

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

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

JOINT SUPPLEMENTAL COMMENTS OF
ASIAN AMERICANS ADVANCING JUSTICE - AAJC, BLACK WOMEN'S
ROUNDTABLE, COMMON CAUSE, COMMUNICATIONS WORKERS OF AMERICA,
HISPANIC FEDERATION, NATIONAL COALITION ON BLACK CIVIC
PARTICIPATION, NATIONAL URBAN LEAGUE, SERVICE EMPLOYEES
INTERNATIONAL UNION, STRATEGIC ORGANIZING CENTER, UNITED CHURCH
OF CHRIST MEDIA JUSTICE MINISTRY, AND MULTICULTURAL MEDIA,
TELECOM, AND INTERNET COUNCIL

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Table of Contents

I. The FCC should collect and publish EEO data	2
II. The federal government routinely collects employment and other data for the purpose of incentivizing equity and monitoring compliance with regulations and laws.	3
A. Federal agencies routinely collect data to increase fairness and equity and enforce federal law.....	3
B. The Securities and Exchange Commission is actively considering more robust disclosure for good reason.....	6
C. The FCC has an important and different role to play from the EEOC.....	8
III. Collection and monitoring of employment data is a best practice and widely sought by shareholders and experts as a means to achieve diversity and equity goals.	10
A. Data collection and monitoring produces more profitable successful companies..	10
B. Other standards promoting fairness support data collection and tracking of employees.....	12
C. Many companies regulated by the FCC already release their EEO data but more is needed.....	14
IV. The news media and broadcast and cable industries lack transparency and the data we have demonstrates a lack of representation.....	15
A. Key data is less available than before.....	15
B. Privately-produced reports demonstrate a need for data and evidence that the news and communications industries are not representative of the country’s diversity.	17
V. Collecting and publishing data is constitutional.	19
A. The FCC must collect EEO data and it is constitutional to do so.....	19
B. <i>MD/DC/DE Broadcasters</i> is an outlier and not consistent with current facts.	20
VI. The FCC should adopt the pending nine diversity proposals.....	24
VII. Conclusion	27

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Joint supplemental commenters, Asian Americans Advancing Justice - AAJC, Black Women’s Roundtable, Common Cause, Communications Workers of America, Hispanic Federation, National Coalition on Black Civic Participation, National Urban League, Service Employees International Union, Strategic Organizing Center, United Church of Christ Media Justice Ministry, and Multicultural Media, Telecom and Internet Council, submit these comments to eradicate any question in the record that the Federal Communications Commission (“FCC”) must enforce the law by collecting and publishing equal employment opportunity data by broadcasters and cable operators. While in the 1960s the FCC might have been a leader in equitable employment regulations, in the 2020s the FCC has fallen far behind of standard

industry practices and is depriving itself and the public of the most basic and least regulatory tools to ensure equity of economic opportunity and a communications workforce that represents the full diversity of our nation. In addition to providing this comprehensive analysis supporting FCC collection of EEO data, the joint filers here endorse MMTC's nine diversity proposals.

I. The FCC should collect and publish EEO data

Since 2004, a wide range of civil rights and public interest organizations have been on record requesting the FCC collect and publish equal employment opportunity data by broadcasters and cable operators, consistent with existing federal law. The National Association of Broadcasters agrees: "NAB ... does not oppose the Commission moving forward with collecting employment data."¹ Previous Chair Michael Powell—now President and CEO of NCTA-- proposed collecting this data years ago.²

The FCC should require all broadcast licensees to submit their EEO-1 data, or comparable data if the licensee does not submit EEO-1 data. The data should be submitted on a market-by-market basis. The Commission should include satellite operators and other MVPDs and other regulatees who are not currently required to supply this information. To avoid any hint of the constitutional questions raised by broadcasters, the Commission should rule that statistical reports alone cannot be used to initiate an inquiry into a licensee's EEO compliance. The Commission should collect this data in an easy-to-use digital portal which can also be used to aggregate data on a state-by-state and regional basis and according to other factors, such as various demographic categories. The Commission must complete this rulemaking within the next

¹ Letter from Rick Kaplan, National Association of Broadcasters to FCC Secretary Dortch at 2, MB Docket No. 98-204 (filed April 6, 2022).

² Statement of Chairman Powell, 19 FCC Rcd 9976, 9990 (2004).

six months and obtain OMB approval within one year so that the data will be collected by the end of 2023 and reports and tabulations can be produced by mid-2024.

The Commission should take these actions as part of an overall effort to ensure that the communications sector acts with equity and fairness to all people as employees, entrepreneurs and creators. It is consistent with the FCC’s Equity Action Plan to promote diversity, equity, inclusion, and accessibility:

The FCC will seek to gain a deeper understanding of how the agency’s rules, policies, and programs may promote or inhibit advances in diversity, equity, inclusion, and accessibility. The FCC will pursue focused action and investments to eliminate historical, systemic, and structural barriers that perpetuate disadvantaged or underserved individuals and communities. In so doing, the FCC will work to ensure equitable and inclusive access and facilitate the ability of underserved individuals and communities to leverage and benefit from the wide range of opportunities made possible by digital technologies, media, communication services, and next-generation networks. In addition, the FCC recognizes that it is more effective when its workforce reflects the experience, judgment, and input of individuals from many different backgrounds. Advancing equity is core to the agency’s management and policymaking processes and will benefit all Americans.³

II. The federal government routinely collects employment and other data for the purpose of incentivizing equity and monitoring compliance with regulations and laws.

A. Federal agencies routinely collect data to increase fairness and equity and enforce federal law.

As several parties recently explained to the Commission, collection of “race and ethnic data and reports perform a core governmental function: ‘To operate efficiently and effectively,

³ Federal Communications Commission, Equity Action Plan, <https://docs.fcc.gov/public/attachments/DOC-382389A1.docx>.

the Nation relies on the flow of objective, credible statistics to support the decisions of individuals, households, governments, businesses, and other organizations.”⁴

The Biden/Harris Equity Agenda is a government-wide initiative to “pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. Affirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government.”⁵ One of the core goals of this executive order is to build accountability for equity through data collection and reporting. The administration notes that “the Federal government’s ability to collect and analyze disaggregated data is essential for advancing equitable outcomes.”⁶ Many agencies collect data to enforce non-discrimination laws and rules.⁷ Without data it is impossible to know what rules and policies are working and what are not; it is impossible to set enforcement strategies and objectives.

⁴ Petition for a Content Diversity Vendor Report, MB Docket 22-209 at 12 (quoting *Office of Management and Budget, Revision of Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, 82 Fed. Reg. 12242, 12243 (2017)).

⁵ In his first day in office, President Biden signed Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>; *Advancing Equity and Racial Justice Through the Federal Government*, <https://www.whitehouse.gov/equity/>.

⁶ *Id.*

⁷ *E.g.*, U.S. Bureau of Labor Statistics, Labor force characteristics by race and ethnicity, 2020 (Nov. 2021), <https://www.bls.gov/opub/reports/race-and-ethnicity/2020/home.htm>; National Institute of Health, Inclusion of Women and Minorities in Clinical Research, NIH RCDC Inclusion Statistics Report, <https://report.nih.gov/RISR/#/>; U.S. Department of Education, Civil Rights Data Collection, Wide-Ranging Education Data Collected from our Nation's Public Schools, <https://ocrdata.ed.gov/>; U.S. Department of Commerce, National Telecommunications and Information Administration, Digital Nation Data Explorer, <https://www.ntia.doc.gov/data/digital-nation-data-explorer> (includes race, ethnicity, gender among other data); U.S. Equal Employment Opportunity Commission, Job Patterns For Minorities And Women In Private Industry, EEOC Explore, <https://www.eeoc.gov/statistics/employment/jobpatterns/eeo1>; U.S. Dept. of Labor, Federal

The Leadership Conference on Civil and Human Rights recently released a report explaining the critical role data collection plays in vindicating civil rights. The report explained, “Data are necessary, even though not sufficient, to advance equity and justice. . . . Failure to collect data on specific topics can sometimes seem like a technical matter, but it has the effect, often intentional, of making it impossible to tackle a problem by disguising its existence or its scope.”⁸ Similarly, the National Urban League recommended in the Lewis Latimer Plan for Digital Equity and Inclusion that the federal government should “collect information that allows the government and the public to understand and evaluate how the private sector, and particularly the technology and related sectors are improving diversity, equity, and inclusion.”⁹

Transparency is a useful, least-intrusive means to evoke change. SEC Commissioner Allison Herren Lee has been a leader on this issue. For example, in September 2020 she said disclosure not only “gets investors the information they need,” but it can also “drive corporate behavior:”

For one thing, when companies have to formulate disclosure on topics it can influence their treatment of them, something known as the “what gets measured, gets managed” phenomenon. Moreover, when companies have to be transparent, it creates external pressure from investors and others who can draw comparisons company to company. The Commission has long recognized that influencing corporate behavior is an appropriate aim of our regulations, noting that “disclosure may, depending on determinations made by a company’s management, directors and shareholders, influence corporate conduct”

Contract Compliance Programs Office, Obligation To Solicit Race and Gender Data for Agency Enforcement Purposes 70 Fed. Reg. 58945, <https://www.federalregister.gov/documents/2005/10/07/05-20176/obligation-to-solicit-race-and-gender-data-for-agency-enforcement-purposes>.

⁸ The Leadership Conference on Civil and Human Rights, *Information Nation: The Need for Improved Federal Civil Rights Data Collection* at 5, 7 (April 2022), <https://civilrights.org/resource/information-nation-the-need-for-improved-federal-civil-rights-data-collection/> (*Information Nation*).

⁹ The Lewis Latimer Plan, National Urban League (March 30, 2021)

https://nul.org/sites/default/files/2021-04/NUL%20LL%20DEIA%20041421%20Latimer%20Plan_vFINAL_1136AM.pdf.

and that “[t]his sort of impact is clearly consistent with the basic philosophy of the disclosure provisions of the federal securities laws.”¹⁰

The business sector understands the value and efficacy of data. The Commission has a statutory and moral obligation to collect the data.

B. The Securities and Exchange Commission is actively considering more robust disclosure for good reason.

Investors have been demanding increased disclosure with respect to human capital policies and outcomes.¹¹ The U.S. Securities and Exchange Commission (“SEC”) has indicated in its Spring 2021 regulatory agenda that proposed rules entitled “Human Capital Management Disclosure” and “Corporate Board Diversity,” are supported by many organizations.¹² In October 2021, the SEC Chair testified before Congress where he asked for staff proposals for “consistent, comparable, and decision-useful disclosures around ... human capital.”¹³ One Commissioner suggested the agency should consider requiring companies to publicly disclose EEO-1 data.¹⁴ Investors, including Boston Trust Walden, the Connecticut State Treasurer, Illinois State

¹⁰ SEC Commissioner Allison Herron Lee, Diversity Matters, Disclosure Works, and the SEC Can Do More: Remarks at the Council of Institutional Investors Fall 2020 Conference, <https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922>.

¹¹ E.g., Letter from Investors to SEC Chair Gensler (Nov. 18, 2021), https://www.bostontrustwalden.com/wp-content/uploads/2021/11/Investor-Signatory-Letter-to-the-SEC-Requesting-Mandatory-EEO-1-Disclosure_Nov-2021.pdf (Boston Trust Walden Letter); *see also* Kirkland & Ellis, Kirkland Alert, “Preparing for Potential Updates to Human Capital Management & Board Diversity Disclosure Requirement (Oct. 2021) (“Recent market and regulatory trends in the U.S. relating to environmental, social and governance (“ESG”) matters have increased the expectation that corporations provide enhanced disclosures with respect to human capital management (“HCM”) and diversity, equity and inclusion (“DEI”).”)

¹² E.g., Letter from Dan Mauer, Communications Workers of America to the Securities and Exchange Commission (Sept. 10, 2021), <https://www.sec.gov/comments/4-711/4-711.html>.

¹³ Oversight of the U.S. Securities and Exchange Commission: Wall Street’s Cop Is Finally Back on the Beat: Hearing Before the U.S. House Committee on Financial Services, 117 Cong. (2021) (Testimony of Gary Gensler), <https://www.sec.gov/news/testimony/gensler-2021-10-05>.

¹⁴ *Id.*

Treasurer, and Washington State Investment Board are urging the SEC to mandate disclosure of EEO-1 data.¹⁵ Those investors highlighted the industry-wide trends toward disclosure:

[T]he world's largest asset managers, including BlackRock and State Street Global Advisors, have specifically asked companies to disclose workforce demographics included in EEO-1 reports. On behalf of the New York City Employee Retirement Systems, New York City's Comptroller asked 67 companies to make public their EEO-1 reports in 2020, and the majority committed to do so. According to the Sustainable Investments Institute, nearly all 29 shareholder proposals seeking EEO-1 disclosure were withdrawn in 2021, signifying agreements with proponents. Of the 3 that proceeded to a vote, earned majority votes exceeding 80% (DuPont de Nemours and Union Pacific) and 1 garnered 40.7% shareholder support (Charter Communications).¹⁶

In 2020, the SEC finalized changes to require companies to provide a description of the company's human capital resources, including any human capital measures or objectives that the company focuses on in managing the business to the extent it is material to an understanding of the registrant's business taken as a whole.¹⁷ The decision was not unanimous because it did not go far enough according to two of the Commissioners who sought more specific data.

The SEC has long required public companies to disclose whether a nominating committee has a policy with regard to the consideration of diversity in identifying director nominees and, if so, how this policy is implemented and how the nominating committee or the board assesses the effectiveness of the policy. Further, if a board considers an individual nominee's self-identified diversity characteristics (e.g., race, gender, ethnicity, religion,

¹⁵ Boston Trust Walden Letter.

¹⁶ *Id.* At 1.

¹⁷ Item 101 of Regulation S-K, 17 CFR 229, 239, and 240, <https://www.sec.gov/rules/final/2020/33-10825.pdf>.

nationality, disability, sexual orientation or cultural background), the SEC now expects proxy disclosures to identify such characteristics and how they were considered.¹⁸

The Securities and Exchange Commission has approved a rule by Nasdaq, set to go in effect this year, that will require companies listed on its exchange to disclose the ethnic and gender makeup of their boards and have at least two “diverse” members or explain why they do not.¹⁹

C. The FCC has an important and different role to play from the EEOC.

Title VII of the Civil Rights Act of 1964 requires employers to make and keep records relevant to the determination of whether unlawful employment practices have been or are being committed and to produce such records to the EEOC. Pursuant to its statutory authority, in 1966 the EEOC began requiring certain employers to report employee data by job category, ethnicity, race, and sex, otherwise referred to as ‘EEO-1’ data.”²⁰ Pursuant to federal law, the EEOC shares this data with state and local Fair Employment Practices Agencies to enable those agencies to

¹⁸ What's New in the Division of Corporation Finance, <https://www.sec.gov/divisions/corpfin/cfnew/cfnew0219.shtml> (Compliance & Disclosure Interpretations 116.11 & 133.13) (2019).

¹⁹ “SEC’s Lee Eyes Release of Workforce Diversity Data Sent to EEOC,” Bloomberg Law (June 22, 2021).

<https://news.bloomberglaw.com/securities-law/secs-lee-eyes-release-of-workforce-diversity-data-sent-to-eecoc>. Nasdaq Rule 5606 will require companies to disclose, in a standardized matrix set forth in the rule or in a substantially similar format, (i) the total number of company board members and (ii) how those board members self-identify regarding gender, predefined race and ethnicity categories and LGBTQ+ status. Nasdaq published sample matrix disclosures to demonstrate how companies can comply with the rule. Companies must comply by August 8, 2022. Brian V. Breheny, “SEC Approves Nasdaq Board Diversity Listing Standards,” Skadden Insights (Sept. 2021), <https://www.skadden.com/insights/publications/2021/09/quarterly-insights/sec-approves-nasdaq-board-diversity-listing>.

²⁰ EEOC, “What You Should Know about EEOC and the Publication of the Notice of Information Collection Regarding the EEO-1.” <https://www.eeoc.gov/wysk/what-you-should-know-about-eeoc-and-publication-notice-information-collection-regarding-eeo-1> (visited August 1, 2022).

enforce the laws in their jurisdictions that prohibit employment discrimination.²¹ The data is used to “identify priorities for investigation and enforcement and also to identify employment patterns within companies, industries, or regions within their jurisdictions.”²²

While the EEOC is the lead agency regarding employment discrimination, it is also vastly under-resourced. The EEOC “has a smaller budget today than it did in 1980, adjusted for inflation, and 42 percent less staff. At the same time, the country’s labor force increased about 50 percent, to 160 million.”²³ The FCC and the EEOC have a long history of complementary collaboration.²⁴ Given that the FCC has concurrent jurisdiction over employment discrimination with the EEOC,²⁵ it is only appropriate that the FCC shoulder some portion of the burden. The FCC and EEOC have had a memorandum of understanding in place for many years which

²¹ U.S. Equal Employment Opportunity Commission, *Fact Sheet: The EEOC and FEPA Data-Sharing*, <https://www.eeoc.gov/fact-sheet-eeoc-and-fepa-data-sharing>.

²² *Id.*

²³ Maryam Jameel and Joe Yerardi, “Workplace discrimination is illegal. But our data shows it’s still a huge problem,” *Vox* (Feb 28, 2019), <https://www.vox.com/policy-and-politics/2019/2/28/18241973/workplace-discrimination-cpi-investigation-eeoc>.

²⁴ Since 1978, the FCC and the EEOC have had a joint Memorandum of Understanding (“MOU”) under which the two agencies share EEO oversight responsibilities involving FCC licensees. Memorandum of Understanding between the FCC and EEOC, 70 FCC2d 2320 (1978). Under this MOU, the EEOC would prioritize its review of EEO violations in an industry not regulated by the FCC whose behavior diminish the FCC’s ability to enforce EEO compliance in related industries that Congress expects the FCC to regulate. *Id.* at 2329 (“If the EEOC receives the charge but the broadcast employer does not fall within the jurisdiction of the EEOC pursuant to Title VII, and also not within the jurisdiction of a state or local agency to which the EEOC defers such charges ... the EEOC will forward the charge to the FCC, which will process the complaint in accordance with its own rules, policies and procedures. Upon request, the EEOC shall provide technical advice and guidance to the FCC in their investigation of such complaints. The EEOC shall also notify the charging party that it has forwarded the complaint to the FCC.”).

²⁵ Glenda G. Leatherman, Employment Discrimination in Television Broadcasting: A Study of FCC and EEOC Concurrent Jurisdiction, *Hastings Communications and Entertainment Law Journal* (Jan. 1979), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1030&context=hastings_comm_ent_law_journal.

recognizes the helpful role the FCC plays in terms of enforcement for its regulatees.²⁶ The EEOC performs different functions and works collaboratively with the FCC. While “the EEOC's objective is to eradicate discrimination and expedite disputes between employees and employers through review and litigation of individual complaints if necessary,” the FCC's primary objective is to deter discrimination in the communications industry.²⁷ The FCC does not review individual complaints for it does not have the ability to provide compensation to an individual employee who has been the victim of discrimination.”²⁸ The EEOC collects data from businesses with more than 100 employees and its jurisdiction is limited to businesses with fifteen or more employees.²⁹ The EEOC only publishes aggregate data, not company-specific data even though, as discussed below, the increasing trend is for companies to release their own EEO-1 data.

III. Collection and monitoring of employment data is a best practice and widely sought by shareholders and experts as a means to achieve diversity and equity goals.

A. Data collection and monitoring produces more profitable successful companies.

Diversity and inclusion has received increased attention in recent years by corporations, standard-setting bodies and journalists. Overwhelmingly each of these institutions are concluding that collection and monitoring of demographic employment data is essential for making any progress toward equitable employment goals. This interest is not only driven by equity, but by investors seeking maximum return on their investment:

²⁶ *Memorandum of Understanding between the FCC and EEOC*, 70 FCC2d 2320 (1978).

²⁷ S. Jenell Trigg, “The Federal Communications Commission’s Equal Opportunity Employment Program and the Effect of *Adarand Constructors, Inc. v. Pena*,” 4 COMMLAW CONSPECTUS 237, 256 (1996).

²⁸ *Id.*

²⁹ *Id.*; 42 U.S.C. 2000e(b).

Numerous studies have found companies with diverse and inclusive workplaces provide a competitive advantage by encouraging varied perspectives that can better anticipate shifts in consumer preferences, reducing costly turnover, and increasing productivity and morale. Such companies are better positioned to recruit the most talented employees from the broadest possible labor pool, a particularly critical benefit in the context of the current U.S. labor shortage. Conversely, charges of discrimination can result in costly litigation and reputational damage.³⁰

The Business Roundtable, an influential association of chief executives who employ 20 million people, states DEI is a business imperative and advocates for greater transparency on diversity metrics. Harvard Business Review noted, “More than 1,600 CEOs have signed onto the CEO Action for Diversity & Inclusion Pledge, and 40% of companies discussed diversity and inclusion in their Q2 2020 earnings calls versus only 4% the same quarter a year prior. According to Gartner research, the number of HR leaders identifying DEI efforts as a top priority was 1.8 times higher in 2020 than in 2019. Gartner analysis reveals an almost 800% increase in job postings for dedicated diversity recruiters.”³¹ In addition, “a recent Gartner survey reveals DEI leaders indicated that ‘setting goals and tracking DEI progress through metrics’ was one of their two top priorities for 2021.”³² A 2020 McKinsey report, *Diversity wins: How inclusion matters*, interviewed corporate leaders amid the radically changed business landscape amid the COVID crisis found, “The most diverse companies are now more likely than ever to outperform less diverse peers on profitability.” Its authors concluded, “Companies whose leaders welcome

³⁰ Boston Trust Walden Letter.

³¹ Lauren Romansky, Mia Garrod, Katie Brown, and Kartik Deo, “How to Measure Inclusion in the Workplace,” Harvard Business Review, May 27, 2021, <https://hbr.org/2021/05/how-to-measure-inclusion-in-the-workplace>.

³² *Id.*

diverse talents and include multiple perspectives are likely to emerge from the crisis stronger. In short: diversity wins, now more than ever."³³

In a major investigation and report by two leading academics in countering social inequality, the leading recommendation was monitoring data. "Set goals, collect data, and examine change over time and in comparison to other organizations: When it comes to maximizing profits and effectiveness, many businesses deploy this set of strategies. By collecting and analyzing data on diversity over time, comparing those numbers to the numbers at other organizations, and sharing them with key stakeholders, companies can increase accountability and transparency around diversity issues."³⁴

B. Other standards promoting fairness support data collection and tracking of employees.

The Uniform Guidelines on Employee Selection Procedures (UGESP)³⁵ are mandatory for federal contractors and guidelines for other employers, which the courts frequently rely upon to determine if unlawful hiring practices were the basis of a discrimination claim. Although not required by law, applicant tracking is recommended by these guidelines for all employers covered under Title VII and can be done pre-hire when it is part of an employer's decision to

³³ Vivian Hunt, et al, McKinsey & Company, *Diversity wins: How inclusion matters* (May 2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters>.

³⁴ David Pedulla, "Diversity and Inclusion Efforts That Really Work," Harvard Business Review, May 12, 2020, <https://hbr.org/2020/05/diversity-and-inclusion-efforts-that-really-work>.

³⁵ 29 C.F.R. § 1607.1 *et seq.*

follow the guidelines.³⁶ Adherence to these guidelines would strongly suggest an employer is free from unlawfully discriminatory hiring practices.³⁷

A 2021 international standard by the International Organization for Standardization (ISO), ISO 30415, Human resource management — Diversity and inclusion, provides a foundation for organizations wishing to create an inclusive workplace and optimizes all the benefits that it can bring.³⁸ The new standard will result in company leaders demonstrating their commitment to diversity and inclusion, with strategic opportunities applied and strong awareness of the results of their commitment by employees and external stakeholders. The standard covers actions, principles, measures, and their associated accountabilities and responsibilities, and takes into account the unique context of each workplace. ISO 30415 is intended to be scalable to the needs of all types of organizations in different sectors, whether in public, private, government or non-governmental organizations (NGO), regardless of size, type, activity, industry or sector, growth phase, external influences, and country-specific requirements.

The final draft of ISO 30415 recommends, among other things, that companies “collect data on workforce and other stakeholder perceptions about the organization’s commitment to D&I, such as from focus groups, surveys, interviews and external reviews” as an action to

³⁶ Roy Maurer, “Clearing Up Misconceptions About the Uniform Guidelines on Employee Selection Procedures, SHRM (Jan. 14, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/clearing-up-misconceptions-uniform-guidelines-employee-selection-procedures.aspx> <https://www.uniformguidelines.com/>.

³⁷ *Id.*

³⁸ American National Standards Institute, New ISO Standard Supports Diversity and Inclusion in the Workplace, (May 4, 2021), <https://www.ansi.org/news/standards-news/all-news/2021/05/5-4-21-new-iso-standard-supports-diversity-and-inclusion-in-the-workplace>; *See also* International Organization for Standardization, ISO 30415: Human Resource Management - Diversity and Inclusion (Jan. 2021) <https://www.iso.org/obp/ui/#iso:std:iso:30414:ed-1:v1:en>.

achieve D&I objectives pertaining to the D&I framework.³⁹ The standard suggests organizational leadership use this data, as well as workforce demographic data, to highlight progress on achieving D&I objectives in annual reports, and emphasizes the role that “identifying and analyzing diversity data” plays in effective D&I.⁴⁰

C. Many companies regulated by the FCC already release their EEO data but more is needed.

Many companies voluntarily release their employment statistics, including some broadcasters. Alphabet, Amazon, American Tower, AT&T, Comcast, Disney, eBay, Facebook, Microsoft, Netflix, Twitter, and Verizon all voluntarily publicly release their EEO-1 data. At the same time, many more companies do not. A study by Just Capital, found that 68 percent of the companies in the Russell 1000 Index (which represents the top 1000 companies by market capitalization in the United States) do not publicly release employment data.⁴¹ DiversIQ, a leading private provider of DEI data and tracking, reported that “In 2019, only 13 S&P 100 companies and 24 S&P 500 companies publicly released their full EEO-1 data. As of today, those figures have climbed to 93 S&P 100 companies (another 1 committed to disclose this year) and 319 S&P 500 companies (19 committed to future disclosure).”⁴² DiversIQ reports that only 47.8 percent of companies it tracks in the communications sector voluntarily report their EEO-1

³⁹ International Organization for Standardization, ISO 30415: Human Resource Management - Diversity and Inclusion (Jan. 2021) <https://www.iso.org/obp/ui/#iso:std:iso:30414:ed-1:v1:en>

⁴⁰ *Id.*

⁴¹ Kavya Vaghul, “A Small Fraction of Corporations Share Diversity Data, but Disclosure is Rapidly on the Rise,” Just Capital (Jan. 19, 2021), <https://justcapital.com/news/a-small-fraction-of-corporations-share-diversity-data-but-disclosure-is-rapidly-on-the-rise/>.

⁴² DiversIQ EEO-1 Data: Summary, <https://diversiq.com/dashboards/eo1-insights/> (visited August 1, 2022).

data, whereas 66.7 percent of the information technology sector and 86.2 percent of utilities.⁴³ A shareholder proposal at Charter Communications for the release of its EEO-1 data, disclosure of the process for assessing the effectiveness of its diversity, equity and inclusion programs and the efficacy assessment received over 40 percent of its shareholders' support in 2021.⁴⁴

IV. The news media and broadcast and cable industries lack transparency and the data we have demonstrates a lack of representation.

A. Key data is less available than before.

Since 1978 the American Society of News Editors and its successor organization the News Leaders Association (NLA) has collected demographic data on the news profession.

NiemanLab reported recently on the current state of the report:

NLA said it reached out to thousands of news organizations and planned to have 2,500 print and online organizations participate. Meredith Clark, a professor at Northeastern University who has been the survey's lead researcher since 2018, told the Associated Press in October that her goal was to reach at least 1,500 responses in order to produce a statistically solid report. In the end, just 303 news organizations responded....⁴⁵

The survey's director said, "What has become abundantly clear to me is that diversity can never be a measure of goodwill. You don't get to transparency about diversity by relying on people's goodwill...."⁴⁶ The 2018 ASNE diversity survey analyzed by Pew Research Center had a

⁴³ DiversIQ EEO-1 Data: Summary, <https://diversiq.com/dashboards/eo1-insights/> (visited August 1, 2022). A listing of the companies they track is available here: <https://diversiq.com/dashboards/eo1-disclosures/>.

⁴⁴ As You Sow, Proxy Preview 2022, at 55-56, <https://www.proxypreview.org/>.

⁴⁵ Sarah Scire, "Crushing Resistance": Yet Again, Newsrooms Aren't Showing Up to the Industry's Largest Diversity Survey, NiemanLab (Apr. 12, 2022), <https://www.niemanlab.org/2022/04/crushing-resistance-yet-again-newsrooms-arent-showing-up-to-the-industrys-largest-diversity-survey/>.

⁴⁶ *Id.*

historically low response rate of 17% in its 2018 survey.⁴⁷ Even surveys that are able to gather a stronger sample, such as the RTDNA/Newhouse School at Syracuse University Survey's higher response rate of 77 percent, are still missing some data.⁴⁸ Surveys that are based on voluntary participation from newsrooms are much more likely to fall short of capturing a complete image of newsroom diversity statistics than EEO data.

The cable industry has historically been more supportive of EEO data collection and commendably does its own study of employment statistics. Every other year the Walter Kaitz Foundation funds a survey, administered by Mercer. Maria Brennan, WICT President said, upon the release of the last study, "Knowing where women and people of color stand is step-one in ensuring progress."⁴⁹ As NCTA explained:

The organizations that participated in the survey represent more than 75% of the industry workforce, and the data collected every two years has proven to be a critical component to the industry's diversity and inclusion efforts. WICT and NAMIC have been measuring cable workforce demographics for over a decade, and have used the study to form best practices around diversity and inclusion, to offer a variety of mentorship and professional development opportunities for women and people of color, and to create campaigns that promote a more diverse and inclusive workplace culture.⁵⁰

Nonetheless, the NCTA data sets as its benchmark the performance in other parts of the industry, not a goal that would improve upon current performance.⁵¹

⁴⁷ 2018 Survey, News Leader Association (2018), <https://members.newsleaders.org/diversity-survey-2018>.

⁴⁸ Bob Papper, "Research: Local News Diversity Reaches Records, but Representation Gap Sinks Slowly, RTDNA (June 23, 2021), <https://www.rtdna.org/article/research-local-news-diversity-reaches-records-but-representation-gap-shrinks-slowly>.

⁴⁹ "Survey: Cable's Diversity Efforts Exceed National Benchmarks in Several Areas," NCTA, September 26, 2019, <https://www.ncta.com/whats-new/survey-cables-diversity-efforts-exceed-national-benchmarks-in-several-areas>.

⁵⁰ *Id.*

⁵¹ *Id.*

B. Privately-produced reports demonstrate a need for data and evidence that the news and communications industries are not representative of the country's diversity.

Members of the academy could use the data to produce reports if the data is public. For example, in 2003, a group of authors conducted a comprehensive analysis using the FCC's employment data.⁵² Many other institutions prepare reports analyzing participation by various demographic groups in the media industries because the data is important for holding the industries accountable, but clear, company-specific data from the industries subject to FCC rules is lacking. In fact, Congress was forced to resort to a GAO study to obtain more information about the participation of Hispanics in the media industry.⁵³ Similarly, the Women's Media Center had to aggregate research from academia, industry and professional groups, labor unions, media watchdogs, newsrooms, and other sources in order to find data on women in the media workforce.⁵⁴ The existence of these reports despite limited data reveals that members of the academy would utilize the FCC's employment data if it were to be publicly reported. Other academics that have produced reports addressing media diversity outside of broadcasting, such as UCLA's 2021 Hollywood Diversity Report, may be enticed to conduct research on broadcast data if it was readily available from the FCC.⁵⁵ Furthermore, their analysis would help generate a

⁵² Dwight E. Brooks, et al., *Television in Living Color: Racial Diversity in the Local Commercial Television Industry*, *The Howard Journal of Communications*, 14:123-146 (2003).

⁵³ U.S. Government Accountability Office, *Workforce Diversity: Analysis of Federal Data Shows Hispanics Are Underrepresented in the Media Industry*, GAO-21-105322 (Sept. 2021), <https://www.gao.gov/assets/gao-21-105322.pdf>.

⁵⁴ Women's Media Center, *The Status of Women in the U.S. Media 2021*, <https://womensmediacenter.com/reports/the-status-of-women-in-the-u-s-media-2021-1>; Frances Negrón-Muntaner, *Columbia Center for the Study of Ethnicity and Race* (2016), <https://asit-prod-web1.cc.columbia.edu/cser/wp-content/uploads/sites/70/2020/03/The-Latino-Disconnect.pdf>.

⁵⁵ *E.g.*, UCLA College Division of Social Sciences, *UCLA Hollywood Diversity Report, Part 2: Television*, <https://socialsciences.ucla.edu/wp-content/uploads/2021/10/UCLA-Hollywood-Diversity-Report-2021-Television-10-26-2021.pdf>;

public response that calls for more accountability for specific companies to examine biases within their hiring process and seek to improve their numbers in future years.

The findings of existing research indicate there are large issues of diversity in newsrooms, further justifying our call to make FCC employment data publicly available. Research by Pew Research Center reveals that newsroom employees are less diverse than U.S. workers across sectors, as 77 percent of newsroom employees are non-Hispanic whites and 61 percent are men.⁵⁶ Smaller news outlets are even less diverse, as ethnic minorities only make up 22 percent of the local television news workforce and only 13 percent of daily newspaper employees.⁵⁷ According to the Asian American Journalist Association while nearly half (48.3%) of the AAPI population in the U.S. lives in the top 20 designated market areas, 25% of the stations had no AAPIs on air and 70% of local TV stations did not have a proportion of on-air staff compared to the local AAPI population.⁵⁸ These alarming statistics reflect biases within the newsrooms' hiring process that inhibit newsrooms from reflecting the diversity of our nation, as minorities with undergraduate degrees in journalism and communications are 17 percent less likely to find a full-time newsroom position within a year of graduation.⁵⁹ Furthermore, Broadcasting and Telecommunications is the 10th ranked industry with respect to the

⁵⁶ Elizabeth Grieco, "Newsroom Employees are Less Diverse than U.S. Workers Overall," Pew Research Center (Nov. 2, 2018), (<https://www.pewresearch.org/fact-tank/2018/11/02/newsroom-employees-are-less-diverse-than-u-s-workers-overall/>).

⁵⁷ Michael Barthel, "In the News Industry, Diversity is Lowest at Smaller Outlets," (Aug. 4, 2015), <https://www.pewresearch.org/fact-tank/2015/08/04/in-the-news-industry-diversity-is-lowest-at-smaller-outlets/>.

⁵⁸ Daniella Ignacio, "AAJA Broadcast Snapshot Finds Underrepresentation of AAPIs in Local TV News in Top 20 Media Markets, AAJA (May 4, 2022), <https://www.aaja.org/2022/05/04/aaja-broadcast-snapshot-finds-underrepresentation-of-aapis-in-local-tv-news-in-top-20-media-markets/>.

⁵⁹ Michael Barthel, "In the News Industry, Diversity is Lowest at Smaller Outlets," (Aug. 4, 2015), <https://www.pewresearch.org/fact-tank/2015/08/04/in-the-news-industry-diversity-is-lowest-at-smaller-outlets/>.

employment of African American women overall according to a 2003 EEOC report on minority women in the workforce.⁶⁰ This lack of diversity is particularly concerning as reports indicate that Black and Hispanic viewers are an increasing share of the newsroom audience.⁶¹ These findings indicate that it is likely the data would reveal significant issues of diversity within newsrooms.

V. Collecting and publishing data is constitutional.

A. The FCC must collect EEO data and it is constitutional to do so.

As the Leadership Conference explained to the Commission, “No court has seriously questioned the constitutionality of demographic employment data collection.”⁶² For example, the U.S. Court of Appeals for the Second Circuit summarily dismissed constitutional challenges to such data collection in *Caulfield v. Bd. of Ed. of City of New York*, writing that “the Constitution itself does not condemn the collection of [demographic] data.”⁶³ Demographic data collection has been approved when requiring states to comply with EEOC rules,⁶⁴ when implementing diversity and inclusion efforts in federal employment,⁶⁵ in collecting data in the U.S. Census.⁶⁶

⁶⁰ Women of Color: Their Employment in the Private Sector, U.S. Equal Employment Opportunity Commission (2003), https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/statistics/reports/womenofcolor/womenofcolor.pdf.

⁶¹ Hispanic and Black News Media Fact Sheet, Pew Research Center (July 27, 2021), <https://www.pewresearch.org/journalism/fact-sheet/hispanic-and-black-news-media/>.

⁶² Comments of the Leadership Conference on Civil and Human Rights, Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries, MB Docket 19-177; Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies, MB Docket 98-204, at 2 (Nov. 4, 2019).

⁶³ *Caulfield*, 583 F.2d at 611-12.

⁶⁴ *U.S. v. New Hampshire*, 539 F.2d 277 (1st Cir. 1976).

⁶⁵ *Sussman v. Tanoue*, 39 F.Supp. 2d 13 (D.D.C. 1999).

⁶⁶ *Department of Commerce v. New York*, 139 S.Ct. 2551, 2567 (2019).

The First Circuit concluded collecting demographic employment data “is both reasonable and fully consistent” with the goal of “achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past.”⁶⁷ As Justice Kennedy explained in his concurrence which tipped the balance in *Parents Involved*, “it is permissible to consider ... racial makeup ... and to adopt general policies to encourage” a diverse racial composition.⁶⁸

Even if the FCC were not obligated to collect this data under the EEO obligations, it would be permitted to collect the data pursuant to its authority under the Communications Marketplace Report and the market entry barriers provisions of the Communications Act.⁶⁹ As advocates for a new content diversity vendor report recently explained, the FCC has ample authority to monitor the equity and metrics of the whole communications sector.⁷⁰

B. MD/DC/DE Broadcasters is an outlier and not consistent with current facts.

As UCC Media Justice recently explained on the record, the two decisions overturning the FCC’s prior EEO rules are no bar to the request here: to collect and publish demographic employment data, a finding that the Commission already adopted.⁷¹ In both of those decisions, the D.C. Circuit criticized the Commission because it used the statistics in its decision-making

⁶⁷ *Id.* at 280 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)).

⁶⁸ *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J. concurring in part).

⁶⁹ 47 U.S.C. §163, §257.

⁷⁰ Petition for a Content Diversity Vendor Report, MB Docket 22-209 at 15-17, <https://www.fcc.gov/ecfs/search/search-filings/filing/105250998318693>.

⁷¹ Cheryl A. Leanza, United Church of Christ Media Justice Ministry, ex parte letter (March 9, 2022), MB Docket 98-204, <https://www.fcc.gov/ecfs/search/search-filings/filing/1031038814390>.

during license renewal and as a predicate for investigations and particularly because it found the race and sex of *applicants* to be an inappropriate measure for enforcement decisions.⁷²

While *MD/DC/DE Broadcasters* is an essential element of the FCC's analysis, it is important to understand this decision lies on the outer edge of the widely accepted understanding of the use of quotas. *MD/DC/DE Broadcasters* was premised on the court's *surmise* about broadcaster response when the FCC indicated it would *open an investigation* (not make a finding of a rule violation) based on employment *application* data. The court found "If a licensee reports 'few or no' women and minorities in its applicant pool, then the Commission will investigate the broadcaster's recruitment efforts."⁷³

There was *no* factual showing that the threat of an investigation (not the threat of action based on an infraction) was having the impact broadcasters claimed. For example, in 1979, a law review note described the extreme difficulties parties faced in their effort to make a *prima facie* case of employment discrimination sufficient to successfully mount a challenge in a license renewal proceeding.⁷⁴ If the D.C. Circuit were correct that the FCC's ability to open an investigation was such a strong influence on employment practices in broadcasting, one would expect that broadcasting would have been highly integrated at the time the FCC's rules were in place. It was not.⁷⁵

⁷² *MD/DC/DE Broadcasters Ass'n v. Federal Communications Commission*, 253 F.3d 732, 734 n.1 (D.C. Cir. 2001) (noting when denying rehearing the court's particular concern with "the race and sex of applicants [as a] measure of compliance.").

⁷³ *MD/DC/DE Broadcasters Ass'n v. Federal Communications Commission*, 236 F.3d 13, 19-20 (D.C. Cir. 2001).

⁷⁴ Glenda G. Leatherman, *Employment Discrimination in Television Broadcasting: A Study of FCC and EEOC Concurrent Jurisdiction*, 2 *Hastings Comm. & Ent. L.J.* 125 (1979), Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol2/iss1/4.

⁷⁵ <https://www.eeoc.gov/special-report/executive-summary-broadcasting>.

The FCC had been clear for many years that “only a ‘highly disproportional representation of minorities or women employed by a licensee in relation to their presence in the work force would constitute prima facie evidence of discriminatory practices.’”⁷⁶ For example, the FCC “assured broadcasters that although it would require the yearly submission of employment statistics in Form 395, such statistics alone would not be determinative of the issue of employment discrimination. The FCC has firmly maintained its position that statistics alone do not compromise a prima facie case of employment discrimination.”⁷⁷ Moreover, the FCC maintained its data collection and relatively robust rules with regard to investigations during the 1970s and some of the 1980s, and yet there is no evidence that employment in broadcasting has remotely approached diversity that would have resulted if broadcasters took local population demographics as a mandatory quota to receive license renewal. The argument that license renewals are threatened by FCC data collection is even less credible given that, since 1996, Congress has directed the FCC to renew licenses without considering whether another licensee could better serve the public interest.⁷⁸ The FCC’s practice is to almost never deny a license renewal⁷⁹ and to permit stations to operate without license renewal for as long as a full eight-year

⁷⁶ *Evening Star Broadcasting Co.*, 27 F.C.C.2d 316 (1971), *aff’d sub nom. Chuck Stone v. FCC*, 466 F.2d 316, 322, *reh. denied* 466 F.2d 331 (D.C. Cir. 1972).

⁷⁷ Glenda G. Leatherman, *Employment Discrimination in Television Broadcasting: A Study of FCC and EEOC Concurrent Jurisdiction*, 2 *Hastings Comm. & Ent. L.J.* 125 (1979), https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol2/iss1/4.

⁷⁸ 47 U.S.C. § 309(k).

⁷⁹ For example, when in 2017 and 2018 the FCC began enforcing the law which automatically cancels broadcast licenses if the licensee has been off-air for a year, a leading broadcast practitioner noted it seemed “unprecedented.” David Oxenford, *Broadcast Law Blog*, “FCC To Hold Hearing to Determine Whether to Deny License Renewal of Radio Station that was Silent for Most of its License Term,” (Aug. 14, 2017), <https://www.broadcastlawblog.com/2017/08/articles/fcc-to-hold-hearing-to-determine-whether-to-deny-license-renewal-of-radio-station-that-was-silent-for-most-of-its-license-term/>.

license term.⁸⁰ The FCC has only one Administrative Law Judge⁸¹ to consider licenses designated for hearing because there are so few.⁸²

Moreover, the decision held that because a station's recruitment budget is finite, an obligation to recruit minorities and women could divert some recruitment resources in a manner that could deprive white people of the benefit of being recruited.⁸³ The bottom line of this ruling is remarkable, particularly given the primacy of online recruiting today: could it credibly be argued that a company is permitted to focus its recruitment resources on whites at the expense of people of color because it is too expensive or burdensome to recruit everyone evenhandedly?⁸⁴

The FCC should be careful to interpret *MD/DC/DE Broadcasters* narrowly and not accede to questionable efforts to extend it.

⁸⁰ See, for example, UCC OC Inc.'s petition to deny based on a detailed and well-documented claim that the licensee violated the Commission's children's television rules which was filed in 2005 and not addressed until 2015. United Church of Christ, OC Inc., Petition to Deny Application of Renewal of Broadcast Station License of Raycom National, Inc. WUAB, Lorain, OH: File No. BRCT-20050527BIO (filed Aug. 31, 2005); Letter from Barbara Esbin to Angela Campbell, counsel for UCC OC Inc., 30 FCC Rcd. 1978 (2015).

⁸¹ Administrative Law Judges, Federal Communications Commission, <https://www.fcc.gov/administrative-law-judges>.

⁸² Sarah Barry James, "An Uncertain Future for Administrative Law Judges at the FCC," *S&P Global Market Intelligence* (2018), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/an-uncertain-future-for-administrative-law-judges-at-the-fcc-45023576>.

⁸³ *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d at 20-21.

⁸⁴ See, e.g., Department of Justice, Justice Department Secures Groundbreaking Settlement Agreement with Meta Platforms, Formerly Known as Facebook, to Resolve Allegations of Discriminatory Advertising (June 21, 2022), <https://www.justice.gov/opa/pr/justice-department-secures-groundbreaking-settlement-agreement-meta-platforms-formerly-known>.

VI. The FCC should adopt the pending nine diversity proposals.

In their September 29, 2021 Comments, the EEO Supporters group of 38 organizations led by MMTC confirmed their endorsements of the following nine proposals (the “Nine Proposals”), some of which have been pending since 2004:

1. Requiring certifications that job postings preceded hiring decisions.⁸⁵
2. Auditing reform, which includes increasing audit frequency and randomly selecting some audited units for more thorough review encompassing applicant interviewing and employee selection.⁸⁶
3. Auditing of employment units that received EEOC probable cause determinations.⁸⁷
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.⁸⁸

⁸⁵ See Comments of EEO Supporters at 2 & n.8, *Review of EEO Compliance and Enforcement in MB Docket No. 19-177 and MM Docket 98-201 (September 21, 2021)* (“2021 EEOS Comments”); see also Erik Ortiz, *The ‘Rooney Rule’ was Supposed to Solve the NFL’s Hiring Issue. The Numbers Show the Problem Runs Deep.*, NBC News (Feb. 4, 2022), <https://www.nbcnews.com/news/sports/rooney-rule-was-going-solve-nfls-hiring-issue-numbers-show-problem-run-rcna14569> (reporting that the Oakland Raiders’ owner admitted that the team had already agreed hire Jon Gruden, who is white, as head coach of the then-Oakland Raiders before interviews with any candidates of color were conducted.) This kind of common behavior could be disincentivized or eliminated by requiring certifications that job postings preceded hiring decisions.

⁸⁶ See 2021 EEOS Comments at 2 and the previous filings referenced therein at n. 9. Presently, annual audits are performed only on job recruitment, and on only 5% of the reporting units. See FCC, Enforcement Bureau Commences 2022 EEO Audits, DA 22-275, https://www.fcc.gov/sites/default/files/2022_audit_pn_letter.pdf (Mar. 21, 2022).

⁸⁷ See 2021 EEOS Comments at 2 and the previous filings referenced therein at n. 10. A reporting unit that has received an EEOC probable cause determination is highly likely to have violated the equal employment laws. See Jamie Goetz, *Whose Opinion Really Matters? Admitting EEOC Reasonable Cause Determinations as Evidence of Discrimination*, 76 U. Cin. L. Rev. 995 (2008); see also, Michael D. Moberly, *The Admissibility of EEOC and Arizona Civil Rights Division Determinations in State Court Employment Discrimination Litigation*, 33 Ariz. St. L.J. 265 (2001) (“If, upon completion of its investigation, the EEOC concludes that discrimination prohibited by Title VII or another federal statute has occurred, it issues what is commonly known as a ‘reasonable cause’ determination. This determination is not a finding that the employer has acted unlawfully, but rather is a tentative conclusion ‘that preliminarily there is reason to believe that a [statutory] violation has taken place.’ The EEO agencies in several states, including Arizona, follow similar procedures.”).

⁸⁸ See 2021 EEOS Comments at 2 and the previous filings referenced therein at n. 11. Section 403 is designed for non-punitive fact-finding. It provides that “[t]he Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this chapter, or concerning which any question may arise under

5. Providing whistleblower protections, including a confidential phone number and protections against retaliation [**unopposed**].⁸⁹
6. Developing and disseminating compliance tools, such as an EEO Primer, Best Practices, FAQs, and Model EEO Programs [**unopposed**].⁹⁰
7. Extending EEO scrutiny to cover promotion, retention, training, and mentoring.⁹¹

any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter.” 47 U.S.C. §403. Section 403 was affirmed in *Stahlman v. FCC*, 126 F.2d 124, 128 (D.C. Cir. 1942) (holding that “the Commission's right to grant licenses or to revoke licenses in the public interest, and likewise to make rules and regulations necessary to the carrying out of the provisions of the Act, implies the grant of all means necessary or appropriate to the discharge of the powers expressly granted.”); and in *FCC v. Schreiber*, 201 F. Supp. 421 (S.D. Cal. 1962), modified, 329 F.2d 517 (9th Cir. 1964), modified, 381 U.S. 279, 291-92 (1965) (holding that “the Commission's procedural rule -- requiring public proceedings except where it is shown that the public interest, the dispatch of business, or the ends of justice would be served by nonpublic sessions -- was well within the Commission's power. Grants of agency authority comparable in scope to §4 (j) of the Communications Act as amended (47 U.S.C. §154(j)) have been held to authorize public disclosure of information, or receipt of data in confidence, as the agency may determine to be proper upon a balancing of the public and private interests involved. That §4 (j) is broad enough to empower the Commission to establish standards for determining whether to conduct an investigation publicly or in private....”).

⁸⁹ See 2021 EEOS Comments at 3 and the previous filing referenced at n. 12. Fortunately, the FCC has vast and successful experience fielding consumer and whistleblower complaints, such as those that respond to unlawful robocalls. See Special Report on Robocall Scourge, *Communications Daily*, Apr. 26, 2022) (subscription required), p. 3 (“[t]he FCC said all its robocall and spoofing investigations involve the use of consumer complaints[.]”).

⁹⁰ See 2021 EEOS Comments at 3 and the previous filing referenced therein at n. 13. In 2004, the Advisory Committee on Diversity for Communications in the Digital Age (predecessor to the current Communications Equity and Diversity Council (CEDC)) recommended revisions to the broadcast and cable, and multichannel video EEO rules to include training and mentoring. See Recommendation for a Regulatory Initiative for Career Advancement, Advisory Committee on Diversity for Communications in the Digital Age, Dec. 10, 2004) (archived on FCC.gov), <https://www.fcc.gov/diversity-committee-adopted-recommendations>.

⁹¹ See 2021 EEOS Comments at 3 and the previous filing referenced therein at n. 14.

Discrimination can occur at each of these and other personnel points of engagement, and the EEO Rule implicitly recognizes that discrimination can occur at each of several personnel points of engagement. See 47 C.F.R. §73.2080(b), which requires each broadcast station to “establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity and nondiscrimination in every aspect of station employment policy and practice.” A licensee must:

“(1) Define the responsibility of each level of management to ensure vigorous enforcement of its policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance;

“(2) Inform its employees and recognized employee organizations of the equal employment opportunity policy and program and enlist their cooperation;

8. Collaborate with the Department of Labor and the EEOC to ensure that each agency's EEO enforcement measures apply equitably across the communications and technology sectors. **[unopposed]**.⁹²
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 Enforcement Bureau **[unopposed]**.⁹³

Eight of the Nine Proposals (numbered 2, 3, 4, 5, 6, 7, 8, and 9) may be granted now.

MMTC and the proposals' supporters have explained that the Proposals numbered 5, 6, 8, and 9 above are unopposed and are grantable without the need for a notice and comment proceeding, as they relate only to agency management and operations. They explain that the Proposals numbered 2, 3, 4, and 7 are not the objects of strong opposition, and they do not require a notice and comment proceeding, as they also relate only to agency management and operations. Further, Proposal #1 (requiring certifications that job postings preceded hiring decisions) would require a round of public comment. Such a comment round should be opened promptly by an expedited Further Notice of Proposed Rulemaking whose goal would be the production of a comprehensive Further Report and Order before the end of 2022.

“(3) Communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, national origin, or sex, and solicit their recruitment assistance on a continuing basis;

“(4) Conduct a continuing program to exclude all unlawful forms of prejudice or discrimination based upon race, color, religion, national origin, or sex from its personnel policies and practices and working conditions; and

“(5) Conduct a continuing review of job structure and employment practices and adopt positive recruitment, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility.”

⁹² See 2021 EEOS Comments at 2 and the previous filings referenced therein at n. 15.

⁹³ See 2021 EEOS Comments at 3 and the previous filings referenced therein at n. 16.

The Leadership Conference has also requested that the FCC create a Civil Rights Office that would include some of the functions proposed for a division of enforcement within the Enforcement Bureau by MMTC and its supporters.⁹⁴

VII. Conclusion

The FCC should adopt rules requiring all broadcasters, cable operators and other MVPDs to file their EEO-1 data publicly at the Commission within the next six months and obtain OMB approval within one year so that the data will be collected in 2023. The FCC should adopt the nine diversity proposals on a similar timetable, prioritizing the easiest to implement.

⁹⁴ Letter from Wade Henderson and Jesselyn McCurdy, The Leadership Conference on Civil and Human Rights to Chair Jessica Rosenworcel, FCC (March 14, 2022), <https://www.fcc.gov/ecfs/search/search-filings/filing/104292431509372>.