

**THE FCC'S EQUAL EMPLOYMENT OPPORTUNITY RULES:
PAST, PRESENT AND FUTURE**

by Angela J. Campbell¹

I. INTRODUCTION

In 1998, the United States Court of Appeals for the District of Columbia Circuit found that the FCC's equal employment opportunity (eoo) rules, violated the constitutional guarantee of equal protection under the law. In this case, *Lutheran Church-Missouri Synod v. FCC*,² the licensee of two radio stations appealed an FCC imposing reporting conditions and a fine for violating the FCC's eoo rules. The D.C. Circuit based its ruling on the 1995 Supreme Court decision in *Adarand Const. Inc. v. Peña*,³ in which the Court held that strict scrutiny applied when the government utilized race based classifications. The D.C. Circuit found that the FCC's eoo rules pressured broadcast licensees to engage in "race-conscious hiring" and were thus subject to strict scrutiny.⁴ Applying this test, the court found the rules failed to meet the standard because even assuming that the rules served a compelling interest in fostering diverse

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² 141 F.3d 344 (D.C. Cir. 1998), *reh'g denied*, 154 F.3d 487, *reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998).

³ 515 U.S. 200 (1995).

⁴ 141 F.3d at 354.

programming, which the court doubted was a compelling interest, they were not narrowly tailored to that interest.⁵

The FCC subsequently revised its rules to comply with the ruling in *Lutheran Church*.⁶ A number of state broadcaster associations, represented by the same attorneys as the Lutheran Church, appealed the new rules alleging that they too violated equal protection. The D.C. Circuit agreed.⁷ On remand, the FCC issued a Second Report and Order (2d R&O) in November 2002 revising the rules.⁸ Although they remain subject to pending petitions for reconsideration,⁹ the new eeo rules have been in effect since March 2003.

This paper will compare and contrast the old and new eeo rules, assess the impact of the new eeo rules on employment opportunities for minorities and women in broadcasting, and explore possible options for increasing opportunities for minorities and women in broadcasting.

II. COMPARISON OF OLD AND NEW RULES

Both the “old eeo rules,” those in effect from 1970 to 1998,¹⁰ and the “new eeo rules,” those adopted in 2002, prohibit discrimination in employment because of race, color, religion, national origin, or sex. In addition, both require that each station “establish, maintain and carry

⁵ Id. at 356.

⁶ *Review of the Commission’s Broadcast and Cable Equal Opportunity Rules and Policies*, RO&O, 15 FCC Rcd 2329, *recon. denied*, 15 FCC Rcd 22,548 (2000).

⁷ *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, *rehearing den.* 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 920 (2002) (“*State Broadcasters*”).

⁸ *Review of the Commission’s Broadcast and Cable Equal Opportunity Rules and Policies*, 2d R&O and 3d NPRM, 17 FCC Rcd 24,018 (2002) (“2d R&O”).

⁹ The State Broadcasters, the National Association for Broadcasters and the Minority Media and Telecommunications Council all filed petitions for reconsideration.

¹⁰ During this period, the eeo rules were often amended, but the basic features remained the same. For purposes of comparison, I will use the 1991 edition of the CFR for the “old” eeo rules and the 2005 edition of the “new” eeo rules. I have also chosen to focus primarily on the eeo rules for broadcast stations. The eeo rules for cable systems are similar to the broadcast rules. The current version of the cable eeo rules may be found at 47 CFR §§76.71, 76.77, 76.1702, 76.1802 (2005).

out, a positive continuing program of specific practices designed to assure equal opportunity in every aspect of station employment policy and practice.”¹¹ However, the rules differ significantly in the specific eeo program requirements, recordkeeping and enforcement, coverage, and rationale.

A. EEO Program Requirements

Under the “old rules,” a station’s eeo program was to address specific areas “to the extent possible, and to the extent that they are appropriate in terms of the station’s size, location, etc.”¹²

The specific areas included:

- 1) disseminating the eeo program to job applicants and employees, by for example, posting notices, including notices on employment applications, and utilizing media for recruitment that could be reasonably expected to reach minorities and women,
- 2) using “minority organizations, organizations for women, media, educational institutions and other potential sources of minority and female applicants, to supply referrals whenever job vacancies are available,”¹³
- 3) evaluating the station’s employment profile against the availability of minorities and women in the recruitment area, and “where there is underrepresentation of either minorities and/or women, examining the company’s personnel policies and practices to assure that they do not inadvertently screen out any group and take appropriate action where necessary,”¹⁴
- 4) offering promotions of qualified minorities and women in a nondiscriminatory manner, and
- 5) analyzing efforts to recruit, hire, and promote minorities and women and address any difficulties in implementing its eeo program.

¹¹ Compare 47 CFR §73.2080(b) (1991) with 47 CFR §73.2080(b) (2005). These sections contain identical language spelling out specific obligations such as defining responsibilities of management to enforce eeo policies, informing employees and applicants of their eeo policies, and conduction continuing review of employment practices to insure genuine equality of opportunity.

¹² 47 CFR §73.2080(c) (1991)

¹³ Id. at §73.2080(c)(2). The rule gives specific examples such as placing employment advertisements in media that have significant circulation among minorities residing in the area and recruiting through schools with significant minority group enrollments.

¹⁴ Id. at §73.2080(c) (3)(ii).

The new eeo rules have three “prongs.” Under the first prong, a station must recruit for every full-time job vacancy. It must do this by using recruitment sources “sufficient in its reasonable, good faith judgment to widely disseminate information concerning the vacancy.”¹⁵ Under the second prong, a station must provide notification of vacancies to any community group or job referral organization upon request.¹⁶

Under the third prong, a station must engage in certain outreach “initiatives.” Stations with more than ten fulltime employees must engage in four initiatives during each two-year period. Stations with five to ten employees, or located in smaller markets, need only engage in two initiatives. The rule lists 16 qualifying initiatives. These range from specific actions, such as participating in four job fairs, hosting one job fair, establishing an internship program, participating in job banks, or establishing an mentorship program, to open-ended “participation in other activities . . . reasonably calculated to further the goal of disseminating information as to employment opportunities in broadcasting to job candidates who might otherwise be unaware of such opportunities.”¹⁷

Significantly, the new eeo rules eliminate the requirement that stations evaluate the station’s employment profile against the availability of minorities and women in the recruitment area. The *Lutheran Church* court had singled out this requirement as pressuring stations to give preferences to minorities in hiring. The court noted that:

The entire scheme is built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional representation. . . . The very term “underrepresentation” necessarily implies that if such a situation exists, the station is behaving in a manner that falls short of the desired outcome. The regulations

¹⁵ 47 CFR §73.2080(c)(1)(i) (2005).

¹⁶ Id. at §73.2080(c)(1)(ii).

¹⁷ Id. at §73.2080(c)(2).

pressure stations to maintain a workforce that mirrors the racial breakdown of their “metropolitan statistical area.”¹⁸

In the new eeo rule, the FCC also makes it explicit that “[n]othing in this section shall be interpreted to require a broadcaster to grant preferential treatment to any individual or group based on race, color, national origin, religion or gender.”¹⁹ And, the FCC goes so far as to eliminate virtually all references to race and gender from its rules.²⁰ Thus, for example, instead of being required to notify minority and women’s organizations of vacancies, the licensee need only notify any organization that requests notification.

B. Reporting and Enforcement

Another difference between the old and new eeo rules is in the reporting requirements and processes for enforcing the rules. Under the old rules, each broadcast station was required to file with the FCC an annual eeo report known as Form 395. The Form 395 required that each station report the number of employees in each of nine job categories by race and gender.²¹ Members of the public could gain access to this data by visiting the station and looking at the public file or from the FCC headquarters.

The FCC used the 395 data for two purposes. First, the FCC used it to compile “trend reports.” These reports, which were issued annually, track the aggregate percentage of

¹⁸ 141 F.3d at 352.

¹⁹ 47 CFR §73.2080(c)(1)(2005).

²⁰ Minorities and women are referenced in two of the 16 options. *Id.* at §73.2080(c)(2)(iii)(co-sponsoring a job fair with business or professional organizations whose membership includes substantial participation of women and minorities; §73.2080(c)(2)(xii)(listing upper-level job openings in a job bank or newsletter of organization whose membership include substantial participation of women and minorities.)

²¹ The job categories are: officials and managers, professionals, technicians, sales workers, office/clerical, craftsmen, operatives, laborers, and service. Minority employees were reported under the following categories: Black, Asian/Pacific Islander, American Indian/Alaskan, and Hispanic.

minorities and women employed in each job category. Second, the FCC used the data to assess the effectiveness of a station's eeo program when the station license came up for renewal.

To assess the effectiveness of a station's eeo program, the FCC employed what was known as the "zone of reasonableness" analysis. It would compare the percentage of minorities and women employed by the station with the percentage of minorities and women in the metropolitan statistical area in which the station was located. The zone of reasonableness was intended to contract over time. In 1980, the FCC concluded that a station would be within the zone if its overall employment of minorities and women was at least at 50% and its employment of minorities and women in the top four job categories was at 25%.²² Thus, for example, if the station was located in a metropolitan statistical area with a 20% minority labor force and 40% female labor force, it would be within the zone of reasonableness if it employed at least 10% minorities and 20% women overall and 5% minority and 10% women in the top-four job categories. Stations falling outside the zone of reasonableness were subject to greater scrutiny.

Beginning in 1987, however, the FCC decided to shift its analysis from the results of a station's eeo program to an assessment of a licensee's efforts to reach out to minorities and women. To make this assessment, which occurred when licenses came up for renewal,²³ the FCC required stations to file with their license renewal application a Broadcast Equal Employment Opportunity Report, known as Form 396. This form asked licensees to certify their efforts to disseminate their eeo policy and to document their efforts to attract qualified minority and women applicants by, for example, listing examples of media used to advertise, schools where they recruiting, minority and women's organization they contacted, and the number of minority and female

²² FCC Public Notice #15528 released February 13, 1980.

²³ When the eeo rules were first adopted, the license term for a broadcast stations was three years. In 1981, license terms were extended to five years for television and seven years for radio. In 1996, license terms for both radio and television extended to eight years.

referrals from each source. Form 396 also required the station to disclose the total number of hires and promotions during the previous year and the number of minorities and women hired and/or promoted.

When the FCC adopted the new eeo rules in November 2002, it deferred its decision on whether to reinstate the requirement that broadcast stations file workforce data that had previously been filed in Form 395.²⁴ The Commission explained that there was no urgency to decide this question because the next reports would not be due until September 2003. In any event, the Commission emphasized that the data would be used only to compile trend report and to report to Congress, not to determine compliance with the eeo rule.

September 2003 came and went and the FCC still had not decided whether to require the filing of Form 395 data. Finally, in June 2004, the Commission decided to reinstate the filing requirement, but then postponed the actual filing date. The Commission explained that although the Form 395 data had always been available to the public, a recent statute known as the Confidential Information Protection and Statistical Efficiency Act of 2002, arguably could allow the FCC collect this data and keep it confidential. The Commission decided to seek public comment on whether it should keep the data confidential and to postpone the filing of the Form 395 until it decided. As of April 2006, the FCC has not issued a determination in this matter, and consequently, no 395 data has been filed.

The new eeo rules do require that stations prepare a different kind of annual report that must be placed in the station's public file and posted on the station's website, if it has one.

These eeo public file reports must contain:

²⁴ *Review of the Commission's Broadcast and Cable Equal Opportunity Rules and Policies*, 3d RO&O & 4th NPRM, 19 FCC Rcd 9973, ¶17 (2004).

- (1) a list of all full-time vacancies filled by the station employment unit during the preceding year, identified by job title;
- (2) for each such vacancy, the recruitment source(s) used to fill the specific vacancy;
- (3) a list of the recruitment sources that referred the people hired for each full-time vacancy; data reflecting the total number of persons interviewed for full-time vacancies during the preceding year and, for each recruitment source used in connection with any such vacancies, the total number of interviewees referred by that source; and
- (4) a list and brief description of Prong 3 menu options implemented during the preceding year.²⁵

When a station license comes up for renewal, the licensee must electronically file a revised Form 396. The revised Form 396 asks for the name of the official responsible for eeo, copies of the two most recent eeo public file reports, and a narrative statement demonstrating “how the station achieved broad and inclusive outreach” and explaining any difficulties in their outreach efforts.²⁶ The Commission uses this information to review a licensee’s compliance with its eeo rules.²⁷ In addition in checking for eeo compliance at license renewal time (and in some cases, in mid-term reviews),²⁸ the rules require the FCC to audit approximately five percent of all radio and television licensees each year.²⁹

C. Coverage

The old eeo rules applied more or less equally to all broadcast stations with five or more full time employees.³⁰ The new eeo rules impose fewer obligations on stations with five to ten employees and those located within “smaller markets,” defined as metropolitan areas with a population of fewer than 250,000 or areas outside of metropolitan areas (as defined by the Office

²⁵ 47 CFR §73.2080(c)(6)(2005).

²⁶ This form is available on the FCC website.

²⁷ 2d R&O, 17 FCC Rcd 24,018, ¶153.

²⁸ The Commission uses Form 397 which is used for mid-term reviews of stations with more than ten full-time employees. *See* 47 CFR §73.2080(f)(2).

²⁹ 47 CFR §73.2080(f)(4)(2005).

³⁰ After directed by Congress in the 1992 Cable Act, the Commission began subjecting television station to mid-term license reviews. The new eeo rules extended mid-term reviews to radio stations with more than ten full-time employees. 47 CFR §73.2080(f)(2).

of Management and Budget).³¹ Specifically, station units with fewer than five full time employees and stations located entirely in a smaller market, regardless of the number of employees, need only complete two instead of four outreach initiatives over a two year period.³²

D. Rationale for the eeo rules

The old eeo rules were grounded in two different rationales--preventing discrimination and promoting diversity of viewpoints in programming. The FCC's decision to adopt eeo rules in the late 1960s was influenced by the recent passage of the Civil Rights of 1964, which made it unlawful for employers with at least 25 employees that engaged in interstate commerce to discriminate based on race, color, religion, sex, or national origin. The Commission reasoned that since it could only grant a broadcast license if it found that it would serve the public interest, any substantial allegation that station had engaged in discrimination would raise question as to that licensee's qualifications.³³

At the same time, the Commission expressed the view that it should do more than merely enforce the national policy against discrimination. Citing the Kerner Commission Report, the Commission observed that "the Nation is confronted with a serious racial crisis" and that media can contribute "to understanding by white and black of the nature of the crisis and the possible remedial actions."³⁴ And if the broadcast media is to play a role, "there must be greater use of the Negro in journalism."³⁵

In its brief before the court in *Lutheran Church*, the FCC defended its eeo rules solely on the diversity rationale, while the Department of Justice argued in a separate brief that the eeo

³¹ 47 CFR §73.2080 (e)(3)(2005).

³² 47 CFR §73.2080(c)(2)(2005).

³³ *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices*, Docket No. 18244, MO&O and NPRM, 13 F.C.C. 2d 766, 769 (1968).

³⁴ *Id.* at 774.

³⁵ *Id.*

rules were “supported by twin governmental goals of seeking diversity in programming and preventing employment discrimination.”³⁶ The court was quite skeptical of the diversity rationale, suggesting that it was either “too abstract to be meaningful,” or reflected the government’s desire to foster content with racial views “at odds with equal protection.”³⁷ At the very least, the court found it “impossible to conclude that the government’s interest, no matter how articulated, is a compelling one,”³⁸ which was the necessary level of governmental interest to support a race-based classification. The court further noted that even if the interest were compelling, there was no reason to believe that there was any connection between low-level employees and program content.³⁹ The court concluded that because “our opinion has undermined the proposition that there is any link between broad employment regulation and the Commission’s avowed interest in broadcast diversity,” it remanded to the FCC “to determine whether it has authority to promulgate an employment non-discrimination rule.”⁴⁰

On remand, the FCC reiterated its belief that “a broadcaster can more effectively fulfill the needs of the community, *i.e.*, serve the public interest, when it maintains” an effective eeo program. The Commission explained that it did “not assume that minority and female employment will always result in minority and female-oriented programming,” nor did it “believe that all minorities or all women share the same viewpoints.” Nonetheless, it believed that “as more minorities and women are employed in the broadcasting industry, it is more likely that varying perspectives will be aired and that programming will be oriented to serve more

³⁶ *Lutheran Church*, 141 F.3d at 354.

³⁷ *Id.* at 354, 355.

³⁸ *Id.* at 355.

³⁹ *Id.* at 356.

⁴⁰ *Id.*

diverse interests and needs.”⁴¹ Thus, it sought comment on “whether there is a nexus between minority and female employment and diverse programming.”⁴²

In adopting revised eeo rules in 2000 (which were similar in most respects to the new eeo rules), the Commission noted that it had received extensive public comment on the nexus question. But, it concluded that the resolution of this issue “was not dispositive” on the question of the agency’s statutory authority to adopt eeo rule. It found that Congress’s ratification of its eeo rules in the 1984 and 1992 Cable Acts provided an independent basis for the FCC’s authority to adopt eeo rules and that this authority was intended both to foster diversity of programming and deter racial and gender discrimination.⁴³

The State Broadcasters sought review of the FCC’s order revising the rules. The court found the State Broadcasters’ claim that the eeo rules relied on the goal of promoting programming diversity that was questioned in *Lutheran Church* was “beside the point” because the Commission had made clear “that its primary and assertedly sufficient goal in issuing the EEO rule was to prevent invidious discrimination.”⁴⁴ Nonetheless, the court found that the FCC’s revised eeo rules were unconstitutional.⁴⁵

The FCC’s revised rules allowed broadcast stations to choose between two different options. Option A set forth a menu of requirements virtually identical to the rules ultimately adopted by the Commission in 2002. Option B, which was intended to give greater flexibility to small broadcasters, allowed a station to design its own eeo program subject to certain reporting

⁴¹ *Review of the Commission’s Broadcast and Cable Equal Opportunity Rules and Policies*, MM Docket 98-204, NPRM, 13 FCC Rcd 23,004, ¶41 (1998).

⁴² *Id.* at ¶45.

⁴³ *Review of the Commission’s Broadcast and Cable Equal Opportunity Rules and Policies*, MM Docket 98-204, R&O, 15 FCC Rcd 2329, ¶40 (2000).

⁴⁴ *State Broadcasters*, 236 F.3d at 18. The court also upheld the FCC’s rules against the State Broadcasters’ argument that they created arbitrary and capricious regulatory burdens. *Id.*

⁴⁵ *Id.* at 22.

requirements, including the requirement that the station report the race and sex of each job applicant.

The court found that Option B's requirement to report the race and gender of job applicants coupled with the Commission's promise to investigate any licensee that reports few or no applications from minorities and women created pressure to recruit minorities and women and thus, subjected Option B to strict scrutiny.⁴⁶ The court concluded that Option B could not survive strict scrutiny because even if it were to accept the government's claim that it had a compelling interest in remedying the effects of past discrimination and preventing future discrimination, Option B was not narrowly tailored to serve that interest.⁴⁷ The court declined to sever the two options, and thus remanded the entire rule back to the FCC.⁴⁸

On remand from *State Broadcasters*, the FCC readopted Option A with some modification. It also addressed at length how Congress had given it the authority to regulate the eeo practices of broadcast licensees.⁴⁹ In light of this statutory authority, the Commission found it unnecessary to rely upon or even discuss the nexus between employment and program diversity.⁵⁰ Thus, the rationale for the FCC's new eeo rules has shifted from promoting diverse viewpoints to preventing discrimination.⁵¹

III. ASSESSING THE EFFECTIVENESS OF THE NEW EEO RULES

To assess whether the FCC's new eeo rules in fact serves the goals of preventing discrimination and promoting diversity, one can examine the audits of stations' eeo practices,

⁴⁶ Id. at 19-20.

⁴⁷ Id. at 21-22.

⁴⁸ Id. at 22-23.

⁴⁹ 2d R&O, 17 FCC Rcd 24,018, ¶¶18-44.

⁵⁰ Id. at ¶45.

⁵¹ See also id. at ¶52-70 (explaining how rules designed to prevent discrimination, noting the difficulty in quantifying actual discrimination and assessing evidence that minorities and women still facing difficulties in obtaining broadcast employment.)

employment statistics, and studies of the extent to which minorities and women appear on the air.

A. Audits

The FCC initiated the first audits in May 2004, more than one year after the new eeo rules took effect. It sent additional audit letters in October 2004, March 2005, June 2005, October 2005 and January 2006. All told, audit letters have been sent to some 550 radio stations, 70 television stations, and 70 cable operators. The audit letters request copies of the stations two most recent eeo public file reports and inquire whether the station has a website and if the public file report is included on the website. The letters also request submission of documents that the FCC's rules require stations to retain but not routinely submit to the FCC. These documents include dated copies of advertisements, letters, emails and other job announcements as well as the number of interviewees for each full time vacancy and the referral source for each. The audit letters also request documentation demonstrating performance of the requisite number of outreach initiations, a description of any pending or resolved complaints alleging unlawful discrimination, and other information.⁵²

According to the FCC official responsible for conducting the audits, the majority of stations are in compliance with the rules.⁵³ Most stations are doing the minimum required, and some appear to be making outstanding efforts.⁵⁴ A number of stations have had minor problems, such as not understanding what they are supposed to do, providing nonresponsive information, or misinterpreting the FCC rules. A common violation is the failure to post the public file report on

⁵² See, e.g., Jan. 30, 2006 Audit Letter, available at www.fcc.gov/mb/policy/eeo/www.fcc.gov.

⁵³ Telephone interview with Lewis C. Pulley, Assistant Chief, Policy Division, Media Bureau, Apr. 7, 2006.

⁵⁴ *Id.* He point out that this judgment is based on the paper alone because the FCC does not actually visit the stations.

the station's website. With respect to stations that do have violations, the FCC official observed no particular pattern with regard to the type of violation, the size of the station, the market size, or station ownership type (chain v. standalone).

When the FCC completes an audit, it will typically do one of three things. First, if it finds no significant problems, it will send a form letter to the station to that effect. Second, if it finds that the station has minor problems, it will send a letter to the station asking it to correct the problem.⁵⁵ Third, if it finds that the station has violated the eeo rules, it will send a letter of admonishment or fine the station. To date, only three stations have been assessed fines for eeo rule violations, although more fines may be forthcoming.⁵⁶

An independent analysis of the audit data obtained by the FCC found that 295 of 350 radio and television outlets audited (84%) passed the audit.⁵⁷ For most of the others, there was insufficient data in the file to determine the status of the audit. The study found that outlets averaged about six vacancies per year. Further, on average, the outlets utilized over twenty recruitment sources per year and approximately 12-13 percent of these were minority-targeted. In terms of outreach activities, 15-16 percent were found to be minority-targeted. The

⁵⁵ These letters are available to the public but only by going to the Commission in person, not online.

⁵⁶ See *Viper Communications*, DA 05-3273, rel. Dec. 22, 2005 (assessing fine of \$8,000 against am/fm combination for failure to engage in a single outreach initiative and for failure to self-assess); *Applications for Renewal of License for Stations KDAY(FM), Redondo Beach, CA, et al.*, DA 05-2341, rel. Dec. 20, 2005 (fining 4 commonly-owned FM stations \$20,000 for failure to recruit for every vacancy and to self-assess); *Emmis Television License, LLC*, DA 05-2345, rel. Aug. 26, 2005 (licensee of two Honolulu television stations fined \$18,000 for failure to recruit for 11 of its 51 vacancies and to keep records required by rules).

⁵⁷ Napoli, P.M. & Shiffman, A. (forthcoming). An analysis of the FCC's EEO audits. Working Paper, Donald McGannon Communication Research Center, Fordham University. (2006). Researchers from the Minority Media and Telecommunications Council were given access to the FCC's audit filed in summer 2005. They analyzed the information in the files using a coding sheet developed by the Donald McGannon Communication Research Center at Fordham University. Of the 350 stations audited, 286 were radio stations and 43 were television stations.

researchers also examined the copies of job announcements and found that 64-67% encouraged female/minority applicants or highlighted the outlet's eeo status. The study found no significant differences in performance between radio and television outlets.

B. Employment Statistics

The trend reports prepared by the FCC covering the years 1972 to 1997 show a steady increase in the percentage of both women and minorities employed by broadcast stations. For example, the percentage of women employed in all job categories increased from 23% to 41%, while the percentage of minorities increased from 10.6% to 20.2%. Impressive as these gains are, however, the percentage of women and minorities consistently remained below the percentage of women and minorities in the national labor force. For example, in 1997, the last year for which data is available, women constituted 46.3% of the national labor force compared to 41% of broadcast employees, while minorities made up 26.0% of the national labor force compared to 20.2% of the broadcast labor force.⁵⁸

Looking solely at the top job category, official and managers, women and minorities also increased consistently over time. Specifically, the percentage of women officials and managers increased from 8.9% in 1971 to 35.6% in 1997, while the percentage of minorities increased during the same time from 4.6% to 14.2%. Despite these increases, the percentage of women and minorities in this category is both smaller than their overall percentage in the broadcast industry and in the national labor force.

For the reasons described above, the FCC has not collected the data needed to create trend reports since 1997. Thus, there is simply no comparable data for assessing the impact of

⁵⁸ The FCC's trend reports for the cable industry also show an increase in the percentage of women (from 28.4% in 1975 to 40.4% in 1999) and minorities (from 8.6% in 1975 to 32.7% in 1999).

the new eeo rules on minority and female employment in broadcasting. Some private organizations, however, do collect some employment data.

The Radio and Television News Directors Association (RTNDA) conducts annual surveys of minorities and women working in television and radio news. Its most recent report, *Running in Place*, found that the percentage of minorities working in television decreased from 21.8% in 2004 to 21.2% in 2005 and the percent working in radio decreased from 11.8% in 2004 to only 7.9% in 2005.⁵⁹ The report notes that “minority numbers in radio news have generally slid since the stringent Equal Employment Opportunity rules were eliminated in 1998.”⁶⁰ Looking at the decline over the past decade, the report found that the percentage of minorities in radio news declined from 14.7% in 1995 to 7.9% in 2005, even though the minority population increased from 27.9% to 33.2% during the same period. Most troubling, the 2005 Report found that “African Americans all but disappeared” from the radio news workforce, accounting for only 0.7% of the 7.9% minority workforce.⁶¹

RTNDA’s surveys show that the percentage of women working in television news has remained flat for the past few years (39.3% in both 2003 and 2005) while the percentage of women news directors decreased from 26.5% in 2003 to 21.3% in 2005.⁶² In radio news, which employs a much smaller percentage of women as compared to television, the percentage overall

⁵⁹ RTNDA’s three most recent surveys are available on its website. Bob Papper, *Running in Place: Minorities and women in television see little change, while minorities fare worse in radio*, Communicator, July/August 2005; Bob Papper, *Recovering Lost Ground: Minorities gain ground and women make management strides in radio and TV newsrooms in 2004*, Communicator, July/August 2004; Bob Papper, *Women & Minorities, One Step Forward and Two Steps Back*, Communicator, July/August 2003. These studies present statistics according to a wide range of variables including whether a station is affiliated with a network, the size of its market, and the size of its staff.

⁶⁰ Communicator, July/August 2005, at 26.

⁶¹ Id. at 27.

⁶² Id. at 28.

increased from 24.0% in 2003 to 27.5% in 2005, and the percentage of women news directors increased from 14.4% in 2003 to 24.7% in 2005.⁶³

Another private organization that collects employment statistics is the National Association of Minorities in Communications (NAMIC). NAMIC conducted its first survey of minority employment in cable in 1999.⁶⁴ This survey found that while the total percentage of minorities employed in the cable industry was equal to their representation in the general population, and even exceeded minority representation in the total workforce, minorities remained “severely underrepresented in the executive suite.”⁶⁵ Specifically, it found that in the twelve non-ethnic-specific companies that responded to the survey, which accounted for 52.5% of the cable workforce, only 12 minorities (5%) held key management position, that is, Senior Vice President to CEO. Minorities constituted approximately 13% of cable middle management positions, that is, from the level of Director to Corporate Vice President.

NAMIC also surveyed its members. Thirty-seven percent “could cite a social/business disadvantage or systematic exclusion faced by ethnic or racial minorities at their company.”⁶⁶ Moreover, 21% of minorities and 22% of women perceived that their race or gender had a negative impact on opportunities at their companies. In its 2002 survey, NAMIC found that a smaller percentage of minorities (17%) and women (15%) perceived that their respective personal attributes had a negative effect on opportunities at their companies.⁶⁷ At the same time,

⁶³ Compare *One Step Forward and Two Steps Back*, Communicator, July/August 2003, at 22, with *Running in Place*, Communicator, July/August 2005, at 28.

⁶⁴ A Look Towards Advancement: Minority Employment in Cable, Aug. 1999, available at www.namic.com/initiatives/research.

⁶⁵ Id. at 3.

⁶⁶ Id. at 4. Examples cited included not being able to fit into the “good ole boy” network, lack of inclusion in “after hours” planned events, and the lack of mentors.

⁶⁷ Id. at 6.

survey responses indicated that many members had concerns about their companies' commitment to diversity.

NAMIC's 2002 survey found that while "Blacks/African Americans have shown strong gains in entering executive positions, . . . minorities overall continue to be underrepresented in the executive suites of the cable industry."⁶⁸ Specifically, it found that in the thirteen not ethnic-specific companies responding to the survey, which accounted for 72% of the cable workforce, there were 24 minorities (7%) in the key management position, an increase of 2 percentage points since 1999. However, NAMIC's 2004 survey found that the number of African-Americans in top management positions fell from 6 in 2002 to 3 in 2004. Further, African-Americans, Asians and Hispanics all suffered losses in the middle-management ranks.⁶⁹

C. Minority Representation On-Screen and On-the-Air

Several studies show that minorities and women continue to be underrepresented in front of the cameras and on the air. For example, the National Urban League Policy Institute analyzed five Sunday morning political talk shows during the eighteen month period between January 1, 2004 and June 30, 2005.⁷⁰ It focused on these programs because

Sunday morning talk shows frame the perception and coverage of issues that have a substantial impact on the American public. Yet these programs consistently lack any African American participation in the discussion of these issues – from the war in Iraq to the economy to electoral politics to Social Security to judicial nominations – leaving the impression that interest in and analysis of these topics is “for whites only.”⁷¹

⁶⁸ A Look Towards Advancement: Minority Employment in Cable II (Sept. 2002).

⁶⁹ R. Thomas Umstead, Study: Cable Trails Other Industries in Diversity, *Multichannel News*, Sept. 20, 2004. [This study was not available on the NAMIC website]

⁷⁰ Stephanie J. Jones, *Sunday Morning Apartheid* (Aug. 2005).

⁷¹ *Id.* at 1-2.

The study found, among other things, that more than 60% of the programs had no black guests, that fewer than 8% of the guests were black, and that three individuals--Condoleezza Rice, Colin Powell, and Juan Williams--accounted for 69% of the appearances by black guests.⁷²

A Report prepared for the National Association of Hispanic Journalists (NAHJ) found that “Latinos remain underrepresented and often stereotypically portrayed by news networks.”⁷³ This study examined news stories that were aired on the ABC, CBS and NBC network evening newscasts as well as on CNN’s NewsNight with Aaron Brown. Among other things, it found that of the estimated 16,000 stories that aired on these channels in 2004, only 115 (0.72%) were exclusively about Latinos, a decrease from 2003, when networks aired 131 (0.82%) Latino-related stories. One third of these stories were about immigration. Only six of these stories featured Latino reporters. Moreover, Latinos appeared as sources in only about 1.7% of non-Latino-related stories.

Women too remain underrepresented as sources for journalists, according to a 2005 study by the Project for Excellence in Journalism (PEJ).⁷⁴ This study examined sixteen newspapers, four nightly newscasts, three network morning shows, nine cable news programs and nine web sites. Overall, it found that 76% of the stories examined contained at least one male source, and only 33% contained a female source.⁷⁵ When each type of media was examined separately, women fared the worst on cable, where of approximately 6,550 stories examined on CNN, Fox,

⁷² Id. at 1. FAIR also looked at the participation of women on four Sunday morning talkshows over a six month period (September 2004 to February 2005). It found that women made up 49% of the participants on NBC’s Chris Matthews Show, 22% on ABC’s This Week, 25% on Fox News Sunday and 39% on Meet the Press. Only two non-white women, Gwen Ifill and Donna Brazile, appeared in the six months studied. *Women’s Opinions also Missing on Television*, Mar. 24, 2005.

⁷³ Frederico Subervi, Network Brownout Report 2005: The Portrayal of Latinos & Latino Issues on Network Television News, 2004 With a Retrospective to 1995 (June 2005).

⁷⁴ The Gender Gap: Women are Still Missing as Sources for Journalists (May 23, 2005).

⁷⁵ Id. at 4.

and MSNBC, only 19% cited a female source.⁷⁶ Among the network evening news programs, women, somewhat surprisingly, fared the worst on PBS's NewsHour, where just 17% of the stories cited at least one female source.

Public radio too has not fared well in presenting minority and women's viewpoints. Fairness and Accuracy in Media (FAIR) did a study that involved recording and classifying every on-air source quoted in June 2003 on National Public Radio's news programs. It found that women were "dramatically underrepresented," accounting for 21 percent of all sources and 15 percent of experts.⁷⁷ In looking at NPR regular commentators over a four month period in 2003, FAIR found that 24% of regular commentators were women and that 19% were minority. Another FAIR study of public radio stations in seven urban markets conducted in 2002 found that while the population reached by these stations averaged 19% African-American and 25% Latino, only 7% of daytime hosts and anchors were African-American and a mere 1% were Latino.⁷⁸

D. Implications of these Studies

These audits, surveys and studies help to assess the FCC's new eeo rules on several levels. The first level is whether broadcast stations are complying with the FCC's new rules. The audits conducted by the FCC, as well as the independent review of this data, suggest that most stations are complying with the FCC's rules.

The second level is whether compliance with the rules is achieving the stated purpose of preventing both intentional and unintentional discrimination. The requirement that stations

⁷⁶ Id. at 7.

⁷⁷ Steve Rendall & Daniel Butterworth, *How Public is Public Radio? A study of NPR's guest list*, Extra, June 2004.

⁷⁸ Will Creeley and Steve Rendall, *White Noise: Voices of color scarce on urban public radio*, Extra, Sept/Oct. 2002.

recruit for every vacancy and engage in broad outreach is intended to expand the applicant pool to include more minorities and women and counteract the discriminatory effects of “word-of-mouth” recruitment.⁷⁹ However, there is no way to know whether these requirements in fact expand the pool in this manner, since the FCC rules do not require collection of such data. Indeed, as discussed above, the D.C. Circuit found in *State Broadcasters* that requiring stations to keep such data was unconstitutional.

The scant evidence that exists regarding discrimination, however, is not encouraging. As described above, the independent study of the FCC audit found that only 12-13 percent of recruitment sources and 15-16 percent of outreach activities were minority targeted. Since these percentages are well below the percentage of minorities in the labor force, it does not appear that stations are making very extensive efforts to specifically reach out to minorities. Moreover, given that it requires little effort to include in vacancy announcements a sentence encouraging women and minorities to apply or mentioning that the station is an equal opportunity employer, the fact that approximately one-third of stations failed to do so suggests that some stations are not trying very hard to broaden their outreach to include minorities and women.

The surveys conducted by RTNDA and NAMIC strongly suggest that minorities and women continue to be underrepresented, particularly in higher level positions, are not making gains as they did in the past, and in some cases, are even losing ground. While non-discriminatory employment practices will not necessarily result in proportional representation, it seems reasonable to expect that, over time, non-discriminatory hiring and promotion will result in participation by minorities and women in rough proportion to their presence in the workforce in all job categories.

⁷⁹ 2d R&O, 17 FCC Rcd 24,018, ¶¶56-59.

The third level is whether the eeo rules increase the diversity of viewpoint on the air. Although as discussed above, the Commission de-emphasized this goal in adopting the new eeo rules, I believe that diversity in programming remains an important goal. To achieve viewpoint diversity, it is not enough that stations simply refrain from discriminating against minorities and women in recruiting. For minorities and women to present their views, they need to appear on the air and to hold positions in which they decide or influence what news stories are covered, which guests are invited to talk shows, what topics are covered, and what programming is produced, purchased and aired. Moreover, for minority and women viewers to feel like they are valued members of the society, they need to see people who look like them on the air and they need to see stories that address issues relevant to their lives. Unfortunately, the studies by the Urban League, NAHJ, PEJ, and FAIR demonstrate that minorities and women continue to be significantly underrepresented in news and talk programs, whether as guests, sources or topics of stories.

IV. SUGGESTIONS FOR INCREASING OPPORTUNITIES FOR MINORITIES AND WOMEN

There are three main options for increasing opportunities for minorities and women in the media. One is for industry to voluntarily increase its efforts to recruit and retain minorities and women. Another is for the FCC to revise its rules. The third is for Congress to mandate new and improved eeo requirements. Given the current political atmosphere, none of the options seems to hold much promise at this time.

A. Efforts by Industry

Voluntary efforts by companies are important and should be encouraged. Clearly, some companies and some industries do a better job than others in hiring, training and promoting minorities and women. For companies that want to do more, the FCC's Federal Advisory

Committee on Diversity has produced several useful tools. In December 2004, it issued a report, *Diversity: Best of the Best Practices*, which argues that diversity is good for business and offers concrete suggestions.⁸⁰ The Advisory Commission also created a web resource directory intended to assist companies with their diversity efforts.⁸¹

At the same time, such efforts will only go so far. The state broadcaster associations have fought so long and hard against the FCC's eeo rules that it is hard to imagine that many of their members will voluntarily do more than the bare minimum required by the FCC eeo rules. And in general, self-regulation is most effective when there is a credible threat of further government regulation, a condition that does not currently exist, as explained below.

B. Actions by the FCC

There are several things that the FCC could do that would be helpful. Perhaps most importantly, the FCC should finally implement the requirement that broadcast stations and cable operators file annual employment reports (Form 395). These reports would provide more comprehensive, accurate and comparable data for assessing the progress of minorities and women.

In addition, the FCC should act on the petitions for reconsideration of its 2d R&O. It should also complete the further rulemaking proceeding it began in November 2002 to consider whether to apply the eeo rules to vacancies for part-time as well as full-time employees.⁸² As NOW explains in its comments, application of the eeo rules to part-time positions would further the Commission's goal of broad and inclusive outreach because part-time positions comprise a

⁸⁰ Available at <http://www.fcc.gov/DiversityFAC/adopted.html>.

⁸¹ The address for the web resource directory is <http://www.fcc.gov/DiversityFAC/directory.html>.

⁸² 17 FCC Rcd 24,018, ¶182.

significant portion of broadcast positions and provide a crucial gateway for entry into the broadcast industry.⁸³

Another useful action by the FCC would be to implement the recommendations of the Advisory Committee on Diversity. In December 2004, the Committee recommended that the FCC take several actions, including amending the current EEO rules to require larger employers to undertake greater efforts to promote opportunities for career advancement. However, the FCC has failed to take any action on this recommendation. Indeed, the Diversity Committee has not even held any meetings since December 2004.

Unfortunately, the current Chairman of the FCC, Kevin Martin, who controls the agency's agenda, has not shown any inclination to act on any of these pending matters or indeed, any particular interest in or support for the Commission's eeo rules. Moreover, none of the four current members of the Commission is a minority; neither is the nominee for the fifth slot. This lack of minority representation presents a stark departure from past practice. From 1972, with the appointment of Commissioner Ben Hooks, to March 2005, with the departure of Chairman Michael Powell, the Commission has, with the exception of a few brief periods, had at least one Commissioner who was a member of a minority group.

Even if the FCC were inclined to expand its eeo policies, the State Broadcasters would likely challenge any revised rules in court.⁸⁴ The prospect of a court challenge, especially given its poor track record to date in the D.C. Circuit, likely has a chilling effect on the FCC's actions.

Another limitation on the FCC's ability to prevent discrimination and promote diversity is that its jurisdiction does not extend to many important segments of the communications

⁸³ Comments of National Organization for Women *et al.*, MB Docket No. 98-204 (filed Jan. 16, 2003).

⁸⁴ In fact, it is possible that even the current eeo rules could still be challenged in court after the FCC acts on the pending petitions for reconsideration.

industry that produce programs or decide what programming to air. Its eeo rules only apply to television and radio station licensees, cable system operators, such as Comcast, direct broadcast satellite service providers, such as DirecTV, and certain other multichannel video program providers.⁸⁵ The eeo rules do not apply to television networks, such as ABC, CBS, NBC, and Fox, or to radio networks, except to the extent that the networks are also licensees of local stations, in which case the eeo rules apply to those stations. Thus, those parts of the major broadcast networks responsible for producing the evening and morning news programs, as well as entertainment and sports programming, are not subject to the FCC's eeo rules. Similarly, the eeo rules do not apply to cable channels such as CNN, Fox News and MS/NBC. Nor do they apply to studios and other companies that may produce programming and provide it to broadcast stations or cable systems, or to companies, such as Yahoo, that operate news-oriented web sites.

C. Actions by Congress

In the past, Congress has passed several bills that have supported or expanded upon the FCC's efforts to promote eeo in the communications industries. Congress has an advantage over the FCC in that it has broad jurisdiction over interstate commerce. However, as a practical matter, the current Congress seems unlikely to pass new laws aimed at expanding equal opportunities for minorities and women.

Even if Congress were to act, it too would be subject to constitutional challenge. Any statute utilizing "race based" criteria would be subject to the highest level of constitutional scrutiny. Conceivably, properly drafted legislation designed to promote greater coverage of minorities and minority-related issues by increasing minority employment could be justified

⁸⁵ See 47 CFR §76.71(a)(2005).

under the reasoning used by the Supreme Court in *Grutter v. Bollinger*.⁸⁶ There, in a 5 to 4 decision written by Justice O'Connor, the Court found that the University of Michigan's Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body did not violate equal protection. The Court deferred to the Law School's determination that enrolling a "critical mass" of minority students would in fact yield educational benefits. The benefits identified by the Court included the promoting of "cross-racial understanding," helping to break down racial stereotypes, enabling students to better understand persons of different races, and teaching "skills needed in today's increasingly global marketplace . . . through exposure to widely diverse peoples, cultures, ideas and viewpoints."⁸⁷

I believe that with proper empirical support, Congress could, if it were so inclined, make a convincing case that the media, especially the news media, serve an educational function that is just as important to American society as institutions of higher learning. Having a critical mass of minority journalists and executives would help to promote cross-racial understanding, break down stereotypes, and ensure that listeners and viewers have the information and understanding of diverse cultures to meaningfully participate in democratic decision making regarding the complex issues faced by our country and to participate in global economy. Whether the current Supreme Court, now that Justice O'Connor has been replaced, would see it this way, of course, is an open question.⁸⁸

⁸⁶ 539 U.S. 306 (2003)

⁸⁷ *Id.* at 330.

⁸⁸ Even if Justice O'Connor had remained on the Court, the outcome would still be far from clear. In its 1990 decision in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567-68 (1990) upholding race-based preferences in the award of broadcast licenses, the Supreme Court found that promoting broadcast diversity was at least an important governmental interest. Justice O'Connor dissented. She found that the asserted interest in diversity was too "amorphous" and

V. CONCLUSION

The FCC's trend data shows that minorities and women made consistent gains in employment at broadcast stations and cable systems from the time the FCC's eeo rules were adopted until the D.C. Circuit found the rules unconstitutional in 1998. Although new eeo rules went into effect in 2003, the new rules are intended to promote recruitment outreach generally without regard to race or gender. It is difficult to evaluate the impact of the new rules on minority and female employment because the FCC suspended the collection of employment statistics in 1998 and has never reinstated collection of this information. Studies by various private organizations, however, suggest that the prior gains made by minorities and women have leveled off or even been reversed. While industry, the FCC and the Congress each has some ability to increase opportunities for minorities and women, given the current legal and political situation, it seems unlikely that they will take significant actions in the near future.

of insufficient weight. *Id.* at 614-16. Moreover, she questioned any correlation between race and diversity, suggesting that this idea was based on stereotyping. *Id.* at 619-20. It is hard to reconcile Justice O'Connor's dissent in *Metro Broadcasting* with her subsequent decision for the Court in *Grutter*. One explanation may be that the Law School was able to marshal more research to support the benefits of racial diversity than the FCC did in *Metro Broadcasting*.