

license term that ended on August 1, 1990. We therefore issued notices of apparent liability for forfeitures to Walker County in the amount of \$31,250 and to KTEM Radio in the amount of \$25,000. We determined these amounts based on Standards for Assessing Forfeitures for Violations of EEO Rules, 9 FCC Rcd 929 (1994) ("EEO Policy Statement"). In Walker County and KTEM Radio, we noted that the EEO Policy Statement had been vacated and we therefore recalculated the amount of the forfeitures by relying on case precedent, which had been the basis for determining the amount of forfeitures prior to the adoption of the EEO Policy Statement. In the case of both petitioners, we separately determined that forfeitures in the amount of \$15,000 were appropriate because the EEO records of both petitioners were comparable to that of television station WNRW-TV, Winston-Salem, North Carolina. In Act III Broadcasting of Nashville, Inc., 11 FCC Rcd 1172 (1995) ("Act III"), we found that WNRW-TV's record warranted a forfeiture in the amount of \$15,000.

3. In their Joint Petition for Reconsideration, petitioners allege that the Commission has failed to scrutinize its EEO Rule and policies in light of the Supreme Court's decision in Adarand Constructors, Inc. v. Peña, 515 U.S. ___, 115 S.Ct. 2097 (1995) ("Adarand"). They further assert that the EEO Rule and policies are inconsistent with Adarand. Petitioners further allege that reliance on Act III as the basis for determining the appropriate forfeitures for petitioners is arbitrary and capricious. They contend that WNRW-TV is not comparable because it was a television station in a larger market than those in which petitioners operated radio stations. Petitioners also note that WNRW-TV's renewal application was filed over a year after their renewal applications and that WNRW-TV received renewal for a full term, whereas they received short-term renewals. They concede that objections to the imposition of short-term renewals were not resolved in Walker County and KTEM Radio only because the issue had become moot. Petitioners also claim that compliance with the EEO Rule is burdensome to small broadcasters and note that there is a pending rule making proceeding in which comments were requested as to possible modifications in the Rule as it applies to small broadcasters. Streamlining Broadcast EEO Rules and Policies, 11 FCC Rcd 5154 (1996) ("NPRM"). Finally, they urge that the forfeitures should be rescinded because the stations are now in compliance with the Commission's Rules.

III. DISCUSSION

4. Constitutionality of the Commission's EEO Rule. We disagree with petitioners' contention that our EEO Rule and policies are inconsistent with Adarand. Adarand addresses the constitutionality of a race-based preference program arising under federal law. The Supreme Court held that where questions arise as to a violation of the personal right to equal protection of the laws as a result of such programs, courts should evaluate such challenges by invoking the "strict scrutiny" standard of judicial review. Under strict scrutiny, racial classifications are constitutional only if they are narrowly tailored measures that further a compelling governmental interest.

5. The requirements imposed by our EEO Rule are fundamentally different from a race-based preference program such as that at issue in Adarand.² The Rule does not require that any person be hired or accorded a hiring preference based on racial or ethnic status. Rather, it requires that licensees make efforts to recruit minority and women applicants so that they will be ensured access to the hiring process.³ The ultimate decision as to whether to hire a particular applicant may be premised upon any non-discriminatory considerations, without regard to the applicant's race, ethnicity or gender status. Further, our Rule does not require licensees to hire any prescribed "quota" of minorities or women. Thus, our EEO Rule imposes no requirement that would operate to deprive any person of a benefit he or she might receive but for his or her race, ethnicity or gender.

6. We employ a two-step process in evaluating licensees' EEO efforts. In the first step, we seek to identify those licensees whose EEO efforts may be unsatisfactory so as to warrant further inquiry. Whether a licensee's employment profile as reflected in its Annual Employment Reports filed during the license term meets the processing guidelines is one factor considered in making this preliminary assessment, along with information contained in the renewal application, allegations raised by any petitions to deny or informal objections, and any other information available concerning the licensee's EEO record. We emphasize that these guidelines are used as an initial screening tool for determining the stations whose EEO programs might require further investigation. If the first step of review indicates that the station's EEO efforts are satisfactory, the station is found to be in compliance with our EEO Rule. In no situation are a station's efforts found to be unsatisfactory or is it found to have violated the EEO Rule solely because it does not meet the processing guidelines. Where we find that a station's efforts may be unsatisfactory, we will generally request additional information which is analyzed along with relevant pleadings to determine if, among other things, the station notifies sources of minority referrals when vacancies occur and engages in continuous self-assessment of its EEO program; if, in light of the evidence, the station violated our EEO Rule; and, if it did, what sanctions or remedies may be appropriate. Compliance with the processing guidelines is not a factor in this second step analysis. Broadcast licensees whose employment profiles are below our processing guidelines have been renewed without sanction.

7. Accordingly, we find no basis for concluding that our process denies any person equal protection of the laws. Indeed, the petitioners have not identified any person who arguably suffered such injury as a result of the provisions of our Rule. As the Court emphasized in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Croson"), the right to equal

² Adarand involved a federal procurement set aside program.

³ Our EEO Rule imposes identical requirements with respect to women. Adarand concerned federal programs based on minority status. The standard of review for gender based programs is intermediate scrutiny. Under that standard, there must be an "exceedingly persuasive justification" for gender-based government action and that action is constitutional if it serves an important governmental objective and is substantially related to achievement of that objective. United States v. Virginia, 116 S.Ct. 2264 (1996); J.E.B. v. Alabama ex rel. T. B., 511 U.S. 127 (1994); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

protection is a personal right. In the absence of any provisions in our EEO Rule that abridge the personal rights of any person, we conclude that Adarand does not implicate our EEO program.

8. Our reading of the scope of the Adarand decision is consistent with the interpretation of the case by the Department of Justice (DOJ). An analysis of the Adarand decision by DOJ states:

Mere outreach and recruitment efforts . . . typically would not be subject to Adarand standards. Indeed, post-Croson cases indicate that such efforts are considered race neutral means of increasing minority opportunity. In some sense, of course, the targeting of minorities through outreach and recruitment campaigns involves race-conscious action. But the objective there is to expand the pool of applicants or bidders to include minorities, not to use race or ethnicity in the actual decision. If the government does not use racial or ethnic classifications in selecting persons from the expanded pool, Adarand ordinarily would be inapplicable.⁴

9. Objections to the Issuance of the Forfeitures. With reference to petitioners' contention that the respective \$15,000 forfeitures assessed based on the precedent set by Act III were improper, reconsideration is appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. See WWIZ, Inc., 37 FCC 685, 686 (1964), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965) cert. denied, 383 U.S. 967 (1966); Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106. Applying this standard, we conclude that petitioners have alleged no basis for reconsideration of the forfeitures assessed in Walker County and KTEM Radio.

10. In seeking reconsideration, the petitioners do not dispute any factual findings concerning the stations. Nor do they dispute that violations of our EEO Rule occurred. Apart from their constitutional objection discussed above, petitioners primarily disagree with the amount of the forfeitures assessed. As to their arguments regarding the amount of the forfeitures, we fully considered this matter in connection with our forfeiture orders. As we have repeatedly stated, reconsideration will not be granted for the purpose of debating matters on which we have already deliberated and spoken. See, e.g., Isis Broadcast Group, 8 FCC Rcd 24 (Rev. Bd. 1992), citing WWIZ. As to the new argument that the comparison to WNRW-TV is inappropriate because it was a television station in a larger market, our EEO Rule applies in the same manner to both television and radio stations. Further, in comparing stations, we look primarily to the composition of the area labor forces of the stations at issue, not market strength. Here, as we noted in our forfeiture orders, both WNRW-TV and petitioners had comparable percentages of

⁴ Memorandum to All Agency General Counsels from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, United States Department of Justice, at 7 (June 28, 1995) (footnotes omitted).

minorities in their respective labor forces.⁵ Moreover, the stations had a similar number of hires during their respective review periods, failed to recruit for comparable percentages of those hires, and failed to self-assess adequately the productivity of their recruitment efforts. WNRW-TV could demonstrate recruitment efforts for only 14 (48.2%) of its 29 full-time hires during the applicable review period. KSAM/KSAM-FM could demonstrate recruitment efforts for only 21 (55.2%) of 38 hires. KTEM/KPLE(FM) could demonstrate recruitment efforts for only 15 (42.8%) of 35 vacancies.⁶ These are the primary factors that determined the sanctions. Our concern is the nature and extent of a licensee's EEO efforts rather than the attainment of a particular numerical goal or quota. As to the other new argument, it is not significant that the renewal application for WNRW-TV was filed later than those of petitioners since the same EEO requirements applied to all three licensees. Petitioners' renewal applications were granted for a short term in Eagle Radio pursuant to the EEO Policy Statement. At the time of the release of Walker County and KTEM Radio, that issue had become moot due to the passage of the short term renewal period. The imposition of short-term renewals pursuant to the EEO Policy Statement is not grounds for reconsideration of the recalculated forfeiture amounts which were not determined based on the EEO Policy Statement.

11. We also find no basis for granting reconsideration on grounds that there is a pending rule making proceeding that might impact the EEO policies applicable to some small broadcasters. NPRM. The forfeitures imposed on petitioners were sanctions for violations, occurring during the license term that ended on August 1, 1990, of the EEO requirements then in effect. Possible future changes in our EEO policies are not relevant to determining the appropriate sanction for past violations. Similarly, alleged improvements in the petitioners' EEO records after the license term has expired will not be considered because violations during the license term warranted sanctions. Rust Communications Group, Inc., 73 FCC2d 39, 53 (1979).

IV. ORDERING CLAUSES

12. **ACCORDINGLY, IT IS ORDERED**, that the Joint Petition for Reconsideration filed July 1, 1996, by Walker County Communications, Inc., and KTEM Radio, Inc., is **DENIED**.

⁵ WNRW-TV was located in an area with a 17.8% minority labor force. KSAM/KSAM-FM and KTEM/KPLE(FM) were located in metropolitan areas with 22% and 20.9% minority labor forces, respectively.

⁶ In this respect, para. 8 of KTEM Radio incorrectly indicates that the licensee was unable to document recruitment for 15 of its 35 vacancies. In fact, 15 is the number of vacancies for which KTEM Radio was able to show recruitment efforts. It was unable to document recruitment for the remaining 20 hires. Eagle Radio, 9 FCC Rcd at 849-50.

13. **IT IS FURTHER ORDERED**, that the Mass Media Bureau shall send by Certified Mail -- Return Receipt Requested -- copies of this Memorandum Opinion and Order to Walker County Communications, Inc., and KTEM Radio, Inc.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary