



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

June 22, 2007

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

DA 07-2733

Earl Monk
Director, Human Resources
RCN Corporation
28 West 23rd Street
New York, NY 10010

Re: Employment Unit # 11833

Dear Mr. Monk:

The Media Bureau (the “Bureau”) has completed its random audit of the above-referenced employment unit (the “Unit”), operated by RCN Corporation (“RCN”), a multichannel video programming distributor (“MVPD”). The Bureau audited the Unit for its compliance with the Commission’s MVPD equal employment opportunity (“EEO”) rules, specifically Sections 76.71 through 76.79, and 76.1702 of the Commission’s Rules (the “Rules”).¹ The audit focused primarily on the information contained in the Unit’s EEO public file report filed for the twelve-month period ending on July 14, 2004, along with underlying documentation.

After the Bureau had reviewed the Unit’s audit response, which RCN submitted by letter from its Director of Human Resources (“HR”),² on February 17, 2006, the Bureau requested additional information from RCN concerning the Unit.³ The Bureau received RCN’s response on May 9, 2006. By that response, along with supplementary responses, RCN also provided answers to further Commission inquiries about the next years’ EEO public file reports prepared by the Unit for the twelve-month periods ending on July 14, 2005 and July 14, 2006.⁴ The Bureau made inquiries to request clarification of information submitted in the Unit’s audit response, and as part of its annual certification investigations of the Unit for the years 2004, 2005, and 2006.

¹ 47 C.F.R. §§ 76.71 – 76.79, 76.1702. See March 7, 2005 letter to RCN from Lewis Pulley, Assistant Chief, Policy Division, Media Bureau, FCC.

² See May 4, 2005 letter to Lewis Pulley, Assistant Chief, Policy Division, Media Bureau, FCC, from Stacy E. Murray, HR Assistant, RCN.

³ See February 17, 2006 letter to Director of HR, RCN, from Lewis Pulley, Assistant Chief, Policy Division, Media Bureau, FCC.

⁴ See May 5, 2006 facsimile to Lewis Pulley, Assistant Chief, Policy Division, Media Bureau, FCC, from Earl Monk, Director of HR, RCN; October 13, 2006 email from Stacy E. Murray, HR Assistant, RCN, to EEO Staff, Media Bureau, FCC; October 31, 2006 email from Stacy E. Murray, HR Assistant, RCN, to EEO Staff, Media Bureau, FCC; December 14, 2006 letter to Lewis Pulley, Assistant Chief, Policy Division, Media Bureau, FCC, from Ken Conrad, Vice President, HR, RCN; December 18, 2006 emails from Ken Conrad, Vice President, HR, RCN, to EEO Staff, Media Bureau, FCC; February 27, 2007 facsimile from Ken Conrad, Vice President, HR, RCN, to EEO Staff, Media Bureau, FCC; April 9, 2007 email from Ken Conrad, Vice President, HR, RCN, to EEO Staff, Media Bureau.

Section 76.75(b)(1) of the Rules requires that an MVPD employment unit recruit for every full-time job vacancy in its operation.⁵ Section 76.75(b)(2) requires that such a unit engage in EEO initiatives during each twelve-month period preceding the filing of the unit's EEO program annual report.⁶ By Section 76.75(f), a unit must analyze its recruitment program on an ongoing basis to ensure that it is effective in achieving broad outreach, and address any problems found as a result of its analysis.⁷ Section 76.1702(b) requires a unit to place certain EEO program information on its website, if it has one, at the time that it files its FCC Form 396-C MVPD EEO Program Annual Report with the Commission.⁸

Pursuant to Section 76.77(b), the Commission must determine, based on information submitted in a unit's EEO program annual report, whether the unit is in compliance with the Commission's EEO rules. If the unit is found to be in compliance, the Commission is required to send a Certificate of Compliance to the unit; if it is found to not be in compliance, the Commission must notify the unit that it is not so certified for the year in question.⁹ The Commission has now concluded its compliance reviews of the Unit for 2004, 2005, and 2006.

In its responses to the Bureau's inquiries noted above and in its 2006 Form 396-C, RCN stated that, during the three annual reporting periods at issue (July 15, 2003, through July 14, 2004; July 15, 2004, through July 14, 2005; and July 15, 2005 through July 14, 2006), it failed to engage in any EEO initiatives, even though it had indicated in its 2004 and 2005 Forms 396-C that it had complied with Section 76.75(b) of the Rules, which requires such initiatives. RCN explained that its HR Director had left the company in September 2004 and its new HR Director could not find any documentation concerning recruitment initiatives.¹⁰ RCN also explained that it was not able to create initiatives due to insufficient HR personnel.¹¹ However, in a meeting with Bureau staff on November 13, 2006, RCN represented that it had, in fact, engaged in the requisite EEO initiatives. Subsequently, RCN filed an amended 2006 Form 396-C and revised its July 15, 2003 - July 14, 2004 and July 15, 2004 - July 14, 2005 annual reports to reflect that it had established training programs for the Unit's personnel and provided EEO training to management as its EEO initiatives.¹²

Bureau staff discovered, by searching RCN's website, that RCN had failed to place its EEO program information for the Unit on its website for 2004 and 2005, although this is required by Section 76.1702(b) of the Rules. RCN explained this omission by stating that its staff did not understand the web posting requirement at the time.¹³

⁵ See 47 C.F.R. § 76.75(b)(1).

⁶ See 47 C.F.R. § 76.75(b)(2).

⁷ See 47 C.F.R. § 76.75(f).

⁸ See 47 C.F.R. § 76.1702(b).

⁹ See 47 C.F.R. § 76.77(b).

¹⁰ See May 5, 2006 facsimile to Lewis Pulley, Assistant Chief, Policy Division, Media Bureau, FCC, from Earl Monk, Director of HR, RCN.

¹¹ See FCC File No. B396-20060927ABP, Section III and October 18, 2006 telephone call between Stacy E. Murray, HR Assistant, RCN and EEO Staff, Media Bureau, FCC.

¹² See FCC File No. B396-20061215AAR.

¹³ See December 14, 2006 letter to Lewis Pulley, Assistant Chief, Policy Division, Media Bureau, FCC, from Ken Conrad, Vice President, HR, RCN.

In addition, the annual report of the Unit for the July 15, 2005 - July 14, 2006 reporting period shows that RCN failed to recruit properly for five of its 34 vacancies, as required by Section 76.75(b)(1) of the Rules, because it relied solely on its website, employee referral program, and internal job database to fill those vacancies.¹⁴ The Commission has established that, although it does not require a specific number of recruitment sources, if a source or sources cannot reasonably be expected, collectively, to reach the entire community, the licensee may be found in noncompliance with the Commission's EEO Rule, as here.¹⁵ The Commission's policy allows recruitment from as few as one source, but the effort must be sufficiently broad.¹⁶ Although employee referrals may reflect the source of an interviewee or hiree, an MVPD's sole reliance on its own employees or its own private contacts does not constitute recruitment as contemplated under the Rules, which require public outreach.¹⁷ Further, the Commission's EEO policy requires a licensee to recruit from non-Internet sources, in addition to any sources from the Internet, in order for its recruitment to sufficiently widely disseminate information concerning the vacancy.¹⁸

Finally, although Section 76.75(f) of the Rules requires units to assess their EEO programs and correct any deficiencies, for 24 months, RCN failed to put its most recent EEO public file report for the Unit on its website, and failed to report that it had actually completed required initiatives for its reporting periods in 2004, 2005, and 2006.¹⁹

We conclude that RCN willfully and repeatedly violated the Commission's EEO rules as discussed above. During its 2006 reporting period, the Unit failed to recruit properly for five of its 34 vacancies, in violation of Section 76.75(b)(1) of the Rules, because it relied solely on its website, employee referral program, and internal job database to fill those vacancies.²⁰ Further, we conclude that RCN failed to place the Unit's EEO program information on its website, in violation of Section 76.1702(b).²¹ The 2004 report was required to be placed on its website no later than September 30, 2004, and the 2005 report no later than September 30, 2005, but the reports were never placed on the website. Finally, because of the Unit's failure to recruit properly for all of its vacancies and to place its EEO reports on its website, we find that RCN did not adequately analyze its recruitment program on an ongoing basis to ensure that it was effective in achieving broad outreach, in violation of Section 76.75(f).²²

Under Section 503(b)(1) of the Communications Act of 1934, as amended (the "Act"), any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision

¹⁴ See 47 C.F.R. § 76.75(b)(1).

¹⁵ See 47 C.F.R. § 73.2080(c)(1)(i). See also, *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, MM Docket No. 98-204, Second Report and Order and Third Notice of Proposed Rulemaking, 17 FCC Rcd 24018, 24047, ¶86 (2002), recon. pending.

¹⁶ *Id.*

¹⁷ *New Northwest Broadcasters LLC*, Memorandum Opinion and Order and Notice of Apparent Liability, 21 FCC Rcd 10748, 10749 (2006) (forfeiture paid).

¹⁸ See 17 FCC Rcd at 24051, ¶99, wherein the Commission said, "...we are unable to conclude that Internet usage has become sufficiently widespread to justify allowing it to be used as the sole recruitment source."

¹⁹ See 47 C.F.R. § 76.75(f).

²⁰ See 47 C.F.R. § 76.75(b)(1).

²¹ See 47 C.F.R. § 76.1702(b).

²² See 47 C.F.R. § 76.75(f).

of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a monetary forfeiture penalty.²³ 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.²⁴ 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. We remind RCN that we expect it to take the steps necessary to ensure that its staff understands and complies with the requirements of the Commission's EEO rules and caution it that we will not hesitate to impose appropriate sanctions against it for any further violations.

Accordingly, we find that RCN Corporation is adjudged NOT CERTIFIED for compliance with our EEO rules for 2004, 2005 and 2006, in accordance with 47 C.F.R. § 76.77(b). Also, RCN Corporation is hereby ADMONISHED for its willful and repeated violation of our EEO rules, specifically Sections 76.75(b)(1), 76.75(f), and 76.1702(b) of the Rules.

Sincerely,

Monica Shah Desai
Chief, Media Bureau

cc: Mr. Ken Conrad

²³ See 47 U.S.C. § 312(f)(1). Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history accompanying Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act, and the Commission has so interpreted the term in the Section 503(b) context. See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982). See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) (“*Southern California Broadcasting Co.*”). “Repeated” merely means that the act was committed or omitted more than once, or lasts more than one day. See *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; see also *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (proposing forfeiture for, *inter alia*, a cable television operator’s violation of the signal leakage rules).

²⁴ See 47 U.S.C. § 503(b)(6)(B); see also *Globcom, Inc., d/b/a Globcom Global Communications*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 19893, 19903, ¶ 23 (2003) (citations omitted) (subsequent history omitted).