

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

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

To the Commission

**COMMENTS OF THE
MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL
IN RESPONSE TO THE THIRD REPORT AND ORDER AND FOURTH
NOTICE OF PROPOSED RULEMAKING**

The Minority Media and Telecommunications Council (“MMTC”) respectfully submits these comments in response to the Media Bureau’s Public Notice, DA 08-752, published in the Federal Register on April 21, 2008,¹ seeking comment on possible changes to the Commission’s annual reporting forms that request certain employee data from multichannel video programming distributors (“MVPDs”) (FCC Form 395-A) (OMB Control No. 3060-0095) and broadcasters (FCC Form 395-B) (OMB Control No. 3060-0390).

The Bureau seeks comment on whether it should incorporate the revised standards found in Form EEO-1 Employer Information Report issued by the Equal Employment Opportunity Commission (“EEOC”) and whether it could conform those forms to those standards consistent with Sections 334 and 634 of the Communications Act of 1934, as amended (the “Act”).² This

¹ Media Bureau Seeks Comment on Possible Changes to FCC Forms 395-A and 395-B, MM Docket No. 98-204, Public Notice, DA-08-752, 23 FCC Rcd 544, 73 Fed. Reg. 21346 (April 21, 2008).

² Id.

inquiry was originally initiated in the Third Report and Order and Fourth Notice of Proposed Rulemaking (“Fourth NPRM”).³

MMTC does not take issue with the Commission’s proposal to adopt the EEOC’s revised standards.⁴ Sections 334 and 634 of the Act authorize the Commission to collect employment data, as noted in the Fourth NPRM.⁵ Since 1978, the Commission has coordinated with the EEOC on matters regarding discrimination complaints and broadcasters’ employment practices as stated in the Memorandum of Understanding between the agencies.⁶ However, MMTC does take issue with the Commission’s record on data collection and equal employment opportunity (“EEO”) enforcement. Given the Commission’s statutory authority to collect this data, it should promptly set a date by which broadcasters and MVPDs must publicly release their annual employment reports, as requested in our July 2004 comments in this docket.⁷

The Commission and the EEOC Have Concurrent Jurisdiction to Prevent and Proscribe Discrimination in Broadcast Employment

The roles of the Commission and the EEOC as partners in broadcast EEO enforcement are well established.⁸ This relationship is supported by court decisions that reinforce the Commission’s authority to prevent employment discrimination.⁹

³ Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies, Third Report and Order and Fourth Notice of Proposed Rulemaking, 19 FCC Rcd 9973, 9977-78 ¶¶14-17 (2004) (“Fourth NPRM”).

⁴ While we do not agree with the addition of the “Two or More Races” category to Form EEO-1, we acknowledge the EEOC as the expert agency on this matter as discussed infra at p. 3. More critical than our objections to the EEOC’s categories is the need for the Commission to reinstate the longitudinal industry-wide Form 395 database and transparent station reporting it maintained 1971 to 1997 and in 2000.

⁵ Fourth NPRM, 19 FCC Rcd at 9974 ¶3 (citing 47 U.S.C. §554(d)(3)(A) (requiring annual EEO filing) and 47 U.S.C. §334(a)-(c) (specifying the extent of the Commission’s authority to revise its EEO regulations)).

⁶ See Memorandum of Understanding between the FCC and EEOC, 70 FCC2d 2320 (1978) (“MOU”).

⁷ Comments of the National Organization for Women, Office of Communication of the United Church Of Christ, Inc., Minority Media and Telecommunications Council et al., MM Docket No. 98-204 (July 29, 2004).

⁸ In 1978, the EEOC and the Commission signed the MOU, which sets out how the agencies coordinate their EEO efforts. The MOU made the Commission “an agent of the EEOC for the sole purpose of receiving charges of employment discrimination” and a “conduit for formal discrimination charges falling within the EEOC’s

Under the Act, the Commission is charged with regulating “communication by wire and radio so as to make available, so far as possible, to all the people of the United States, *without discrimination on the basis of race, color, religion, national origin, or sex.*”¹⁰ The EEOC, established by Title VII of the Civil Rights Act of 1964,¹¹ is responsible for preventing unlawful employment practices including employment discrimination.¹² EEOC regulations regarding employment classifications are entitled to deference because Congress delegated such authority to the agency.¹³ Deference to administrative interpretations is a widely accepted principle and

jurisdiction.” MOU at 2321 (quotations omitted) and 2326. While the Commission may defer to the EEOC in pursuing individual cases, it retains the authority to investigate a matter on its own, even before the EEOC concludes its review. See MOU at 2327 (providing that the Commission may inquire into EEO complaints “even before the EEOC’s conciliatory process ends”); see also id. at 2328 ¶21, 2328 n. 12, and 2331, Appendix B, §III (b). The Commission may also investigate and process a complaint where the EEOC lacks jurisdiction. See, e.g., Catoctin Broadcasting of New York, 4 FCC Rcd 2553, 2558 ¶44 (1989) (holding that race discrimination by a radio station with five employees was sufficient to justify denial of the station’s license renewal applicant).

⁹ See NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976) (observing in dictum that the Commission’s broadcast EEO rules “can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934...to ensure that its licensees’ programming fairly reflects the tastes and viewpoints of minority groups.”) However, the Commission’s recruitment and outreach portions of the 1969 Rules were struck down on equal protection grounds in Lutheran Church/Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998), petition for rehearing denied, 154 F.3d 487, petition for rehearing en banc denied, 154 F.3d 494 (D.C. Cir. 1998) (“Lutheran Church”). The Commission then adopted new recruitment and outreach rules. Review of the Commission’s Broadcast Equal Employment Opportunity Rules and Policies (R&O), 15 FCC Rcd 2329, recon. denied, 15 FCC Rcd 22548 (2000) (“2000 Rules”). In MD/DC/DE Broadcasters Association v. FCC, 236 F.3d 13 (D.C. Cir. 2001), petition for rehearing and rehearing en banc denied, 253 F.3d 732 (D.C. Cir. 2001), cert. denied sub nom. MMTTC v. FCC, 534 U.S. 1113 (2002) (“MD/DC/DE Broadcasters”), the recruitment and outreach portions of the 2000 Rules were struck down, again on equal protection grounds. The Commission then issued the recruitment and outreach rules that are currently in effect. Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second R&O and Third NPRM, 17 FCC Rcd 24018 (2002) (reconsideration petitions pending) (“2002 Rules”). The 2002 Rules, like the 2000 Rules, were aimed at preventing discrimination. 2002 Rules at 24039 ¶37 (“our policy is designed to prevent both intentional and unintentional discriminatory practices in the broadcast and MVPD industries, and to ensure equal opportunity in employment practices, including recruitment”); see also 2000 Rules, 15 FCC Rcd at 2331 ¶2. Neither the 2000 Rules nor the 2002 Rules was aimed at promoting diversity of viewpoints, although the Commission has never gone so far as to disown the diversity rationale for its EEO rules.

¹⁰ 47 U.S.C. §151 (2006) (emphasis added).

¹¹ Pub. L. No. 88-352, §705, 78 Stat. 241, 258-29 (1964).

¹² See 42 U.S.C. §§2000e-2 - 2000e-3 (2006).

¹³ Id.; see also Gonzalez v. Oregon, 546 U.S. 243, 255-56 (2006) (citing United States v. Mead Corp., 533 U.S. 218, 226-227 (2001) (deference is warranted when Congress delegates authority to the agency and the agency’s interpretation is promulgated in the exercise of that authority); Madison-Hughes v. Shalala, 80 F.3d 1121, 1129-30 (6th Cir. 1996) (“Madison-Hughes”) (Congress may ensure compliance with federal regulations by collection of data, but the type of data to be collected falls within agency discretion in absence of specific guidelines).

recognized by courts.¹⁴ Even if the EEOC's decision to modify Form EEO-1 were incorrect, it is still entitled to respect because "the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"¹⁵ Thus, the Commission should accept the EEOC's revisions to Form EEO-1.

**Since Collection of EEO Data is Permissible and Desirable,
the Commission Should Require Annual Employment Reports**

While courts have called into question some former uses of data contained in Form 395,¹⁶ collection and publication of such data is still permissible.¹⁷ A state actor may compile racial statistics for the purpose of making and applying civil rights policy, and an agency may collect data and create classifications so long as the collection is for a legitimate purpose that does not lead to disparate treatment.¹⁸ Racial and ethnic data is considered relevant if it relates to the

¹⁴ See Chevron v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984).

¹⁵ Bragdon v. Abbott, 542 U.S. 624, 642 (1998) (citing Skidmore v. Swift, 323 U.S. 134, 139-140 (1944)).

¹⁶ See Lutheran Church and MD/DC/DE Broadcasters supra n. 9 (both decisions invalidated the Commission's recruitment and outreach portions of the EEO rules on equal protection grounds).

¹⁷ See Lutheran Church, 141 F.3d at 356; see also MD/DC/DE Broadcasters, 236 F.3d at 18 (holding that strict scrutiny applies only if the government's actions lead to people being treated unequally on the basis of their race).

¹⁸ The Equal Protection Clause of the Fourteenth Amendment does not forbid the government from creating classifications, but it prevents the government from "treating differently persons who are in all relevant respects alike." Nordlinger v. Hahn, 505 U.S. 1, 10 (1992). The government may draw distinctions between individuals provided it is relevant to a legitimate governmental objective. See Lehr v. Robinson, 463 U.S. 248, 265 (1983) (upholding adoption statute that distinguished rights of fathers that claim paternity of child versus rights of fathers that fail to claim paternity). It is within Congress' power to mandate the collection of various forms of information. See Watkins v. U.S., 354 U.S. 178, 215 (1957) (in exercising its legislative power, Congress is free to determine the type of data that should be collected); U.S. v. New Hampshire, 539 F.2d 277, 282 (1st Cir. 1976) cert. denied, 429 U.S. 1023 (1976) ("New Hampshire") (holding that collection of data related to equal employment opportunity was within Congress' enforcement powers under the Fourteenth Amendment); Madison-Hughes, 80 F.3d at 1129-30 (Congress may ensure compliance with federal regulations by collection of data, but the type of data to be collected falls within agency discretion in the absence of specific guidelines). If there were any doubt about whether racial statistics can and should be compiled and publicly disclosed, these doubts should have been put to rest by Justice Kennedy's controlling opinion in Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738, 2792 (2007) (Kennedy, J., concurring). In his opinion, Justice Kennedy encouraged the collection of data by race as a constitutionally permissible means to achieve a diverse student body ("Schools may pursue the goal of bringing students of diverse backgrounds and races through other means, including ... tracking enrollments, performance, and other statistics by race.") Id. at 2792.

statutory duties of the government agency.¹⁹ Raw statistical data on race and ethnicity may be collected, regardless of a party's fear of misuse;²⁰ the only caveat is that the data may not be used in an unconstitutional manner.²¹ By neutrally reporting information for all races and both genders, Form 395 neither contains nor implies a preference for one race or gender. Nor would Commission consideration of Form 395 data give effect to any such preference. Commission licensees have no significant interest, much less a constitutionally protected interest, in concealing from their own listeners and viewers an obviously very relevant – albeit not dispositive – piece of evidence of whether their recruitment, hiring and retention efforts have helped prevent discrimination.

Form 395 serves profoundly legitimate purposes. Form 395 yields longitudinal industry-wide data that has been vital to the ability of Congress,²² the Commission,²³ scholars²⁴ and the

¹⁹ See Safeway Stores v. NLRB, 691 F.2d 953, 956 (10th Cir. 1982) (citing NLRB v. Acme Indus. Co., 385 U.S. 432 (1967)); see also Caulfield v. Bd. of Educ. City of New York, 583 F.2d 605, 611 (2nd Cir. 1978) (collection of racial and ethnic data of school employees was deemed to relate to government's statutory authority and duty to alleviate discrimination).

²⁰ See New Hampshire, 530 F.2d at 279-280. However, even if the data is relevant, the need for that data may be balanced against the burden and confidentiality constraints of the regulated entity. See Safeway Stores, 691 F.2d at 957-58 (requiring employer to provide data based on race and employment status in order to comply with NLRB regulations).

²¹ See Bush v. Vera, 517 U.S. 952, 969-971 (1996) (rejecting a redistricting plan formulated with computer software that made racial classification a dominant factor).

²² Congress relied on Form 395 data while considering the Cable Communications Policy Act of 1984 (Pub. L. No. 87-549 §2, 98 Stat. 2279, 2797 (1984), codified as amended as 47 U.S.C. §554(c) (1984)), and concluded that “while the employment record of the cable industry has improved in the years since the Commission first adopted equal employment opportunity regulations, women and minorities still are significantly underrepresented as employees and owners in the industry.” H.R. Rep. No. 98-934, at 85 (1984), reprinted in 984 U.S.C.C.A.N. 4655, 4723. Congress also relied on Form 395 data in 1992 to bar the Commission from revising its EEO rules governing television stations (Pub. L. No. 102-385, 1065 Stat. 1460 (1992), codified as amended at 47 U.S.C. §334(a)(1)), finding that “despite the existence of regulations governing equal employment opportunity, females and minorities are not employed in significant positions of management authority in the cable and broadcast industries...rigorous enforcement of equal opportunity rules and regulations is required in order to effectively deter racial and gender discrimination.” Cable Television Consumer Protection and Competition Act of 1992, §22(a), 106 Stat. at 1498.

²³ See, e.g., Implementation of the Commission's Equal Employment Opportunity Rules (Report), 9 FCC Rcd 6276, 6314-15 ¶79 (1994) (using, *inter alia*, Form 395 data in concluding that “a continuing need exists for EEO enforcement in the communications industry.”)

²⁴ See, e.g., Fonda Leigh Whittaker, “Reflective Images: Personnel Diversity in the Public Broadcasting Industry,” Department of Telecommunications, University of Georgia (2000).

public to track industry employment trends as well as the effectiveness of the EEO rules and policies. As with the closely related subject of minority ownership policy,²⁵ data collection and publication is a constitutionally permissible step the Commission may take to improve its regulatory effectiveness, responsiveness and judgment.

Gathering EEO Data Will Lead to Better Commission Policy and Enforcement

As discussed supra, the Commission may compile and publish racial statistics for the purpose of developing and improving anti-discrimination policies and regulations.²⁶ Non-governmental entities that follow employment trends in broadcasting report that discrimination remains a factor in the broadcast job market, even among college graduates. The Cox Center of the University of Georgia's 2006 Annual Survey of Journalism and Mass Communication graduates found that "students who are members of minority groups had a harder time finding a job."²⁷ Broadcast employment of women and minorities has been unsteady, with increases in some categories and sharp decreases in others. Mentoring and Inspiring Women in Radio ("Radio MIW") performs an annual gender analysis of radio station management trends in the top 100 markets.²⁸ Radio MIW found that:

- General Managers: representation of women has increased from 14.8% in 2001 to 16.7% in 2007

²⁵ See Promoting Diversification of Ownership In the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294, 23 FCC Rcd 5922, _____ ¶53 (released March 5, 2008) ("Diversity Order") (acknowledging that its "current data-collection efforts could be improved." The Commission's inaccurate minority ownership data collection methods are forgivable in light of the many pro-active steps taken in the Diversity Order to promote minority ownership and, of course, in light of the fact that the Commission had at least tried to collect and publish minority ownership data, a step it hasn't taken for EEO data.)

²⁶ See supra ns. 17-25 and accompanying discussion.

²⁷ L. Becker, et al., 2006 Annual Survey of Journalism & Mass Communications Students, at 1, available at http://www.grady.uga.edu/ANNUALSURVEYS/grd06/grdrpt2006_merged_full_v6_Color.pdf (last visited May 20, 2008).

²⁸ See Radio Station Management Trends – By Gender, available at <http://www.radiomiw.com/PDFs/2007stationsummary-TRENDS.pdf> (last visited May 20, 2008).

- Sales Managers: representation of women increased from 29.7% in 2001 to 32.5% in 2007
- Program Directors: representation of women declined from 10.4% in 2001 to 9.8% in 2007.²⁹

The Radio-Television News Directors Association (“RTNDA”) has found that minorities comprised 21.5% of local television news staffs in 2006, down from 22.2% in 2005.³⁰ At non-Hispanic stations, RTNDA found that the minority workforce was 19.4%, down 1% from the previous year,³¹ and only 3.6% of non-Hispanic television stations had minority general managers in 2006.³² In 1995, RTNDA reported that minorities were 14.7% of radio news employees, but that number actually had declined to 6.2% by 2006.³³ Starting from this percentage, MMTC has calculated that minority news employment at non-minority owned, English language radio stations is statistically zero – about where it was in 1950.³⁴

How was it possible for minority employment in radio journalism to completely collapse?

The answer begins with the fact that most recruitment is still done by word of mouth. When the group of employees conducting word of mouth recruitment is homogeneous, the recruitment primarily reaches these employees’ generally homogeneous family and social affinity groups.³⁵

As a result, the homogeneity of employment rosters will increase. Unless an industry had

²⁹ Id.

³⁰ See B. Papper, “Women and Minorities in the Newsroom,” RTNDA Communicator, July/August 2007 at 20, available at http://www.rtna.org/media/pdfs/communicator/2007/julaug/20-25_Survey_Communicator.pdf (last visited May 20, 2008) (“RTNDA Communicator”).

³¹ Id.

³² Id. at 24.

³³ Id. at 20.

³⁴ See David Honig, “Are the Current FCC EEO Rules Effective?” FCBA CLE Program, February 12, 2008 (“Current EEO Rules”), p. 4.

³⁵ The Commission has repeatedly recognized that word of mouth recruitment from a homogeneous workforce is inherently discriminatory. See, e.g., Jacor Broadcasting Corporation, 12 FCC Rcd 7934 (1997) (“Jacor”); Walton Broadcasting, Inc. (KIKX, Tucson, AZ) (Decision), 78 FCC2d 857, recon. denied, 83 FCC2d 440 (1980) (“Walton”).

already employed a critical mass of minorities, large enough to replicate itself over time by participation in word of mouth recruitment, minorities are at risk of being purged. That has already happened in radio journalism.³⁶

Unfortunately, the Commission's EEO enforcement program is a tiny shell of its former self. MMTC examined all 300 of the Bureau's 2003 and 2004 broadcast audits, and found that only 12% of the recruitment sources were minority-targeted while 36% of the job notices still did not contain an "EOE" tag. Yet every one of the stations passed its audit anyway.³⁷ Comparison of 2004-2007 EEO enforcement with 1994-1997 EEO enforcement reveals that:

- 1994-1997: 251 cases decided; 86 of which resulted in forfeitures totaling \$2,149,000, or \$312,250 per year. Mean forfeiture per forfeiture decision was \$3,631.
- 2004-2007: 10 cases decided, eight of which resulted in forfeitures totaling \$97,000, or \$24,250 per year. Mean forfeiture per forfeiture decision was \$12,125.³⁸

Thus, while current enforcement efforts feature much higher forfeitures in particular cases than those issued a decade ago, the size of the Commission's EEO docket is down 96% (from 251 cases from 1994-1997 to 10 cases from 2004-2007), and the total forfeiture amounts imposed annually have also decreased 96% (from \$312,250 in 1994-1997 to \$12,125 in 2004-2007).

Further, and notwithstanding the Media Bureau's experienced and dedicated staff, the very rare cases being brought seem to have no purpose other than to annoy the industry. These wooden decisions certainly don't advance any coherent regulatory goal. To be sure, the cases focus on violations of the recruitment outreach rules, which are laudably aimed at preventing exclusive reliance on word of mouth recruitment. However, word of mouth recruitment from a heterogeneous workforce is harmless. Word of mouth recruitment is only inherently

³⁶ See RTNDA Communicator at 20 and discussion above.

³⁷ Current EEO Rules, pp. 3-4.

³⁸ Id. at 4.

discriminatory when the workforce doing the recruitment is homogeneous.³⁹ Because the Commission has chosen not to collect Form 395 data, it has blinded itself to whether word of mouth recruitment by a particular licensee is harmless or harmful. As a result, the Commission has “enforced” the EEO rule by imposing enormous fines on some of the nation’s most diverse multicultural broadcasters for technical violations.⁴⁰ This understandably has bred cynicism among broadcasters, who are barred from pointing out the obvious fact that with a diverse workplace, their recruitment efforts have obviously been successful. At the same time – as shown above – the Commission has given a free pass to virtually every discriminator and serial violator. In a particularly deplorable example, the Commission botched its only large MVPD EEO case in 15 years by missing its own statute of limitations by two years.⁴¹

Thus, the Commission’s current EEO enforcement program is a stunning failure. The Commission has presided over the greatest purge of minorities in broadcasting history – a purge made even worse because it happened in radio journalism, a linchpin of program diversity. To

³⁹ See Jacor and Walton, *supra* n. 35.

⁴⁰ See Emmis Television License, LLC (NAL), 20 FCC Rcd 13860 (2005) (\$18,000 fine and reporting conditions for failing to recruit for 11 of 51 vacancies, failing to retain or report data on interviewees or referrals, and failing to self-assess adequately; these stations, in Hawaii, had the most diverse management team in American broadcasting); KDAY(FM) (NAL), 20 FCC Rcd 20130, 20133 (December 20, 2005; unpublished erratum issued December 21, 2005) (\$20,000 fine and reporting conditions for failing to recruit adequately for 46 of 54 vacancies, even though this Spanish language licensee reported to Commission staff that it believed it did not need to recruit for all openings because it “maintains that it frequently received unsolicited employment inquiries from a diverse pool of applicants”); Liberian Television of Dallas License Corp. (NAL), 22 FCC Rcd 2032 (2007) (\$20,000 fine and reporting conditions for failing to recruit for 30 of 54 vacancies and failing to adequately document the station’s EEO program; this Spanish language station had one of the most diverse workforces of any station in the country.)

⁴¹ See RCN Corp., 22 FCC Rcd 11182 (2007). RCN conducted no EEO initiatives for three years and apparently dissembled during the Bureau’s investigation. The Bureau held that “Section 503(b)(6)(B) of the Act, however, limits the time period within which the Commission can initiate a forfeiture proceeding against non-broadcast entities to only those violations that occur within one year of the issuance date of a notice of apparent liability for forfeiture. Because the violations here occurred more than 12 months ago, the statute of limitations prohibits us from initiating a forfeiture proceeding against RCN. For this reason, we admonish RCN for these violations. But for the running of the statute of limitations we would have initiated a forfeiture proceeding in this case (fn. omitted).” *Id.* at 11185. Compare Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program “NYPD Blue” (NAL), 23 FCC Rcd 1596 (2008), imposing nearly \$1.5 million in forfeitures for indecency violations that allegedly occurred during a February 25, 2003 (!) broadcast. The decision was issued one month before the five-year statute of limitations would have expired.

restore the health of its EEO enforcement program, the least the Commission can do is reinstate transparent EEO data collection.

Early in this proceeding, Chairman Martin, then a commissioner, stated that “[a] more talented workforce leads to improved programming, which ultimately benefits all consumers” and that the Commission’s EEO program “should promote not just diversity, but also true competition.”⁴² With current, reliable data, the Commission can achieve its goals of promoting competition and diversity, and preventing discrimination in broadcast and MVPD employment.

CONCLUSION

For the foregoing reasons, MMTC believes that the Commission should incorporate the revised standards found in Form EEO-1 Employer Information Report issued by the EEOC. MMTC also respectfully requests the Commission to act on MMTC’s July 29, 2004 request to set a date by which broadcasters and MVPDs must publicly release their annual employment reports.

Respectfully submitted,

David Honig

David Honig
Executive Director
Joycelyn James
John W. Jones Fellow
Minority Media and Telecommunications Council
3636 16th Street, N.W., Suite B-366
Washington, D.C. 20010
(202) 332-7005
dhonig@crosslink.net

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⁴² Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second R&O and Third NPRM), 17 FCC Rcd 24018 (2002) (Separate Statement of Commissioner Kevin J. Martin).