William & Mary Law Review

Volume 17 (1975-1976)
Issue 2 Symposium: The Employee Retirement Income Security Act of 1974 - Labor Law Considerations

Article 7

December 1975

Implementation of Equal Employment Opportunity by the Independent Regulatory Commissions Through the Power to Act in the Public Interest: Two Divergent Views

IMPLEMENTATION OF EQUAL EMPLOYMENT OPPORTUNITY BY THE INDEPENDENT REGULATORY COMMISSIONS THROUGH THE POWER TO ACT IN THE PUBLIC INTEREST: TWO DIVERGENT VIEWS

Extensive federal legislation aimed at achieving equal employment opportunity for all[1] manifests a commitment by the federal government to eradicate employment discrimination based upon race, religion, sex, national origin, or, to some extent, age. Yet serious questions remain concerning the proper method by which to achieve this result. One important area of inquiry illustrated by the recent decision of the Court of Appeals for the District of Columbia Circuit in *National Association for the Advancement of Colored People v. Federal Power Commission*,[2] concerns the role to be accorded independent regulatory agencies in the pursuit of equal employment opportunity. Administrative agencies, such as independent regulatory commissions, "are primarily instruments of quasi-judicial and quasi-legislative powers designed to carry out policies which reflect a broad consensus of public acceptance and approval." [3] Delegations of authority by the legislature often are cast in broad and nebulous terms to provide the agency with sufficient flexibility and latitude to meet new situations. A common legislative mandate is that the agency act in the "public interest" or for the "public convenience and necessity." [4] Such language allows the agency the necessary discretion

1. The most comprehensive legislation in the area is found in Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e to 2000e-15 (1970), *as amended*, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II 1972). In addition, there are several statutes that either specifically apply to employment discrimination or have been interpreted to apply. *E.g.*, Labor Management Relations Act, 29 U.S.C. §§ 141-87 (1970); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1970); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1970); Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970); Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970); Railway Labor Act, 45 U.S.C. §§ 151-88 (1970). Federal jurisdiction is not exclusive in the area of employment discrimination and many states have enacted statutes similar to Title VII. *See generally* FAIR EMP. PRAC. MAN. BNA 451:25-28 (1975).

2. 4 MB FED. POWER SERV. 6-48 (D.C. Cir. Feb. 5, 1975), *cert. granted*, 44 U.S.L.W. 3223 (Oct. 14, 1975).

3 Jones, *The Role of Administrative Agencies as Instruments of Social Reform*, 19 AD. L. REV. 279, 287 (1967).

4. *See, e.g.*, Federal Aviation Act of 1958, 49 U.S.C. § 1371(e) (1970) (CAB grants certificates under such conditions as the public interest may require); Securities and Exchange Act of 1934, 15 U.S.C. § 78(b) (1970) (the presence of a national public interest necessitates regulation of securities transactions).

and power to expand the area of its operation to resolve and satisfy the problems and needs continually arising from industrial expansion. Practical experience indicates that the agencies are "uniquely capable of redefining a public interest concept [and] regularly do so in the normal course of their practice in order to keep pace with developments in the regulated area." [5]

Although discretionary power is necessary to the proper functioning of an agency, such power also creates uncertainty as to the perimeters within which the body is to operate. In determining the proper limits of authority for an agency acting in the "public interest," three crucial questions must be answered. First, how much responsibility can be given to the agency without destroying its ability to perform efficiently the function for which it was designed? Second, does the mere existence of a clear national policy, such as equal employment opportunity, require the "public interest" agencies to participate in the implementation of that policy? Finally, even if the implementation of that policy is not required by the "public interest" mandate, are the agencies constitutionally bound to participate actively in the implementation of the policy because they regulate in the area? Each of these questions was considered in *NAACP v. FPC;* because of the importance of its issues and the potentially great impact upon all regulatory commissions of the answers rendered,[6] this case serves as an appropriate vehicle for examining the proper extent of the implementation of national policies, such as equal employment opportunity, by independent regulatory agencies.

NAACP v. FPC

Employment Discrimination: The Scope of Agency Regulation

Superficially, the positions of the litigants in *NAACP* were totally adversary. The case was precipitated by the dismissal of a petition filed with the FPC requesting the agency to promulgate a rule requiring its

5. Comment, *Administrative Agencies, the Public Interest, and National Policy: Is a Marriage Possible?*, 59 GEO. L.J. 420, 426 (1970). The Federal Communications Commission presents an excellent example of this principle in operation. The Commission originally was created to regulate use of the electromagnetic spectrum, as chaos had resulted from unrestricted access to the spectrum. Subsequently, the FCC constantly has redefined the public interest to expand its scope of regulation to such matters as scrutinizing the program content of its regulatees. *See* notes 137-142 *infra.*

6. Note that though the issues in *NAACP v. FPC* are significant, the concept of regulation of employment practices is not entirely foreign to the independent regulatory scheme. The FCC has been regulating the employment practices of its licensees since 1969. *See* note 104 *infra* & accompanying text.

regulatees[7] to pursue equal opportunity and nondiscrimination practices.[8] The FPC ostensibly took the position, consistent with earlier pronouncements,[9] that due to the absence of explicit statutory authorization in either the Federal Power Act[10] or the Natural Gas Act,[11] it lacked the jurisdiction to consider discrimination matters except with respect to the supply of services or use of facilities.[12] Moreover, the Commission as-

7. The agencies to be considered are the Federal Power Commission, the Securities and Exchange Commission, the Civil Aeronautics Board, the Interstate Commerce Commission, and the Federal Communications Commission. The Federal Trade Commission will not be discussed because it does not regulate any particular industry.

8. FPC Docket No. R-447 (1972). The proposed rule was similar to those adopted by the FCC. *See* note 108 *infra*. It would permit the Commission to govern affirmative programs, receive reports, and handle individual discrimination complaints. For the full text of the proposed rule, see 4 MB FED. POWER SERV. at 6-71 to 6-76.

This was not the first nor the sole source of pressure on the FPC to adopt nondiscrimination rules and regulations. The EEOC, the Commission on Civil Rights, and the Justice Department all favor FPC regulation of the employment practices of its regulatees as the utility industry is reported to have extremely low levels of minority employment. *See Hearings on Responsibilities of the Federal Power Commission in the Area of Civil Rights Before the Civil Rights Oversight Committee of the House Committee on the Judiciary*, 92d Cong., 2d Sess., ser. 24, at 1-2 (1972) [hereinafter cited as *Hearings*]. *See also* UNITED STATES COMMISSION OF CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT (1970) [hereinafter cited as REPORT—1970]; UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL ENFORCEMENT EFFORT—A REASSESSMENT (1973) [hereinafter cited as REPORT—1973].

9. *Hearings, supra* note 8 at 9, *citing* Pacific Gas & Elec. Co., 44 F.P.C. 1373 (1970).

10. 16 U.S.C. §§ 791(a)-825r (1970) (sections 791-823 were formerly titled "The Federal Water Power Act").

11. 15 U.S.C. §§ 717-717(w) (1970).

12. The Natural Gas Act states in pertinent part:

> No natural gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

15 U.S.C. 717c(b) (1970).

The Federal Power Act states in pertinent part:

> No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, service, facilities, or in any other respect, either as between localities or as between classes of service.

16 U.S.C. § 824(d)(b) (1970). *See* 16 U.S.C. § 813 (1970); 18 C.F.R. § 8.3 (1974) (requiring "equal and unobstructed" use of recreational facilities without regard to "race, color, religious creed or national origin."); *Hearing, supra* note 9 at 3-12 (statement of FPC Chairman Nassikas). In his statement before the Civil Rights Oversight Commit-

serted that a close nexus did not exist between the purpose of the agency, economic regulation, and the deleterious effects occasioned by the employment practices of the agency's regulatees. The agency further contended that consideration of discrimination in employment was not warranted merely because of its "public interest" responsibilities.[13] In considering these positions the Court of Appeals for the District of Columbia Circuit became the first appellate court to review the refusal of a regulatory commission to take jurisdiction of employment practice regulation.

The court in *NAACP*, by noting that individuals could utilize commission proceedings to challenge increased utility costs arising from discriminatory employment practices, found the positions of the adversaries less irreconcilable than they had appeared initially.[14] The court stated that "a concession of this kind is not compatible with any flat statement that the Commission has no authority to consider . . . employment discrimination in its public interest determinations." [15] The question to be answered, in the opinion of the court, was not whether the FPC had any jurisdiction at all, but whether the agency could regulate employment practices per se, or merely as an ancillary consideration to its main regulatory function.[16]

The court found neither in the language nor in the legislative history of the Federal Power Act[17] or the Natural Gas Act[18] (included within the public interest authority of the Commission) the power to regulate

tee of the House Committee on the Judiciary, FPC Chairman Nassikas asserted that the FPC did not have authority to engage in the enforcement of the Civil Rights Act of 1964. Instead, concluded Chairman Nassikas, the FPC's role was one of support and cooperation with the EEOC and other agencies explicitly responsible for regulating civil rights matters. *Id.* at 12.

13. In its opinion denying the petition, the Commission stated:

> Application of a public interest concept in the context of any given regulatory statute presupposes inquiry into, and observance of, the legislative purposes of that Act. . . . [T]he purposes of the National [Natural] Gas and Federal Power Acts are economic regulation of entrepreneurs engaged in resource development. So considered, we do not find the necessary nexus between those aspects of our economic regulatory activities and the employment practices of the utility systems we regulate . . . .

Petitioner's Brief for Certiorari S.Ct. Docket No. 74-1619 (June 20, 1975).

14. 4 MB FED. POWER SERV. at 6-52.

15. *Id.*

16. *Id.* at 6-53.

17. 16 U.S.C. §§ 791(a)-825r (1970).

18. 15 U.S.C. § 717-717(w) (1970).

employment discrimination per se.[19] The Commission, stated the court, therefore lacked the power to regulate employment discrimination solely for the purpose of curtailing such conduct.[20]

In so holding *NAACP* distinguished a past decision that recognized that the policy of the antitrust laws was to be considered by the FPC in its actions.[21] The petitioners had argued that consideration and implementation of antitrust policy by the agency formed a basis for similar sensitivity to employment discrimination. In response, the court stated that it is not true "that the context of the 'public interest' criterion is generally supplied by other national policies and laws. *Some* such policies and laws are surely relevant, but not simply because they exist. They are relevant because their objectives 'can be related to the objectives of the statute administered by the agency'." [22] Furthermore, the court noted an express statutory basis in both the Federal Water Power Act and the Natural Gas Act for the consideration of antitrust policies.[23]

Similarly, the court rejected the contention that Commission consideration of environmental matters, as sanctioned in *Udall v. FPC*[24] and *Scenic Hudson Preservation Conference v. FPC*,[25] warranted a like consideration of employment discrimination under the "public interest" standard. *Udall* and *Scenic Hudson* were distinguished on the point that they involved the application of section 10(a) of the Federal Power Act,[26] which expressly commands that projects adopted by the Commis-

19. The court found that under the "Federal Water Power Act", 16 U.S.C. § 791(a)-823 (1970) [now part of the Federal Power Act], the agency's public interest authority existed to protect "the public's interest in the optimal use of the waterways." 4 MB FED. POWER SERV. at 6-55. Under the Federal Power Act, 16 U.S.C. § 824-25r, stated the court, this authority existed "to guard the consumer from exploitation by non-competitive electric power companies." *Id.* at 6-56. As for the Natural Gas Act, the court held that the public interest authority of the agency was created to stop "exploitation of the gas consumer." *Id.* at 6-57.

20. 4 MB FED. POWER SERV. at 6-58 to 6-61.

21. In Northern Natural Gas v. FPC, 399 F.2d 953 (D.C. Cir. 1968) the court had stated: "Although the Commission is not bound by the dictates of antitrust laws, it is clear that antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the Commission is obliged to weigh antitrust policy." 399 F.2d at 958 (citations omitted). *See also* California v. FPC, 369 U.S. 482 (1962); City of Pittsburgh v. FPC, 237 F.2d 741, 754 (D.C. Cir. 1956).

22. 4 MB FED. POWER SERV. at 6-61 (emphasis supplied by the court), *quoting* City of Chicago v. FPC, 385 F.2d 629, 635 (D.C. Cir. 1967).

23. 4 MB FED. POWER SERV. at 6-62. *See* 16 U.S.C. § 803(h) (1970) (FPA prohibition of combinations in restraint of trade); 15 U.S.C. § 717(s)(a) (1970) (NGA requirement that the Commission notify the Attorney General of possible antitrust violations).

24. 387 U.S. 428 (1967).

25. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

26. 16 U.S.C. § 803(a) (1970).

sion "be the best adapted to a comprehensive plan for improving or developing a waterway . . . and for other beneficial public uses, including recreational purposes." [27] *Udall* specifically involved the issue of whether the FPC should consider, in receiving applications for the construction of dams, the effects such dams would have on salmon spawning behavior. The Supreme Court found that because salmon are sporting fish, their protection bore a clear relation to the "recreational purposes" language of the statute.[28] *Scenic Hudson* decided that environmental effects were an integral factor to be considered when choosing a plan "best adapted to . . . improving or developing a waterway." [29] Moreover, the court in *NAACP* noted that under the National Environmental Policy Act of 1969,[30] all federal agencies are required to consider the environmental impact of any agency action.[31]

Although *NAACP* dismissed the contention that the FPC could regulate employment practices per se, it did provide at least a partial means toward the goals petitioners sought. The court stated that it could "foresee situations in which consideration by the Commission of a regulatee's discriminatory employment practices, including rules governing the invocation of that consideration, reasonably could be related to the pursuit of the Commission's proper objectives." [32] Although the court did not delineate all of the forseeable situations, it did stress one example: the potential adverse cost effects of discriminatory employment practices.[33]

The court specifically ruled that section 9 of the proposed rule submitted by the petitioners, which provided that the Commission entertain individual complaints, was inapplicable in view of the lack of jurisdiction to regulate employment practices per se. The court, however, continued:

> On the other hand, those sections providing for the annual filing with the Commission of a form already due the EEOC (section 6), and for intervention and receipt of evidence in Commission pro-

27. *Id.*

28. 387 U.S. at 437-40.

29. 354 F.2d at 612, *quoting* 16 U.S.C. § 803(a) (1970).

30. 42 U.S.C. § 4332 (1970).

31. *Id.* at § 4332(2)(A)-(H).

32. 4 MB FED. POWER SERV. at 6-65.

33. Such costs could include, for example: duplicate labor costs resulting from back pay awards in discrimination suits, costs incurred as a result of the loss of government contracts, costs of legal proceedings arising out of discrimination charges, and the cost of strikes due to discriminatory labor policies. Indeterminate costs could include, for instance, those arising from inefficiency of minority employees created by low morale. *Id.* at 6-65 to 6-66.

> ceedings (sections 10 and 11), might well be viewed as orderly methods of bringing to the Commission's attention information which could be relevant to its deliberations. . . .[34]

Section 11 of the proposed rule directs the Commission to give material consideration to the information required to be provided under sections 4 through 7; significantly, these sections would seem to imply more than a nominal involvement by the Commission. Section 4 allows the Commission to oversee equal employment opportunity programs required to be instituted by regulatees, while section 5 delineates the substantive requirements of such programs. Section 6 requires the regulatee to file with the FPC a copy of the annual employment report required by the EEOC. Section 7 requires that the regulatee attach equal employment compliance information to every application for a license, renewal of a license, rate change, certificate of public convenience and necessity, or other Commission benefits.[35] Although the court did not order the adoption of these proposals, its pointed suggestion can be expected to be persuasive on remand to the Commission.

Constitutional Issues Raised by NAACP

Petitioners in *NAACP* posed an interesting constitutional argument as a basis for Commission regulation of employment practices. Reliance was placed upon the doctrine of "state action," which, simply stated, provides that "when a state has become a joint participant in a pattern of . . . discriminatory conduct by placing itself in a position of interdependence with private individuals acting in such a manner . . . this constitutes a type of 'state action' proscribed by the Fourteenth Amendment." [36] Further, petitioners cited precedent for their contention that constitutional obligations of the Government devolve upon private individuals either endowed with "powers or functions governmental in nature" or granted some governmental benefit.[37] Specifically, they contended that the discriminatory activities of the FPC regulatees amounted

34. 4 MB FED. POWER SERV. at 6-70 (the text of the proposed rule is found at 6-71 to 6-76).

35. *Id.*

36. Ethridge v. Rhodes, 268 F. Supp. 83, 87 (S.D. Ohio 1967). *See also* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). The doctrine of state action is applicable to the federal government through the fifth amendment. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

37. Evans v. Newton, 382 U.S. 296 (1966), *cited at* 4 MB FED. POWER SERV. at 6-68 n.49.

to state action, thereby requiring FPC regulation of employment practices, because of: "(1) the . . . comprehensive extent of federal regulation . . .; (2) the enjoyment by the companies of what amounts to a government-granted monopoly; and (3) their performance of a governmental function in the production and transmission of energy." [38]

The court agreed that in certain circumstances the obligations of the Government can be enforced against private individuals whose action becomes "state action." Further, the court agreed that national policy could require the termination of any ongoing relationship between the Government and a private party involved in discriminatory practices.[39] The court did doubt, however, that there would be a constitutional obligation to regulate the individual to the extent of dictating the specific act necessary to attain compliance.

In addition, *NAACP* noted the recent decision of *Jackson v. Metropolitan Edison Co.*,[40] in which the Supreme Court held that regulation, in and of itself, does not involve the Government in the affairs of the regulatee to such an extent as to result in state action even if the regulation "is extensive and detailed, as in the case of most public utilities . . . ." [41] To amount to state action, the Court continued, there must be a "sufficiently close nexus between the State and the challenged activity of the regulated entity so that the action of the latter may be fairly treated as the action of the State itself." [42]

In determining whether such a nexus exists, the Court apparently would ask whether the challenged act of the regulatee falls within the scope of conduct that the agency was created to govern. The primary inquiry, then, under such an approach, would examine the relationship between the articulated regulatory function of any given agency and the alleged discriminatory act of the regulatee. Utilizing such a test, an activity of a regulatee might be state action if performed under the

38. 4 MB FED. POWER SERV. at 6-67.

39. *Id.* at 6-68 n.50. In support of this proposition the court cited McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972), in which the Secretary of the Treasury was enjoined from extending tax benefits to fraternal and nonprofit organizations because of their discriminatory membership practices. *See also* Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom.* Green v. Coit, 404 U.S. 997 (1971); Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967).

40. 95 S. Ct. 449 (1974).

41. *Id.* at 453.

42. *Id. See also* Martin v. Pacific N.W. Bell Tel. Co., 441 F.2d 1116 (9th Cir. 1971). "[T]he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury." *Id.* at 1118, *quoting* Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968).

auspices of a regulatory agency sufficiently concerned with that type of activity, while the same activity performed by another regulatee, if governed by a commission removed from the close regulation of such action, might not be state action.[43] Under this premise, it can be argued that FPC regulation of the employment practices of public utilities is questionable, unlike FPC regulation of discriminatory area rate charges.

Notably, the court in *NAACP* did not examine the nice distinctions inherent in the state action argument. Rather, invoking the principle that constitutional issues will not be decided if they can be avoided, the court dismissed the argument by stating that "however we might resolve our difficulties with the proposition that the Commission is constitutionally required to adopt *some* anti-discrimination rule, we are very sure that it is not required to adopt *this* one." [44]

Employment Practice Regulation and the Other Commissions

The ultimate resolution of the issues presented in *NAACP* could have a tremendous impact on the functioning and responsibilities of not only the Federal Power Commission, but also other independent regulatory agencies. Regulatory agencies have not been totally oblivious to the problem of equal employment opportunity, nor have they been totally insulated from pressure to undertake affirmative duties in this area. Each agency, at least in public statements, has recognized the need to oversee the employment practices of its regulatees. The current status of agency conduct in this area, however, presents a varied picture of action and inaction.

The Securities and Exchange Commission

The Securities Exchange Commission (SEC) was created by the Securities and Exchange Act of 1934[45] to regulate the securities industry for the benefit and protection of investors and the general public. Although the securities laws are remedial in nature and are construed broadly so that they may perform their function, the judiciary traditionally has observed that these are specialized statutes that are concerned

43. *See* notes 94-103 *infra* & accompanying text.

44. 4 MB Fed. Power Serv. at 6-70. The court refused to detail the constitutional obligations of the Commission, leaving the task to the Commission itself.

45. 15 U.S.C. §§ 78(a)-78(jj-1) (1970). In addition to the Securities and Exchange Act, which deals primarily with brokerages and secondary offerings of securities, the SEC is charged with the administration of the Securities Act of 1933, 15 U.S.C. §§ 77(a)-77(aa) (1970), which deals with initial issue and primary offerings.

only with the economic aspects of the investment milieu.[46] The SEC has adopted this point of view in regard to employment discrimination.

In 1974, the SEC denied a petition that requested its regulatees to demonstrate affirmatively the absence of discriminatory employment practices.[47] In so acting, the Commission reasoned that efforts to regulate the employment practices of its regulatees merely would duplicate existing federal laws.[48] Moreover, in rejecting the petition, the Commission specifically noted that neither evidence of discriminatory employment conduct nor evidence of an adverse impact on investors and capital markets as a result of alleged discriminatory conduct was produced.[49] In view of the Commission's prior practice of considering only economic factors, it is doubtful that the SEC, in pointing to the absence of a showing of discriminatory conduct, meant to suggest that such a showing alone would prompt the agency into action. It would appear, however, to be entirely proper for the Commission to act upon a showing that discriminatory conduct has adversely affected an investor. Significantly, such action, consistent with prior SEC pronouncements, would comport with the cost factor analysis of *NAACP*.[50]

It therefore is evident that although a strict economic-oriented approach to SEC functions may appear to preclude Commission involvement with the employment practices of its regulatees, a contrary result has obtained, albeit in a nominal and indirect fashion. Thus, since 1971, the SEC has required "disclosure if material, of proceedings arising, for example, under the Civil Rights Act, any debarment or other sanctions imposed under Executive Order 11246, Title VII of the Civil Rights Act of 1964, and any sanctions imposed for violation of the non-discrimination rules of any Federal regulatory agency whenever such actions are material." [51] Although uncertainty often may exist as to the materiality

46. *See, e.g.*, Forman v. Community Serv., Inc., 366 F. Supp. 1117, 1131 (S.D.N.Y 1973) (Congress never intended to expand the scope of the securities acts beyond the commercial world to the realm of intangible personal values).

47. SEC Release No. 10597 (January 14, 1974), in 2 CCH EMP. PRAC. GUIDE ¶ 5205 (1974).

48. *Id.* The SEC noted that securities exchange, NASD, and the firms that employ the overwhelming majority of persons in the brokerage field would all be subject to EEOC jurisdiction in matters dealing with employment discrimination. The SEC was unpersuaded that the nonexclusive nature of the EEOC's jurisdiction warranted the adoption of an SEC rule. *Id.* at 3386-3387.

49. *Id.* at 3386.

50. *See* note 33 *supra* & accompanying text.

51. SEC Release No. 9252 (July 19, 1971), in 1 CCH FED. SEC. L. REP. ¶ 78,150 at 80,488 (1971).

of a proceeding, actions that would result in the cancellation of a government contract or termination of business relations with the Government, apparently are deemed material unless the regulatee affirmatively demonstrates to the contrary.[52] In view of the impact that the loss of governmental business could have upon the financial structure of an enterprise, and a fortiori upon the investor, the disclosure requirement appears to be in complete harmony with the espoused purpose of the Commission and the relevant legislation.[53]

The Civil Aeronautics Board

The Civil Aeronautics Board (CAB), which is responsible for the regulations of commercial air carriers under the Federal Aviation Act,[54] responded in 1972 to pressure from the Civil Rights Commission by issuing an Advance Notice of Proposed Rulemaking on the subject of employment discrimination by the Board's regulatees.[55] In addition to the possibility of regulating employment discrimination by virtue of the Board's public interest responsibilities, the Notice suggested that sections 102[56] and 404(b)[57] of the Federal Aviation Act mandate such regulation.[58]

Section 404(b) prohibits the subjecting of any person "in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." [59] There is some doubt, however, as to whether the provision is strictly service-oriented or broad enough to encompass discriminatory employment practices. Several factors militate against the broader reading of section 404(b). First, as noted by the Board in its Advance Notice, the Supreme Court held in *Colorado Anti-Discrimination Commission v. Continental Air-*

52. *Id.*

53. *See* note 46 *supra* & accompanying text.

54. 49 U.S.C. §§ 1301-1542 (1970).

55. 37 Fed. Reg. 15518 (1972).

56. 49 U.S.C. § 1302 (1970).

57. 49 U.S.C. § 1374(b) (1970).

58. 37 Fed. Reg. 15518, 15519 (1972).

59. 49 U.S.C. § 1374(b) (1970). The section reads in full:

> No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

lines, Inc.[60] that section 404(b) is a "familiar type of regulation, aimed primarily at rate discrimination injurious to shippers, competitors, and localities." [61] Second, it also has been held that employees are not included within the term "person . . . in air transportation." [62] Finally, the potentiality of expanding the scope of section 404(b) is weakened by an *in pari materia* reading with section 102 of the Aviation Act.[63]

60. 372 U.S. 714 (1963). *Continental Airlines* was precipitated by a finding of the Colorado Anti-Discrimination Commission that Continental had rejected a black job applicant solely because of his race. Under the Colorado Discrimination Act of 1957, COLO. REV. STAT. ANN. § 80-21-6 (1963), the Commission issued a cease and desist order. A state court dismissed the Commission's findings and the Supreme Court of Colorado affirmed. 372 U.S. at 716-717.

Reversing the lower court, the Supreme Court of the United States held that federal legislation and Executive Orders had not so pervasively covered the field of employment discrimination as to preempt state legislation on the subject. The airlines had argued that preemption resulted from section 404(b) of the Federal Aviation Act of 1958 [forbidding air carriers to subject any particular person to "any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever," 49 U.S.C. § 1374(b) (1970), *quoted at* 372 U.S. at 723] and section 102 of that Act [requiring "the promotion of adequate economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices . . . ." 49 U.S.C. § 1302(c) (1970), *quoted at* 372 U.S. at 723]. The Court rebutted the preemption argument by assuming arguendo that these sections "protect job applicants or employees from discrimination on account of race," 372 U.S. at 723. The Court noted that such an assumption did not necessitate a conclusion of pre-emption. Significantly, the Court did imply that the assumption may comport with reality, for it stated: "The Civil Aeronautics Board and the Administrator of the Federal Aviation Agency have indeed broad authority over flight crews of air carriers, much of which has been exercised by regulations." *Id.* (footnotes omitted). Discussion of this aspect of the case may be found at 37 Fed. Reg. 15518, 15519 (1972).

61. 372 U.S. at 723. Although such language has been expanded to prohibit discrimination against passengers, such an interpretation is consonant with a service oriented construction of section 404(b). *See* Boynton v. Virginia, 364 U.S. 454 (1960); Mitchell v. United States, 313 U.S. 80 (1941).

62. 37 Fed. Reg. 15518-19 (1972).

63. 49 U.S.C. § 1302 (1970). The section states in pertinent part:

> In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:
>
> (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> (b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to

Section 102 sets forth guidelines for determining the Board's "public interest" standard, providing, *inter alia*, that the Board should consider: "The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages or unfair or destructive competitive practices . . . ." [64] The Board itself reasoned that the section's delineation of the public interest standard, though somewhat broad in parts,[65] restricts the ability to infer nonservice-oriented responsibilities within the purview of section 404(b), or the general public interest standard.[66]

As an additional explicit statutory mandate, the CAB referred to section 401(d)(3) of the Aviation Act, which requires that a carrier be "fit" to perform its duties.[67] Noting that "[r]egulatory agencies . . . have been upheld by the courts in denying applications for benefits filed by law violators on the grounds of fitness," [68] the Board reasoned that any violation of antidiscrimination statutes that adversely affected the rendition of services would be a proper matter for consideration. Although stated in somewhat nebulous and broad terms, this position of the CAB appears to be comparable to the *NAACP* cost factor analysis.

In considering whether the CAB could regulate employment discrimination per its public interest mandate, the Board stated that such regulation would have to be founded upon the purpose and policy guidelines of section 102 of the Act, but the Board did not pursue this inquiry further. Specifically, it left open the question of whether a basis for regulation could be found in the section 102(a) policy of "encouragement and development of an air transportation system." [69] The Board did note, however, that since section 102(f) mandates that it consider the "promotion, encouragement, and development of civil aeronautics" when it

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improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices . . .

(f) The promotion, encouragement, and development of civil aeronautics.

Id.

64. *Id.* § 1302(c).

65. *See* note 63 *supra.*

66. 37 Fed. Reg. 15518, 15519-20 (1972).

67. 49 U.S.C. § 1371(d)(3) (1970).

68. 37 Fed. Reg. at 15520 (footnote omitted), *citing* Great Lakes v. CAB, 294 F.2d 217 (D.D.C.), *cert. denied*, 366 U.S. 965 (1961).

69. 37 Fed. Reg. at 15520, *citing* 49 U.S.C. § 1302(a) (1970). For the full text of section 1302(a), see note 63 *supra.*

acts,[70] and since the development of civil aeronautics should be consonant with other national policies, regulation of employment discrimination is arguably within the purview of the agency's powers.[71] The Board next diluted this position, though, by noting that Title VII was intended to fulfill such purposes in the employment area.[72]

Positing the alternatives upon which it could proceed, the Board concluded:

> The nature of the Board's role, if any, will depend upon the source of its jurisdiction. Thus, under one interpretation, the Board may be empowered to regulate equal employment opportunity practices directly by rule or by conditioning awards of operating authority. Under another interpretation, the Board may have no direct regulatory authority, but nevertheless may consider employment practices as a factor in making determinations of public interest in exercising its delegated functions under the Federal Aviation Act. Yet another interpretation would be that the Board has no statutory authority in this area.[73]

As should be noted, these are precisely the issues considered by the Court in *NAACP* with respect to the FPC. Apparently, the CAB has been unable to choose affirmatively between the alternatives, as the proposed rulemaking has been pending since 1972. Consequently, by indecision, the third alternative presently governs.

The Interstate Commerce Commission

The Interstate Commerce Commission (ICC), originally created by the Interstate Commerce Act of 1889[74] to protect the public from commercial abuse practiced by the railroads, is now responsible for "developing, coordinating and preserving a national transportation system by water, highway and rail . . . adequate to meet the needs of the commerce of the United States." [75] Like the CAB, the ICC apparently has been unable to determine whether the regulation of employment practices is appropriate for Commission consideration, for the matter has been

70. *Id.* § 1302(f).

71. 37 Fed. Reg. at 15521-2.

72. *Id.* In this regard, it should be noted that Congress rejected proposals that have made the EEOC the exclusive enforcement agency for equal opportunity laws. *See* note 92 *infra.*

73. 37 Fed. Reg. at 15521.

74. 49 U.S.C. §§ 1 *et. seq.* (1970).

75. *Id.* (National Transportation Policy Note preceding section 1).

pending since the issuance of a Notice of Proposed Rulemaking in 1971.[76]

Under the empowering provisions of the Interstate Commerce Act, the Commission's primary, if not sole responsibility, centers upon economic considerations. For example, the ICC is responsible for ensuring just and reasonable rates,[77] rerouting traffic upon failure of the initial carrier to serve the public if such rerouting is found to be "in the interest of the public and the commerce of the people," [78] controlling the extension and abandonment of lines based upon a showing of public convenience and necessity,[79] formulating reasonable rules, regulations and practices with respect to car service, including the compensation to be paid.[80] An arguable basis for jurisdiction over employment practices, however, has been found in the 1940 amendment to the Act, which promulgates a National Transportation Policy.[81]

The policy statement provides that the Commission should administer the Act so as to "promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation . . . ; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices . . . ." [82] Similar language exists in the Federal Aviation Act,[83] which used the Interstate Commerce Act as a model. However, the policy further requires that the Commission "encourage fair wages and equitable working conditions" within the industry.[84] Similar language is not found in the Federal Aviation Act, a fact noted by the CAB in concluding that, unlike the ICC, the CAB may not have the power to regulate employment discrimination.[85]

76. 36 Fed. Reg. 10741 (June 1, 1971).

77. 49 U.S.C. § 1(4) (1970).

78. *Id.* § 1(16).

79. *Id.* § 1(18) & (20).

80. *Id.* § 1(14).

81. Act of Sept. 18, 1940, ch. 722 §§ 1-27, 54 Stat. 899, *amending* 49 U.S.C. §§ 1-27, 301-27 (1934).

82. *Id.* (National Transportation Policy Note preceding section 1).

83. 49 U.S.C. § 1302 (1970).

84. 49 U.S.C. at National Transportation Policy Note Preceding Section 1 (1970).

85. The CAB stated:

> Congress has not laid down for the [CAB] any public interest standard parallel to the provisions of the National Transportation Policy in the Interstate Commerce Act . . . which declares the policy of Congress, among other things, "to encourage . . . equitable working conditions" . . . and directs that the Act is to be administered and enforced to carry out that policy.

37 Fed. Reg. at 15521.

There is some judicial support for the proposition that the ICC is empowered to consider national policies without the scope of its enabling act. In *ICC v. Railway Labor Executives Association*[86] the Supreme Court held that the impact of the abandonment of a railway line on the labor force was a matter to be considered by the ICC in its determination of the "public convenience and necessity." The Court stated:

> [I]f national interests are to be considered in connection with an abandonment, there is nothing in the Act to indicate that the national interest in purely financial stability is to be determinative while the national interest in the stability of the labor supply available to the railroads is to be disregarded.[87]

It must be noted, however, that the situation in *Railway Labor* was one that required direct, affirmative action on the part of the ICC in approving an abandonment.[88] Limited by its facts, it is doubtful that the holding applies to discriminatory employment practices arising from the ordinary course of business and not requiring ICC approbation. The act of hiring or firing, for example, therefore would seem to be beyond the reach of *Railway Labor*.

Other cases have considered whether the federal antitrust laws preclude the enforcement by the ICC of antitrust policies in the "public interest." In *McLean Trucking Co. v. United States*,[89] for example, the Supreme Court considered whether the ICC's authority to approve industry consolidations should be affected by the antitrust laws notwithstanding a provision in the Sherman Act[90] exempting from coverage

86. 315 U.S. 373 (1942).

87. *Id.* at 377.

88. Under the facts of the case, the advent of motor coach passenger service precipitated the abandonment of railway lines, with a resultant termination of particular railroad employees. Under 49 U.S.C. § 1(18)-(20) (1970), any carrier must obtain from the Commission a certificate of public convenience and necessity before a railway line lawfully may be abandoned. In addition, the Commission "may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." 49 U.S.C. § 1(20) (1970). Representatives of the railroad employees contended that the certificate should be granted only upon certain conditions designed to protect the employees. 315 U.S. at 374. The Court held that the utilization of such conditions was within the Commission's authority, but left the final decision to the ICC. *Id.* at 380.

89. 321 U.S. 67 (1944). *McLean Trucking* involved an appeal to set aside certain ICC orders that authorized the consolidation of seven large motor carriers. The consolidation created the largest single motor carrier in the United States. *Id.* at 68-72.

90. 15 U.S.C. § 18 (1970) provides in pertinent part:

> Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal

transactions authorized by the ICC. The Court decided that the Commission's authority to approve mergers, acquisitions, and the like was not plenary; rather, it "is restricted . . . by all the ramifications of the antitrust laws and policies, to which the Commission must give strict regard in approving motor consolidations, as if the exemption did not exist." [91] In reaching this decision the Court, reflecting on the propriety of incorporating national policy considerations into an internally developed standard, stated:

> [I]n executing those [immediate regulatory] policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot without more ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned.[92]

Such an ad hoc approach necessarily creates an uncertainty as to the propriety of agency actions that do not comport with policies embodied in legislation lying outside the agency's enabling statute. In examining the propriety of agency conduct, the court is to focus upon the act in question as related to the purpose for which the agency was created. In so doing, the public interest responsibilities of the agency are thereby

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Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission . . . .

91. 321 U.S. at 78.

92. *Id.* at 80 (dictum) (citations omitted). It should be noted that past attempts to make the EEOC the exclusive enforcement agency of equal opportunity employment have failed. 110 CONG. REC. 13650-52 (1964) (proposed amendment to the Civil Rights Act of 1964 by Senator Taft); *Hearings, supra* note 8, at 35-36, 61-65.

Further, one commentator has noted:

> Congress had ample opportunity at the time it was considering Title VII to know that the NLRB had already launched its attack on employers and unions which practice racial discrimination. It is arguable that congressional failure to provide an exclusive federal remedy through the EEOC constitutes inferential approval of the NLRB activity. If Congress approved past NLRB activity and allowed its continuation, it could not logically have intended to prevent other federal agencies from entering the field in the future where such entrance is based on an agency's statutory authority.

Note, *The FCC's Role in Providing Equal Employment Opportunity for Minority Groups*, 53 B.U.L. REV. 657, 680 (1973) (footnotes omitted).

practically delimited. Regarding the scope of the ICC's "public interest" responsibilities in particular, the Supreme Court has stated:

> [T]he term 'public interest' . . . is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of authority conferred.[93]

Arguably, through utilization of a state action argument an affirmative duty may be imposed on the ICC to enter the employment regulation area. The Interstate Commerce Act provides that the Commission may place conditions on mergers, and mandates that the ICC "require a fair and equitable arrangement to protect the interests of the railroad employees affected." [94] To understand the significance of this provision, the unique characteristics of the discrimination problem within the railway industry first must be considered.

The railroad employment structure is based upon a strict craft and class seniority system. It was not unusual for pre-Title VII employment contracts to provide for the exclusion of minorities, particularly blacks, from the more desirable crafts. Although such contracts could not, and did not, survive the remedial impact of Title VII, the effects of this discrimination have not been eliminated. Post-Title VII contracts still may operate so as to perpetuate discriminatory employment practices.[95] Although minority group members now may enter the more desirable crafts, the seniority system threatens their job security. Following a merger, for instance, resultant reduction of the work force finds a disproportionate number of minority employees displaced as a result of the "last hired first fired" practice. At least one court, holding this result to be violative of Title VII, required affirmative action by the employer to correct the discrimination.[96] Further, when a minority group member

93. New York Cent. Sec. Corp. v. United States, 287 U.S. 12, 25 (1932). *Cf.* Alabama Elec. Coop. v. SEC, 353 F.2d 905 (D.C. Cir. 1965): "Words like 'public interest' . . . take their meaning and definition from the substantive provisions and purposes of the Act." *Id.* at 907.

94. 49 U.S.C. § 5(2)(f) (1970).

95. *See, e.g.*, United States v. Jacksonville Terminal Co., 415 F.2d 418, 448 (5th Cir. 1971).

96. Watkins v. United Steelworkers Local 2369, 369 F. Supp. 1221 (E.D. La. 1974) (liability); 8 BNA FEP Cases 729 (E.D. La. 1974) (remedy).

Watkins involved a class action challenging layoff and recall practices that were based on seniority. The plaintiffs argued that the utilization of seniority as a basis for

has managed to obtain seniority in one craft, transfer to another craft leads to the total loss of seniority.[97] Notably, the above results are perpetuated by contracts that, though neutral on their face, retain a craft and seniority system that sustain at least the vestiges of past discriminatory conduct.

With regard to the discriminatory effects of mergers, the state action argument finds some support in the Supreme Court decision, *Moose Lodge No. 107 v. Irvis*,[98] which involved the granting of a state liquor license. The regulations pursuant to which the license was issued required that "[e]very club licensee shall adhere to all of the provisions of its Constitution and By-laws." [99] The constitution of the Moose Lodge, in turn, authorized discriminatory conduct.

The Supreme Court noted that the impetus for the forbidden discrimination need not originate with the state if it is state action that enforces privately organized discrimination. Although the Court found that the issuance of the license in itself did not constitute state action, it found that the regulations invoked the sanctions of the state to enforce a concededly discriminatory private rule. In so holding, the Court recognized that "[s]tate action for purpose of the Equal Protection Clause, may emanate from rulings of administrative and regulatory agencies as well as from legislation or judicial action." [100] Even though the Liquor Control Board regulation was neutral in its terms, the Court found that the *result of its application* amounted to state action.

Such a rationale is relevant to the above discussion of the deleterious effects that mergers have on minority group employees when it is noted that the Commission is required, for a specified period, to maintain the rights of the employees gained through earlier collective bargaining

layoffs was racially discriminatory because blacks had been prevented from acquiring seniority because of the employer's previous all-white hiring policy. *Id.* at 1224. The district court noted that the employer's intent was not a relevant consideration. *Id.* at 1224 n.3. The court held that employment preference could not be allocated on the basis of length of service and that existing practices should be altered so as to redress the discrimination. *Contra*, Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3505 (U.S. Mar. 13, 1975) (No. 74-1064). *See generally* Levitt, *Title VII of the Civil Rights Act: A Review of Significant Decisions*, 16 WM. & MARY L. REV. 529, 530-35 (1975).

97. United States v. Jacksonville Terminal Co., 451 F.2d 418, 426 (5th Cir. 1971).

98. 407 U.S. 163 (1972).

99. *Id.* at 177, *quoting* regulations of the Pennsylvania Liquor Control Board, § 113.09 (June 1970 ed.).

100. 407 U.S. at 179 (citations omitted).

agreements.[101] As the effect of these agreements arguably perpetuates past discriminatory practices,[102] requiring the ICC to enforce such agreements would seem to fall squarely within the rationale of *Moose Lodge.*

Acceptance of the state action argument next poses the question as to what action would be required of the ICC. In *Moose Lodge*, the license under review was not revoked, apparently because state regulation of liquor through the use of licenses was not deemed to amount to a state granted monopoly.[103] Because railroad labor unions are the exclusive bargaining agents for railway employees, a different result, requiring affirmative action by the ICC to eliminate all vestiges of past discrimination, may obtain.

The Federal Communications Commission

The Federal Communications Commission (FCC) adopted rules proscribing employment discrimination in 1969,[104] and thereby became the first and only agency to implement formal rules regarding employment practices.[105] Although the FCC entertained several theoretical grounds for assuming jurisdiction over employment practices,[106] the Commission

101. 49 U.S.C. § 5(2)(r) (1970). The section reads in pertinent part:

> In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period . . . than the period during which the employ of such carrier . . . prior to the effective date of such order.

Id. For a discussion of the legislative history and purpose of this section, see Railway Labor Executives' Ass'n v. United States, 339 U.S. 142 (1950).

102. *See* note 96 *supra* & accompanying text.

103. Justice Douglas dissented on this point. In his opinion there was a state-granted monopoly, thereby requiring revocation. 407 U.S. at 182 (Douglas, J., dissenting).

104. Nondiscrimination Employment Practices of Broadcast Licensees, 18 F.C.C.2d 240 (1969).

105. The rules were implemented as a result of petitioning by the Office of Communication of the United Church of Christ. The FCC apparently was persuaded by the holding of Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), that petitioners had standing to challenge a license renewal on the grounds that discriminatory programming was inimical to the public interest.

106. In its Notice of Proposed Rulemaking the Commission placed emphasis on the relationship between violation of the laws (such as Title VII) and the public interest. 13 F.C.C.2d 766, 767, 769 (1968). Case law supported this position. *See, e.g.*, Mansfield Journal Co. v. FCC, 180 F.2d 28 (D.C. Cir. 1950) (violation of antitrust laws may be considered by the Commission in determining whether granting a license would be in the public interest).

finally relied on its own concept of the "public interest" standard. Believing that without minority representation there would be no accurate input of minority views and no internal impetus to develop programming that would satisfy the needs of minority audiences, the agency deemed equal opportunity employment a condition precedent to quality broadcasting.[107]

The rules promulgated by the FCC require broadcasters[108] to take affirmative steps guaranteeing the establishment of fair employment practices with respect to race, color, religion, sex, or national origin.[109] The Report and Order adopting the rules provided the general standard to be applied by the Commission in considering discrimination matters: "[W]hile not every complaint of an isolated action, even if substantial, will warrant deferring a renewal or designating a renewal application for [an evidentiary] hearing, renewal will not be appropriate where there is a pattern of substantial failure to accord equal employment opportunities." [110] Less than a year later, the Commission ordered all licensees subject to the regulations to file annual employment reports outlining the results of their affirmative programs.[111] The Commission, however, initially made limited use of these reports; rather than examining the types of positions given minority groups by the licensee,[112] or equating the licensee's employment of less than a representative number of minority group members with employment discrimination,[113] the Commission

107. 18 F.C.C.2d 240 (1969).

108. The original broadcasters covered were commercial or noncommercial standard, FM, television, and international licensees. 47 C.F.R. §§ 73.125, 73.301, 73.599, 73.680, 73.793 (1974). Subsequently this was expanded to include common carrier licensees, 47 C.F.R. § 21.307 (1974), and cable licensees and permittees of cable television relay stations, 47 C.F.R. § 76.311 (1974).

109. The requirements focused on duties of management, contact with sources of minority applicants, and positive recruitment programs. 47 C.F.R. §§ 73.125, 73.301, 73.599, 73.680, 73.793 (1974). Sex was added as an unlawful basis for discrimination in 1971. Equal Employment Program, 32 F.C.C.2d 708 (1971).

110. 18 F.C.C.2d at 241-42 (footnotes omitted).

111. Nondiscrimination Employment Practices of Broadcast Licensees, 23 F.C.C.2d 430 (1970).

112. *See* Equal Employment Opportunity Inquiry, 36 F.C.C.2d 515, 518 (1972) (opinion of Commissioner Johnson).

113. "We have at no time indicated that fully proportional employment of minority groups is called for by our rules, since we do not believe that fair employment practices will necessarily result in the employment of any minority group in direct proportion to its numbers in the community." 23 F.C.C.2d at 431. This policy, though not actually overruled, was greatly affected by later appellate review of renewal challenges, in which the courts stated that statistical disproportion could play an important role in establishing a prima facie violation of the regulations. *See* notes 123-130 *infra* & accompanying text.

policed only those licensees employing no blacks or women, or whose employment of these groups actually declined from the previous period.[114] Even this minimal perusal appears to have been neglected on occasion.[115] The Commission, however, did consider several cases in which, aside from an individual complaint or a lack of proportionate minority representation, there existed additional factors that raised serious compliance questions.[116]

In summary, early operation of the rules generally resulted in rare Commission denials of license or renewal applications. Petitioners challenging license renewals were usually unsuccessful in obtaining even an evidentiary hearing on an employment discrimination charge.[117] Perhaps

114. Equal Employment Opportunity Inquiry, 36 F.C.C.2d 515, 518 (1972) (opinion of Commissioner Johnson). The agency adamantly refused to conduct evidentiary hearings on employment discrimination when presented solely with statistical evidence that minority group members were represented disproportionately in the employment force of a licensee. *See, e.g.*, Time-Life Broadcast, Inc., 33 F.C.C.2d 1050, 1059 (1972); Pueblo Stereo Broadcasting Corp., 32 F.C.C.2d 734, 737 (1971); WTAR Radio-TV Corp., 31 F.C.C.2d 812, 833 (1970). Commissioner Johnson typically dissented from the conviction with which the Commission cast aside the statistical question. "A station's equal employment program, no matter how elaborate it may be on paper, cannot count for much unless and until hiring of racial minorities bears some reasonable relationship to the minorities' composition of the area's population." WGN of Colorado, Inc., 31 F.C.C.2d 413, 423 (1971).

115. *See* Great Trails Broadcasting Corp., 39 F.C.C.2d 39, 47 (1972) (dissenting opinion of Commissioner Johnson).

116. In one such case, Bob Jones Univ. Radio Station NMUU, 25 F.C.C.2d 732 (1970), the Commission reviewed the license of a university-operated radio station that employed only students, faculty and their spouses, and alumni. The Commission noted the complete absence of an equal opportunity employment program and was particularly critical "of the fact that the station utilize[d] as a primary source of recruitment a school which [did] not accept [blacks]." *Id.* at 734. An affirmative action program was ordered. *See also* Alabama Educ. Television Comm'n, 33 F.C.C.2d 495 (1972) (charge that station employed no blacks); Kings Garden, Inc., 38 F.C.C.2d 339 (1972), *aff'd*, 498 F.2d 51 (D.C. Cir. 1974) (religious affiliation is a valid nondiscriminatory requirement *only* for religiously oriented operations).

Moreover, the mere existence of formal rules probably resulted in voluntary compliance that might not have occurred otherwise. Sensitivity to the rules is illustrated by the fact that broadcast complaints charging employment discrimination rose from 29 in fiscal 1970 (race category only) to 165 in fiscal 1971 (all categories) and 202 in fiscal 1972 (all categories). FCC 38TH ANNUAL REPORT, FISCAL YEAR 1972 (1973); 37TH ANNUAL REPORT, FISCAL YEAR 1971 (1972); 36TH ANNUAL REPORT, FISCAL YEAR 1970 (1971). However, lax enforcement of the rules at least partly discouraged voluntary compliance. As late as 1973 the Civil Rights Commission stated: "Although the FCC has taken a leadership role in this area and has required its regulatees to submit racial and ethnic data and affirmative action plans, it does not strictly enforce its rules." REPORT—1973, *supra* note 8, at 405.

117. In most cases, a petition to deny a license renewal was based on three separate grounds: nonascertainment of community needs, deficient programming, and employ-

due to criticism resulting from its nonresponsiveness, the Commission, in *Time-Life Broadcast, Inc.*,[118] issued the following clarification of the basic requirements:

> In order to challenge a station's equal employment program or show noncompliance with the Commission's Rules, a petitioner . . . must demonstrate with some degree of specificity that the licensee's program in some way prevents equal employment opportunities or that the licensee discriminates in employment. The best evidence of such discrimination or noncompliance would be specific examples of persons who were discriminated against by the licensee because of race, religion, color, national origin, or sex.[119]

Yet, when the Commission later was confronted with challenges based in part on specific allegations of discrimination against a minority employee,[120] it retreated to the language of the original Report and Order, stating that one instance of discrimination, even if substantial, did not equal a pattern of discrimination, and thus did not warrant a hearing.[121] Former Commissioner Johnson dissented strongly from this position and questioned whether such a rationale would result even in an evidentiary hearing, much less a license denial.[122]

As a result of two decisions by the Court of Appeals for the District of Columbia Circuit, *Stone* v. *FCC*[123] and *Bilingual Bicultural Coalition of*

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ment discrimination. *See, e.g.*, WGN of Colorado, Inc., 31 F.C.C.2d 413 (1971); Pueblo Stereo Broadcasting Corp., 32 F.C.C.2d 734 (1971). All grounds were considered individually and on separate evidence.

118. 33 F.C.C.2d 1050 (1972).

119. *Id.* at 1059.

120. *See* Taft Broadcasting Co., 38 F.C.C.2d 770 (1972); RadiOhio, Inc., 38 F.C.C.2d 721 (1972).

121. RadiOhio, Inc., 38 F.C.C.2d 721, 747 (1972). The Commission seemed to balance the individual action against the licensee's efforts to comply with the regulations. *See also* Taft Broadcasting Co., 38 F.C.C.2d 770, 799 (1972); Fort Collins Broadcasting Co., 38 F.C.C.2d 707, 709 (1972).

122. [A]fter conceding that petitioners might well have alleged sufficient facts to indicate that WBNS-TV has, indeed, discriminated against at least one black employee, the majority nevertheless refuses to designate that question for hearing. . . . Passing the troublesome, and as yet unanswered, question of just how many instances of discrimination are necessary before we have a 'pattern,' if a petitioner must establish the existence of such a pattern in order to obtain a hearing . . ., what purpose will be served by the hearing? In short, the majority demands that in order to get a hearing, the petitioner prove, *prior* to a hearing, that which can only be proved through a hearing.

RadiOhio, Inc., 38 F.C.C.2d 721, 750-51 (1972) (dissenting opinion).

123. 466 F.2d 316 (D.C. Cir. 1972), *aff'g* Evening Star Broadcasting, 24 F.C.C.2d 735 (1970), *rehearing denied per curiam*, 466 F.2d 331 (1972).

Mass Media, Inc. v. *FCC*,[124] the Commission has become more receptive to charges of employment discrimination. Both cases involved the role to be accorded statistical information in establishing a prima facie showing of discriminatory practices necessary to obtain a hearing. In *Stone*, the court sustained the Commission's holding that the statistical picture presented did not establish a prima facie case. The court added, however, that its ruling was not to be construed to mean that "statistical evidence of an extremely low rate of minority employment will never constitute a *prima facie* showing of discrimination, or 'a pattern of substantial failure to accord equal employment opportunities'." [125] Citing *Stone*, the court in *Bilingual* stated that the FCC had been neglecting the importance of statistical disparities in employment data:

> The Commission is aware that statistics alone do not provide ideal evidence of discrimination. From *Stone* to the present case, it has insisted that groups challenging license renewals show 'specific instances of discrimination or a conscious policy of exclusion.' This insistence is understandable, but unrealistic. Discrimination may be a subtle process which leaves little evidence in its wake.[126]

Although the court agreed that disproportionate employment figures were inconclusive as to the lack of compliance, it did advise that the importance of statistical data be recognized.

Certainly attributable in part to the *Bilingual* decision, the FCC developed a new perspective in 1974. Following a review of the 1971-72 annual employment reports, the Commission made inquiries concerning the employment policies of 245 broadcast licensees located in 13 states, 2 territories, and the District of Columbia.[127] Although the FCC has maintained the position that proportionate equality is not required, but rather that the proportion must fall within a zone of reasonableness, it has stated: "Clearly . . . if the number of employees of a particular minority group is low and the licensee has failed to take sufficient affirma-

124. 492 F.2d 656 (D.C. Cir. 1974), *aff'g* Avco Broadcasting Corp., 39 F.C.C.2d 4 (1972).

125. 466 F.2d at 332 (dictum).

126. 492 F.2d at 659 (footnote omitted). The court held that the Commission had to develop some procedures (in lieu of a hearing) through which challengers could have discovery-like mechanisms to aid them in their attempts to prove a prima facie case.

127. FCC, FISCAL YEAR 1973 REPORT at 71 (1974). "The stations selected for review had more than ten fulltime employees but no fulltime women employees or showed a decline in their number. In areas with a minority population of 5 percent or more, they employed no fulltime members of minority groups or showed a decline in their number." *Id.*

tive action efforts to remedy the situation, then a fair question is raised requiring appropriate administrative action." [128]

Notwithstanding the Commission's recognition of the value of statistical information, the FCC has accepted the presence of an affirmative action program and a numerical increase in minority employment vis-a-vis the previous year's report as sufficient to prevail over inferences drawn from statistical profiles in a number of recent cases.[129] The agency has, however, been more considerate of employment discrimination charges since *Bilingual*, as is evidenced by a number of cases in which a license renewal has been temporary, conditional, or deferred subject to further investigation of compliance.[130]

Simply because the FCC has entered affirmatively the area of employment discrimination, arguably with some success, such action is not necessarily appropriate for all other regulatory commissions. The argument that the FCC occupies a position somewhat unique within the regulatory scheme by virtue of the qualities of the industry it is designed to regulate, is more than colorable. Federal regulation of the electromagnetic frequency spectrum was the logical response to the chaos that resulted from unrestricted access of individual station owners to the limited number of available broadcast frequencies.[131] Although it has

128. Hubbard Broadcasting, Inc., 48 F.C.C.2d 517, ——, 31 P & F RADIO REG. 2d 144, 152 (1974).

129. *See, e.g.*, Avco Broadcasting Corp., 52 F.C.C.2d 825, 33 P & F RADIO REG. 2d 875 (1975); RKO General, Inc., 52 F.C.C.2d 582, 33 P & F RADIO REG. 2d 632 (1975); WTWV, Inc., 51 F.C.C.2d 1247, 33 P & F RADIO REG. 2d 65 (1975).

130. Scott Broadcasting Corp., 52 F.C.C.2d 1029, 33 P & F RADIO REG. 2d 1065 (1975) (employment policies deemed neutral at best, no blacks employed during 1967-72); Louisiana TV Broadcasting Corp., 53 F.C.C.2d 561, 33 P & F RADIO REG. 2d 1568 (1975) (renewal subject to filing of affirmative action program for next renewal period); Triple X Broadcasting Co., 51 F.C.C.2d 585, 32 P & F RADIO REG. 2d 1560 (1975) (short term, conditional renewal; no blacks employed by station since 1972).

The FCC recently has released plans to clarify and modify its rules to assure that licensees pursue active and affirmative equal employment programs. Among possible changes are included active examination of each broadcaster's program and the imposition of remedial measures when a program is considered inadequate. "Such steps would include a request for more specific data by race and sex on applicant flow, hires, promotions and terminations, and the establishment of minority and/or female employment goals and timetables for each year of the license term." CCH EMP. PRAC. GUIDE No. 89, at 3 (August 9, 1975). These measures may well be in response to criticism that the FCC still is failing in its enforcement duties. *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974, VOL. 1, TO REGULATE IN THE PUBLIC INTEREST (1974) [hereinafter cited as REPORT (1)—1974]. *See also* CCH EMP. PRAC. GUIDE ¶ 5276.

131. For a discussion of the background and rationale of federal regulation of the

been argued that the Commission's regulatory authority was intended to be confined to the technical and economic considerations of the allocation and supervision of the use of such a limited national resource among those best able to exploit the medium,[132] the Commission's role has been expanded both statutorily[133] and judicially. Noting that the statutory mandate of the Federal Communications Act should be interpreted to allow the FCC to respond with flexibility to the needs and effects of a dynamic industry of exceptional public impact,[134] the Supreme Court has stated that the Act "gave the Commission not niggardly but expansive powers."[135] Consequently, it has been recognized that the public interest associated with broadcast regulation is "not susceptible of precise or comprehensive definition;"[136] its constituent elements must necessarily be determined ad hoc.[137] The public interest criteria, then, has been extended beyond mere evaluation of the financial and technical capabilities of station operators;[138] the agency has required surveys of the informational and entertainment needs of local communities and their identifiable socio-economic subgroups,[139] made value judgments on programming content,[140] considered the impact of the media on issues of

broadcast industry, see National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

132. *See id.* at 215-216. *See generally* Comment, *Administrative Agencies, the Public Interest, and National Policy: Is a Marriage Possible?* 59 GEO. L.J. 420, 436-437 (1970).

133. The Federal Communications Act of 1934, 47 U.S.C. §§ 151 *et. seq.* (1970), which created the FCC, states as its purpose, "among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission." 47 U.S.C. § 301 (1970). The Act imposes upon the FCC the responsibility of carrying out each of its various licensing and regulating duties and of determining whether the "public convenience, interest, or necessity" will be served. *See id.* §§ 303, 307, 308, 309, 310(b), 312(a)(2), 316, 319(a).

134. National Broadcasting Co. v. United States, 319 U.S. 190 (1943); FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940).

135. National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943).

136. McClatchy Broadcasting Co. v. FCC, 239 F.2d 15, 18 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957).

137. *Id.*; Carroll Broadcasting Co. v. FCC, 258 F.2d 440, 443 (D.C. Cir. 1958).

138. *See, e.g.*, 47 U.S.C. § 308(b) (1970); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958).

139. Citizens Comm. v. FCC, 436 F.2d 263 (D.C. Cir. 1970); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Henry v. FCC, 302 F.2d 191 (D.C. Cir. 1962); City of Camden, 18 F.C.C.2d 412 (1969).

140. Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969); National Broadcasting Co. v. United States, 319 U.S. 190 (1940). *See* Note, *The Public Interest in Balanced Programming Content: The Case for FCC Regulation of Broadcasters' Format Changes*, 40 GEO. WASH. L. REV. 933 (1972); Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701 (1964).

public health,[141] and examined the right of the public itself to participate in deciding what is the public interest.[142]

Although it has been argued that with respect to consideration and enforcement of national social and economic policies the public interest standard in broadcast regulation should not be limited,[143] the Supreme Court has stated that the FCC's discretion to determine what is in the public interest is not without bounds.[144] In *FCC v. RCA Communications, Inc.*,[145] for example, the Court held that the administrative grant of a license based on the "national policy in favor of competition," [146] rather than on a finding that competition would have a beneficial impact on the industry, was improper.[147] *RCA* therefore suggests that in determining the scope of the FCC's public interest responsibilities, the existence of a broad national policy is only one factor to be considered. Any agency action based on national policy must be related additionally to the purpose for which the agency was created.[148] In examining specifically whether the FCC should scrutinize the employment practices of its regulatees, it therefore must be asked, once it is accepted that agency inquiry is not limited to the purely technical and economic activities of the industry regulatees, whether such regulation, besides conforming to a national policy, is related sufficiently to agency goals. The requisite nexus is found by noting that the affirmative regulation of employment practices by the FCC allows minority groups to participate in the vital industry function of informing the public and thereby molding public opinion. This nexus places the FCC in a position substantially different from other agencies with respect to employment practices and forms a basis for affirmative regulation that may well be peculiar to that agency.

Although the above rationale appears to justify the FCC's regulation of the employment practices of its *broadcast* licensees, it must be noted that the Commission has extended such regulation to other regulatees as

141. Barghaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968).

142. *See* Volner, *Broadcast Regulation: Is There Too Much "Public" in the "Public Interest"?* 43 U. CIN. L. REV. 267 (1974).

143. *See* Comment, *National Policy and the "Public Interest"—A Marriage of Necessity in the Communications Act of 1934*, 114 U. PA. L. REV. 386 (1966).

144. *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190, 225-26 (1943); FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); FRC v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933).

145. 346 U.S. 86 (1953).

146. *Id.* at 89 (citing the Commission's prior opinion).

147. *Id.* at 94-95.

148. *Cf.* note 32 *supra* & accompanying text.

well.[149] In outlawing employment discrimination in the telephone and telegraph industries, the Commission stated:

> The Communications Act of 1934 recognizes the special responsibilities of such carriers by providing that it is unlawful for any common carrier to "make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services for or in connection with like communication service . . . ." It would seem evident that a company which follows discriminatory employment practices would find it difficult to provide nondiscriminatory service. Both because of the special position granted communications common carriers by the Government, and the relationship between service to the public and the carrier's employment practices, it would be intolerable to countenance discriminatory employment practices.[150]

In so stating, the FCC adopted the broadest possible position on the subject of employment discrimination, arguing that discriminatory employment practices certainly and unavoidably affect the service to the public, thus taking the position specifically rejected in *NAACP*.

Conclusion

In analyzing the divergent positions of the FCC and the court in *NAACP* it should be recognized that, with respect to the scope of an agency's public interest responsibilities, both positions agree that administrative action must be reasonably related to administrative objectives as discerned from the agency's enabling statute. The positions differ as to the evidence needed to show such a relationship. The FCC reasons that a regulatee's employment discrimination *necessarily* affects service and therefore must be regulated. Rejecting this absolutist approach, the court in *NAACP* suggested that when the agency is confronted with a "very poor equal employment opportunity record," it should presume the existence of particular results that, unless rebutted by the regulatee, may lead to administrative action.[151] More specifically, the court stated that the purpose of the FPC was to insure that its regulatees did not pass along to the consumer unnecessary or illegitimate costs, and that when confronted with evidence of clear employment discrimination, the agency should assume that the burden of illegal costs was indeed borne

149. 34 Fed. Reg. 19200 (1969).
150. *Id.* at 19201.
151. 4 MB Fed. Power Serv. at 6-67.

by consumers unless otherwise rebutted.[152] This "financial-impact test" likewise is applicable to the SEC, ICC, and CAB, as these agencies were created to regulate the economic problems confronting their licensees.

In examining the above approaches it should be remembered that although greater agency involvement in discrimination matters appears desirable, such involvement could lead to multiagency regulation of an area already fraught with confusion. Recognizing the chaos presently existing as a result of multiagency enforcement of civil rights legislation, the United States Commission on Civil Rights recently has advocated that such enforcement be headed by one agency.[153] Citing the diffusion of enforcement authority as a prime reason for the overall failure of the federal government effectively to eliminate employment discrimination, the Commission reasoned that one agency, administering one standard of compliance, would be more fair and efficient.[154] As noted by one

152. Noted the court:

> It is at least conceivable that a regulatee with a very poor equal employment record might be presumed to have incurred excess labor costs because of its exclusionary practices, and that these costs, being difficult to quantify and prove, will be rebuttably presumed to equal a certain percentage of actual labor costs.

Id. With regard to such indeterminate costs, the United States Commission on Civil Rights has stated:

> Employment discrimination gives rise to inefficiency. Excluding a group of qualified potential applicants creates an artificial restriction on the labor force which otherwise would be at the employer's disposal. This may tend to inflate wages, limit the quality of work performance, and result in preventing the employer from realizing an optimum return on labor cost expenditures.

Statement of the United States Commission on Civil Rights, Before the Civil Aeronautics Board at 3-4 (September 25, 1972), *reprinted in* Brief for the Petitioners in NAACP v. FPC at 33. *See* note 33 *supra.*

153. *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974, VOL. 5, DISCRIMINATION IN EMPLOYMENT at 649-55 (1974).

154. Agencies have different policies and standards for compliance. They disagree, for example, on such key issues as the definition of employment discrimination, testing, the use of goals and timetables, fringe benefits, and back pay. Moreover, there is inadequate sharing of information, almost no joint setting of investigative or enforcement priorities, and little cross-fertilization of ideas and strategies at the regional level. This fragmented administrative picture has resulted in duplication of effort, inconsistent findings, and a loss of public faith in the objectivity and efficiency of the program. This last deficiency is best exemplified by contrasting the opinion of many employers that they are being harassed by Federal bureaucrats with the belief of many minorities and women that the Government's equal employment program is totally unreliable.

Id. at 618. The only steps taken thus far to comply with the Commission's recommenda-

commentator, the problems encountered with the present system lend support to the recommendations of the Commission on Civil Rights:

> To illustrate, a company may have an NLRB fair representation case, a charge before the EEOC, a private action under Title VII, a pattern and practice suit brought by the Attorney General, a complaint to the OFCC and complaints to the procurement agencies, all involving the same set of facts. At each of these levels precisely the same factual and legal issues may be litigated and relitigated. It is obvious that the social objective of equal employment opportunity can easily become lost in this chaotic administrative situation.[155]

Moreover, it is doubtful that the independent regulatory agencies have either the manpower or the expertise to undertake the task of affirmative regulation. Notably, the Equal Opportunity Employment Commission has a tremendous backlog of cases.[156] If a regulatory commission were placed in a similar position without a massive infusion of funds and personnel, it is likely that other essential functions of the agency would suffer.

For the above reasons it appears that the approach of the FCC may be less desirable than that of the *NAACP* court. In practice, however, the two approaches may not be as dissimilar as they first appear. The court in *NAACP* noted that, under its financial-impact test, costs rebuttably presumed to exist might include, for instance, "excessive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against, [or] the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment or promotion." [157] It seems clear that the presumption

tions were those of the Department of Labor in merging three of its contractor compliance units, including the OFCC, into a single "Office of Federal Contract Compliance Programs." *See* Dep't of Labor News Release No. 75-333 (June 17, 1975), CCH EMP. PRAC. GUIDE ¶ 5332 (1975).

155. Farmer, *Equal Employment Opportunity—Case Study of Chaotic Administration*, 44 FLA. B.J. 400 (1970). As an example of his proposition Farmer cites Crown Zellerbach Corp. v. Wirtz, 281 F. Supp. 337 (D.D.C. 1968), in which the defendant had negotiated a settlement acceptable to the EEOC only to be faced with litigation over the same issue with both the OFCC and the Department of Justice.

156. In the fiscal year ending June 30, 1972, the EEOC had a backlog of 38,254 cases. EEOC 7th Annual Report, CCH LABOR LAW REPORTS, EMP. PRAC., No. 39, at 51 (August 23, 1973). By the end of the following year the backlog had risen to 57,286 cases. EEOC 8th Annual Report, CCH LABOR LAW REPORTS, EMP. PRAC., No. 81, at 35 (April 10, 1975).

157. 4 MB FED. POWER SERV. at 6-66.

of such nebulous costs would be, if not impossible, very difficult to rebut. If the Commission were to consider the inability to rebut such presumptions determinative as to whether a license should be granted, such a result, in substance, would be no different than that obtained under the FCC approach. The Commission, however, may mold the *NAACP* financial-impact test into a more flexible solution by treating the inability to rebut presumptions of unnecessary cost as but one factor in many to consider when ruling upon a license application or renewal. This approach is more desirable because it would direct the regulation of employment discrimination toward those agencies more properly disposed to performing that function.