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September 3, 2019

Rosemary Harold, Esq.
Chief, Enforcement Bureau
Federal Communications Commission
445 12th Street N.W.
Washington, D.C. 20554

Dear Ms. Harold:

**RE: EEO Enforcement Reforms Capable Of Being Performed On
Delegated Authority (FCC Docket No. MB-19-177)**

The Multicultural Media, Telecom and Internet Council (“MMTC”) respectfully recommends four steps the Commission can take immediately, upon delegated authority, to improve EEO enforcement.¹ These process recommendations can be implemented by the staff without the need to undertake a rulemaking proceeding.²

The RTNDA’s broadcast management and news surveys, even given their low response rates, present a disappointing picture of minority broadcast employment. Here are some recent results:³

¹ The views expressed in these Comments are the institutional views of MMTC, and are not intended to reflect the individual views of any officer, director or member of MMTC.

² See 47 C.F.R. §§0.111(A)(11), (13), and (17).

³ See Robert Papper, *2019 Research: Local Newsroom Diversity*, RTNDA (June 13, 2019) and Hofstra University-RTNDA Newsroom Surveys (since 1990), available at https://rtdna.org/article/2019_research_local_newsroom_diversity (last visited August 16, 2019).

<u>Job Category</u>	<u>% Minority</u>					
	<u>1994</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2011</u>	<u>2019</u>
Total TV News Workforce	17.1	24.6	20.6	18.1	20.5	25.9
Total Radio News Workforce	14.7	10.7	8.0	6.5	7.1	14.5
TV News Directors	7.9	8.0	9.2	6.6	13.6	17.2
Radio News Directors	8.6	4.4	5.1	5.0	5.3	8.2
TV General Managers	n/a	8.7	5.2	3.6	7.5	10.0
Radio General Managers	n/a	5.7	3.8	2.5	6.0	7.2

To ensure, *inter alia*, that FCC-regulated broadcasters and MVPDs reflect the growing diversity in America, the FCC is tasked with ensuring that licensees perform outreach to ensure that they do not discriminate in employment. See *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, Report and Order*, 18 FCC2d 240, 241 (1969) and subsequent authorities.

In the *2019 EEO Improvements NPRM*, the Commission sought comments on “how the Commission can make improvements to equal employment opportunity (EEO) compliance and enforcement.”⁴ By the comment deadline of September 20, 2019,⁵ MMTC and several other organizations (the “EEO Supporters”) will file thorough policy recommendations whose implementation may require a vote by the commissioners upon the record of this docket.

⁴ *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries, NPRM, MB Docket No. 19-199*, FCC 19-54 (rel. June 21, 2019), 84 Fed. Reg. 35063 (rel. July 21, 2019) at 1 ¶1 (“*2019 EEO Improvements NPRM*”).

⁵ *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries, Order Granting Extension of Time to File Comments and Reply Comments*, DA 19-721 (July 30, 2019).

1. Substantially Increase The Percentage Of Employment Units Audited Each Year.

Presently, only 5% of units undergo an audit every year. On average, this means that a unit is audited every 20 years—a length of time that far exceeds the typical station holding period.

Such small odds of being audited during a licensee's ownership tenure provide little incentive to comply with the rules. At a minimum, the percentage of units undergoing an audit should be doubled.

2. Randomly Select Some Audited Units For More Thorough Review To Ensure Nondiscrimination At The Points Of Applicant Interviewing And Employee Selection.

Just as the Transportation Security Administration (TSA) deters security risks by selecting passengers at random for more intensive screening, the Commission should randomly select a modest percentage of audited units (*e.g.*, 1%) for thorough, on-site reviews to ensure nondiscrimination at the points of interviewing and employee selection.

These intensive audits would remind the industry that the nondiscrimination obligations extend not just to recruitment but also to such elements of personnel administration as interviewing, hiring, working conditions, and termination.⁶

3. Issue A Public Notice Reminding The Public Of The Agency's Whistleblower And Anti-Retaliation Protections, And Install A Secure Whistleblower Phone Line.

Concealment of discrimination is easy. The discrimination victim will seldom know that her job application was thrown into the trash; or that she was rejected due to an "ethnic-sounding" name; or that it wasn't true that "the job was just filled," or that there was a "better candidate." Knowledge of whistleblower and anti-retaliation protections makes it possible for someone to quietly report discrimination without risk of retaliation.

⁶ See 2019 EEO Improvements NPRM at 4 ¶8 (asking commenters to address whether "our current auditing procedures [are] sufficient to uncover discrimination at the points of recruitment, interviewing, and selection? If not, how could we modify those procedures so that they would be sufficient?")

The broadcasting and multichannel industries are close-knit, with only a few job sites in a community. Thus, a person known to have come forward as a witness to wrongdoing can easily be blacklisted and locked out of opportunities in her chosen field.⁷

Fortunately, there are well-established FCC protections for receiving whistleblower information,⁸ protecting whistleblowers, and taking very strong action—including license revocation—against those who retaliate against whistleblowers.⁹ Were these procedures widely publicized, they would serve as a strong deterrent to further wrongdoing. Unfortunately, though, broadcast and MVPD employees generally have no idea that these FCC protections exist.

⁷ According to the Government Accountability Project in 2002, 90% of all whistleblowers suffered some sort of reprisal. Caroline E. Mayer and Amy Joyce, “Blowing the Whistle,” WASHINGTON POST, February 10, 2002, at H1, H4. The Commission was advised early in its EEO regulatory journey that “many people will not complain even though they suspect or know they have been treated unfairly in respect either to initial employment or management practices, that many people will not even seek employment where they believe discriminatory practices to exist, and that individuals have great difficulty in demonstrating the existence of discrimination where it does exist.” *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, R&O, 18 FCC2d 240, 242 (1969) (“1969 EEO R&O”). See also Alina Tugend, *Opting to Blow the Whistle or Choosing to Walk Away*, THE NEW YORK TIMES, available at <https://www.nytimes.com/2013/09/21/your-money/deciding-when-to-blow-the-whistle-and-when-to-walk-away.html> (last visited August 23, 2019).

⁸ The correct recipient of whistleblower complaints is the Enforcement Bureau if the alleged wrongdoer is a regulatee, and the Inspector General if the alleged wrongdoer is a Commission employee or entity.

⁹ See *Whistleblower 10949-13W v. Comm’r*, 107 T.C.M. (CCH) 1475 (T.C. 2014) (“The whistleblower has satisfied the factual burden to proceed anonymously. The facts alleged in the petition and the affidavit attached to the motion to proceed anonymously demonstrate that disclosure of the whistleblower’s identity could result in the risk of retaliation, social and professional stigma and economic duress ... the nature and severity of potential harm that could befall the whistleblower outweigh the societal interest in knowing the whistleblower’s identity.”)

We therefore recommend that the Commission issue a “restatement” of its whistleblower protection policies and disseminate it as widely as possible, while also placing on the home page of the FCC website a secure phone number whistleblowers can call.¹⁰

4. Publish An EEO Primer, Best Practices, FAQs, And Model EEO Programs.

When the Commission first adopted EEO Rules, it recognized that the voluntary efforts of broadcasters who could go beyond the minimal and somewhat sterile obligations of the rules were what it would take to eliminate discrimination from broadcasting.¹¹ That is just as true today. Certainly, too, industry buy-in is vital for the success of any regulatory initiative. To achieve that, it is necessary that regulations be “demystified” for those who may be having difficulty grasping what the rules require of them.

When the Commission relocated the EEO Staff to the Enforcement Bureau in July 2018, it implicitly recognized that EEO compliance is foremost an enforcement function. There is also a parallel educational function still worthy of

¹⁰ There might need to be at least three numbers – one for broadcast and MVPD-related matters, and another for wireline, wireless related matters, especially inasmuch as those numbers would attract millions of complaints regarding “spam” calls, and a third number for reporting fraud in FCC-administered programs. Currently, the FCC’s universal complaint form does not provide for anonymity, nor is EEO one of the several substantive categories set out on the form. *See* FCC, Informal Complaint Form, available at https://theme.zdassets.com/theme_assets/513073/a58fd9ede242a9fbc90f24968bc4df52dcf6985a.pdf (last visited August 24, 2019).

¹¹ *1969 EEO R&O*, 18 FCC2d at 245 (“[B]roadcasters might consider the adoption of special training programs for qualifiable minority group members, cooperative action with other organizations to improve employment opportunities and community conditions that affect employability, and other measures in addition to the employment practices suggested in the proposed rules. These voluntary measures may well be the chief hope of achieving equal employment opportunity at the earliest possible time, and the decision to take such action rests with the individual broadcaster.”)

being performed. Thus, we recommend that the Commission authorize the EEO Staff¹² to prepare print, multimedia and internet versions of each of four forms of documents that are in common usage in the realm of EEO compliance:

- A Mass Media EEO Primer—setting out a full restatement of the case law in this area.
- A “Guide To Mass Media EEO Best Practices” that would be filled with examples of EEO initiatives that have proven themselves effective. The EEO Staff could also hold Best Practices workshops at national and state trade association and civic organizations’ meetings.¹³
- FAQ’s, which should be updated as questions are received and answered; and
- Model EEO Programs—several examples of them, tailored to units’ sizes, market sizes, geography, and area demographics.

By producing these materials, the Commission would also be responsive to the concerns of some broadcasters that compliance requirements appear overwhelming to them, or may appear, to those unfamiliar with equal employment opportunity policy, to have fewer benefits than they really do.¹⁴

¹² Perhaps the Broadcast Development Working Group of the Commission’s Advisory Committee on Diversity and Digital Empowerment could assist the EEO Staff in producing some of the materials suggested here.

¹³ Most of the EEO Supporters organizations hold annual conferences, and would warmly welcome a member of the FCC EEO Staff as a presenter.

¹⁴ See 82 Broadcasters, Joint Comments and Petition for Further Notice of Proposed Rulemaking, July 18, 2019 (“82 Broadcasters Petition”) at 2. The economic – and social – costs of discrimination are profound, and will be addressed in the EEO Supporters’ forthcoming Comments. See Danielle Davis, *The Economic Costs of Discrimination*, MMTTC, April 26, 2019, available at <https://www.mmtconline.org/wp-content/uploads/2019/04/Andrew-Brimmer-and-the-Economic-Costs-of-Discrimination-042619.pdf> (last visited August 24, 2019).

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