

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Review of EEO Compliance and Enforcement in)	MB Docket No. 19-177
Broadcast and Multichannel Video Programming)	
Industries)	
)	MM Docket No. 98-204
Review of the Commission's Broadcast and)	
Cable Equal Employment Opportunity Rules)	
and Policies)	
To the Commission		

COMMENTS OF THE EEO SUPPORTERS

The 38 EEO Supporters¹ respectfully submit these Comments in response to the Further NPRM (“*FNPRM*”).² Earlier filings by the EEO Supporters and MMTC that developed the record to this point are cited herein as follows:

- MMTC Comments, May 22, 2008 (“MMTC 052208 Comments”)
- Comments of MMTC, January 29, 2017 (“MMTC 012917 Comments”)
- Reply Comments of MMTC, February 14, 2017 (“MMTC 021417 Reply”)
- Comments of the EEO Supporters, April 30, 2018 (“EEOS 043018 Comments”)
- EEO Supporters’ Letter to Marlene Dortch May 29, 2018 (“EEOS 052918 Letter”)
- MMTC Letter to Rosemary Harold, September 3, 2019 (“MMTC 090319 Letter”)
- EEO Supporters’ Comments, September 20, 2019 (“EEOS 092019 Comments”)
- EEO Supporters’ Reply Comments, November 4, 2019 (“EEOS 110419 Reply”)
- MMTC Letter to Hon. Ajit Pai *et al.*, December 11, 2019 (“MMTC 121119 Letter”).

The focus of the *FNPRM* is on the collection and use of broadcast employment data to enable the agency and researchers to understand broadcast EEO trends by race and gender.³ Such data collection would serve invaluable public purposes.⁴

¹ The EEO Supporters are listed in the Annex hereto. The views expressed in these Comments are the institutional views of the EEO Supporters, and are not intended to reflect the individual views of each officer, director or member of these organizations.

² *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, MB Docket No. 980204, Further Notice of Proposed Rulemaking, FCC 21-88 (July 26, 2021) (“*FNPRM*”).

The EEO Supporters have enthusiastically endorsed EEO data collection.⁵ The EEO Supporters also endorse the extensive and eloquent advocacy of the Leadership Conference on Civil Rights and Human Rights on this subject.⁶

While data collection is one essential element of an EEO compliance program,⁷ it is hardly the only element. The EEO Supporters respectfully encourage the Commission to seek comment on the following nine proposals to ensure improved EEO compliance and enforcement. These proposals are:

1. Requiring certifications that job postings preceded hiring decisions;⁸
2. Auditing reform, which includes increasing audit frequency and randomly selecting some audited units for more thorough review encompassing applicant interviewing and employee selection;⁹
3. Auditing of employment units that received EEOC probable cause determinations;¹⁰
4. Opening a fact-finding, non-content-based investigation under 47 U.S.C. §403 into the abysmal levels of minority employment in radio news;¹¹

³ See *FNPRM*, p. 7.

⁴ See EEOS 092019 Comments, pp. 18-22 and 29-33. A recent illustration of the need for EEO data can be found in this GAO report on media industry employment, *Workforce Diversity: Analysis of Federal Data Shows Hispanics Are Underrepresented in the Media Industry* (September 21, 2021), <https://www.gao.gov/assets/gao-21-105322.pdf>.

⁵ See EEOS 110419 Reply, pp. 1-5; EEOS 092019 Comments, pp. 13-18; EEOS 043018 Comments, p. 5.

⁶ See, *inter alia*, Letter from the Leadership Conference on Civil Rights and Human Rights to Hon. Ajit Pai *et al.*, November 4, 2019, pp. 1-4.

⁷ See *FNPRM*, p. 8.

⁸ See MMTC 121119 Letter, pp. 16-18; EEOS 110419 Reply, p. 5; EEOS 092019 Comments, pp. 22-24; EEOS 043018 Comments, p. 5; MMTC 012917 Comments, pp. 3-4.

⁹ See MMTC 121119 Letter, pp. 15-16; MMTC 090319 Letter, p. 3.

¹⁰ EEOS 092019 Comments, pp. 24-28; MMTC 052208 Comments, pp. 2-4.

¹¹ See MMTC 121119 Letter, pp. 18-19; EEOS 092019 Comments, pp. 28-29.

5. Providing whistleblower protections, including a confidential phone number and protections against retaliation;¹²
6. Developing and disseminating compliance tools, such as an EEO Primer, Best Practices, FAQs, and Model EEO Programs;¹³
7. Extending EEO scrutiny to cover promotion, retention, training, and mentoring;¹⁴
8. Extending pro-active EEO enforcement to high tech companies,¹⁵ in cooperation with the EEOC; and
9. Consolidating all anti-discrimination compliance and regulatory enforcement (to include advertising, transactional, procurement and employment discrimination) in a new Civil Rights Section of the Employment Bureau.¹⁶

Of special note is the EEO Supporters' proposal to have the Enforcement Bureau examine whether a licensee, having already been found to have violated the broad outreach elements of the EEO Rule, may also have violated the Rule's core nondiscrimination obligation.¹⁷ It is hornbook law that EEO statistics should be considered as part of a tribunal's consideration of whether a respondent company engaged in discrimination.¹⁸ As the Commission has long held, excessive use of word-of-mouth recruitment by members of a station's homogeneous staff is inherently discriminatory and could

¹² See MMTC 090319 Letter, pp. 3-5.

¹³ See MMTC 090319 Letter, pp. 5-6.

¹⁴ See MMTC 012917 Comments, p. 8.

¹⁵ See MMTC 021417 Reply, pp. 1-6; MMTC 012917 Comments, p. 7.

¹⁶ EEOS 092019 Comments; MMTC 021417 Reply, p. 7.

¹⁷ See MMTC 121119 Letter, pp. 1-10; EEOS 092019 Comments, pp. 13-18. EEO data is not germane to the agency's analysis of whether a licensee has violated the outreach requirements. EEO data would only be relevant *after* the Commission finds an outreach violation to help determine whether the licensee's recruiting misconduct was also evidence of a discriminatory scheme.

¹⁸ See, e.g., MMTC 121119 Letter, pp. 10-15.

be disqualifying.¹⁹ If such a case arises, one piece of evidence that should be available to the Enforcement Bureau staff is data on the racial and gender composition of those whose “mouths” are doing the “word of mouth” recruitment.²⁰ Broadcasting must not become the only industry in the country that is immune from the obligation to produce data that is useful to a finder of fact in determining whether an employer may have engaged in a discriminatory scheme.²¹

¹⁹ See, e.g., *Jacor Broadcasting Corporation, Memorandum Opinion and Order*, 12 FCC Rcd 7934, 7940 ¶14 (1997) (holding that over-reliance on word of mouth (“WOM”) recruitment may “have the effect of discriminating against qualified minority groups or females”); *Walton Broadcasting, Inc. (KIKX, Tucson, AZ), Decision*, 78 FCC2d 857, 875, *recon. denied*, 83 FCC2d 440 (1980) (holding that station used “employment practices which discriminated against minority groups in recruitment and employment” including “‘word of mouth’ referral from a predominately white work force, which, while unintended, effectively discriminated against minority group employment”); see also *William H. Schuyler*, 44 RR2d 559 (1978), and *Triple R, Inc.*, 42 RR2d 907, 908 (1978). In 1994, the Commission rendered findings on WOM recruitment after a thorough inquiry undertaken at Congress’ request. *Commission’s Equal Employment Opportunity Rules, Report*, 9 FCC Rcd 6276, 6314-15 ¶79 (1994) (“there continues to be evidence...that minorities are still not recruited for a significant number of positions....in many of these cases...positions were filled without any recruitment having taken place. Given the foregoing, we believe that a continuing need exists for EEO enforcement in the communications industry”) (fn. omitted). See also EEOS 052918 Letter, pp. 2-3; EEOS 043018 Comments, pp. 2-5; MMTc 012917 Comments, p. 7.

²⁰ See EEOS 092019 Comments, pp. 13-18; MMTc 012917 Comments, p. 3. This data is primarily, and appropriately, used by EEO enforcement respondents to *rebut* allegations of discrimination. Recruitment primarily by word of mouth from a *heterogeneous* workplace violates the recruitment portions of the EEO Rule, and is generally not business-like given the universal availability of such methods as free employment websites and e-mail, but it is not inherently discriminatory.

²¹ The agency’s assertion that it will not use EEO data attendant to an investigation of compliance with “47 C.F.R. §73.2080”, obviously must have been meant to refer to the outreach elements of the rule (§73.2080 (b) *et seq.*), rather than §73.2080(a), the core nondiscrimination element. See *FNPRM*, p. 6 and n. 43, discussed at EEOS 092019 Comments, p. 15 n. 30. Of course EEO data is a potential factor in anti-discrimination prosecutions. See, e.g., *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1167 (2017); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 56-57 (1984); *Domingo v. New England Fish Co.*, 445 F. Supp. 421, 428, 431 (W.D. Wash. 1977); see also *Domingo v. New England Fish Co.* 727 F.2d 1429 (9th Cir. 1984) and *NAACP v. City of Evergreen*, 693 F.2d 1367 1369 (11th Cir. 1982) (each holding that WOM recruitment by a homogeneous staff can be a form of discrimination); see also *Moore v. Napolitano*, 926 F. Supp. 2d 8, 23, 24 (D.D.C. 2013) and *Young v. Covington & Burling LLP*, 846 F. Supp. 2d 141, 156-57 (D.D.C. 2012) (to the same effect).

The EEO Supporters look forward to the issuance of another FNPRM that will seek public comment on our many proposals to improve compliance and to facilitate enforcement of both the core nondiscrimination and broad recruitment elements of the EEO Rule.

Respectfully submitted,

Robert Branson

Robert Branson
President and CEO

David Honig

David Honig
President Emeritus and Senior Advisor

Danielle Davis

Danielle Davis
Policy Counsel

Multicultural Media, Telecom and Internet Council
Convenors, EEO Supporters
1250 Connecticut Ave. N.W., 7th Floor
Washington D.C. 20036
(202) 261-6543
rbranson@mmtconline.org
dhonig@mmtconline.org
ddavis@mmtconline.org

Of Counsel:

Tamonica Jones
MMTC Earle K. Moore Law Student Fellow,
Florida A&M University Externship Program

September 29, 2021

ANNEX

EEO Supporters

1. American Indians in Film and Television
2. Asian American Journalists Association
3. Black College Communication Association
4. Black Entertainment and Sports Lawyers Association
5. Blacks in Government
6. Dialogue on Diversity
7. Hispanic Federation
8. International Black Broadcasters Association
9. International Business Kids Foundation
10. Japanese American Citizens League
11. League of United Latin American Citizens
12. LGBT Technology Partnership and Institute
13. MANA, A National Latina Organization
14. Multicultural Media Correspondents Association
15. Multicultural Media, Telecom and Internet Council
16. National Action Network
17. National Asian American Coalition
18. National Association for the Advancement of Colored People
19. National Association of Black Journalists
20. National Association of Multicultural Digital Entrepreneurs
21. National Bar Association
22. National Black Caucus of State Legislators
23. National Coalition on Black Civic Participation
24. National Congress of Black Women
25. National Council of Negro Women
26. National Diversity Coalition
27. National Hispanic Caucus of State Legislators
28. National Hispanic Foundation for the Arts
29. National Newspaper Publishers Association
30. National Organization of Black County Officials
31. National Puerto Rican Chamber of Commerce
32. National Urban League
33. National Utilities Diversity Council
34. Native American Journalists Association
35. Rainbow PUSH Coalition
36. TechLatino: The National Association of Latinos in Information Sciences and Technology
37. Transformative Justice Coalition
38. Vision Maker Media