

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

In re Application of	)	
	)	
Southern Broadcast Corporation of Sarasota	)	BRCT-961001UL
	)	
For Renewal of License of	)	
Station WWSB(TV)	)	
Sarasota, Florida	)	
Facility ID No. 61251	)	

**MEMORANDUM OPINION AND ORDER**

Adopted: January 4, 2001

Released: February 5, 2001

By the Commission:

**I. INTRODUCTION**

1. The Commission has before it for consideration: (i) an application for review timely filed on June 5, 2000, by the Manatee County (Florida) Branch of the NAACP ("NAACP") regarding the *Memorandum Opinion and Order (MO&O)* of the Chief, Mass Media Bureau, adopted May 5, 2000 in the above-captioned matter;<sup>1</sup> (ii) an opposition thereto filed by Southern Broadcasting Corporation of Sarasota ("Southern"), licensee of television station WWSB(TV), Sarasota, Florida; (iii) the NAACP's reply to the opposition; and (iv) a request for official notice filed by the NAACP. The *MO&O* granted the above captioned renewal application for WWSB(TV), and dismissed a petition to deny filed by the NAACP which alleged that Southern violated the Commission's Equal Employment Opportunity (EEO) Rule, Section 73.2080(a) of the Commission's Rules, 47 C.F.R. § 73.2080(a), by discriminating against certain Black employees.

**II. BACKGROUND**

2. The NAACP filed its petition to deny the WWSB(TV) renewal application on January 2, 1997, alleging that the licensee of WWSB(TV) engaged in unlawful discrimination, as detailed in the *MO&O*. Thereafter, the licensee filed an opposition on March 21, 1997. After extensions of time, the NAACP filed its Reply on June 11, 1997. Citing extensive new matter in the NAACP's Reply, the licensee filed a Response to Petitioner's Reply on September 26, 1997. On December 12, 1997, the NAACP filed a Reply to Response to Petitioner's Reply. On January 23, 1998, the licensee filed a Contingent Response to Reply, citing new allegations in the NAACP's December 12, 1997 Reply. On February 4, 1998, a conference call was held by the Chief, EEO Branch, and counsel for both parties in which it was indicated that the NAACP's December 12, 1997, Reply would be treated as the last authorized pleading. The case thus would ordinarily have been ripe for resolution. However, on April 14, 1998, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in *Lutheran Church - Missouri Synod v. FCC*, 141 F.3d 344, *pet. for reh'g denied*, 154 F.3d 487, *pet for reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) ("*Lutheran Church*"). The Court held that the EEO program requirements of former Section 73.2080(b) and (c) of the Commission's Rules were unconstitutional as applied to minorities

<sup>1</sup> Because the *MO&O* was not published, a copy is attached hereto.

because aspects of those provisions pressured stations to make race-based hiring decisions. The Court also expressed concerns regarding the Commission's authority to promulgate an employment nondiscrimination rule and remanded the matter to the Commission to address those concerns. After conducting a rulemaking, the Commission reaffirmed its authority to promulgate a nondiscrimination rule in *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, 15 FCC Rcd 2329 (2000) ("Report and Order"). The *Report and Order* became effective on April 18, 2000. 45 Fed. Reg. 24654 (2000). On May 5, 2000, the Chief, Mass Media Bureau, adopted the *MO&O* in this proceeding.

3. Bureau *MO&O*. The *MO&O* dismissed the NAACP's petition to deny because it failed to make a *prima facie* case as required by Section 309(d)(1) of the Communications Act of 1934, as amended (the "Act"). Pursuant thereto, a petitioner to deny must, as a threshold matter, submit "specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience and necessity.]" 47 U.S.C. § 309(d)(1). See also *Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) ("*Astroline*"). The *MO&O* premised this conclusion on the fact that the NAACP's petition to deny was based on unresolved individual complaints of employment discrimination. It cited Commission precedent holding that such complaints should ordinarily be resolved in the first instance by the Equal Employment Opportunity Commission ("EEOC") or other governmental agency and/or court established to enforce nondiscrimination laws. See *Pacific and Southern Company, Inc.*, 11 FCC Rcd 8503, 8505-06 (1996) ("*Pacific*"); *CBS, Inc.*, 59 FCC 2d 1127, 1132 (1976) ("*CBS*"). The *MO&O* acknowledged that in *Pacific*, we indicated that the general policy does not preclude consideration of an individual discrimination complaint in all circumstances. However, it did not find that the circumstances set forth in NAACP's petition to deny warranted a departure from our general policy, especially since NAACP's petition relied heavily on the contention that the alleged discrimination might also reflect a deficient EEO program under requirements that were later held unconstitutional in *Lutheran Church*.

4. In analyzing the NAACP's petition, the *MO&O* considered only the facts alleged in its petition to deny. It found that allegations contained in later pleadings were not pertinent to determining whether NAACP had made a *prima facie* case in its initial petition to deny, citing *Blue Ridge Public Television*, 12 FCC Rcd 4634, 4637 n. 5 (1997) ("*Blue Ridge*"). The *MO&O* also decided the case on the basis of the Rule and applicable precedent in effect when the alleged acts of discrimination occurred. It thus did not take into account policies articulated in the *Report and Order* because it found that any changes were prospective in nature.

5. The *MO&O* also considered two allegations other than discrimination. Both of these allegations were raised in pleadings filed after the petition to deny and, accordingly, the *MO&O* found that they could not cure the defects in the petition to deny, citing *Blue Ridge*.

6. The first allegation concerned two memoranda from the licensee to its employees. In the first memorandum, the licensee requested that all of its employees include the station's counsel in any discussions they might have with counsel for the NAACP. In the second memorandum, the licensee clarified that only managers were required to include the station's counsel and that other employees were free to talk with the NAACP's counsel without the presence of the station's counsel, if they so chose. The NAACP alleged that these memoranda were an abuse of the Commission's process because they were an attempt to intimidate prospective witnesses. The *MO&O* rejected this contention, finding that the memoranda did not on their face reflect an intent to intimidate prospective witnesses and the NAACP had

failed to present any evidence raising a substantial and material question of fact that the licensee had in fact taken adverse actions against any actual or prospective witnesses.

7. The second allegation was that David Collins, the station's former News Director, had made statements reflecting racial prejudice and sexism in private conversations with two former station employees. The NAACP urged that issues were warranted as to whether the licensee knew of Collins' racist attitudes and whether it deliberately failed to report this fact to the Commission. The *MO&O* rejected this contention, finding that the NAACP failed to present evidence raising a substantial and material question of fact that the licensee knew of Collins' alleged attitudes or that his alleged prejudice resulted in employment decisions that adversely impacted women or minorities at WWSB(TV).

8. The *MO&O* accordingly concluded that the NAACP had failed to make a *prima facie* case and dismissed its petition for failure to meet the requirements of Section 309(d) of the Act. It nonetheless noted that, pursuant to the *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 51 Fed. Reg. 21798 (1986) ("*MOU*"), the Commission acts as a receiving agency for the EEOC regarding charges of discrimination against broadcasters. The *MO&O* accordingly indicated that complaints submitted in this proceeding that had not been previously submitted to the EEOC would be referred to that agency.<sup>2</sup> The *MO&O* also required the licensee to report the resolution of any discrimination charges within 30 days, recognizing that the Commission would view seriously any final determination that the licensee engaged in unlawful discrimination.

9. Application for Review. The NAACP's application for review first faults the *MO&O* for failing to set forth all of the allegations contained in all of its pleadings. It next asserts that its allegations would require a hearing as to whether Southern engaged in systematic discrimination against Black journalists. Thus, it contends that evidence such as it proffered would be adequate under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") to establish a *prima facie* case sufficient to shift the burden from the complainant to the employer, citing *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973) ("*McDonnell*").<sup>3</sup> The NAACP also urges that Commission precedent dictates a finding of a *prima facie* case, citing *Leflore Broadcasting Co., Inc.*, 46 FCC 2d 980 (1974) ("*Leflore*"); *Rust Communications Group, Inc.*, 53 FCC 2d 355 (1975) ("*Rust*"); *New Mexico Broadcasting Co., Inc.*, 54 FCC 2d 126 (1975) ("*New Mexico*"); *Federal Broadcasting System, Inc.*, 59 FCC 2d 356 (1976) ("*Federal*"); *Catoctin Broadcasting of New York, Inc.*, FCC 85-155, 50 Fed. Reg. 19229 (1985) ("*Catoctin*"); and *Black Broadcasting Coalition of Richmond v. FCC*, 556 F. 2d 59 (D.C. Cir. 1977) ("*Richmond*"). It therefore contends that the result reached in the *MO&O* constitutes an unexplained

<sup>2</sup> One of the complainants, Vickie Oldham, had filed a complaint with the EEOC. On August 16, 1999, the Tampa Area Office of the EEOC issued a Dismissal and Notice of Rights with respect to Oldham's complaint indicating that it was unable to conclude that the information obtained established a violation of statutes enforced by the EEOC. The EEOC also notified Oldham of her right to bring suit. On November 15, 1999, Oldham filed a suit against the licensee and other defendants in the United States District Court for the Middle District of Florida (*Oldham v. Southern Broadcast Corporation of Sarasota, et al.*, Case No. 8:99-CV-2615-T-23F) alleging Title VII violations. The matter remains pending.

<sup>3</sup> Under *McDonnell*, a complainant must show that he belongs to a racial minority; that he applied and was qualified for a job for which an employer was seeking applicants; that he was rejected; and that, after his rejection, the position remained open and the employer continued to solicit applicants of the complainant's qualifications.

departure from the Commission's own controlling authorities. The NAACP also disputes the *MO&O*'s characterization of its petition to deny as having relied heavily on the contention that its discrimination allegations might also reveal violations of the EEO program requirements of former Section 73.2080(b) and (c) of the Commission's Rules that were invalidated by *Lutheran Church*. The NAACP argues that it "scarcely complained of" EEO program violations by the licensee. The NAACP further contends that it is unfair to place on it the burden of proving that WWSB(TV) News Director David Collins harbored racist and sexist attitudes because he was an agent of the licensee and the licensee can therefore be charged with knowledge of his attitudes. The NAACP also contends that the *MO&O* erred in not considering the "zero tolerance" policy articulated in the *Report and Order*.

10. The NAACP additionally asserts that the EEOC cannot be relied upon to resolve the issues concerning alleged discrimination at WWSB(TV) because relief may be precluded by the applicable Title VII statute of limitations. Thus, the NAACP suggests that the EEOC failed to make a probable cause of discrimination finding in Oldham's case because it considered some of her key allegations time-barred under Title VII. The only basis cited for this conclusion is the NAACP's "information and belief." The NAACP also suggests that the allegations of other complainants "probably" are time-barred under Title VII. The NAACP compares this situation to the situation of broadcasters with fewer than the 15 employees needed to trigger EEOC jurisdiction under Title VII.

11. Finally, the NAACP disagrees with the *MO&O*'s rejection of its allegations concerning witness intimidation. It urges that inquiry was warranted based on evidence that some employees may have elected not to cooperate with the NAACP's investigation because of a perception arising from the licensee's memoranda that it might retaliate against them if they provided adverse information to the NAACP.

12. The NAACP also requests that we hold oral argument in this case. It asserts that oral argument would illuminate the issues, expand public understanding of the policies, and provide an opportunity to sort out the allegations with both parties' counsel.

13. The licensee, in its opposition, generally supports the result reached by the *MO&O*. It also suggests that the NAACP's application for review exceeds the limit of 25 double-spaced pages specified in Section 1.115(f) of the Commission's Rules. Thus, although the NAACP's application for review is 22 pages in length, the licensee notes that much of it is single-spaced so that it would likely exceed 25 pages if properly double-spaced. In its reply, the NAACP asserts that the rules permit the use of single-spacing to set out background material. It otherwise urges that an expeditious hearing on the allegations presented is warranted.

### III. DISCUSSION

14. In general, individual complaints of employment discrimination do not suffice to make a *prima facie* case that grant of a renewal application would be inconsistent with the public interest. *Pacific*. This is based on the Commission's general policy that such complaints should ordinarily be resolved in the first instance by the Equal Employment Opportunity Commission ("EEOC") or other governmental agency and/or court established to enforce non-discrimination laws. *Pacific*; *Application for Renewal of License of WNBC-TV*, 5 FCC Rcd 2049 (1990); *Washington Radio, Inc.*, 88 FCC 2d 1200 (1982); *KSDK, Inc.*, 85 FCC 2d 797 (1981), *recon. den.*, 88 FCC 2d 1443 (1982); *Newhouse Broadcasting Corporation*, 61 FCC 2d 528, 539-40 (1976); and *CBS*. The primary basis for this policy is the fact that Congress intended the EEOC to be principally responsible for the resolution of individual employment discrimination disputes and that efforts on our part to resolve such disputes separately would result in duplication of efforts. *Pacific*;

*CBS, Inc.* Not only is such duplication wasteful, but it raises the possibility of inconsistent results in proceedings going forward before different agencies or courts. Further, as indicated in *CBS*, the Commission does not have the expertise to duplicate the functions assigned by Title VII to the EEOC or state fair employment agencies.

15. Our policy with respect to discrimination complaints is only one of several circumstances in which we will not inquire into arguably relevant alleged misconduct unless it has first been adjudicated by an agency or court with primary responsibility in the pertinent area. For instance, we will generally not designate an application for hearing based on alleged non-FCC misconduct such as fraudulent representation to another government agency or commission of a felony in the absence of an adjudication. See *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986) as modified by 5 FCC Rcd 3252 (1990). We indicated in *Pacific* that our general policy does not preclude consideration of facts relating to unadjudicated allegations of discrimination where surrounding circumstances raise questions about a licensee's basic qualifications. We conclude, however, that the *MO&O* properly resolved the issues in this proceeding consistent with our general policy.

16. The NAACP initially urges that the *MO&O* erred in failing to set forth all of its allegations, including those in pleadings filed subsequent to the petition to deny. However, this is immaterial because the NAACP has not alleged in any of its pleadings that a final determination of discrimination has been made by the EEOC or other agency or court charged with responsibility for enforcing Title VII. Thus, the NAACP misperceives the basis for the ruling. The decision in the *MO&O* was based on the general policy that allegations of discrimination should be resolved in the first instance by the EEOC or other appropriate agency or court. In the absence of a finding of discrimination, the mere pendency of a complaint is generally insufficient to meet the *prima facie* showing requirement applicable to a petition to deny pursuant to the Act. See *MO&O*, paragraph 10. This policy applies irrespective of whether the facts alleged would, in themselves, suffice to raise a question of discrimination. Therefore, the *MO&O* properly made no finding on that question. Nor do we. Also, in light of our policy, it is unnecessary to address whether the standard for finding a *prima facie* case in Title VII cases is relevant to the standard for the finding of a *prima facie* case under Section 309 of the Act.

17. The NAACP cites precedent that it asserts to be inconsistent with the *MO&O*'s conclusion. However, as outlined below, our review of the cited cases finds its contentions are misplaced.

18. *Leflore* primarily concerned allegations of violations of then applicable programming requirements. An issue as to violation of the then applicable EEO Rule was specified; however, there is little discussion of the basis for the action, and *Leflore* is therefore of little precedential value. In *Rust*, an issue was specified primarily because of alleged violations of the then applicable EEO program requirements. *Rust* did not find the discrimination complaint before it sufficient, standing alone, to justify the issue. *New Mexico*, as noted by the NAACP, involved an allegation that the licensee had made racist remarks to a prospective applicant suggesting that it would not hire minorities. However, *New Mexico* also found that the allegation did not raise a substantial and material question of fact warranting a hearing because the licensee in fact did hire minorities and women. An issue was specified because of unrelated deficiencies in the licensee's EEO program efforts. *Federal*, as noted by the NAACP, involved an allegation that the licensee used and separately filed "male" and "female" application forms. However, *Federal* did not specify a hearing issue based on this allegation. Again, an issue was specified based on unrelated deficiencies in the licensee's EEO program efforts. The specification of an issue in *Catoclin* resulted from concern as to possible misrepresentation in a pleading filed with the Commission by the licensee. Thus, the licensee denied having discriminated against an individual whereas other evidence

reflected that the licensee's sole stockholder had made a racially derogatory remark concerning her. In *Richmond*, the Court found that a hearing was warranted because of the pendency of two discrimination complaints; the failure of the station to hire minorities; and doubt as to whether the licensee had an "affirmative action program" that "systematically and positively encourages minority hiring, training, and advancement . . ." The circumstances here are not comparable. In sum, the *MO&O* conclusions are not inconsistent with the precedent cited by the NAACP.

19. The NAACP also objects to the characterization of its petition to deny as having relied heavily on the proposition that a finding of discrimination would also suggest violations of the EEO program requirements of former Section 73.2080(b) and (c). We believe the *MO&O* was correct. Thus, at p. 9-10 of its petition to deny under the heading "Policy Questions," the NAACP suggests that the misconduct it alleges would extend to violations of the program requirements, as well as the nondiscrimination requirement. It cites former Section 73.2080(b)(3), which required examination of personnel policies and practices to ensure that no group is inadvertently screened out; former Section 73.2080(b)(4), which required a continuing program to exclude all unlawful forms of discrimination from personnel policies and practices; former Section 73.2080(b)(5), which required continuing efforts to ensure equality of opportunity in all organizational units, occupations, and levels of responsibility; and former Section 73.2080(c)(5), which required ongoing self-assessment of a licensee's EEO efforts. The *MO&O* correctly found that, in light of *Lutheran Church*, we cannot consider these allegations.

20. We also do not find that the alleged prejudice of former News Director David Collins warrants a departure from our general policy. The NAACP contends that Collins' alleged prejudice should be attributed to the licensee because Collins was an agent of the licensee. However, the NAACP has not submitted evidence raising a substantial and material question of fact that Collins engaged in any actionable conduct reflecting this alleged prejudice. We also agree with the *MO&O* that no evidence has been submitted raising a substantial and material question of fact that the licensee in fact knew of Collins' alleged attitudes and withheld that information from the Commission.

21. The *MO&O* also correctly declined to consider the policies, including our "zero tolerance" policy, articulated in the *Report and Order* in connection with the new EEO Rule adopted therein.<sup>4</sup> The rules and policies adopted by the *Report and Order* apply prospectively. Therefore, we need not reach the question as to whether a different result would be warranted under the policies articulated in the *Report and Order*.

22. The NAACP also contends that reliance on the EEOC is unwarranted because some complaints or some contentions may be barred by the statute of limitations applicable to the EEOC. However, the NAACP's claim that some or all of the complaints submitted by it are time-barred under

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<sup>4</sup> In the *Report and Order*, we indicated that we would determine on a case-by-case basis whether, given the unique circumstances in each instance, the evidence was indicative of discrimination or other EEO violations that would warrant action by the Commission prior to an adjudication by the EEOC or a court. We cited as examples of evidence that might, under certain circumstances, warrant consideration even in the absence of an adjudication well-supported allegations of discrimination made by a large number of individuals or allegations of discrimination that shock the conscience or are particularly egregious. In addition, we indicated that a pattern of deliberate and systematic violations of the EEO program requirements might be considered as evidence of discrimination where such practices have the effect of denying women and minorities access to job opportunities. 15 FCC Rcd at 2362.

Title VII is vague and undocumented. Further, even if the NAACP is correct, it does not follow that we should necessarily entertain the matters that the EEOC will not. If the allegations are untimely for Title VII purposes, it would be inconsistent with our longstanding general policy, that discrimination complaints must be pursued initially before the EEOC or other agency and/or court established to enforce non-discrimination laws, to accord parties the option to file complaints in the first instance with this agency after passage of applicable Title VII statute of limitations provisions. For the Commission to assert jurisdiction to resolve individual charges of employment discrimination as an alternative to the EEOC after the expiration of the applicable Title VII statute of limitations would have the effect of extending that statutory deadline, which we decline to do. Nor is this situation analogous to complaints that are never subject to the EEOC's jurisdiction because the licensee has fewer than 15 employees. See 42 U.S.C. § 2000e(b). The NAACP does not allege that the EEOC lacked jurisdiction over the matters it seeks to raise. Rather, it appears that the EEOC would have had jurisdiction but for the complainants' possible failure to invoke it in a timely manner.

23. We also find no error in the *MO&O*'s disposition of the NAACP's request for an abuse of process issue arising from witness intimidation. The NAACP faults the station for initially issuing a memorandum asking all employees to include the station's counsel in any conversation they might have with the NAACP's counsel. A second memorandum issued shortly thereafter clarified that only management employees were required to include the station's counsel in any interview. It further stated that non-managerial employees could choose whether or not to be interviewed by the NAACP and the choice "will not affect your employment situation with the Station in any way." The *MO&O* correctly found that the memoranda on their face do not reflect an intent to intimidate employees and that no evidence had been presented raising a substantial and material question of fact that the licensee had in fact taken adverse action against any employee. The NAACP asserts that some employees may have perceived the first memorandum (it does not address the second memorandum) as threatening. However, even if true, that is insufficient to raise a question as to whether the licensee attempted to abuse the Commission's processes in the absence of evidence of an improper intent or abusive actions on the part of the licensee itself.

### III. CONCLUSION

24. We accordingly find that the NAACP has failed to establish that the *MO&O* is inconsistent with precedent or the record in this case or that the staff committed prejudicial procedural error. Also, in light of the foregoing, we do not believe that oral argument would serve a useful purpose in this proceeding. We will therefore deny the NAACP's application for review.<sup>5</sup> We emphasize, however, as indicated in the *MO&O*, we will take cognizance of any final determination by the EEOC, other governmental agency and/or court relating to employment discrimination by the licensee.

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<sup>5</sup> The licensee urges that the application for review be dismissed because it violates the page limit of 25 double spaced pages specified by Section 1.115(f) of the Commission's Rules. We agree that the NAACP exceeded the page limit. Although only 22 pages long, the NAACP's application for review includes nearly nine pages of single spaced text and 26 single spaced footnotes. Section 1.49(a) of the Commission's Rules cautions counsel "against employing extended single spaced passages or excessive footnotes to evade prescribed pleading lengths." However, in light of our disposition of this matter, we do not believe any purpose would be served by dismissing the application for review or requiring the NAACP to submit a reformatted version.

**IV. ORDERING CLAUSES**

25. Accordingly, **IT IS ORDERED**, that, pursuant to Section 1.115(g) of the Commission's Rules, the application for review filed by the NAACP **IS DENIED**.

26. **IT IS FURTHER ORDERED** that copies of this *Memorandum Opinion and Order* be sent to the licensee and the NAACP by Certified Mail -- Return Receipt Requested.

**FEDERAL COMMUNICATIONS COMMISSION**

Magalie Roman Salas  
Secretary

ATTACHMENT

Before the  
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Washington, D.C. 20554

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MEMORANDUM OPINION AND ORDER

Adopted: May 5, 2000

By the Chief, Mass Media Bureau:

I. INTRODUCTION

1. The Commission, by the Chief, Mass Media Bureau, pursuant to delegated authority, has before it for consideration: (i) the license renewal application for Station WWSB(TV);<sup>6</sup> (ii) a Petition to Deny the application timely filed on January 2, 1997, by the Manatee County (Florida) Branch of the NAACP ("NAACP");<sup>7</sup> (iii) an opposition by the licensee; (iv) the NAACP's reply to the opposition; and (v) other pleadings. The NAACP alleges that the licensee violated the Commission's Equal Employment Opportunity (EEO) Rule, Section 73.2080 of the Commission's Rules, 47 C.F.R. § 73.2080, by discriminating against certain Black employees. It requests that the Commission investigate the instances of alleged discrimination and designate the licensee's renewal application for hearing with a view toward denying it. The licensee maintains that it has followed the requirements of the Commission's EEO Rule and policies, that it has never discriminated against its employees, and that it deserves unconditional renewal.

2. Initially, in *Lutheran Church - Missouri Synod v. FCC*, 141 F.3d 344, *pet. for reh'g denied*, 154 F.3d 487, *pet for reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) ("*Lutheran Church*"), the United States Court of Appeals for the District of Columbia Circuit held that the EEO program requirements of the EEO Rule are unconstitutional. With respect to the non-discrimination provision of the EEO Rule, the court remanded to the Commission to determine whether it has authority to enforce a non-discrimination rule. *Lutheran Church*, 141 F.3d at 356-57. The Commission thereafter proposed and requested comment concerning a new broadcast EEO rule and policies. *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, 13 FCC Rcd 23004 (1998) ("*NPRM*"). The *NPRM* tentatively concluded that the Commission has authority to retain the anti-discrimination provisions of the broadcast EEO Rule. The Commission determined that it has jurisdiction to enforce anti-discrimination requirements in adopting a

<sup>6</sup> The station's license term ended February 1, 1997.

<sup>7</sup> The NAACP has requested to withdraw as the Petitioner to Deny if we approve another party as its successor. As discussed in paragraph 16, *infra*, we find this request to be moot because we are dismissing the Petition to Deny. We will continue to treat the NAACP as the filing party.

revised EEO Rule in *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, FCC 00-20, released February 2, 2000 ("Report and Order"). Accordingly, consideration of the instant allegations of employment discrimination is now appropriate. Thus, the court in *Lutheran Church* did not invalidate the anti-discrimination provision of the EEO Rule as it stood at the time of the alleged acts of discrimination, and the Commission has now determined that a requirement prohibiting discrimination is within its jurisdiction. However, the rules and policies adopted by the *Report and Order* are prospective in nature. *Washington Broadcasting Company*, 14 FCC Rcd 16999, 17000 n. 1 (1999). Therefore, we will assess the allegations in light of the Rule and related precedent applicable at the time the acts of discrimination allegedly occurred.

## II. DISCUSSION

3. In challenging an application pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended (the "Act"), a petitioner to deny must, as a threshold matter, submit "specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience and necessity.]" 47 U.S.C. § 309(d)(1). See also *Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) ("Astroline"). In assessing whether a petitioner has made a *prima facie* case, we consider only the petition's specific allegations of fact that are supported by an affidavit of a person with personal knowledge thereof or that may be officially noticed. We must then determine whether, assuming the truth of such facts, a grant of the application would be *prima facie* inconsistent with the public interest. Section 309(d)(1) of the Act; *Astroline*. For the reasons set forth below, we find that the NAACP has failed to make a *prima facie* case as required by Section 309(d)(1) of the Act.

4. Allegations of Discrimination. In its Petition to Deny, the NAACP states that "WWSB(TV)'s Program appears to comply with the EEO Rule." It nonetheless urges that, in practice, the licensee's EEO program is a "sham." This allegation is based on four declarations under penalty of perjury by present or former station employees who are Black females and claim to have been discriminated against on the basis of their race and/or gender.

5. The first declarant, Vickie Oldham, is a part-time employee responsible for producing a public affairs program. Oldham asserts that the present station General Manager, unlike his predecessor, has not provided adequate support for her program. She also alleges that she has otherwise not been treated in the same manner as White employees and has not received consideration for a news anchor position, although, she contends, she is qualified for such a position. She attributes these circumstances to racial discrimination. Kylelise Holmes-Thomas, the second declarant, is a former station employee who alleges racial discrimination because she was denied the position of producer for certain programs, although she was, in her estimation, qualified for the position and had in fact held it on a *de facto* basis for a period of time. After failing to receive the producer opportunity, Holmes-Thomas resigned her position at the station because she felt her opportunities thereafter would be limited. She also suggests that discrimination existed at the station because she was denied the opportunity to assist the first declarant on a volunteer basis and, because a Black reporter was not considered for an anchor position which went to a White female who, in Holmes-Thomas' opinion, was less qualified. The third declarant, Sharon Lawson, is a former WWSB(TV) photographer who alleges that she was denied promotion to a position as a reporter based on her gender. She resigned her position at WWSB(TV) to accept a reporter position at another station. The fourth declarant, Cynthia Myers, is employed as a director, character generator, and audio technician at WWSB(TV). She does not allege in the Petition to Deny that she was the victim of any

specific act of discrimination, but supports allegations made by Oldham and Holmes-Thomas.<sup>8</sup>

6. On March 12, 1997, the NAACP submitted a supplement to its Petition to Deny consisting of an affidavit of Arnetta Hilton, who was hired November 6, 1996, as a part-time studio camera operator, after working at the station as an intern. The supplement was untimely since any petition to deny the WWSB(TV) license renewal was due by January 2, 1997.<sup>9</sup> Because we find that the NAACP failed to make a *prima facie* case in its Petition to Deny, further matters raised in supplemental pleadings will not be considered in assessing whether the NAACP has made a *prima facie* case. *Blue Ridge Public Television*, 12 FCC Rcd 4634, 4637 n.5 (1997) ("*Blue Ridge*"). In any event, Hilton's declaration only supports some of the allegations made in other declarations and expresses Hilton's concern as to whether equal opportunities are available for minorities at WWSB(TV). She does not allege any specific acts of discrimination against herself.

7. Pursuant to the anti-discrimination provision of the EEO Rule in effect when the alleged discrimination occurred, it was the Commission's general policy that individual complaints of employment discrimination do not suffice to make a *prima facie* case that grant of a renewal application would be inconsistent with the public interest. *Pacific and Southern Company, Inc.*, 11 FCC Rcd 8503, 8505-06 (1996) ("*Pacific*"). This is based on the Commission's policy that such complaints should ordinarily be resolved in the first instance by the Equal Employment Opportunity Commission ("EEOC") or other governmental agency and/or court established to enforce non-discrimination laws. The primary basis for this policy is the fact that Congress intended the EEOC to be principally responsible for the resolution of individual employment discrimination disputes and that efforts on our part to resolve such disputes separately would result in duplication of efforts. *Pacific; CBS, Inc.*, 59 FCC 2d 1127, 1132 (1976).

8. The NAACP notes that, in 1992, Congress adopted special provisions concerning television EEO requirements. See Section 334 of the Act. However, the provisions adopted did not encompass any additional Commission responsibilities in connection with the resolution of individual complaints of employment discrimination.

9. The Commission indicated in *Pacific* that its general policy does not preclude consideration of facts relating to specific instances of discrimination where surrounding circumstances raise questions about a licensee's basic qualifications. However, we do not find that the NAACP has alleged facts that would warrant a departure from the general policy as reflected in *Pacific*. Thus, in its Petition to Deny, the NAACP relies heavily upon its contention that the discrimination complaints, if proven, might also reflect a deficient EEO program under the Commission's EEO Rule. However, we need not reach this contention because we could not in any event consider allegations insofar as they relate to the EEO program requirements held unconstitutional in *Lutheran Church*.

10. In sum, the NAACP's Petition to Deny fails to raise a *prima facie* case as required by Section 309(d)(1) of the Act. Its allegations consist only of charges of individual discrimination that, under Commission policy, will generally be considered only after a final determination by the EEOC or other agency or court responsible for administering anti-discrimination laws. Further, the NAACP has failed to allege in its Petition to Deny facts that would, if true, justify a departure from the general policy.

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<sup>8</sup> In a declaration attached to the NAACP's Reply to Opposition to Petition to Deny, Myers indicated that she came to realize subsequent to the filing of the Petition to Deny that she was a victim of racial discrimination. She cited the fact that she did not receive a director's position for which she felt herself qualified and her perception of being treated differently from similarly situated White employees.

<sup>9</sup> Because WWSB(TV)'s license expired on February 1, 1997, any petition to deny was due by January 2, 1997 (given that January 1, 1997, was a holiday) pursuant to Section 73.3584(a) of the Commission's Rules as it relates to Section 73.3516(e) thereof.

11. Alleged Abuse of Process. In its Reply to the Opposition to the Petition to Deny, the NAACP presents copies of two memoranda to station employees allegedly written by the current general manager of the station regarding discussions related to this case. The first memorandum, dated April 4, 1997, states in part, "In order to protect the interests of the Station's licensee, Southern Broadcast Corporation of Sarasota, I ask that you include the Station's attorney . . . in any conversations you have with counsel for the NAACP." The second memorandum, dated May 6, 1997, states that managers at the station must have station's counsel present if they discuss the case with the NAACP's counsel but that other employees may discuss the case with the NAACP, if they so choose, with or without station's counsel present, again at the employee's option. It also states that no station employee is required to discuss the case with the NAACP. The NAACP provides a declaration under penalty of perjury from Oldham, the first complainant referenced above, stating that eight of ten current and former station employees who had scheduled interviews with the NAACP to discuss this case prior to issuance of the memoranda cancelled the interviews because they were afraid that it would hurt their careers. The NAACP states that two of the individuals who had scheduled interviews did complete their interviews, but it contends that the station improperly intimidated employees and former employees from offering information to the NAACP by issuing the two memoranda described above.

12. This allegation, first interposed in a supplemental pleading, does not cure the NAACP's failure to make a *prima facie* case in its Petition to Deny. See *Blue Ridge*. In any event, we do not find that the facts alleged would, if true, demonstrate that grant of renewal would be inconsistent with the public interest. The language of the memoranda does not reflect an intent to intimidate employees for the purpose of deterring their participation in this proceeding and the NAACP has presented no evidence raising a substantial and material question of fact that the licensee has in fact taken adverse actions against any actual or prospective witnesses. The NAACP cites a June 5, 1997, incident in which Cynthia Myers was disciplined for inappropriate remarks to department heads. She indicates a belief that the incident was retaliation for her involvement in the NAACP's Petition to Deny. However, her belief is speculative and does not constitute personal knowledge, as required by Section 309(d)(1) of the Act, especially since the incident occurred five months after her involvement in the Petition to Deny became known to the licensee.

13. Allegations Concerning David Collins. In a Reply to Response to Petitioner's Reply,<sup>10</sup> the NAACP submits declarations from two former employees of WWSB(TV). They allege that David Collins, the station's former News Director, made statements in private conversations with them that reflect racial prejudice. The NAACP accordingly urges that an issue is warranted as to whether the licensee knew of Collins' alleged racism and deliberately failed to report it to the Commission.

14. Again, because the NAACP's Petition to Deny failed to make a *prima facie* case, this allegation does not serve to cure that deficiency. See *Blue Ridge*. Moreover, the pleading containing this allegation was filed on December 12, 1997, over 11 months after the January 2, 1997, deadline for the filing of petitions to deny. The NAACP has failed to submit a justification for supplementing its Petition to Deny over 11 months late. Possibly, it had only recently procured the declarations containing the allegations. However, it has not demonstrated why it was unable to conduct its investigation in a timelier manner. Nonetheless, we have reviewed the allegations and find that they would be insufficient to support the requested issue, even if it were properly before us. The NAACP has not submitted a sworn statement based on personal knowledge alleging that the licensee was aware of Collins' attitudes, assuming *arguendo* that they were correctly described by the declarants, or that it deliberately withheld information concerning the matter from the Commission. The NAACP urges that someone connected with the licensee "must have known." It also contends that the licensee would have learned of the matter if it maintained an effective EEO program. More importantly, the NAACP has not proffered specific, documented allegations of fact to

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<sup>10</sup> The licensee filed a motion to strike this pleading. However, in view of our disposition of this matter, we find that the motion to strike is moot.

demonstrate that Collins' alleged racial prejudice ever resulted in employment related decisions that adversely impacted women or minorities at WWSB(TV). Thus, both contentions are speculative and do not constitute specific allegations of fact supported by an affidavit of a person with personal knowledge, as required by Section 309(d)(1) of the Act.

15. Disposition of the NAACP's Petition to Deny. In light of the foregoing, we conclude that the NAACP has failed to make a *prima facie* case as required by Section 309(d)(1) of the Act. Accordingly, the Petition to Deny is legally deficient and we will therefore dismiss it. See Section 73.3584(d) of the Commission's Rules, 47 C.F.R. § 73.3584(d). However, pursuant to the *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 51 Fed. Reg. 21798 (1986) ("MOU"), the Commission acts as a receiving agency for the EEOC regarding charges of discrimination against broadcasters. One of the complainants included in the NAACP's Petition to Deny, Oldham, has filed a complaint with the EEOC.<sup>11</sup> The remaining complainants – Holmes-Thomas, Lawson, Myers, and Hilton – have not filed complaints with the EEOC. Therefore, in accordance with the MOU, we are referring the claims of the other complainants, along with the NAACP's arguments concerning them, to the EEOC. Furthermore, by copy of this Order, we are notifying the licensee of this action. In accordance with our policy, we will take cognizance of a final determination regarding employment discrimination. Because we would view seriously any final determination that the licensee engaged in unlawful discrimination, we will require the licensee to expeditiously report any final determinations in proceedings involving charges of discrimination, as reflected in the Ordering Clauses below.

16. As a final matter, on January 22, 1998, the NAACP and the Rainbow/Push Coalition ("Rainbow") filed a motion to designate Rainbow as a successor to the NAACP in this proceeding. The request is based on the fact that counsel for the NAACP is liquidating his private law practice in order to become Special Counsel for Rainbow. However, since we are dismissing the Petition to Deny filed by the NAACP, the requested substitution of parties is moot. In any event, we would not find the cited justification sufficient to allow Rainbow, in effect, to file a petition to deny over one year after the applicable deadline.

17. After carefully considering all of the above, we find that there are no substantial and material questions of fact warranting designation for hearing and that grant of the application would be consistent with Section 309(k) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(k). Thus, because the licensee is otherwise qualified, grant of the renewal application will serve the public interest. 47 U.S.C. § 309(d)(2).

### III. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED**, that the Petition to Deny filed by the NAACP IS **DISMISSED**.

19. **IT IS FURTHER ORDERED** that the license renewal application filed by Southern Broadcast Corporation of Sarasota for Station WWSB(TV) IS **GRANTED**.

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<sup>11</sup> On August 16, 1999, the Tampa Area Office of the EEOC issued a Dismissal and Notice of Rights with respect to Oldham's complaint indicating that it was unable to conclude that the information obtained established a violation of statutes enforced by the EEOC. The EEOC also notified Oldham of her right to bring suit. On November 15, 1999, Oldham filed a suit against the licensee and other defendants in the United States District Court for the Middle District of Florida (*Oldham v. Southern Broadcast Corporation of Sarasota, et al.*, Case No. 8:99-CV-2615-T-23F) alleging Title VII violations. The matter remains pending.

20. **IT IS FURTHER ORDERED** that discrimination allegations made by Holmes-Thomas, Lawson, Myers, and Hilton, and related pleadings, will be referred to the EEOC, as described in paragraph 15 above.

21. **IT IS FURTHER ORDERED** that Southern Broadcast Corporation of Sarasota submit to the Commission a complete report on the final resolution of Vickie Oldham's charge of discrimination, the charges of discrimination being referred to the EEOC pursuant to paragraphs 15 and 20 hereof, and any other proceedings that may be brought involving charges of discrimination by the licensee, within 30 days after a resolution is reached.

22. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Staff.

23. **IT IS FURTHER ORDERED** that copies of this *Memorandum Opinion and Order* be sent by Certified Mail – Return Receipt Requested – to the licensee, the NAACP, and the Rainbow/PUSH Coalition.

24. This action is taken under delegated authority pursuant to Section 0.283 of the Commission's Rules, 47 C.F.R. § 0.283.

**FEDERAL COMMUNICATIONS COMMISSION**

Roy J. Stewart  
Chief, Mass Media Bureau