules to satisfy constitutional concerns, the Commission lacks authority to refuse to apply its EEO rules equally to protect rural Americans.^{22/}

Indeed, even had Congress not acted to lock in the constitutional portions of the television EEO rules as they stood in 1992, it would still be impossible to justify the exclusion of rural broadcast employment from full EEO outreach protection. As the Second Circuit declared in 1977, when it rejected a Commission decision exempting stations with fewer than fifteen employees from the EEO rules, “[t]he Commission does not argue, nor could it, that the need for equal employment opportunity has become less urgent” since the EEO rules were adopted.^{23/}

There is no rational basis for depriving rural residents of full EEO outreach protection, since almost any sizable broadcaster in the nation can easily perform four of the 16 Prong 3 options in two years. These 16 items include, at most, only three items that might not easily be performed

^{21/} 2000 EEO R&O, 15 FCC Rcd at 2343 n. 59. Additional authority for maintenance of all constitutional portions of the original EEO regulations is found in Section 634 of the Act, which codifies portions of the Cable Act of 1984, and in Section 22(a) of the 1992 Cable Act. See 2000 EEO R&O, 15 FCC Rcd at 2339-42 ¶¶28-33.

^{22/} Contrary to the Second R&O, 17 FCC Rcd at 24028 ¶26, the Lutheran Church/Missouri Synod decision (141 F.3d 344 (D.C. Cir.), pet. for reh’g. denied, 154 F.3d 487, pet. for reh’g. en banc denied, 154 F.3d 494 (D.C. Cir. 1998)) and the MD/DC/DE Broadcasters decision did not render the 1992 EEO program requirements a “nullity.” These holdings each vacated the outreach portions of the EEO rules in the course of finding, each time, only one aspect of them constitutionally offensive. The Court manifested no intention to nullify Congress’ intention that the Commission maintain its previous rules to the extent possible constitutionally, and obviously subject to the fine-tuning that all regulations experience over time.

^{23/} Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 533 (2d Cir. 1977) (“UCC III”). The only theory given in the Second R&O for the potential denial of full EEO outreach protection for rural residents is that a previous version of the rule contained an alternative option that would have permitted “small market” broadcasters (and others) to verify their recruitment of minorities and women and thus avoid “burdensome” outreach requirements. We note, however, that the bare claim of “burdensomeness,” even when combined with other purported justifications (e.g. limited FCC resources, unreliability of statistical reports by licensees, continued protection of other workers) was insufficient in 1977 to justify the denial of EEO protection for a large number of positions in the broadcasting industry. See UCC III, 560 F.2d at 533. Depriving rural residents of first-class EEO coverage on “burdensomeness” grounds would be even less justifiable.

by a few small market broadcasters.^{24/} The slight “burden” on a few broadcasters of performing four out of 13, rather than four out of 16 items in two years is far outweighed by the substantial burden on rural residents of second-class EEO outreach protection -- particularly in light of the paucity of employment sites available to rural residents qualified to work in broadcasting. First-class EEO performance by all licensees capable of providing it is not a chit to be yielded up to appease implacable EEO opponents. This has serious consequences for rural Americans.

We stop short of asking the Commission to correct its error here, since data generated by two forthcoming events should help the Commission formulate the best policy going forward. First, the Commission may soon issue a decision in which it permits greater consolidation in broadcasting. The Commission might decide, inter alia, to allow more television/radio crossownership, which would decrease the numerosity of EEO reporting units while increasing the size of these units.^{25/} Second, the Commission plans to resume collecting Form 395 data, which it has not done since 2000.^{26/} Thus, the Commission will soon know whether some rural broadcasters, which can be quite large,^{27/} are now and will become even larger.

^{24/} Three of the 16 outreach items involve participating in job fairs. Second NPRM, 17 FCC Rcd at 24055 ¶114. In a few very small markets there might not be job fairs, although state-run colleges serving rural populations generally do produce annual job fairs. The other thirteen items are: participating in community group activities; having an internship program; using job banks or Internet programs; having scholarship programs; offering training programs; providing mentoring; participating in schools’ broadcast-related events; sponsoring community events to inform the public about opportunities available in broadcasting; listing upper-level openings in a job bank or newsletter of a broad-based membership organization; assisting nonprofit organizations to maintain websites that provide counseling on searching for broadcast employment; training management-level personnel on how to ensure equal employment opportunity and prevent discrimination; training personnel of outside recruitment organizations to help them refer job candidates for broadcast positions; and any other pertinent activity the licensee designs. Id. at 24055-56 ¶¶114-117.

^{25/} See Review of the Commission’s Broadcast Ownership Rules (NPRM), 17 FCC Rcd 18503, 18536-37 ¶102 (2002) (discussing radio/TV crossownership).

^{26/} See Second R&O, 17 FCC Rcd at 24024-25 ¶17.

^{27/} A few examples drawn from 2000 Form 395 data are KELO-TV, Sioux Falls, SD, DMA 112 (95 fulltime and 18 parttime employees); WBKO-TV, Bowling Green, KY (DMA 181) (56 fulltime and 14 parttime employees); KIDO(AM) and five co-owned stations, Boise, ID (Metro Rank 121) (58 fulltime and 21 parttime employees); WNBF(AM) and four co-owned stations, Binghamton, NY (Metro Rank 175) (44 fulltime and 17 parttime employees).

Therefore, the Commission should pledge that this fall, after it completes the omnibus broadcast ownership proceeding and gathers new aggregate Form 395 data, it will revisit the question of whether to afford rural Americans the same EEO protections that are afforded to other Americans.^{28/}

Respectfully submitted,

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^{28/} The Commission can take this step now, of course. This alternative suggestion is offered in the spirit of compromise.

ANNEX 1

LIST OF EEO SUPPORTERS

Minority Media and Telecommunications Council
Office of Communication of the United Church of Christ, Inc.
African American Media Incubator
Alliance for Community Media
Alliance for Public Technology
American Civil Liberties Union
American Federation of Television and Radio Artists
American Hispanic Owned Radio Association
American Indians in Film
Asian American Journalists Association
Asian American Media Development, Inc.
Black Citizens for a Fair Media
Black College Communication Association
Black Entertainment and Sports Lawyers Association
Black Entertainment and Telecommunications Association
Civil Rights Forum on Communications Policy
Cleveland Talk Radio Consortium
Cultural Environment Movement
Fairness and Accuracy in Reporting
League of United Latin American Citizens
Minorities in Communications Division of the Association for Education in Journalism and Communications
Minority Business Enterprise Legal Defense and Education Fund
NAMIC, Inc. (National Association of Minorities in Communications)
National Asian American Telecommunications Association
National Asian Pacific American Legal Consortium
National Association for the Advancement of Colored People
National Association of Black Journalists
National Association of Black Owned Broadcasters
National Association of Black Telecommunications Professionals
National Association of Hispanic Journalists
National Association of Hispanic Publications
National Bar Association
National Council of Hispanic Organizations
National Council of La Raza
National Council of the Churches of Christ in the United States
National Hispanic Foundation for the Arts
National Hispanic Media Coalition
National Indian Telecommunications Institute
National Latino Telecommunications Taskforce
National Newspaper Publishers Association
National Urban League
Native American Journalists Association
Native American Public Telecommunications
Puerto Rican Legal Defense & Education Fund
San Diego Community Broadcasting School, Inc.
Telecommunications Research and Action Center
UNITY: Journalists of Color, Inc.
Women's Institute for Freedom of the Press