Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Joint Petition by 50 Named State Broadcasters Associations for Stay of New Broadcast EEO Rule	)	MM Docket Nos. 98-204 and 96-16
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MEMORANDUM OPINION AND ORDER

Adopted: April 7, 2000 **Released: April 7, 2000**

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

1. On March 16, 2000, 50 Named State Broadcasters Associations ("State Broadcasters") filed a joint petition for stay of the effectiveness of the Commission's new broadcast Equal Employment Opportunity ("EEO") Rule adopted in *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, Report and Order*, MM Docket Nos. 96-16, 98-204, FCC 00-20, 15 FCC Rcd 2329 (2000) (*Report and Order*). In *Report and Order*, the Commission adopted new EEO broadcast regulations and policies and amended its cable EEO rules and policies. In its joint petition, State Broadcasters request that the Commission stay the new broadcast EEO Rule until the United States Court of Appeals for the District of Columbia decides their appeal of the rule, filed with the court on March 15, 2000.

2. On March 23, 2000, the United Church of Christ and some 34 organizations representing the interests of minorities and women ("UCC") filed an opposition to the State Broadcasters' petition for stay.[1] In its opposition, UCC contends that State Broadcasters fail to meet the high burden required for the Commission to grant the extraordinary remedy of a stay pending judicial review. On March 29, 2000, the National Association of Broadcasters ("NAB") filed a reply to the UCC opposition. On March 31, 2000,

[1] The organizations include: NOW Foundation, NOW Legal Defense and Education Fund, Center for Media Foundation, Feminist Majority Foundation, Philadelphia Lesbian and Gay Task Force, Women's Institute for Freedom of the Press, Minority Media and Telecommunications Council, African American Media Incubator, Alliance for Community Media, Alliance for Public Technology, Black College Communications Association, Civil Rights Forum on Communications Policy, Cultural Environment Movement, Fairness and Accuracy in Reporting, League of United Latin American Citizens, Mexican American Legal Defense and Education Fund, Minority Business and Enterprise Legal Defense and Education Fund, National Asian American Telecommunications Association, National Asian Pacific American Legal Consortium, National Association of Black Owned Broadcasters, National Association of Black Telecommunications Professionals, National Association for the Advancement of Colored People, National Bar Association, National Council of La Raza, National Hispanic Media Coalition, National Latino Telecommunications Taskforce, National Urban League, People for the American Way, Project on Media Ownership, Puerto Rican Legal Defense and Education Fund, Rainbow/PUSH Coalition, Telecommunications Advocacy Project, Telecommunications Research and Action Center, and Women's Institute for Freedom of the Press.

UCC filed a motion to dismiss the NAB reply. As UCC notes in its motion, Section 1.45(d) of the Commission's rules clearly states that [r]eplies to oppositions [to a request for stay of any order] should not be filed and will not be considered." *See* 47 C.F.R. § 1.45(d). Accordingly, we grant UCC's motion and will not consider any arguments raised by NAB in its reply.

3. A petition for stay of a Commission action is analyzed under a four-part test which requires the stay proponent to demonstrate: (1) that it will suffer irreparable harm if a stay is not granted; (2) that it is likely to prevail on the merits; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors the grant of a stay. *See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). The State Broadcasters' petition meets none of these standards.

4. State Broadcasters address the four-part test for granting stays. They first contend that without a stay of the EEO Rule, broadcasters would be forced to expend substantial efforts and costs as well as face discrimination suits by rejected job applicants not of the race and gender favored by the rule. According to State Broadcasters, the "reputational damage" and other costs to broadcasters faced with discrimination lawsuits resulting from our rule would be irreparable. UCC contends in opposition that State Broadcasters do not provide any evidence of the extent of any harm broadcasters might endure under the new rule and that the petition does not attempt to quantify the "substantial costs" as alleged by State Broadcasters.

5. We find that the potential injury cited by State Broadcasters does not constitute irreparable injury. Contrary to the claims of State Broadcasters, our broadcast EEO Rule does not create a racial and gender based employment program or subject broadcasters to "reputational damage." Indeed, our rule does not require broadcasters to employ a staff that reflects the racial or other composition of the community or to use racial preferences in hiring, and expressly provides that broadcasters shall not grant favorable treatment based on race or gender. *See Report and Order* at 2382 (In order to "clarify the intent of our EEO Rule," we "include in our EEO Rule language clarifying that it is not intended to require that any person be given preferential treatment based on race, color, national origin, religion, or gender.") In *Lutheran Church – Missouri Synod v. FCC*,[2] the D.C. Circuit held that the Commission's broadcast EEO program requirements were unconstitutional because the court concluded that they pressured broadcasters to maintain a workforce reflecting the racial composition of their communities. Accordingly, the Commission removed all requirements that broadcasters and FCC staff compare a station's employment profile with the local minority and female labor force, and adopted new broadcast EEO regulations requiring broad outreach in recruitment to all persons regardless of race or gender "consistent with the court's decision in *Lutheran Church.*" *Report and Order* at 2419. State Broadcasters' claim to the contrary mischaracterizes the explicit purpose and mandate of our *Report and Order* and rules. Petitioner will suffer no irreparable injury by complying with these outreach and nondiscrimination requirements.

6. Second, State Broadcasters claim that they are likely to prevail on the merits because the EEO Rule violates the equal protection component of the Fifth Amendment; deterring discrimination is not a legally supportable rationale for the EEO outreach recruitment requirements; and the *Report and Order* is arbitrary and capricious.

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[2] 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh'g denied*, 154 F.3d 487, *pet. for reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) ("*Lutheran Church*").

7. State Broadcasters argue that the EEO Rule pressures stations to make race and gender based hiring decisions, and is therefore subject to strict scrutiny under the Equal Protection Clause, which they claim it cannot survive. They argue that the requirement under one of the alternative recruitment programs to maintain records of the race and gender of applicants, and to engage in "inclusive" recruitment under the other program, require stations to use race and gender in making decisions about whom to recruit and whom to hire. They also claim that because stations must publicly file annual employment reports showing the number of minority and female employees, submission of these race and gender based employment numbers will result in Commission audits and investigations or third party complaints. Consequently, they claim that a station's own required knowledge of gender and racial data, together with the threat of a complaint, audit or investigation, pressures broadcasters to recruit and hire based on race and gender.

8. State Broadcasters further argue that they will likely prevail on the merits since the Commission has not shown that the EEO Rule's outreach provisions are necessary to deter discrimination against minorities and women. They also argue that the *Report and Order* is arbitrary and capricious since, among other things, it institutes burdensome and expensive outreach programs, requires the filing of burdensome EEO forms, eliminates the former exemption for a written EEO program in markets where minorities in the local labor force are less than five percent, requires stations to place public file reports on their web sites when the purpose of a public file is to enable local listeners and viewers to obtain that data, and rejects without comment the use of an anonymous tear-off sheet system which removes the filer's identity for annual employment reports.

9. UCC disputes State Broadcasters' claim that the EEO Rule implicates strict scrutiny under the Equal Protection Clause of the Fifth Amendment, noting that courts have consistently held that recruitment measures designed to expand the applicant pool without favoring anyone are not subject to strict scrutiny.[3] Further, UCC contends that sufficient evidence exists to prove that broadcasters have been guilty of discrimination, and that restricting opportunities to certain members of the applicant pools is itself an act of discrimination. UCC further contends that requiring broadcasters to place their public files on web sites enables local community residents to conveniently monitor their local broadcaster's recruitment efforts. Finally, UCC argues that the additional EEO forms required by the *Report and Order* are minimal in nature and not burdensome at all.

10. State Broadcasters have failed to establish a likelihood of success on the merits warranting issuance of a stay. The recruitment obligation imposed by our rule requires outreach to all qualified persons. The courts have consistently held that recruitment measures that are designed to expand the applicant pool, and that do not favor anyone in the applicant pool, are race-neutral and are not subject to strict scrutiny. *See Report and Order*, n.353 at 2415. State Broadcasters cite no case holding that inclusive outreach requirements are subject to strict scrutiny, much less that they are unconstitutional. Nor do they provide a persuasive explanation of how our inclusive recruitment requirements will pressure broadcasters to make race or gender-based hiring decisions. There is simply no aspect of the inclusive

[3] UCC cites the following in support of its argument that racially neutral recruiting and hiring programs do not implicate the Equal Protection Clause: *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997) (affirmative efforts to recruit women did not constitute reverse discrimination or support a finding that employer's reasons for hiring a woman were pretexts); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994) (both voluntary and consent decree provisions requiring recruitment of Black and female employees viewed by court as race neutral measures); *Report and Order* n. 353 (*citing Raso v. Lago*, 135 F.3d 11 (1st Cir. 1998) (curtailment of statutory preference to reside in redeveloped housing granted to former residents of area, most of whom were White, in order to make some of apartments available to all applicants regardless of race, was not subject to strict scrutiny).

outreach requirements that will pressure stations to make race or gender-based hiring decisions, and the rules explicitly prohibit preferential treatment on the basis of race or gender. *See* 47 C.F. R. § 73.2080(c).

11. State Broadcasters' assertion that the requirement that broadcasters file annual employment reports will pressure them to make race-conscious hiring decisions is based on a mistaken assumption concerning the Commission's use of annual employment data. State Broadcasters erroneously claim that the Commission will use the race and gender based data to initiate station audits and investigations or consider third party complaints. However, as we clearly stated in the *Report and Order*, the reason for the Commission's collection of annual employment report data is to monitor industry employment trends and report to Congress, and not to screen renewal applications or assess compliance with our EEO requirements. *See Report and Order* at 2417-8 ("We also state in the clearest possible terms that we will *not* use the data to assess broadcasters' or cable entities' compliance with our EEO rules."). Therefore, contrary to petitioner's claim, broadcasters will not be pressured to adopt racial or gender hiring preferences because the Commission will not consider any complaint or initiate any investigation or audit based on such data. *See Report and Order* at 2418 (The Commission "will dismiss any such petition summarily" that is filed "against a broadcaster based on the Form 395-B employment profile data."). Suggestions by State Broadcasters that we will ignore our stated policies in administering the EEO program requirements are baseless.

12. Nor do we find merit in petitioner's claim that the EEO Rule requires burdensome outreach and paperwork requirements. The new EEO Rule requires broadcasters to file only two new EEO forms -- a one-time only filing of the Initial Election Statement and a Statement of Compliance filed every two years. Since the first filing is simply a one-page election and the latter a certification, the cost of compliance is minimal, and at any rate, cannot fairly be termed "burdensome." Under our former EEO Rule, all broadcasters with five or more full-time employees were required to maintain records of the recruitment source, gender, and race or ethnic status of every applicant and every interviewee for every position and of the person hired from each applicant pool. Our new rule does not require the collection of this extensive data.[4] Hence, far from being "arbitrary and capricious," the *Report and Order* provides relief from the most frequently cited burden of our former rule. The outreach and data collection requirements are not unduly burdensome and are carefully designed to achieve important regulatory objectives.

[4] Under the new rule, broadcasters have the choice of complying with two different recruitment options. Under both options, broadcasters must widely disseminate information concerning full-time job openings. In addition, under Option A, broadcasters provide notice of vacancies to qualifying organizations that request such notice and broadcasters engage in two (for employment units with five to ten full-time employees) or four (for larger employment units) longer-term recruitment initiatives within a two-year period, such as participation in at least four job fairs by station personnel with substantial hiring authority; hosting at least one job fair; participation in broadcasting scholarship programs; and sponsorship of at least two events in the community designed to inform the public as to broadcasting employment opportunities. Option A does not require broadcasters to collect any data on the race, national origin or gender of applicants. *See Report and Order* at 2364-5. Under Option B, broadcasters may design their own recruitment program as long as they are able to demonstrate that their program is inclusive, *i.e.*, that it widely disseminates job vacancy information throughout the local community. In order to assist the broadcaster and the Commission in evaluating whether outreach efforts are inclusive under Option B, the broadcaster must collect data tracking the recruitment sources, gender, and race/ethnicity of its applicants. If the data indicate that the broadcasters' outreach efforts are not reaching the entire community, it is expected to modify its program so that it is more inclusive. Broadcasters are not, however, required under Option B to keep records of the race, ethnicity or gender of either interviewees selected or persons hired from any applicant pool.

13. As for petitioner's assertion that the *Report and Order* is arbitrary and capricious because it eliminates the exemption for a written EEO Program where minorities in the local labor force are less than five percent, such an exemption is no longer necessary or appropriate since the new rule is not based on any assessment of minority labor forces and does not refer to minority employment profiles. Consistent with *Lutheran Church,* the *Report and Order* eliminated all previous requirements that broadcasters compare their employment profile with the local labor force and the Commission will no longer compare a broadcaster's employment profile with the local labor force as a screening device. Contrary to State Broadcasters' assertion, the requirement that stations place their public file reports on their web site if they maintain a web site is a reasonable way to facilitate convenient access to that information by local listeners and viewers. Finally, the Commission reasonably decided not to separate the identity of the station from its annual employment report so that it can follow up with the station should its filing, upon review, prove incomplete, and so that it can analyze trend data for subcategories of stations, such as by market size or station size.

14. In attempting to satisfy the third part of the stay test, State Broadcasters claim that no irreparable injury will be caused to others if a stay is granted. They argue that the nondiscrimination prong of the EEO Rule remains undisturbed by a stay so that employment discrimination continues to be prohibited, that the Commission can wait for judicial review of the rule since it has already waited fifteen months to adopt new EEO regulations, and that the *Report and Order* did not claim that broadcasters' current outreach efforts are inadequate to achieve diverse programming. For its part, UCC contends that minority and female job seekers will be harmed by a stay because they are less likely to learn of job opportunities if broadcasters do not engage in the type of outreach required by the rule.

15. Grant of a stay poses a clear risk of irreparable harm to job seekers in the broadcast industry who might not otherwise be afforded the opportunity to learn of industry vacancies. Our EEO Rule is designed to achieve broad outreach so that all interested applicants can apply for positions in the broadcast industry. Suspension of the rule will likely result in some potential job candidates not having notice of job openings, and being foreclosed from job opportunities of which they are unaware.

16. Finally, State Broadcasters submit that the public interest favors a stay since the public is disserved anytime the federal government takes action that violates the Constitution. State Broadcasters also submit that it is confusing to broadcasters and intended beneficiaries of the EEO Rule to begin an extensive and burdensome new EEO program when the Commission may be persuaded or compelled to revise or withdraw the program. UCC argues that State Broadcasters fail to show how a stay would further the public interest. It asserts that in adopting the EEO Rule, the Commission carefully reviewed its statutory mandate and extensive public comments in determining that the new rule would serve the public interest.

17. State Broadcasters have not shown that the public interest favors a stay. First, we note that EEO requirements are mandated by statute for broadcast and cable television stations, and Congress has thus determined that the public interest is served by such requirements. 47 U.S.C. § 334, 634. Further, as discussed above, the EEO Rule we have adopted is race neutral, and State Broadcasters have not shown that it violates constitutional rights or is likely to be overturned on appeal. The EEO Rule is a product of careful and thorough rule making proceedings and clearly describes the recruitment and filing requirements with which broadcasters must comply. State Broadcasters submit no evidence of confusion either to broadcasters or job applicants warranting a stay.

18. In view of the foregoing, we find that State Broadcasters have not provided sufficient grounds upon which to grant its petition for stay.

19. Accordingly, IT IS ORDERED that the joint petition for stay filed by State Broadcasters Associations IS DENIED.

20. IT IS FURTHER ORDERED that the motion to dismiss the National Association of Broadcaster's reply to the opposition to the State Broadcasters Associations' joint petition for stay filed by United Church of Christ IS GRANTED.

21. IT IS FURTHER ORDERED that the National Association of Broadcaster's reply to the opposition to the State Broadcasters Association's joint petition for stay filed by United Church of Christ IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

DISSENTING STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH

IN THE MATTER OF JOINT PETITION BY 50 NAMED STATE BROADCASTERS ASSOCIATIONS FOR STAY OF NEW BROADCAST EEO RULE, MM DOCKET NOS. 98-204 AND 96-16.

For the reasons given in my dissent from the Memorandum Opinion and Order adopting the revised Equal Employment Opportunity rules, *see* Dissenting Statement of Commissioner Harold W. Furchtgott-Roth, *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, Report &* Order, 15 FCC Rcd 2329 (2000), I believe there is a likelihood that petitioners will prevail on the merits of their Equal Protection Clause claim. I am certainly not persuaded by the legal reasoning to the contrary in this item.

Had I any doubt about petitioners' ability to meet the merits prong of the test for administrative stays, the gravity of the potential harm here – the broadcasters' injury of being required to discriminate against others, in violation of the Constitution and even federal and state employment law – would tip the balance. In addition, it seems to me that the potential employees' injury of being passed over for a recruiting event, interview, or job is undoubtedly irreparable once the position in question is filled. Accordingly, I would grant the State Broadcasters Associations' petition for stay of the rules.