THE FEDERAL COMMUNICATIONS COMMISSION'S EQUAL OPPORTUNITY EMPLOYMENT PROGRAM AND THE EFFECT OF ADARAND CONSTRUCTORS, INC. v. PEÑA

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In "[t]he communications industry, the employment picture is not what it should or can be."1

Affirmative action. Few Americans are neutral on the subject. This all too familiar phrase invokes a variety of emotions in people ranging from anger to apathy.2 The demise of affirmative action has become the rhetorical cry of conservative politicians and pundits across the country.3 They contend that programs that single out a specific race or ethnic group are no longer necessary, are unfair and "do more harm than good."4 In opposition to this frontal assault, many minorities and women rally "to oppose the dismantling of affirmative action" and to ensure that they will continue to share in the American dream.5

Today, affirmative action programs "face[ ] triple jeopardy: a skeptical Supreme Court, a hostile Re-

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1 Federal Communications Commission Chairman Reed Hundt, Speech to the National Urban League Conference, at 4 (July 26, 1994) (transcript on file with author).
3 Paul M. Barrett & Michael K. Frisby, Affirmative Action Advocates Seeking Lessons From States to Help Preserve Federal Program, WALL ST. J., June 14, 1996, at A20 ("[C]onservative lawmakers are vowing to go in precisely the opposite direction, possibly in an attempt to wipe out federal affirmative action altogether."); see also Ann Devroy & Kevin Merida, Justice Dept. Outlines Standards for Affirmative Action, WASH. POST, June 29, 1995, at A10 (Senate Majority Leader and presidential candidate Robert J. Dole (R-KA) is close to introducing his "long-promised legislation to overhaul federal affirmative action programs"). John F. Harris, For Clinton a Challenge of Balance, WASH. POST, June 14, 1995, at A1. Harris points out that [t]he Republican position is plain. Presidential candidates, including Sens. Robert J. Dole and Phil Gramm (TX), have vowed to make what they see as widespread resentment of preferential treatment programs a major theme of their candidacies. A [former] presidential hopeful, California Gov. Pete Wilson, signed an executive order June 1 eliminating many state affirmative action programs, saying they were the product of "misfired good intentions."

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6 Paul D. Kamenar, Goodbye to Preferences, USA TODAY, June 13, 1995, at 10A; see also John F. Harris & Kevin Merida, Ruling May Sharpen Debate on Preference Policies, WASH. POST, June 13, 1995, at A6 ("The court's decision will give impetus to the movement in Congress to dismantle the system of race and gender preferences that have built up over the last 25 years.") (quoting Rep. Charles T. Canady (R-FL)).
7 Peter Behr, A Rush to the Defense of Affirmative Action, WASH. POST, June 14, 1995, at A1 (remarks of Robert L. Johnson, founder of Washington-based Black Entertainment Television, regarding a newly formed political action committee which is soliciting contributions from the top 100 largest black-owned companies). Minority business leaders from across the country have galvanized to join in the fight to preserve affirmative action programs. Id.
publican Congress, and the possibility of a first-ever popular vote [this] year in California, where opinion is running heavily against preferences based on race and gender. The Supreme Court's landmark decision, *Adarand Constructors, Inc. v. Peña,* held that "all racial classifications, imposed by whatever federal, state, or local government, must be analyzed . . . under strict scrutiny," triggering intense legal debate about affirmative action. Critics question whether affirmative action continues to be necessary and justified today as a matter of law. Unfortunately, amongst all of this conflict, the original purpose of affirmative action appears to have been forgotten. Affirmative action programs were initially proposed to remedy invidious and disparate disparate (past and present) and to ensure that those disadvantaged under such discrimination had an equal opportunity for beneficial participation in all areas of commerce. Yet, all affirmative action programs are under fire regardless of their inherent value or need in the 21st century.

In today's anti-affirmative action climate, *Adarand* generated controversy about the viability of programs implemented by the Federal Communications Commission ("FCC" or "Commission"), which are designed to enhance employment opportunities for minorities and women. The FCC implemented Equal Employment Opportunity ("EEO") rules for some of the communications services that it regulates. Since its inception, the EEO program for radio and television stations received the most scrutiny and criticism.

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8 Id. at 2113.

"Affirmative action is not, and has never been, a device to achieve a quota system requiring rigid results, without regard to qualifications." *The Economic and Social Impact of Race and Gender Preference Programs: Hearing Before the Subcomm. on the Constitution, Comm. on the Judiciary, 104th Cong., 1st Sess. 9 (Oct. 25, 1995) (written testimony of William Coleman Jr., Senior Partner, O'Melveny and Meyers) (on file with author) (1995 WL 624749, printed text forthcoming)." Affirmative Action is a flexible concept which includes various actions to ferret out those present barriers for women and most minorities, not based upon merit and qualifications, to opportunity." Id. at 5. Mr. Coleman was one of the attorneys for the plaintiffs, along with the late Justice Thurgood Marshall, in the landmark cases *Brown v. Board of Education,* 347 U.S. 483 (1954), and *Aaron v. Cooper,* 358 U.S. 27 (1958) (desegregating Central High School in Little Rock, Arkansas). Id. at 3.

"The problem with [Justice Thomas'] analysis is it ignores ongoing discrimination. If you have both past discrimination that puts people at a disadvantage how does one deal with that? Judge Thomas pretends it's not there. He leaves aggrieved parties with no remedy at all." Linda Kanamine, 'Preference Programs Oppressive, Thomas Says,' USA TODAY, June 13, 1995, at 2A (quoting Charles Kamashki, Vice President of the National Council of La Raza, a civil rights organization). But see Kevin Merida, *The Firm Founder of Affirmative Action,* WASH. POST, June 13, 1995, at G1 (interview with Arthur Fletcher, former Assistant Labor Secretary under President Richard Nixon, whose administrative order targeted to Philadelphia's construction industry which "required firms competing for federal contracts to commit to numerical hiring targets devised by the Labor Department" became the model for future affirmative action programs nationwide).

Contrary to popular sentiment . . . affirmative action is not a civil rights issue at all - or even one of social policy. [T]here is a fundamental misunderstanding of what should be the purpose. 'It's based on sound economic law and procurement principles,' says Fletcher. . . . His arguments to Nixon, he recalls, were not that blacks should be compensated for past discrimination but that they 'ought to have a piece of tomorrow's future.'

*Id.*

10 "Government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice." Paul D. Kamenar, *Goodbye to Preferences,* USA TODAY, June 13, 1995, at 10A (quoting Associate Justice Clarence Thomas on Monday, June 12, 1995, the day of the *Adarand* decision); see also Kanamine, supra note 9, at 2A (quoting Jesse Jackson, Leader of the Rainbow Coalition).


13 The National Association of Broadcasters ("NAB") voiced its displeasure about the administration and enforcement of the EEO program since its creation. Petition for Rulemaking to Require Broadcast Licensee to Show Nondiscrimination in Their Employment Practices, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 F.C.C.2d 766, para. 2 (1968) (noting that the sole objection to the United Church of Christ petition was filed by the National Association of Broadcasters). NAB was "sympathetic to the basic goals of the petition" but expressed reservations about the proposed rule's reporting requirements and enforcement. *Id.* Today, NAB has vigorously opposed the Commission's EEO policy because it "unduly emphasizes efforts over results, and provides broadcasters and Commission staff alike with little clear guidance regarding how a station may be in compliance with the EEO rules." See, e.g., Letter from Henry L. Bauman, Executive Vice President & General Counsel, National Association of Broadcasters, to Roy J. Stewart, Chief, Mass Media Bureau, Federal Com-
This Comment discusses the reasons for a continuing need for a federal regulatory program that promotes increased employment and management opportunities for minorities and women in the broadcasting industry. It asserts that the Supreme Court’s decision in Adarand does not invalidate the FCC’s EEO program for broadcast radio and television because it is efforts-based and does not require set-asides or hiring preferences based on race. Part I of this Comment examines the Commission’s authority to impose EEO obligations on the broadcast industry as “public trustees” and gives a historical overview of the Commission’s EEO rules and policies. Part II reviews the Adarand decision and its impact on the Commission’s EEO program and the recently released Order and Notice of Proposed Rulemaking (“1996 NPRM”), which proposes streamlining of the EEO program. Part III explores the remnants of the Supreme Court’s Metro Broadcasting v. FCC decision, overruled in part by Adarand, and the major issues left unresolved by Adarand. Part V distinguishes the purpose and function between the Equal Employment Opportunity Commission (“EEOC”) and the FCC’s EEO program. Part VI illustrates the continuing importance of affirmative action employment programs in the broadcast industry. Finally, Part VII examines whether EEO obligations can be imposed on broadcasters if radio spectrum is auctioned. This Comment concludes that the FCC’s EEO program for broadcast television and radio is critical to the development of a competitive, productive, and economically sound industry throughout the 21st century.

I. HISTORICAL OVERVIEW

A. Authority of the FCC to Regulate in the Public Interest

Under the enumerated powers of the Constitution, Congress has the authority to regulate the radio frequency spectrum. Congress has conferred authority on the FCC to act in its behalf. The Commission has broad power to “perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions.” In granting licenses for the use of broadcast frequency, the Commission must discharge its duties in a manner that serves the “public convenience, interest, or necessity.” The recently passed Telecomm

communications Commission (Sept. 15, 1995) (on file with author and the FCC, MM Dkt No. 93-34); see also Reauthorization of the Federal Communications Commission, Hearing Before the Subcomm. on Telecommunications and Finance of the Comm. on Commerce, 104th Cong., 1st Sess. 35-36 (1995) (statement of Rep. Ralph Hall (D-TX)). Representative Hall asserted that the FCC’s EEO program was a duplication of the EEOC. He stated that the FCC could be barred from implementing and enforcing an EEO program given an express restriction in future budget appropriations. Id.

He then proposed that “[a]ll funds authorized by Congress for use by the [FCC] in its administrative functions may be used to solicit information, police, investigate, punish or reward any applicant . . . .” Id.


Multiple communications services use the radio spectrum: broadcast television, radio, wireline telephones, wireless services such as cellular, personal communications services (“PCS”) and satellite. Id. The use of electromagnetic spectrum is inherently interstate commerce. United States v. American Bond and Mortgage Co., 31 F.2d 448, 454 (1929). Congress’ authority to “regulate commerce with foreign nations, and among the states” stems from the Commerce Clause of the United States Constitution. U.S. CONST. art. I, § 8, cl. 3.

The statutory authority of the FCC to promulgate rules is found in the Communications Act of 1934. 47 U.S.C. § 151 et seq. (1988). The Federal Communications Commission is the successor of the Federal Radio Commission established by Congress by the Radio Act of 1927. Sydney W. Head & Christopher H. Sterling, Broadcasting in America 418 (6th ed. 1990). The 1927 Act was supposed to impose order on the radio industry, but did not centralize control of interstate and foreign wire communications in one federal agency which caused some conflict in the management of spectrum. Id. The FCC is constantly monitored by the House and Senate subcommittees on communications and “must come back to Congress annually for budget appropriations.” Id. In 1995-96, congressional scrutiny has sharpened given the Republican-controlled Congress. See, e.g., Jeffrey Silva, GOP Tries to Freeze FCC Budget as Agency Works to Show Value, RADIO COMMUNICATIONS REPORT, July 10, 1995, at 1.

communications Act of 1996, which amends the 1934 Act, reaffirms the Commission's statutory obligation of granting a renewal of a broadcast license in the "public interest."\(^{30}\)

The Supreme Court first upheld the Commission's unprecedented control over spectrum users, specifically the broadcast licensee, in the landmark case, Red Lion Broadcasting v. FCC.\(^{31}\) In Red Lion, the Court affirmed the FCC's substantial governmental interest in ensuring that broadcasters present a balanced and adequate coverage of news and public issues.\(^{32}\) A broadcast licensee "has no [First Amendment] constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens."\(^{33}\) Therefore, a broadcaster is considered a fiduciary or proxy for its community,\(^{34}\) given its "preferred position conferred by the Government" as a licensee.\(^{35}\) Red Lion, for almost thirty years, has been the definitive decision establishing both a concomitant duty by broadcasters to serve as "public trustees" as well as the government's authority to impose certain obligations on a licensee to serve this public trust.\(^{36}\)

1. The Legacy of Red Lion and Red Lion in the 21st Century

Whether the FCC will have continued authority to impose affirmative obligations and regulate broadcasters to influence content may turn on whether Red Lion remains good law. The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."\(^{27}\) Nonetheless, the Supreme Court has traditionally held broadcasters to a lesser standard of First Amendment protection. The Court noted that "[i]t is true that our cases have permitted some intrusive regulation of broadcast speakers than of speakers in other media."\(^{28}\) This justification for the Government's control of broadcast content and diminished constitutional protection, sustained by the Supreme Court, "rests upon the unique physical limitations of the broadcast medium."\(^{29}\) This limitation created a scarcity of voices because "only a few [broadcasters] can be licensed and the rest must be barred from the airwaves."\(^{30}\)

Today, Red Lion is under fire. The traditional "scarcity of voices" doctrine that justified Government control of broadcasters for decades, may no longer be valid due to the extensive growth of alternative media.\(^{31}\) Congress, in its deliberations over the Children's Television Act of 1990, debated the constitutionality of the Act based on the precedent of Red Lion.\(^{32}\) In a letter to Senator Hollings, the Department of Justice ("DOJ") asserted that Red Lion "is no longer good law in view of the technological changes in the broadcast media."\(^{33}\) However, Congress disregarded the DOJ's warning that Red Lion...
could be overruled and recast the ‘scarcity of voices’ justification into a ‘scarcity of spectrum’ justification, determining that “[the DOJ] is thus simply wrong in sloughing aside this allocational scarcity and instead focusing on overall numbers of broadcast . . . outlets.” Congress stated that the regulation of broadcasting “does not turn on the absolute number of broadcast facilities overall or in particular markets but rather on whether many more people want to broadcast than there are available frequencies or channels.” Congress then recognized that the “[d]emand for broadcast frequencies still far exceeds supply, and governmental licensing and regulation is necessary to resolve competing claims to these frequencies.”

If the recent success of spectrum assignment via the FCC’s auction process for Interactive Video Data Services (“IVDS”), Personal Communications Services (“PCS”), and Direct Broadcast Satellite (“DBS”) licenses is any indication, the demand for spectrum is indeed great and the 21st century ‘scarcity of spectrum,’ as opposed to the 1969 ‘scarcity of voices,’ interpretation of Red Lion has some validity. The Supreme Court could also reaffirm the Red Lion doctrine, which justifies increased federal regulation of broadcasters and lesser First Amendment protection, under the recast scarcity of spectrum interpretation, because “the benefits of free, over-the-air local broadcast television [and] promoting the widespread dissemination of information from a multiplicity of sources” is a very important governmental interest.

Broadcasters are providers on the information superhighway. Over-the-air radio and television are the only audio/video communications media that reach virtually 100% of the viewing and listening public. Broadcasters will continue to have power over the American public because not everyone can afford or has access to alternative media such as Cable and Direct Broadcast Satellite (“DBS”). Although 96% of households in the United States have at least one television set and are technically able to receive cable television (i.e., TV households national penetration), only 65.3% of TV homes are subscribers to cable. “[T]he inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations on broadcast licensees.”

B. The FCC’s Authority to Impose EEO Rules

The Commission has authority pursuant to the 1934 Act and the 1996 Act to determine the conditions which shall attach to the grant of an application for or a renewal of a broadcast license. The 1934 Act states that “the Commission shall determine . . . whether the public interest, convenience,
and necessity will be served by the granting of such application . . . and upon consideration of such other matters as the Commission may officially notice . . . ."46 The 1996 Act amends section 309 of the 1954 Act by adding a separate section pertaining exclusively to broadcast station renewal procedures.47 This section expressly mandates that the Commission shall, prior to granting a renewal of a license, ascertain whether during its preceding license term a "station has served the public interest, convenience, and necessity,"48 whether there have been any "serious violations . . . of this Act or the rules and regulations of the Commission,"49 and whether such violations would "constitute a pattern of abuse."50

One of the many factors the Commission uses to determine if a broadcast licensee fulfilled its responsibility as a public trustee,51 is whether it has a proper EEO program. "Each broadcast station shall establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice."52 The Commission stated that EEO requirements for broadcasters "serve two objectives: to promote programming that reflects the interests of minorities and women in the local community in addition to those of the community at large and to deter discriminatory employment practices."53 There are additional benefits to an effective EEO program for broadcasting. First, the employment of minorities and women in managerial and executive positions provides excellent exposure and training in the business of broadcasting, which is a foundation for ownership.54 Second, determination of whether a licensee has unlawfully discriminated will determine whether it can fulfill the needs of the community - a character issue that could be a factor at the time of license renewal.55 Third, due to the tremendous impact broadcasting has upon American life, "equal opportunity in employment in [broadcasting] could therefore contribute significantly toward reducing and ending discrimination in other industries."56

C. The Genesis of the FCC's EEO Program

The employment practices of broadcast licensees were not addressed by the Commission until 1968, when it first announced its intention to act on substantial complaints of discrimination as a means of implementing the important "national policy against discrimination."57 This 1968 Memorandum Opinion and Order by the Commission was prompted by a Petition for Rulemaking filed by the Office of Communications, the Board for Homeland Ministries and the Committee for Racial Justice Now of the United Church of Christ ("UCC") requesting adoption of rules to prevent the granting of a license to any station "which engages in discrimination in employment practices on the basis of race, religion, or nationality."58 It was the Commission's view that deliberate discrimination may be inconsistent with the responsibility of each licensee to operate as a public trustee and is obligated to "ascertain the needs and interests of his public to be served. . . ."59

One year later, the Commission adopted rules that prohibited employment discrimination and required

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51 Additional factors imposed upon broadcast television license renewals include compliance with the Children's Television Act of 1990, Pub. L. No. 101-437, § 103, 104 Stat. 996 (1990) (codified at 47 U.S.C. § 303(b)). ("[T]he Commission shall, in its review of any application for renewal of a commercial or noncommercial television licensee, consider the extent to which the licensee . . . [inter alia] has served the educational and informational needs of children through the licensee's overall programming . . . ."").
52 47 C.F.R. § 73.2080(b) (1994).
53 1996 NPRM, supra note 14, para. 3.
54 Id.
55 Id. para. 3 n.4.
57 See Petition for Rulemaking to Require Broadcast Licensee to Show Nondiscrimination in Their Employment Practices, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 F.C.C.2d 766, para. 11 (1968) [hereinafter 1968 Memorandum Opinion and Order] ("A refusal to hire Negroes or persons of any race or religion clearly raises a question of whether the licensee is making a good faith effort to serve his entire public. Thus, it immediately raises the question of whether he is consulting in good faith with Negro community leaders concerning programming to serve the area's needs and interests."). The Commission referred such complaints to the appropriate state or federal agency with primary jurisdiction, and if no agency existed, the Commission then acted on its own motion. Id. para. 13.
58 Id. para. 1. The petition also requested that evidence of compliance with the equal opportunity rule "shall be furnished with each application for a license and annually during the term of each license in prescribed forms." Id.
59 Id. paras. 9-10; see also In re Petition for Rulemaking to Require Broadcast Licensee to Show Nondiscrimination in Their Employment Practices, Report and Order, 18 F.C.C.2d 240, para. 1 (1969) [hereinafter 1969 Report & Order].
television and radio stations to establish, maintain, and carry out a formal EEO program. The Commission did not feel that a policy based on complaints alone, as proposed in the 1968 Memorandum Opinion and Order, would remedy the general patterns of discrimination present in the industry. In 1970, the Commission adopted rules which, inter alia, required licensees with five or more employees to file an Annual Employment Report. Annual reporting requirements and nondiscrimination rules were also expanded with this 1970 Report and Order to include gender "in light of the inclusion of this category in the Civil Rights Act of 1964, title VII, and the national policy of insuring equal employment rights to women."

The Commission's EEO program was indirectly endorsed by the Supreme Court in NAACP v. Federal Power Commission. The Court held that the Federal Power Commission's statutory authority to regulate in the public interest does not per se, give it the authority to regulate discriminatory practices without a showing of a nexus to the statutory purpose. However, the Court recognized that the FCC's EEO regulations "could 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."

In Peightal v. Metropolitan Dade County, the U.S. Court of Appeals for the Eleventh Circuit confirmed that an employment outreach program is race/gender neutral under strict scrutiny. The Peightal court found that "to successfully meet the factual predicate under the compelling interest inquiry, statistical comparison between the employer's workforce and the composition of the relevant population are probative of a pattern of discrimination."

The Cable Television Consumer Protection and Competition Act of 1992, for the first time, codified the Commission's EEO policy for broadcast stations. Congress found that "despite the existence of regulations governing equal employment opportu-

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60 1969 Report & Order, supra note 59, para. 6, appendix A. At this time, the Commission also issued a Further Notice of Proposed Rulemaking which sought comment on the proposed requirement that existing licensees and applications for construction permits, renewals, transfers or assignments set forth an EEO program and a proposed annual employment reporting requirement with the proposed Annual Employment Report - FCC Form 325. In re Petition for Rulemaking To Require Broadcast Licensees To Show Nondiscrimination in Their Employment Practices, Further Notice of Proposed Rulemaking, 18 F.C.C.2d 249 (1969).

61 1969 Report & Order, supra note 59, para. 4. A substantial number of parties, including the U.S. Commission on Civil Rights, commented that the Commission's EEO "policy cannot be effectively implemented by relying solely upon individual complaints." Id. paras. 4-5. The commenters were concerned that the Commission's consideration of complaints was time consuming, "many people would not complain even though they suspect or know they have been treated unfairly," and it is very difficult for an individual to prove the existence of discrimination, even where it does exist. Id. para. 4. Although the Commission's "tentative decision to proceed primarily upon a complaints basis was substantially influenced by considerations related to [its] limited staff resources," the Commission acknowledged the validity of the Commenters' concerns and changed its proposal from a complaint-based program to one that would "adopt further requirements to assure equal employment opportunity . . . ." Id. para. 5. The Commission also noted that given their "independent responsibility to effectuate such a strong national policy in broadcasting [there was not a need to] await a judgment of discrimination by some other forum or tribunal." Id. para. 2.


63 Id. at 431. One year later, women were included in written EEO programs required by existing licensees and all new applicants at the request of a petition filed by the National Organization for Women. See Amendment of Part VI of FCC Forms 301, 303, 309, 311, 314, 315, 340 and 342, and Adding the Equal Employment Program Filing Requirement to Commission Rules 73.125, 73.301, 73.599, 73.680 and 73.793, Report and Order, F.C.C.2d 708 (1971).


65 Id.

66 Id. at 670 n.7.

67 26 F.3d 1545 (11th Cir. 1994).

68 Id. at 1558.

69 Id. at 1553.


71 Id. The 1992 Cable Act also expanded the Commission's EEO program by imposing mid-term EEO reviews of television stations. 47 U.S.C. § 334(b). The current license term for television stations is five years and radio stations is seven years. 47 C.F.R. § 73.1020(a) (1994). However, the 1996 Act authorizes the FCC to extend the number of years in a broadcast license term for both radio and television stations "not to exceed [eight] years." 1996 Act supra note 12, § 203 (amending 47 U.S.C. 307(c)). A mid-term review consists of the EEO staff's comparison of the licensee's Annual Employment Reports (FCC Form 395-B) for the first two and one-half years of the station's license term with the Metropolitan Statistical Area's ("MSA") minority labor force as reported by the U.S. Census Bureau. 47 C.F.R. § 73.2080(4)(d) (1994). If those reports indicate employment or minority workers or minorities is below the processing guidelines which compare their percentage labor force representation in the relevant market, then a staff letter shall be sent to the licensee informing them of this fact. Id. The letter is merely a notice to a licensee that their EEO program may warrant improvement. Id. No action or sanctions are imposed on the licensee in a mid-term
nity, females and minorities [were] not employed in significant numbers in positions of management authority in the cable and broadcast industries. The Nation's policy favoring diversity in the workforce also found that a multi-faceted workforce "advances the Nation's policy favoring diversity in the expression of views in the electronic media . . . [and] rigorous enforcement of equal employment opportunity rules is required to effectively deter racial and gender discrimination.

In addition, the 1992 Cable Act mandated that the FCC review its EEO program and submit to Congress a report on the "effectiveness of its procedures, regulations, policies, standards, and guidelines . . . . This comprehensive review revealed that the Commission's EEO policies and rules have been effective in promoting equal employment opportunities for minorities and women in broadcasting and cable. The Commission also recognized that there was a need for continued examination of its EEO rules to "make them [as] meaningful and relevant as possible without unnecessary or burdensome restrictions."

Mindful of the objective of improving the implementation of its EEO policy, the Commission recently adopted the 1996 NPRM in which it proposes streamlining its rules and policies and re-introducing EEO forfeiture guidelines. The 1996 NPRM seeks comments on several proposals that would reduce qualifying stations' recordkeeping and filing obligations; new options for stations to establish adequate recruitment efforts, such as participation in joint recruitment programs or other cooperative efforts; and a revised test for the use of alternative labor force data by stations that believe their efforts should be judged by comparison with labor forces other than the relevant MSA. Superseding all of these proposals is the following issue: whether the FCC's overall EEO program is effectively invalidated by the Supreme Court's decision in Adarand.

II. ADARAND CONSTRUCTORS INC. v. PEÑA AND ITS IMPACT ON EEO

A. The Decision

Adarand Constructors, Inc., ("Adarand Inc.")

guidelines proposed in the Forfeiture Policy Statement subsequent to USTA. The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, Notice of Proposed Rulemaking, 10 FCC Rcd. 2945 (1995). However, given the comparable nature of the vacated Forfeiture Policy Statement to the 1994 EEO Policy Statement, the Commission abandoned use of the 1994 EEO Policy Statement and returned to the old procedure of using a case-by-case analysis (stare decisis) in reviewing EEO cases. The 1996 NPRM, supra note 14, para. 12 ("We shall continue with this approach until new guidelines are adopted."). Therefore, the 1996 NPRM now includes proposed "non-binding guidelines for assessing forfeitures for violations of the Commission's broadcast EEO Rule." Id. para. 39.

The 1996 NPRM has been sharply criticized by the Minority Media and Telecommunications Council ("MMTC"), a Washington, D.C., based public interest organization that advocates increased opportunities in the communications industry for minorities. "EEO doesn't need to be 'streamlined' or 'reinvented,' unless it's to express zero tolerance for discrimination. Make no mistake about it, the FCC contemplates extreme and unprecedented outbacks in EEO enforcement." Minority and Media Telecommunications Council, Statement on the FCC's EEO Rulemaking Notice, Feb. 9, 1996 (emphasis in original). The 1996 NPRM, supra note 14, para. 17.

115 S. Ct. 2097 (1995). The decision was a fractured 5-4 vote which overruled the United States District Court for the District of Colorado's grant of summary judgment in favor of the government. Id. at 2098. The case was remanded to determine whether the challenged program satisfied strict scrutiny. Id. Justice O'Connor filed the majority opinion, Parts I, II, III-A, III-B, III-D, and IV, joined by Chief Justice Rehnquist and Justices Kennedy, Thomas and Scalia. Id. at 2101. Justice Scalia
owned by a white male, lost a sub-contract for a guardrail construction project to a minority-owned firm, although Adarand Inc. had submitted the lowest bid. Adarand Inc. sued, contending that a Department of Transportation ("DOT") program providing financial compensation to general contractors who receive government contracts for hiring subcontractors that are controlled by "socially and economically disadvantaged individuals," violated his Fifth Amendment constitutional right to due process. In particular, Adarand Inc. challenged the government’s race-based presumptions which were used to identify such individuals.

Adarand did not outlaw affirmative action. Rather, the Supreme Court held that all local, state, and federal race-based affirmative action program must be subjected to "strict scrutiny." Under strict scrutiny, a federal race-based program will be upheld only if it meets a compelling governmental interest and is narrowly-tailored for that specific purpose. In this regard, Adarand explicitly overruled Metro Broadcasting v. FCC, which held that a lesser standard of intermediate scrutiny applied to a federal race-based program.

B. The Government’s Response to Adarand

The Court’s decision induced the President of the United States to order an immediate comprehensive review of all affirmative action policies and programs delivered Part III-C, joined by Justices Kennedy and Thomas. Id. Justices Scalia and Thomas also filed opinions concurring in part and concurring in the judgment. Id. Three dissenting opinions were filed separately. Id. Justice Stevens filed a dissenting opinion in which Justice Ginsburg joined, Justice Souter filed a dissenting opinion in which Justices Breyer and Ginsburg joined; and Justice Ginsburg filed a dissenting opinion in which Justice Breyer joined. Id.

Adarand, 115 S. Ct. at 2102.

Adarand, 115 S. Ct. at 2101.

Id.

Id.

Id. at 2097. The Court previously held that strict scrutiny applied to local and state programs. City of Richmond v. J.A Croson Co., 488 U.S. 469 (1989).

Adarand, 115 S. Ct. at 2097.


Remarks by President William Jefferson Clinton on Affirmative Action, The White House, Office of the Press Secretary, July 19, 1995 ("This review [released July 19, 1995] concluded that affirmative action remains a useful tool for widening economic and educational opportunity.").

Id. at 8.

Memorandum from Walter Dellinger, Esq., Assistant Attorney General, Office of Legal Counsel, United States Dept. of Justice, to all Agency General Counsel (June 28, 1995) (footnotes omitted) [hereinafter DOJ Memorandum].


1996 NPRM, supra note 14, para. 15.

See Letter from Henry L. Bauman, Executive Vice President & General Counsel, National Association of Broadcasters, to Roy J. Stewart, Chief, Mass Media Bureau, Federal Communications Commission (Sept. 15, 1995) (on file with the author and the FCC, MM Docket No. 93-34) ("[T]he Commission has had an EEO inquiry in MM Docket 94-34 outstanding for more than 15 months, but still has not issued a Notice of Proposed Rule Making on the subject."); see also Petition for Rule Making, In re Re-examination of the FCC’s Equal Employment Opportunity Program, Haley Bader & Potts P.L.C. (Aug. 18, 1995) (requesting that the FCC "undertake a searching examination of its EEO program . . . [and] to initiate a rulemaking as expeditiously as possible)."

"[I] object to the word ‘preferences’ if the topic is affirmative action. They are not the same." The Economic and Social Impact of Race and Gender Preference Programs: Hearing Before the Subcomm. on the Constitution, Comm. on the Judiciary, 104th Cong., 1st Sess. 2 (Oct. 25, 1995) (written testimony of William Coleman Jr., Senior Partner, O’Melveny and Meyers) (1995 WL 624749 and on file with author).
the same.94

Preferential programs, including those that mandate set-asides and quotas exclusively for minorities, are those programs that have generated the negative press and public ire for affirmative action programs as a whole.95 Such preferential programs are less likely to survive constitutional challenge because they require that race or ethnicity be the sole factor for eligibility.96 Conversely, affirmative action programs that include race as one factor among many, but not the ultimate factor in the hiring decision, are more likely to sustain constitutional challenge by the courts.97 One such category of judicially accepted programs are those that serve to increase the participation of minorities and ethnic groups in applicant pools.98 The DOJ, in its analysis of Adarand, stated that

[ mere outreach and recruitment efforts . . . typically should not be subject to the Adarand standards. Indeed, post Croson cases indicate that such efforts are considered race-neutral means of increasing minority opportunity. In some sense, of course, the targeting of minorities through outreach and recruitment campaigns involves race-conscious action. But the objective there is to expand the pool of applicants or bidders to include minorities, not to use race or ethnicity in the actual decision. If the government does not use racial or ethnic classifications in selecting persons from the expanded pool, Adarand ordinarily would be inapplicable.99

When applied to hiring minorities a majority of Whites are convinced that 'preferential treatment' means giving an unqualified Black a job over a qualified White man, or 'reverse discrimination against White men.' Yet, when asked what affirmative action means to them, 68% of the same Whites say it 'is a program designed to help women and minorities who have not had an equal chance to have an equal opportunity in education or in a job.' Louis Harris, The Power of Opinion, EMERGE, Mar. 1996, at 50.

See, e.g., Harris, supra note 94, at 49 (reporting results of public opinion polls which illustrate that there is a distinct difference between the public's opinion about "affirmative action" and "preferential programs.") "Sadly, the media, including many of the most respected newspapers, have done the public a disservice by continually referring to 'preferential treatment' or 'preferences' or 'racial preference programs' as interchangeable with affirmative action." Id. at 50.

DOJ Memorandum, supra note 89, at 23 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) and Fullilove v. Klutznick, 448 U.S. 448 (1980), as examples of racial or ethnic classifications based on a specific number of positions that were set aside for minorities and were struck down by the Supreme Court).

DOJ Memorandum, supra note 89, at 25 (citing Johnson v. Transportation Agency, 480 U.S. 616, 638, 656-57 (1987) in which an affirmative action program considered a candidate's gender as one of many factors in evaluating them for promotion and City of Richmond v. J.A. Croson Co., 488 U.S. 469, 508 (1989), in which the "color of an applicant's skin [was] the sole relevant consideration").

Under the standards expressed in Adarand and the post-Croson cases, the FCC's EEO program for broadcasting is race-neutral. The key factor that makes the Commission's EEO program race-neutral is that consideration of race or gender is not required in the actual hiring decision.100 A licensee is free to hire any candidate, regardless of race, ethnicity, or gender.101 The program is, therefore, an efforts-based program and not a preferential hiring or quota system.102 The EEO program simply requires that licensees put forth a good faith effort to expand the pool of qualified applicants to include minorities and women.103

1. EEO Administration and Enforcement

All commercial and noncommercial television and radio licensees and permittees are required to "establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice."104 To prove compliance with the Commission's EEO Rule, a licensee with five or more employees must also engage in some degree of recordkeeping to self-assess the success of its recruitment efforts.105 Such records are not expressly required in the EEO Rule, but the Commission re-

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94 Id. at 7.
95 Id.
96 1996 NPRM, supra note 14, para. 15.
97 Id. para. 7.
99 The DOJ Memorandum warned that an outreach program could be considered "race-based decision making" and therefore, implicated by Adarand if such efforts were used to create a "minorities-only" applicant pool. DOJ Memorandum, supra note 89, at 7 n.13.
100 47 C.F.R. § 73.2080(b) (1994) (emphasis added).
101 Self-assessment is required. 47 C.F.R. § 73.2080 (3) (1994). Stations with four or less employees are exempt from the Commission's filing and record-keeping requirements. 1996 NPRM, supra note 14, para. 8.
quires licensees to file formal reports on an annual basis and as part of a license renewal application.108

To evaluate whether a licensee is in compliance under the EEO Rule, the Commission uses processing guidelines to determine whether a licensee's EEO program requires further review.107 In the 1996 NPRM, the Commission briefly addressed whether its EEO program and processing guidelines were impacted by Adarand.108 Although the guidelines compare the percentage of a station’s minority and female staff to the availability of minorities and women in the labor force based on the U.S. Census,109 this comparison does not constitute a quota because the licensee is not required to hire a particular percentage of minorities in their Metropolitan Statistical Area (“MSA”) based on the Census Bureau Reports,110 nor are they penalized for failure to achieve these levels.111 “[T]he establishment of numerical goals for minority participation should not raise concerns under Adarand where race-based decisionmaking is not used to achieve the goal and the goal is commensurate with availability of minorities in the qualified and appropriate labor pool.”112 The statistical comparison of a licensee’s staff with the minority labor force is only one of several screen-
ing factors included as part of the first-step of a two-part review.113 If a licensee does not meet the parity benchmark, the Commission issues a letter of inquiry and requests detailed documentation of the licensee’s recruitment efforts, part two of the two-part test.114 If this documentation shows sufficient recruitment efforts, regardless of the licensee’s hiring record or the composition of minorities and women on its staff, then the licensee is not in violation of the Commission’s EEO Rules.115 Therefore, the EEO processing guidelines may not subject to strict scrutiny under Adarand.

D. Streamlining Proposals in The 1996 NPRM

1. The Small Station Exemption

Broadcast stations with four or fewer full-time employees are currently exempt from reporting and formal recordkeeping requirements of the EEO program.116 In response to comments from broadcasters that the Commission’s recordkeeping and recruitment requirements are too burdensome for small stations,117 the 1996 NPRM proposes to expand or modify the definition of small stations as a means to

108 The Broadcast Station Annual Employment Report (Form 395-B) is filed each May and reports a station’s workforce profile for any one payroll period during the months of January, February, or March. Instructions for Completion of FCC Form 395-B Broadcast Station Annual Employment Report (Mar. 1996) at 4. The licensee has discretion to select the two-week period. See id. The data is “broken down by full and part-time status, job category, gender, and race or ethnic origin.” 1996 NPRM, supra note 14, para. 8. The “Broadcast Equal Employment Opportunity Program Report” (Form 396) is filed with the license renewal application and “requests general information concerning the recruitment and hiring practices of the licensee during the renewal year, i.e., the 12-month period prior to the filing of the renewal application.” Id.

109 In re EEO Processing Guidelines, Report and Order, 46 Rad. Reg. 2d (P & F) 1693 (1980); see also 1996 NPRM, supra note 14, para. 10.

The processing guidelines are applied as follows: stations with five to ten full-time employees meet the guidelines if the proportion of minority and female representation on their overall staffs is at least 50% of that of the relevant labor force, and on their upper-level staffs is at least 25% of that relevant labor force. Stations with [eleven] or more full-time employees meet the guidelines if the proportion of minority and female representation is at least 50% of that of the relevant labor force for both overall and upper-level job categories.

110 1996 NPRM, supra note 14, para. 10.

111 Id. para. 10 n.19.

112 Id. para. 7.

113 Id. para. 10.

114 Memorandum from John R. Schmidt, Esq., Associate Attorney General, The United States Dept. of Justice, to all General Counsels, Post-Adarand Guidance on Affirmative Action in Federal Employment 5 (Feb. 29, 1996) [hereinafter February 1996 DOJ Memorandum]. The purpose of this memorandum was to provide guidance for the internal employment activity of federal departments and agencies. Id. at 1. Therefore, this memorandum does not address Adarand’s impact on the employment practices of private employers. See id. at 2. However, the FCC’s EEO program indirectly affects private employers, broadcast licensees, and this additional analysis by the DOJ may be pertinent.

115 1996 NPRM, supra note 14, paras. 9-10. Additional steps include the review of any petitions to deny or informal objections filed against the licensee’s renewal application; any final determinations of discrimination complaints that have been filed with other government agencies and/or courts; and the station’s EEO efforts, “including, inter alia, the recruitment sources listed, the number of minority and female referrals received, and the licensee’s analysis of the effectiveness of its EEO efforts.” Id. para. 9.

116 Id. para. 11.

117 Id. para. 21 n.34. This exemption is based on the Commission’s administrative convenience and on the difficulty in adequately measuring a licensee’s compliance based on statistics when there are only four or fewer employees. “[E]mployee statistics tend to be meaningless, since a change of one employee is a 25% change.” In re Amendment of Broadcast Equal Employment Opportunity Rules and FCC Form 395, First Report and Order, 70 F.C.C.2d 1466, para. 24 (1979).

118 See, e.g., Comments of the National Association of
streamline the Commission’s EEO program and relieve undue paperwork and recruitment burdens while “maintaining the effectiveness of [the Commission’s] EEO enforcement.”118 Staff size, market size, or the size of the minority labor force have been proposed by the Commission as various qualifying factors to define “small stations.”119

The influence of Adarand should be considered when the Commission ultimately selects factor(s) to determine whether a licensee will be exempt from existing EEO requirements. “Adarand applies to both the final judgment as to a particular decision, as well as to the various steps leading to that judgment.”120 One such judgment is whether a licensee will be considered a “small station.” Where the government uses race as a criterion, Adarand may apply.121 Therefore, using the percentage of minorities in the labor force of a given MSA as the sole threshold for choosing a station’s status for EEO compliance is arguably a race-based decision. It is also possible that if an additional factor was considered, including race, such as staff size, Adarand may still be implicated. The liberal interpretation of Adarand is that “race-based decision-making includes situations where race is one of several factors as well as those in which race is the only factor.”122

Presently, stations located in MSAs where the minority labor force is less than five percent, in the aggregate, are not required to submit a Broadcast Equal Employment Opportunity Program Report (FCC Form 396) for minorities as part of license renewal.123 The purpose of the EEO Program Report is for the licensee to evaluate its employment profile using the size of the minority labor force,124 to report the hiring and promotions of minorities and women,125 and to identify activities it will use to implement its EEO program.126 The Commission determined that five percent or less minority representation in the labor force were “such insignificant numbers that a program would not be meaningful.”127 These licensees, however, are still required to file an EEO Program Report for women.128 Exempted licensees from the EEO Program Report for minorities are also required to file an Annual Employment Report (FCC Form 395)129 and to recruit so as to attract minority and female applicants, including the maintenance of job-by-job recordkeeping as proof of its recruitment efforts,130 and to self assess.131 Now, the 1996 NPRM proposes to use the size of a minority labor force as a qualifying factor to determine whether a station is also exempt from all recordkeeping requirements.132 This is a major expansion of the current exemption from the EEO Program Report filing requirements because it goes to the heart of a licensee’s recruitment efforts by eliminating the recordkeeping requirement. The purpose of this exemption is no longer based on insignificant statistics.133 The Commission’s stated purpose is to relieve an alleged paperwork and recruiting burden.134

Adarand is applicable when race-based decision by any government entity is designed to provide a benefit or a burden.135 Some broadcasters have alleged that the Commission’s EEO policy, which emphasizes recruitment over actual results, creates an “enormous” paperwork burden due to the cost of recordkeeping efforts.136 Eliminating this burden is clearly a benefit to broadcasters. A station meeting

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118 1996 NPRM, supra note 14, para. 20.
119 Id. para. 21.
120 February 1996 DOJ Memorandum, supra note 112, at 3.
121 DOJ Memorandum, supra note 89, at 7.
122 February 1996 DOJ Memorandum, supra note 112, at 3. This interpretation of Adarand by the DOJ appears to be in conflict with a previous memorandum in which the DOJ cites to case precedent that supports racial considerations, as one factor among many, as potentially acceptable under Adarand. See supra note 97.
124 Id. para. 40.
125 Id. para. 39 (requesting the total number of minorities and women hired and promoted within the upper four job categories).
126 Id. para. 35.
128 1987 Report and Order, supra note 123, para. 36.
129 See 47 C.F.R. § 73.3612 (1994) (exempting only stations with four or fewer full-time employee from filing the Annual Employment Report FCC Form 395).
130 1996 NPRM, supra note 14, para. 32.
132 1996 NPRM, supra note 14, para. 23.
133 Supra note 126 and accompanying text.
134 1996 NPRM, supra note 14, para. 20.
136 Comments of the Texas Association of Broadcasters, to Notice of Inquiry in MM Dkt No. 94-34, at 8 (June 13, 1994) [hereinafter NOI Comments of TAB].
the qualifying percentage would be exempt from the recordkeeping requirements. Conversely, if adopted, the proposed exemption would subject a station with a large minority labor force (e.g., a percentage greater than the qualifying percentage) to the full force of the Commission's EEO rule therefore, a burden to a licensee. For example, two hypothetical broadcast stations (either television or radio) are located in two different MSAs. Station A is located in a MSA with a five percent minority labor force. Station B is in a MSA with a twenty percent minority labor force. Under the FCC's proposal, Station A would be exempt from all recordkeeping and filing requirements such as the Annual Employment Form and minority views on matters of concern to the entire community, albeit one with few minorities, would receive the benefit of a diversity of viewpoints achieved through the continued recruitment and subsequent hiring of minorities and women. Furthermore, this proposal would, in effect, contradict Commission precedent which previously supported the enhancement of a diversity of viewpoints, regardless of the racial composition of a market.

2. The Benchmark Proposal

The 1996 NPRM also proposes an “alternative way for licensees to demonstrate compliance with the EEO rule involving use of an employment benchmark.”146 Licensees reaching the to-be-determined benchmark for overall and upper-level positions for most of the license term would not be required to “file, submit, or retain detailed job-by-job recruitment and hiring records.”147 Commenters are requested to address whether a licensee reaching this benchmark, which will measure the number of minorities and women on staff, “should be found in presumptive compliance with the EEO Rule.”144 At first glance, this proposal appears to offer a reward to licensees who have achieved the ultimate goal of affirmative action - to hire qualified minorities and women. This proposal addresses two major complaints of the EEO program: one, that the Commission's program is focused too much on efforts and not on results; and two, that licensees with good hiring profiles have been unfairly penalized for lack of proper documentation and recordkeeping.146 However, upon closer review it may very well un-

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137 February 1996 DOJ Memorandum, supra note 112, at 3.

138 Id.

139 See In re Implementation of Commission Equal Opportunity Rules, Policy Statement, 9 FCC Rcd. 992 (1994); see also 1996 NPRM, supra note 14, para. 6 (citing the 1994 Notice of Inquiry, “the overriding goal underlying our EEO rules is to promote program diversity”).

140 1996 NPRM, supra note 14, para. 32 (“Without such records, the Commission is unable to ascertain whether a station is making efforts to recruit women and minorities as required by our Rule, nor can the station meaningfully assess the effectiveness of its EEO program.”).

141 See generally In re Applications of Waters Broadcasting Corp., Hart Michigan, Decision, 91 F.C.C.2d 1260, para. 9 (1982) (holding that a minority controlled station in a non-minority community “serves the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation”).

142 1996 NPRM, supra note 14, para. 25. A station meeting the benchmark would still be subject to the EEO rules and would be required to maintain reports of their employment profile. Id. However the licensee “could elect not to file, submit, or retain detailed job-by-job recruitment and hiring records if their employment profile for overall and upper-level positions met certain benchmarks for most of the license term.” Id. The appropriate benchmark and the length of the term would be determined pending review of the record. Id.

143 Id.

144 Id.

145 NOI Comments of NAB, supra note 117, at 8-9.

146 See, e.g., NOI Comments of TAB, supra note 136, at 5 (stating that TAB members met or exceeded 50% of parity during their license term, but were imposed forfeitures because of poor documentation of recruitment efforts or an inadequate pool of minority applicants).
dermine the Commission’s efforts-based EEO program and bring it within the scope of Adarand. To measure the effectiveness of this proposal, this Comment addresses several issues: first, whether the benchmark could be considered a quota under Adarand; second, whether the benchmark could effectively operate as a ceiling for the hiring of minorities and women; third, whether a licensee would have incentive to recruit for each vacancy, or only for those vacated by a minority or a woman.

Compliance with the EEO Rule requires a licensee to have a “continuing” efforts-based EEO recruitment program. However, application of this benchmark proposal would measure a licensee’s compliance by the amount of minorities and women on staff against a certain numerical percentage. In meeting this benchmark, a licensee may be presumed to have executed a successful EEO recruitment program. However, the composition of a licensee’s staff may not have been achieved through compliance with the Rule, which would then negate this presumption. There are several ways that a licensee can achieve the designated benchmark outside of the EEO Rule. For example, upon assignment or transfer of a license, the new owner could inherit the current staff which meets the benchmark level. In addition, maintenance of this benchmark level can be achieved by recruiting for only those positions vacated by a minority or a female employee. In effect, if a minority vacated only a clerical position, the licensee would recruit for minorities for this position only, regardless of the number of management level vacancies it recruited for. In this scenario, minorities or women would be foreclosed from decisionmaking positions.

Adarand could be implicated if this benchmark proposal had the following effects: first, if a licensee only hired the designated number of minorities to qualify for the benchmark exemption and no more, in effect a ceiling; and third, if a licensee only hired minorities when a position was vacated by a minority, resulting in “minority only” applicant pools.

Qualifying for the benchmark proposal exemption is purely voluntary on behalf of the licensee. A licensee has total discretion whether it will file, submit or retain complete recruitment and hiring records or not. This could be a determining factor in whether the benchmark proposal is implicated by Adarand. Nonetheless, the benefit of the recordkeeping exemption conferred by the government would still be based on the number of minorities on staff, whether reaching this number was discretionary or not.

This benchmark proposal is distinguishable from the Commission’s processing guidelines. The processing guidelines, which also compare the minority labor force with the percentage of a station’s staff, are only one of multiple factors used to ascertain a licensee’s compliance. Unlike the benchmark proposal, the processing guidelines’ statistical comparison is not the sole or final judgment that determines whether a licensee is in compliance with the Commission’s Rule. A licensee is required to keep records for each vacancy and report the number of vacancies, recruitment sources contacted, referrals received, and minorities in the applicant and interview pools, as part of a ‘totality of the circumstances’ review of a licensee’s recruitment program.

Therefore, the processing guidelines are less likely to be implicated by Adarand. Conversely, a licensee meeting the designated benchmark will be exempt from such record-keeping and the evaluation of the number of minorities on staff becomes the sole measure of whether a licensee is in compliance with the EEO Rule. Furthermore, the absence of records would make it difficult, if not impossible, to ascertain based decisionmaking . . . if such efforts work to create a ‘minorities-only’ pool of applicants or bidders, or if they are so focused on minorities that nonminorities are placed at a significant competitive disadvantage.

147 47 C.F.R. § 73.2080(h) (1994).
148 1996 NPRM, supra note 14, para. 25.
149 DOJ Memorandum, supra note 89, at 7 (Adarand’s “standards will apply to any classification that makes race or ethnicity a basis for decisionmaking.”).
150 Id. Furthermore, if a licensee used outreach efforts to attract minorities, but purposefully did not hire minorities, regardless of their qualifications, just to preserve the percentage of minorities already on staff, it is racial discrimination. Such action by a licensee would also be a violation of Title VII for a failure or refusal “to hire or to discharge . . . or otherwise discriminate . . . because of the individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (1994).
151 DOJ Memorandum, supra note 89, at 7 n.13 (“[O]utreach and recruitment efforts conceivably could be viewed as race-based decisionmaking . . . if such efforts work to create a ‘minorities-only’ pool of applicants or bidders, or if they are so focused on minorities that nonminorities are placed at a significant competitive disadvantage.”).
152 1996 NPRM, supra note 14, para. 25.
153 Id.
154 See supra note 108 and accompanying text.
155 See supra note 113-14 and accompanying text.
156 1996 NPRM, supra note 14, para. 32.
157 See supra note 97 and accompanying text; but see February 1996 DOJ Memorandum, supra note 113, at 3 (“[r]ace-based decision-making includes situations where race is one of several factors as well as those in which race is the only factor.”).
whether the licensee discriminated or not. All broadcast licensees are prohibited from discriminatory practices under the Commission’s rules and Title VII of the Civil Rights Act.

3. The Forfeiture Guidelines

In the 1996 NPRM, the Commission also proposed “non-binding guidelines for assessing forfeitures for violations of the Commission’s broadcast EEO Rule.” These guidelines will streamline the Commission’s resolution of EEO cases by replacing the current method of “case-by-case or precedential analysis” and installing a “greater degree of predictability and certainty” in the assessment of sanctions for EEO violations. Adarand may be a consideration in the administration of these guidelines as well. The Commission has proposed that a base forfeiture amount of $12,500 be imposed if a licensee failed to recruit for at least 66% of all vacancies for the period under review so as to attract an adequate pool of minority and female applicants.

The Commission indicated that upward adjustments may be warranted, inter alia, “when a licensee has a ‘large or substantial number of hiring opportunities that did not translate into an adequate pool of minority and female applicants;’” . . . [and] when a ‘[l]arge pool of minorities in the relevant labor forces did not translate into an adequate pool of minority applicants.’ A downward adjustment in the forfeiture amount would be considered, inter alia, if “minorities constitute less than 6% of the relevant labor force.” A short-term license renewal could also be imposed if a combination of any two of these circumstances were found upon review of a licensee’s EEO efforts; “Failure to Recruit, Many Hires, and Large Minority Labor Force.”

The above forfeiture guidelines and adjustments include factors based on race or some measurement of the number of minorities (and women) recruited by a licensee. These factors could induce a forfeiture, which is a governmental imposed burden on a licensee and thus, could be implicated by Adarand. Although the DOJ has stated that the “establishment of numerical goals for minority participation . . . commensurate with availability of minorities in the qualified and appropriate labor pool” may be acceptable under Adarand and thus, their use in the assessment of EEO compliance could be a valid, lawful application, the use of numerical goals to determine sanctions has not been expressly addressed by the DOJ nor the Supreme Court. Arguably, the use of numerical goals for sanctions could be considered a logical outgrowth of their use for determining compliance and therefore, may be acceptable under Adarand.

III. UNRESOLVED ISSUES AFTER ADARAND

A. What’s Left of Metro Broadcasting Inc. v. FCC?

Adarand did not overrule Metro Broadcasting in its entirety and the Court left unresolved issues which may impact a future judicial review of the FCC’s broadcast EEO program. In Metro Broadcasting, the Supreme Court upheld the Commission’s distress sale and comparative preference policies for the enhancement of minority ownership. The Commission to determine whether the license should be revoked. See id.
Court upheld the minority ownership policies under an intermediate scrutiny standard. The Court further determined that the minority ownership policies served the important governmental interest of promoting program diversity and "that they were substantially related to the achievement of that objective." Congress reported that the "effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." However, the Commission and Congress did not justify the minority ownership policies "strictly as remedies for victims of . . . [racial and ethnic] discrimination." A remedial based justification, arguably, would have invoked strict scrutiny. The primary reason offered for the enhancement of minority ownership was to "promote programming diversity." If today's Supreme Court gives substantial weight to congressional findings, there may be adequate justification for an EEO program designed to remedy employment discrimination in both the broadcasting and cable industries. If not, there will be a need to substantiate historical and contemporary discrimination of minorities with empirical data under the standards set forth in Croson and its progeny. Such documentation of both statistical and anecdotal

of broadcast licenses. Id. A licensee whose qualifications have come into question and is subject to a noncomparative hearing or a hearing for revocation of the license, can assign the license to a controlling minority owner for a price "substantially" below the fair market value. Id. para. 3. The minority assignee must meet the FCC's basic qualifications and must purchase the station before the commencement of the noncomparative or revocation hearing. Id.; see generally David Honig, The FCC and Its Fluctuating Commitment to Minority Ownership of Broadcast Facilities, 27 How. L.J. 859 (1984) (discussing the history of FCC policies and regulations for minority ownership). The Commission's distress sale program has also been effected by Adarand and is currently under review by the Commission. David Kaut, Affirmative Action Ruling Ripples Through FCC, MULTICHANNEL NEWS, June 19, 1995, at 12.

1. Judicial Deference to Congressional Action

A major issue that remains unresolved given the Adarand decision is the degree of deference the Supreme Court will give to Congressional findings or affirmative action legislation based on racial preferences. In Metro Broadcasting, the Court gave great deference to Congressional findings of discrimination. In fact, the Court recognized that "[i]t is of overriding significance . . . that the FCC's minority ownership programs have been specifically approved —indeed, mandated—by Congress." Congress reported that the "effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." However, the Commission and Congress did not justify the minority ownership policies "strictly as remedies for victims of . . . [racial and ethnic] discrimination." A remedial based justification, arguably, would have invoked strict scrutiny. The primary reason offered for the enhancement of minority ownership was to "promote programming diversity." If today's Supreme Court gives substantial weight to congressional findings, there may be adequate justification for an EEO program designed to remedy employment discrimination in both the broadcasting and cable industries. If not, there will be a need to substantiate historical and contemporary discrimination of minorities with empirical data under the standards set forth in Croson and its progeny. Such documentation of both statistical and anecdotal

172 Metro Broadcasting, 497 U.S. at 600.
173 Id. at 566.
174 Id. at 563.
175 Id. In 1982, Congress amended the 1934 Act section 309(I)(3)(A), to mandate that significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.

177 Id.
178 Neither Congress nor the FCC developed a complete historical factual record that would sustain the remedial claim under strict scrutiny. Matthew L. Spitzer, Justifying Minority Preferences in Broadcasting, 64 S. CAL. L. REV. 293, 295 n.8 (1991) (citing witness testimony at Minority Ownership of

Broadcast Stations: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 101st Cong., 1st Sess. (1989)). The statistics illustrating the paucity of minority ownership cited in Metro Broadcasting do not include the necessary historical factual predicate that recounts discriminatory practices by local, state, or Federal Governments. See City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). This evidence would have identified the original genesis of minority discrimination and documented entry barriers to employment and ownership. For example, the Commission indirectly supported local and state racial discrimination in the 1940's and 1950's by "routinely handing out license[s] to applicants it knew were going to deprive minorities of the training needed to become station owners." Written statement of David Honig, Executive Director of Minority Media and Telecommunications Council Before the Federal Communications Commission, En Banc Advanced Television Hearing, MM Dkt No. 87-268, at 2 n.3 (Dec. 12, 1995) (citing Southland Television Co., 10 Rad. Reg (P & F) 699, 750, recon. denied, 20 F.C.C. 159 (1955) (awarding a VHF television license to an owner of a segregated movie theater in Shreveport, LA because segregation "would be legal under the laws of [Louisiana]."). The FCC's licensing procedures also fostered market entry barriers for minority ownership. See, e.g., id. at 3 n.3 (citing Ultravision Broadcasting Co., 1 F.C.C.2d 544 (1965), repealed in financial qualifications, 87 F.C.C.2d 200 (1981), in which a full year of working capital was required as part of an applicant's financial qualifications).
179 Metro Broadcasting, 497 U.S. at 566.
181 Croson, 488 U.S. at 500 (1989) (holding that the government must have a "strong basis in evidence for its conclusion that remedial action was necessary"). Post-Croson cases involving state employment programs have provided a better indication of what type of evidence will sustain strict scrutiny. See, e.g., Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1557 (11th Cir. 1994); Jansen v. City of Cincinnati, 977 F.2d 238,
data is commonly called a Croson disparity study.\textsuperscript{182}

2. Post-Enactment Evidence

The second unresolved issue is whether a “governmental institution must have sufficient evidence of discrimination to establish a compelling interest in engaging in race-based remedial action before it takes such action.”\textsuperscript{183} Several Courts of Appeals decisions have consistently held that “post-enactment” disparity evidence is acceptable,\textsuperscript{184} but the Supreme Court did not address this issue explicitly in Adarand.

3. Diversity of Voices: A Compelling Governmental Interest?

The critical, unresolved issue that affects the FCC’s EEO program is whether a non-remedial program, such as those programs promoting diversity of voices, will also be subject to strict scrutiny. Would the EEO’s primary objective be considered a compelling governmental interest? In Regents of the University of California v. Bakke,\textsuperscript{185} the Supreme Court held that increasing the racial and ethnic diversity of a university student body constituted a compelling governmental interest.\textsuperscript{186} The importance of a “diversity of voices” in the context of higher education established in Bakke could be extended to the field of broadcasting, particularly given the Court’s precedent of lesser First Amendment protection for broadcasting in general.\textsuperscript{187} In Metro Broadcasting, the Court concluded that “the interest in enhancing broadcast diversity is, at the very least, an important governmental objective,”\textsuperscript{188} leaving open the possibility that diversity could also be considered a compelling governmental interest.

The Court acknowledged that a “diversity of views and information on the airwaves serves important First Amendment values.”\textsuperscript{189} However, Justice O’Connor’s dissent in Metro Broadcasting, a precursor to her majority opinion in Adarand, may have effectively closed that option. In Metro Broadcasting, she stated that “[m]odern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest.”\textsuperscript{190} This opinion is in direct contrast to Justice O’Connor’s previous concurrence in Wygant v. Jackson Board of Education, of Justice Powell’s assertion that promoting racial and ethnic diversity in the area of higher education is a compelling governmental interest.\textsuperscript{191} Nonetheless, given the current composition of the Court, it is probable that the FCC’s primary objective of promoting a diversity of voices under strict scrutiny would not qualify as a compelling governmental interest for equal protection purposes - effectively failing the first prong of strict scrutiny.\textsuperscript{192}

\textsuperscript{182} To sustain a legal challenge, a Croson study must include both statistical data of historical and continuing discrimination, as well as anecdotal information that will go behind the numbers. Croson, 488 U.S. at 500; see, e.g., Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1990). “Statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. Id. at 919. Anecdotal evidence, “standing alone, suffers the same flaws as statistical evidence.” Id. Anecdotal evidence may provide proof of individual discrimination however, “rarely, if ever, can such evidence show a systematic pattern of discrimination necessary for the adoption of an affirmative action plan.” Id. “Nonetheless, the combination of convincing anecdotal and statistical evidence is potent.” Id.

\textsuperscript{183} DOJ Memorandum, supra note 89, at 2.

\textsuperscript{184} Id. at 13 n.26.

\textsuperscript{185} 438 U.S. 265 (1978) (plurality).

\textsuperscript{186} Id. A post-Adarand case in the Fifth Circuit has challenged Bakke and rejected diversity of viewpoints as a compelling governmental interest. See generally Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996) (holding that the admissions program at the University of Texas School of Law, which uses substantial racial preferences, is constitutionally invalid).

\textsuperscript{187} See, e.g., Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969) (holding that the “government is permitted to put restraints on licensees in favor of other views that should be expressed”). National Broadcasting Co. v. FCC, 319 U.S. 190, 215 (1943) (holding that the government’s role in distributing broadcast licenses is not merely that of a “traffic officer”).

\textsuperscript{188} Metro Broadcasting Inc. v. FCC, 497 U.S. 547, 567 (1990).

\textsuperscript{189} Id. at 568. But see Hopwood, 78 F.3d at 944 (rejecting diversity of viewpoints as a compelling governmental interest for institutions of higher education).

\textsuperscript{190} Metro Broadcasting, 497 U.S. at 612 (O’Connor, J., dissenting).

\textsuperscript{191} Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O’Connor, J., concurring) (agreeing that “a state interest in the promotion of racial diversity has been found sufficiently ‘compelling,’ at least in the context of higher education, to support the use of racial considerations in furthering that interest”).

\textsuperscript{192} Justice O’Connor’s opinion that diversity of voices would not be a compelling governmental interest would most likely be joined by Chief Justice Rehnquist and Justice Kennedy, who joined the majority opinion in Adarand. See Adarand, 115 S. Ct. at 2101. Justices Scalia and Thomas, who in Adarand concurred in the judgment, but would have imposed an absolute ban on all affirmative action programs on the theory that “government can never have a ‘compelling interest’ in discriminating on the basis of race . . . .” Id. at 2118.
4. Are Gender-based Programs Subject to Strict Scrutiny?

The final major issue that Adarand did not address is whether affirmative action programs that are gender-based will also be subject to strict scrutiny. The current standard of judicial review is intermediate scrutiny in which “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” The Adarand Court, although not explicitly ruling on gender, asserted that the Constitution protects “persons, not groups.” This assertion indicates that the Court could overrule the current standard of judicial review for local, state, or federal actions based on gender. In fact, in a case presently before the Supreme Court, United States v. Commonwealth of Virginia, the Federal Government argues that strict scrutiny “is the correct constitutional standard for evaluating classifications that deny opportunities to individuals based on their sex.”

B. The Continuing Importance of a Diversity of Voices

Whether or not a “diversity of voices” will be sustained as a constitutionally permissible goal is still extremely important because:

Television is preeminent as a communicator of ideas and as an entertainment form. Just as in a moment of triumph it showed the thrust into space fairly and objectively, it can achieve equivalent standards of presentation when grappling with cultural and racial diversity or when covering men and women. Because of the medium’s capacity for fixing an image in the public mind, its responsibility for avoiding stereotypic and demeaning depictions becomes central to its role. The encompassing nature of the medium necessitates that diversity among decisionmakers, newsmakers, and newscasters become an integral aspect of television.

Notwithstanding the holdings in Metro Broadcasting and Lamprecht v. FCC, the nexus between minority and female employment in broadcasting (as opposed to ownership) and diversity of programming has never been challenged directly in a court of law. The FCC’s EEO policies for broadcast television may soon have their day in court. To sustain judicial scrutiny, it may be necessary to present evidence, beyond Congressional findings, that prove a nexus exists between minority and female employment and programming. However, it may be difficult to gather the factual predicate necessary for such an evaluation because the benefits of a diverse workforce are often subtle and intangible, but certainly not “insubstantial.” Although potentially difficult to measure in quantifiable ways, these benefits are critically important to the broadcast system, particularly those benefits involved in the presentation of news.

The Commission does not assume that an increase of minorities and women on staff will always facilitate an increase in minority and women-oriented participation in management would be considered a “plus” in comparative hearings for mutually exclusive applicants. The Commission’s rational for promoting minority and female employment was based on the theory that such ownership would promote increased programming that reflected the views of that specific group. This theory was sustained in Metro Broadcasting, 497 U.S. at 547, for minority ownership and overruled in Lamprecht, 958 F.2d 382, for female ownership.


Metro Broadcasting, 497 U.S. at 612 (O’Connor, J. dissenting). Justice O’Connor also characterized diversity of broadcast viewpoints as “too amorphous... and too unrelated to any legitimate basis for employing racial classifications.” Id.

Metro Broadcasting, 497 U.S. at 588 (citing Minority Ownership Statement, 68 FCC RD. at 980, which cites findings from the United States Commission on Civil Rights); see also M. Junior Bridge, Women, Men, and Media: Show Window or Window Dressing?, UNABRIDGED COMMUNICATIONS (1992) (reporting disparities of women in news coverage in the print and broadcast media) (on file with author) [hereinafter Women, Men and Media].
programming or the expression of minority and women viewpoints. Even if this were true, the real benefit of a diverse workforce is not whether minority or female-oriented programs will be broadcast, but whether every program that arises reflects a fair representation of the facts and does not advance negative racial, ethnic, or sexual stereotypes. A diversity of personnel, particularly in decision-making management positions, can influence not only the kinds of news stories that are broadcast, but who will report these stories as well.

One can only wonder how particular national news events would have been reported, if there were more minority and female network or local news chiefs, executive directors, or producers at the decision-making level. For example, it is questionable whether the local television stations in Boston would have embraced the Charles Stuart murder case so quickly, or the disturbingly similar Susan Smith case in South Carolina, both of which implicated a mythical black assailant for hideous crimes committed against white victims, if there had been increased representation of the African-American community harmed by the stereotypical portrayal of a murder suspect.

IV. THE EEOC AND EEO: TWO DIFFERENT PURPOSES AND FUNCTIONS

Congressional criticism of the Commission's EEO program for broadcasters is premised on the assumption that the program is not necessary because it duplicates the functions of the EEOC. This assumption is erroneous. There are several distinguishing factors between the two programs.

A. Approval from the EEOC and the DOJ of the FCC's EEO Policy

Upon consideration of the EEO policy introduced in 1968, the Commission first consulted other Federal agencies, including the EEOC and the DOJ in regard to its authority to venture into this territory. The EEOC endorsed the Commission's program as one that would "complement, not conflict with, action by bodies specially created to enforce the [National] policy . . . ." The DOJ also confirmed that the "Commission has authority to promulgate a rule or policy . . . which would prohibit racial discrimination in the employment practices of broadcast licensees." In reaching this conclusion, the DOJ recognized that "[T]itle VII was not intended to circumscribe the authority of Federal agencies other than the Equal Employment Opportunity Commission to regulate employment practices." Further-

205 1996 NPRM, supra note 14, para. 3.
206 Id.
207 See, e.g., Jannette L. Dates & William Barlow, SPLIT IMAGE: AFRICAN AMERICANS IN THE MASS MEDIA 402-04 (1990). Chapter 8: Broadcast News documents the difficulty of African-Americans entering and achieving decision-making positions in the news industry as journalists, reporters, and management personnel, at both the local and national level. Id. at 389-418.
208 Women, Men, and Media, supra note 202.
209 See generally Gary Lee, S.C. Mother Arrested in Tots' Deaths; Police Find 2 Bodies, End Nationwide Search for Missing Youngsters, WASH. POST, Nov. 4, 1994, at A1 (comparing the story of a white man who shot dead his pregnant wife, inflicted a gun shot on himself, and blamed a black man for the assault; Stuart later killed himself when he became a suspect).
210 Id. (reporting the recovery of the bodies of 3 year old and 14 month old brothers from a local lake). The mother, Susan Smith, was charged with their murder. Id. She wrongfully accused a black gunman of carjacking her Mazda and kidnapping their sons. Id.
211 See, e.g., William Raspberry, Automatically Suspect, WASH. POST, Nov. 9, 1994, at A19 (commenting on the "slander" against black men who are erroneously accused and automatically suspect for hideous crimes against white victims).
212 See David L. Rose, Twenty-Five Years Later: Where Do We Stand on Equal Employment, 42 VAND. L. REV. 1121
more, in 1978, for the purpose of fostering coordination and cooperation, the FCC and EEOC adopted a plan to facilitate the “exchange of information, handling of discrimination complaints and automatic inquiry by [the] FCC of broadcasters whose EEO efforts were found inadequate by [the] EEOC.” Nonetheless, critics of the FCC’s EEO program continue to question the Commission’s function in overseeing the employment practices of the industries it regulates as duplicative of the functions of the EEOC.

B. The EEOC’s Limited Jurisdiction

The EEOC’s objective is to eradicate discrimination and expedite disputes between employees and employers through review and litigation of individual complaints if necessary. On the other hand, the FCC EEO’s efforts-based program serves as a deterrent to discrimination. The FCC’s primary objective is to monitor the unique problems and responsibilities of the employment practices of business that are regulated by the Commission. Furthermore, the FCC does not review individual complaints for it does not have the ability to provide compensation to an individual employee who has been the victim of discrimination.

The EEOC’s jurisdiction is also limited to businesses with fifteen or more employees. Under this provision, 8,238 (62.3%) of the total number of radio and television broadcast licensees subject to the FCC EEO Rules, are not covered. This effectively leaves the FCC as the only source of information about the employment practices of the broadcasting industry. The EEOC also requires businesses in all areas of commerce with 100 or more employees to file an annual report. The number of units, radio and television stations exempt from this reporting requirement is more than 98%. Only an estimated 153 radio and television licensees, out of a total of 13,230, are required to file an annual report for both the FCC and the EEOC. Given its statutory limitations, it is evident that the EEOC receives an incomplete and distorted statistical picture of the broadcasting industry, if it gets a picture at all.

Even if the EEOC’s threshold number of employees were lowered, in effect bringing more broadcast licensees under its jurisdiction, the EEOC would be ill equipped to properly police discrimination by licensees or issue timely remedies given its tremendous backlog and diminished personnel count and budget. During the lengthy time it takes for the EEOC to review a case, the broadcast license could have been renewed or transferred to another owner. Elimination of the FCC’s EEO program would allow for the grant of a renewal, assignment, or the acquisition of new stations by a licensee in violation of Title VII to go unchecked. Congressional endorsement of the elimination of the FCC’s EEO program would be in direct conflict with the congressional mandate for the FCC to ensure that licensees operate in the public interest. Not only is there no duplication of efforts, but the FCC’s EEO program supplements as well as complements the EEOC’s statutory obligations.

V. THE IMPORTANCE OF EEO IN THE 21ST CENTURY

The Constitution may be “color blind,” but...
America is not. The ugly vestiges of racism still permeate throughout all areas of civilized society and the "Supreme Court's definition of a 'color blind' Constitution ignores the reality that America is far from overcoming more than two centuries of bigotry."\textsuperscript{381}

A. The Underrepresentation of Minorities and Women in the Broadcasting Industry

According to the U.S. Census Bureau, women represent 45.9% of the national labor force and minorities represent 24.3%.\textsuperscript{382} However, both women and minorities are underrepresented in the broadcasting industry as compared to the national labor force. The Commission's 1994 Equal Employment Opportunity Trend Report\textsuperscript{383} reports that women represent 39.9% of all employees at broadcast stations, 5% lower than the national labor force average.\textsuperscript{384} Minorities represent only 18.4% of the total number of employees in the broadcasting industry, a difference of 6% less than the national average.\textsuperscript{385} Despite underrepresentation in comparison with national levels, the number of women and minorities employed in the broadcasting industry improved steadily between 1990-1994.\textsuperscript{386} However, there is much concern that these nominal increases do not reflect the real employment picture given the FCC's flawed reporting procedures.\textsuperscript{387} Conversely, broadcasters have commented that the Commission's reports are "sufficient to give the Commission an overall view of how each licensee is faring in the employment of women and minorities in key positions, as well as the flow of women and minorities through the licensee's hierarchy."\textsuperscript{388}

Contrary to NAB's assertion, it is evident that minorities and women have not "fared" well where it counts. In 1979, the United States Commission on Civil Rights reported in a comprehensive study that "despite [an] increase in the numbers of minority and female employees at television stations, they were almost completely absent from decision-making positions."\textsuperscript{389} The report asserted that the increase in the number of women and minorities reported in the upper-four levels of job categories in the FCC's Annual Employment reports (Form 395), was illusory and misleading because many were given impressive job titles, "but their salaries and locations on organi-

\textsuperscript{380} Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097, 2135 (1995) (Ginsburg, J., dissenting) (citing evidence of historical racial discrimination in housing, employment, and business); see also William Claiborne, Study Finds Disparity in 'Three Strikes' Law, WASH. POST, Mar. 5, 1996, at A3 (citing the results of a study by the San Francisco Center on Juvenile and Criminal Justice that reports that African-Americans are being sentenced to prisons at a rate 13 times that of whites under California's law that mandates sentences of 25 years to life for three-time convicted felons); Interim Report of the Federal Communications Commission Small Business Advisory Committee, Apr. 21, 1994, at 46 (citing studies that have reported disparities in the approval of short-term bank loan applications between non-minority firms and those firms that are owned by African-Americans and Hispanics).


\textsuperscript{383} The Commission's 1994 Equal Employment Opportunity Trend Report reports a five year trend (1990-1994) in minority and female employment for the broadcast and cable industries. \textit{Id.} This data is compiled from the Annual Employment Reports, Form 395, that broadcasters and cable operators are required to file to report the composition of their staffs by gender, race and/or national origin. \textit{Id.}

\textsuperscript{384} See id.

\textsuperscript{385} See id.

\textsuperscript{386} Id.

\textsuperscript{387} The annual EEO Trend Report for broadcasting released by the FCC in June of each year is the compilation of only a two-week survey of staff by gender, race and job category filed by television and radio licensees on or before May 31 of each year. See supra note 106 and accompanying text. FCC Form 395-B has been criticized for "overstat[ing], through misclassification or otherwise, the true role of women and minorities in the broadcasting industry."\textit{Window Dressing on the Set: An Update,} A Report of the United States Commission on Civil Rights, (Jan. 1979) at 36 (discussing challenges to the FCC's Annual Report Form 395-B) (footnotes omitted) [hereinafter \textit{Window Dressing Update}]. To resolve some of the problems with the reporting procedures, the Commission proposed amending Form 395 in 1977. \textit{In re Amendment of Broadcast Equal Employment Opportunity Rules and FCC Form 395, First Report and Order,} 44 Rad. Reg. 2d (P & F) 15, para. 5 (1979).

Although broadcasters rejected major overhaul of Form 395, several broadcasters revised their reporting procedures to ensure that job titles were appropriate to the actual job function. After passage of the 1992 Cable Act, the Commission again sought comment on revising Form 395 for broadcasters. \textit{In re Implementation of Commission's Equal Opportunity Rules, Notice of Inquiry, 9 FCC Rcd. 2047, para. 29 (1994) [hereinafter 1994 NOI].} In the 1994 NOI, the FCC also sought comment on whether the number of job categories should be expanded for broadcasters from nine to fifteen, the same number required for cable operators and Multiple Video Programming Distributors under section 22(g) of the 1992 Cable Act. \textit{Id.} This proposal was not addressed in the 1996 NPRM. See 1996 NPRM, supra note 14.

\textsuperscript{388} NOI Comments of NAB, supra note 117, at 25.

\textsuperscript{389} \textit{Window Dressing Update,} supra note 237, at 33.
zational charts suggested that the job titles constituted an artificially inflated job status. This disturbing trend has not changed much in fifteen years. The 1994 EEO Trend Report shows an increase in the total of women officials and managers in broadcasting from 33.9% in 1993 to 34.9% in 1994. The total of minorities also increased nominally during the same period, from 12.6% in 1993 to 12.9% in 1994. Nonetheless, women and minorities have not yet risen in any measurable degree to the upper echelon of industry leaders and corporate executive ranks. The guest list composing of only one minority and three females out of thirty of television industry's "top guns" for an unprecedented White House Summit on television violence in February 1996, is indicative of the paucity of minorities and women as part of the television elite. In fact, women have been more successful in reaching the upper echelons of management in cable television than in broadcasting. The unresolved issues surrounding the accuracy of the Commission's reporting procedures and a licensee's potential for abuse of the system, question whether the annual employment figures reported by the Commission should be the definitive measure of equal employment in the industry.

It is a major concern of the Commission that women and minorities have an opportunity to serve in managerial and executive positions because this experience is a means "to learn the operating and management skills necessary to become media owners and entrepreneurs." The level of minority and women ownership of broadcast properties is also minimal, mirroring the level of executive employment. In 1994, minorities, specifically Blacks, Hispanics, Asians, and Native-Americans, owned and controlled 31 (2.7%) of 1,155 commercial television stations and 292 (2.9%) of 9,973 commercial radio stations in the United States. Therefore, the total of commercial broadcast stations combined owned by minorities is 323 (2.9%) of a total of 11,128 stations in the U.S. This represents a nominal increase since 1993 when the total number of minority owned stations was 302 (2.7%). According to the most recent report of the U.S. Census Bureau, in 1987 women owned and controlled 27 (1.9%) of 1,342 commercial television stations and 394 (3.8%) of 10,244 commercial radio stations in the United States.

B. The Explosion of the Communications Age

The communications industry is one of the few in-
dustries that is expected to have the "highest expected growth [in employment] between the year 1990 and 2005." Those who trumpeted the passage of the 1996 Act highlighted the benefits of deregulation as creating "innovative new products and services that will create thousands of new American jobs" spurred by the convergence of different communications industries competing with one another. As expressed by FCC Chairman Reed E. Hundt, one of the Commission's goals was to "promote EEO policies in new and existing communications business."

The future of the communications industry, including broadcasting, is unlimited. The technology for use of the electromagnetic spectrum is developing faster than the regulatory entities can keep up with it. It is only appropriate that a greater representation of qualified minorities and women participate in this evolution.

C. A Diverse Workforce is Good Business

"[The] hiring and advancement of women and minorities is good business. Media entities should view the presence of women in the workplace as criteria for success and competitiveness: Affirmative Action helps to guarantee fairness in media employment and, therefore, the quality of programming." The United States workforce is becoming more diverse as we move into the 21st century. Minorities, women, and immigrants now make up more than half of the country's workforce. There is a need for American companies to go beyond affirmative action programs and develop businesses that "manage diversity." Managing diversity "consists of enabling people, in this case minorities and women, to perform to their potential." Companies that are able to provide upward mobility, especially to middle-management and leadership positions, will have a competitive edge.

The benefits of a diverse workforce are well documented. The Glass Ceiling Commission issued a comprehensive fact-finding report in 1995 that not only confirms that women and minorities rarely reach the highest level of business, but documents success stories of businesses that have taken advantage of the benefits that diversity, at all levels, can bring. For example, a 1993 study of Standard and Poor 500 companies showed that firms that succeed in shattering their own glass ceilings profited by stock-market records that were nearly two and a half times better than comparable companies.

Large corporations are not the only beneficiaries of diversity. The basic principle expressed by corporate leaders is that "it is necessary for their business that they better reflect the marketplace and their customers." A broadcast station, of any size, can benefit from operating its business to better reflect the diversity of its customers which are advertisers and audience members. However, to benefit from successfully managing a diverse workforce, one first has to have a diverse workforce. Unfortunately, there is still a need for affirmative action to create diversity in employment, especially in the broadcast industry.

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353 Federal Communications Chairman Reed Hundt, Speech at the 1994 National Urban League Conference 4 (July 26, 1994).

354 The Next Step: Lucille Luongo Looks to '96 As a Time for Change, THE RADIO WORLD MAGAZINE, Dec. 1995, at 32. Lucille Luongo is the current President of American Women in Radio and Television, an organization founded in 1951 to "promote progress and create change through the media by educating, advocating and acting as a resource for its members and promoting the advancement of women in the electronic medium and allied fields." Id. AWRT was also instrumental in forming a women's industry media coalition comprising of Women of Wireless, Women in Cable and Telecommunication, and Women in Communications. Id. The coalition represents approximately 12,000 women in the communications industry. Id.


356 Id. at 109.

357 Id.

358 Id. at 108, 113.


356 Id. at Part V.

351 Glass Ceiling Report, supra note 259, at iv.

355 Affirming Diversity, supra note 255, at 117.
VI. THE POTENTIAL AUCTION OF SPECTRUM FOR ADVANCED TELEVISION SERVICES

The award of valuable electromagnetic spectrum by the FCC is presently licensed to radio and television broadcasters for no monetary cash consideration - in a word, free. Broadcast licensees, “in return for receiving a free license from the public, in return for receiving the right to use the public airwaves, to graze on the public airwaves, so to speak” have an obligation to broadcast in the public interest. This concept necessitates the involvement of minorities and women. This is the statutory quid-pro-quo that is currently the foundation of all regulations and rules that control the broadcast industry.

Given the success of several auctions for new communications services which have raised over $15 billion dollars for the U.S. Treasury, there is a real possibility that broadcasters may have to pay for the continued use of spectrum. There has been more than a passing interest from individual Congressmen who believe that radio and television broadcasters should be charged for the use of public electromagnetic spectrum. The overriding issue is whether payment for spectrum alters or eliminates the quid-pro-quo “public trust” requirement now controlling the broadcast industry. Specifically, will the payment of spectrum fees eliminate the FCC’s authority to impose EEO obligations on broadcasters?

Pursuant to the Spending Clause of Article I, § 8, Congress has the authority to attach conditions on the receipt of the use of public spectrum since the award of spectrum is a grant of public property, a benefit conferred by the U.S. Government to television broadcast licensees. This grant invokes governmental control of that spectrum and the authority to regulate the industry in the name of the public trust. “Contrary to the broadcaster’s claims, there is nothing in the auction process that precludes the [government] from imposing public interest obligations on the winning bidders. The [government will have] sold spectrum ‘rights,’ and not lifetime ownership of the frequencies.”

FCC Chairman Reed Hundt remarked that a station “should pay for their second channel, either in cash or in concrete commitments to serve the public interest.” Broadcasters argue that “if you have to bid for spectrum, you no longer have public interest obligations. No other user of the spectrum has public interest obligations other than broadcasters.” This statement is incorrect. Similar EEO obligations are imposed on Common Carriers, Commercial Mobile Radio Service (“CMRS”), Public Land Mobile Radio Services, and Cable Television. In fact, the

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266 The term “advanced television services” (“ATV”) is defined as any television service that provides “improved audio and video quality or enhances the current NTSC [National Television System Committee] analog standard for monochrome and color television. In re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry, 10 FCC Rcd. 10540 (1995). High Definition Television (“HDTV”) is one type of ATV that offers a superior picture of that approaching a 35 millimeter film quality video and compact disc quality audio. Id. ATV is also commonly defined as television that uses digital or other advanced technology. The 1996 Act § 336(g)(1).


270 The 1934 Act grants the FCC the authority to regulate television licensees as the “public, convenience, interest, or necessity” requires. 47 U.S.C. §§ 303, 307, 309 (1994).

statutory requirements for Cable and other Multiple Video Program Distributors ("MVPD's") are more extensive than the Commission's EEO requirements for broadcasters. Additional public interest obligations also exist for the other communication services regulated by the FCC.

Moreover, Congress' grant of auction authority under Section 309(j) of the 1934 Act negates the theory that if spectrum is paid for, the Commission would not have the authority to regulate auctioned licenses in the public interest. Section 309(j) expressly mandates that "the Commission shall include safeguards to protect the public interest in the use of the spectrum..."). The ATV public interest provisions set forth in the section entitled "Broadcast Spectrum Flexibility" in the 1996 Act are another indication that it is unlikely that a congressional grant of auction authority for broadcast licenses would eliminate the Commission's current statutory authority to regulate in the public interest. An express provision in the 1996 Act mandates that television broadcast stations granted a license for advanced television services shall not be relieved from their obligation "to serve the public interest, convenience, and necessity." Congress also mandated that broadcasters pay a fee to the government if they were to offer subscription services. However, Congress stipulated that "[n]othing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity.

It is explicit that public interest obligations for television licensees includes all ancillary or supplementary services that may be subject to the payment of a fee.

Therefore, it is likely that broadcasters will continue to be subject to the public interest obligations if a license for spectrum is auctioned or even charged a use fee. The FCC, acting pursuant to the delegated authority of Congress, has the power to stipulate a "condition-of-sale" to the receipt of government funds or benefits. Case precedent indicates that such a condition-of-sale may also be sustained under the First Amendment. The grant of a license will remain an award of a scarce public commodity to a select few. Therefore, this privilege may continue to carry an obligation to serve the public trust, including EEO obligations.

Upon passage of the 1996 Act, Congress delayed its decision on whether to mandate the auction of broadcast spectrum to be allocated for the transition to digital television. "While the rest of the industries affected by the Telecommunications Act of 1996

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776 The EEO programs between cable and broadcast television are similar, however, there are differences in the frequency of Commission review and the type of information reported by the respective industries. Congress enacted rules requiring the annual review of cable system's EEO programs. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 634 (e)(1), 98 Stat. 2779 (1984). Broadcasters are only reviewed upon the renewal of their licenses, currently every five years for television and seven years for radio licenses. 1996 NPRM, supra note 14, para. 8 n.16. Cable operators and broadcasters are both required to keep a record on each vacancy as to the number of applicants for each position, as well as their gender, ethnic group, and the referral source of the position. 1994 Report to Congress, supra note 75, para. 22. These reports also breakdown positions between upper-level job categories and lower-level categories. Id. However, cable has more job categories than broadcasters. They are required to report hiring for fifteen job categories as compared to only nine for broadcasters. Id. at paras. 15 n.27, 27 n.48. 777 For example, the 1996 Act imposes public interest obligations on cable television to scramble any program or otherwise block the full audio and video of a program a subscriber deems unsuitable, section 504; interactive computer services are required to provide protection and private blocking of offensive

777 47 U.S.C. § 309(j)(4)(D)). Both the Commission and Congress have recognized that increased employment opportunities for minorities and women provide training and management skills that enable such groups to have viable ownership opportunities in the communications industry. Id. para. 233 (citing H.R. REP. No. 628, 102d Cong., 2d Sess. 114 (1992)).

779 The ATV public interest provisions set forth in the section entitled "Broadcast Spectrum Flexibility" in the 1996 Act are another indication that it is unlikely that a congressional grant of auction authority for broadcast licenses would eliminate the Commission's current statutory authority to regulate in the public interest. An express provision in the 1996 Act mandates that television broadcast stations granted a license for advanced television services shall not be relieved from their obligation "to serve the public interest, convenience, and necessity." Congress also mandated that broadcasters pay a fee to the government if they were to offer subscription services. However, Congress stipulated that "[n]othing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity. It is explicit that public interest obligations for television licensees includes all ancillary or supplementary services that may be subject to the payment of a fee.

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Upon passage of the 1996 Act, Congress delayed its decision on whether to mandate the auction of broadcast spectrum to be allocated for the transition to digital television. "While the rest of the industries affected by the Telecommunications Act of 1996
celebrated its passage last week, broadcasters’ enthusiasm was checked by vows from the Republican majority to revisit Congress’ decision to set aside spectrum for the transition to digital TV. A full review of the government’s spectrum policy is expected to culminate in a “grand spectrum bill” this spring. It is also unlikely that Congress would include an exemption for broadcasters from public service obligations in subsequent legislation. Broadcaster’s public interest obligations have increased even more under the new 1996 Act and additional legislation.

VII. CONCLUSION

The history of broadcasting in America is riddled with discriminatory practices that have prevented minorities and women from full participation in employment, management and ownership positions. A hiring program based on racial preferences which remedy historical and contemporary discrimination could be justified under the strict scrutiny test of Adarand. However, the FCC has chosen to implement a race-neutral alternative that promotes diversity without imposing quotas or hiring criteria on its regulatees as well as providing the licensee with flexibility and discretion to hire their candidate of choice. This efforts-based EEO program currently does not come with the holding of Adarand because the evaluation of a licensee’s compliance with the program is not based on race. However, the Commission’s modification, administration, and enforcement of the program to incorporate race-based factors may implicate Adarand.

The need for employment affirmative action in the broadcast industry continues to be evident and the FCC’s efforts-based program is a means within the law to achieve this diversity. However, the Commission’s EEO program, which can facilitate the hiring of qualified minorities and women, is only the beginning. Broadcasters must develop a commitment and strategy for the development and management of a diverse workforce that includes minorities and women in the decisionmaking process. Every employee should have an opportunity to reach their full potential. This is the most effective way to ensure that broadcasters can compete in a changing global communications environment. With the full and vigorous support of the broadcast industry, employment and programming at radio and television stations across the country can truly reflect America’s mosaic of people.

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287 Id.