Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 72M-1361

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In the Matter of	)	
	)	
Petitions filed by the Equal Employment Opportunity Commission (EEOC) et al.	)	DOCKET NO. 19143

MEMORANDUM OPINION AND ORDER
Issued October 30, 1972; Released October 31, 1972

By Frederick W. Denniston, Administrative Law Judge:

1. By Motion filed September 22, 1972, the Equal Employment Commission (EEOC) seeks the striking of certain written testimony distributed by the Bell System Respondents (Bell) on August 1, 1972, and which is scheduled to be introduced into evidence at the hearings which are to resume October 30, 1972. On the same date, a somewhat similar Motion was filed by the Chief of the Common Carrier Bureau of this Commission (Bureau), and on October 16, 1972, the Bureau filed a Comment supporting the EEOC Motion. On October 16, 1972, Bell filed an Opposition to the Motions. The right to file replies to the Opposition was sought by both EEOC and the Bureau, and was formally requested by the Presiding Judge. Replies were filed by EEOC on October 25, 1972, and the Bureau on October 26, 1972.[1/] Each party supported his filings with an extensive Brief.

2. In view of the importance of the questions presented, it is appropriate to deal with these pleadings even though the testimony complained of has not as yet been formally offered in evidence. The conclusions reached herein will therefore determine the action to be taken with respect to the specific testimony at such time as it is offered. The presentation of the matter in this manner, while technically premature, has permitted a thorough briefing by each party and correspondingly studied reflection by the Presiding Judge, rather than by on-the-spot rulings at the hearing.

3. EEOC seeks to have stricken in their entirety, the proposed testimony of Frank Coss, Nathan Glazer and Valerie Oppenheimer, and portions of the proposed testimony of Leona Tyler and Hugh Folk. Since the indicated portions of the latter two witnesses represent their major portion, the discussion herein will treat the Motion as dealing with

1/ The Bureau's reply was filed one day late accompanied by a Motion for Extension of Time indicating that the non-functioning of the Commission's duplicating facilities prevented a timely filing. Both EEOC and Respondents were said to have consented to the Motion, which is granted herein.

the whole of each. The Bureau Motion seeks the striking of the testimony of Leona Tyler and Nathan Glazer, but by its subsequent Comment, supports the entire request of EEOC. In its Motion, the Bureau also asks, as an alternative to striking the Tyler and Glazer testimony, that there be a ruling that such testimony "be limited to issues other than whether Respondents have been or are engaging in a pattern of discrimination against women and minorities and be limited to issues other than what are proper goals and timetables for Respondents' affirmative action obligations."

4. Both EEOC and the Bureau base their Motions on the grounds the testimony in question is immaterial. In effect, they determine what they consider to be the defenses open to Respondents and conclude the testimony covered by the Motions is not relevant thereto, and hence, immaterial. Additionally, both the EEOC and the Bureau emphasize the voluminous record already amassed herein and state that failure to exclude the testimony in issue can only result in a record of unmanageable proportions and one confused by unnecessary facts. This failure, moreover, would result in possibly lengthy cross-examination it is said, and the necessity of presenting witnesses in rebuttal to Respondents' witnesses in question.

5. In Opposition, Bell points out that EEOC has taken the position herein that the foundation of EEOC's direct case was a "massive amount of statistical data which showed a substantial underrepresentation of minorities and females," and that "absent discrimination one would expect a nearly random distribution of women and minorities in all jobs." While Bell acknowledges the validity of examining appropriate statistical evidence of minority and female employment, it challenges the theory that a random distribution of employees by sex and race is either factual or a legal norm. Bell contends, moreover, that the testimony of the challenged witnesses concerns the validity of EEOC's contention that, on the random distribution theory, discrimination should be presumed from the lack of proportional representation indicated by statistics. Each of the parties cites many cases touching on this question, but none of which appear conclusive to the issue at hand, which is a very narrow one. More importantly, none of the cases cited by EEOC or the Bureau are authority for the proposition that the evidence here discussed is immaterial or inadmissible for any other reason.

6. In addition to the thorough statistical analysis presented by EEOC, the latter also offered the testimony of a number of psychologists, economists, and others, who testified broadly on motivations, testing, societal attitudes, and the like, described herein, for convenience, as sociological. The arguments presented by the Motions imply, but do not contend, that all of such additional evidence offered by EEOC and the Bureau, may have been immaterial and that only statistical data should be considered. The Bureau has not so contended with respect to, and did not object to, the EEOC sociological evidence tendered.

7. Bell contends that, in addition to being concerned with the validity of the proportional representation argument advanced by EEOC, the challenged testimony responds to the assumptions and assertions made by EEOC witnesses Laws, Daryl and Sandra Bem, Anderson, and others. Thus, Bell says, an elementary question of due process is at stake as to whether it may offer countervailing testimony to that already of record. Bell also attacks many of the premises offered by EEOC and the Bureau as to the nature and validity of the defenses open to it.

8. In its separate Comment in support of EEOC filed October 16, 1972, the Bureau also contends the record in this proceeding is already voluminous, as heretofore noted. All of the testimony here in dispute is, however, essentially opinion testimony, not factual, and the size of the record has been established by EEOC and the Bureau, presumably upon careful planning of the evidence required to establish their contentions.

9. In their replies, both the Bureau and EEOC vigorously charge Bell with having "missed the point" of the Motions, or "knocking down straw men." Indeed, there is ample indication the contending parties are not tuned in on the same wavelength. For this, EEOC must accept some responsibility. In presenting its case, it chose to offer two basic types of testimony or evidence. First, it presented extensive statistical analysis of Bell's actual employment, which is not here subject to challenge. Secondly, it offered extensive sociological expert testimony. Up to this point, the Presiding Judge had found the sociological testimony to be informative and helpful in the light of the importance of the issues and the novelty of this proceeding. Exactly how it may weigh in the balance at the decision stage is not yet apparent. As the extensive briefing of the parties indicate, there are many recent and current court decisions which will offer helpful guidance and perhaps controlling precedent.

10. The narrow question here presented is whether Bell's "sociological" testimony should be suppressed as being immaterial. The basis for the contention that it is immaterial is, in essence, that the trend of court decisions and various regulations are constricting the effective defenses open to Bell and that the challenged testimony relates to those no longer open. It is entirely possible dispositive analysis will result in but little weight being attributed to particular defenses or testimony, but that does not mean the particular testimony is immaterial. In none of the extensive citations has a case been found which held sociological testimony immaterial nor in which the grounds of defense were delimited in the manner here suggested.

11. In their Replies, while strongly defending their Motions, both EEOC and the Bureau appear to perceive the inconsistency of their

position that the sociological testimony is immaterial in the light of the testimony already of record. Thus, EEOC now says:

> Petitioner's [EEOC] sociological references are in no way material to proving a violation of Title VII just as Respondents' sociological testimony is immaterial to its defense in this proceeding. Thus, Petitioners would have no objection to striking all references to general sociological matters. (Reply, p. 64).

There is, however, no specific identification of the testimony it would be willing to strike.

12. In the same vein, the Bureau states:

> The Bureau is willing to concede that to strike the testimony of Drs. Tyler and Glazer, while allowing similar testimony on vocational interests and attitudes introduced by any other party to remain in the record, would be inappropriate. We suggest that the Judge has two alternatives. He can strike the immaterial testimony wherever it is found in the record. Or, in reliance on the Fogg decision, supra, admit the testimony of Drs. Tyler and Glazer as non-decisional background evidence, and so label any other evidence on vocational interests and attitudes. The Bureau, however, would point out that any testimony concerning vocational interests and attitudes could be considered background evidence only on the most tenuous grounds. . . . (Reply, p. 29).

13. It is plain the Motions must be denied. Bell's right to submit testimony in rebuttal to that of evidence already presented is an entitlement under the Administrative Procedures Act [5 U.S.C. 556(d)]. The question could be reconsidered should EEOC delineate with clarity the portions of its own case which it is willing to have stricken from the record. The weight and purpose to be accorded Bell's sociological testimony is a matter to be resolved in the Initial Decision and not by attaching pre-conditions to its receipt upon a challenge to its materiality. There is nothing in the Fogg decision cited by the staff to justify the conditional receipt of the evidence.

14. It is not clear that even the withdrawal of all its sociological testimony by EEOC would resolve the controversy, inasmuch as Bell apparently contends it is entitled to offer its sociological testimony as a matter of defense apart from its purported rebuttal of EEOC testimony of the same nature. But that question need not be reached.

15. The Bureau also requests that the concluding portion of Dr. Glazer's testimony (pp. 15-20) be stricken for the further reason that he there expresses the opinion that it would be uneconomic and inefficient to change certain business practices which might result in higher rates and poor service. The Bureau questions Dr. Glazer's expert qualifications to express an opinion on such subjects. In this connection, it is noted that witness Orly Ashenfelter (EEOC Ex. No. 5), who disclosed no expertise in the field of utility costs, supplied certain cost calculations to be expected from changed practices and conditions, without challenge by the Bureau. Similarly, many of the public witnesses who have heretofore testified, have expressed views as to the effect on costs or rates of described practices or failures without challenge. All such testimony will be weighed in the light of the qualifications of the witnesses and appropriate weight ascribed to it.

In view of the foregoing, IT IS ORDERED, That the Motion of the Chief, Common Carrier Bureau, for an Extension of Time, is GRANTED, and the Motions to Strike Testimony filed by Equal Employment Opportunity Commission and the Chief, Common Carrier Bureau of this Commission, on September 22, 1972, are DENIED.

Frederick W. Denniston
Administrative Law Judge
Federal Communications Commission

Ben F. Waple
Secretary