

January 10, 2019

Marlene Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington DC 20554

Re: Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies; Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2); MB Dockets 98-204, 17-105, and 18-23

Dear Ms. Dortch:

The EEO Supporters (33 joint commenters in the above-referenced dockets), pursuant to 47 C.F.R. §1.1206 of the Commission's Rules, respectfully report on a telephone call I held on January 8, 2019 with Commissioner Brendan Carr. During the call, I addressed errors of fact, policy and law in Paragraph 10 of the January 3, 2019 *White Copy*.¹

For decades, the Commission has understood that broadcast employment is a critical ingredient of program diversity² and facilitates the acquisition of the skills necessary to obtain broadcast ownership.³ Helpfully, then, the *NPRM* in this proceeding expressly sought comment on “the

¹ Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080 (f)(2), MB Docket No. 18-23, R&O, FCC-CIRC1901-03 (January 3, 2018) at 7-8 ¶18 (“*White Copy*”) at 7-8 ¶10.

² See, e.g., Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, 13 FCC2d 766, 770-71 (July 3, 1968) (adopting the original EEO rule; declaring that “[a] refusal to hire Negroes or persons of any race or religion clearly raises a question of whether the licensee is making a good faith effort to serve his entire public”, and citing a DOJ statement (the “Pollak Letter”, in Appx A, p. 4), which concluded that “[b]ecause of the enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees. The provision of equal opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries.”)

³ See, e.g., Streamlining of Mass Media Applications, Rules and Processes, and Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities (Report and Order), 13 FCC Rcd 23056, 23098 ¶102 (1998) (observing that “[t]o the extent that a lack of employment opportunities in the broadcast industry deprives minorities of employment or management experience and thereby erects barriers to entry into the industry, our action today will help us to fulfill our mandate under Section 257 to identify and eliminate those barriers and foster a diversity of media voices”); Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (NOI), 11 FCC Rcd 6280, 6306 ¶38 (1996) (“[r]ace or gender discrimination in employment may impede participation and advancement in the communications industry. Employment provides business knowledge, judgment, technical expertise, and entrepreneurial acumen, and other experience that is valuable in attaining ownership positions.”)

FCC’s track record on EEO enforcement and how the agency can make improvements to EEO compliance and enforcement.”⁴ In response to this request, the EEO Supporters focused on the principal mechanism by which racial and gender discrimination in broadcasting occur, having:

expressed concern over the degree to which the Commission has addressed the “core issue” of word-of mouth recruiting “conducted by a homogeneous non-diverse staff,” or “cronyism” within the broadcast industry.⁵

In its fn. 46, the *White Copy* notes that the EEO Supporters “assert that this practice perpetuates a ‘lack of diversity in the industry across generations’ and urge the Commission to use ‘certain racial and gender data’ to identify stations who recruit primarily by word of mouth and require them to submit a Form 395.”⁶ In fn. 46, the *White Copy* also notes that the EEO Supporters proposed publishing an anonymized summary of EEO data.⁷

These proposals go right to the heart of the causes of, and solutions for, racial and gender discrimination in broadcasting.⁸

⁴ Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080 (f)(2), MB Docket No. 18-23, Notice of Proposed Rulemaking, 33 FCC Rcd 2570, 2575 ¶11 (2018) (“*NPRM*”).

⁵ *White Copy*, Paragraph 10, describing EEO Supporters Comments (filed April 30, 2018) at 2.

⁶ *Id.* (citing EEO Supporters Comments at 2, and Letter from David Honig (filed June 1, 2018)). Form 395 is the Annual Employment Report.

⁷ In fn. 46, the *White Copy* also notes that the EEO Supporters proposed re-evaluating the audit program and relocating the EEO Staff from the Media Bureau to the Enforcement Bureau. On July 3, 2018, the 50th Anniversary of the EEO Rule, the Commission granted these proposals. While laudable, the audit review and staff relocation were not defended in the *White Copy*, nor are they defensible, as substitutes for the anti-“cronyism” enforcement effort and the data-anonymized Form 395 broadcast employment summary proposed by the EEO Supporters.

⁸ Through “cronyism,” broadcasters with homogenous staffs recruit primarily through word-of-mouth (“WOM”), perpetuating lack of diversity in the industry across generations. This practice is inherently discriminatory. *See, e.g., Jacor Broadcasting Corporation*, 12 FCC Rcd 7934 (1997); *Walton Broadcasting, Inc. (KIKX, Tucson, AZ)* (Decision), 78 FCC 2d 857, recon. denied, 83 FCC 2d 440 (1980). First, the agency should determine if a station recruits primarily through WOM and not online (or otherwise broadly) and through community groups. Then, if the station is violating the “broad recruitment” rules, the agency should ask the station to submit, *in camera*, a Form 395. If the staff is homogenous, then the Commission should issue sanctions. The Commission should also collect and publish an annual summary of Form 395 data to evaluate equal opportunity in broadcast employment—a task it has not undertaken since 2001, meaning that for nearly two decades the Commission has not tracked, *inter alia*, the job types and geographic markets that have proven the most and least hospitable to minorities and women in broadcast employment.

Although the proposals (in only slightly different form) have been pending since 2004, the agency has repeatedly avoided opportunities to address them. The *NPRM* presented members of the public with their first opportunity, in 14 years, to respond to what appeared to be a genuine indication from the Commission that it intended to seriously consider the proposals at last. That was as it should be: as the Commission is aware, a panel of Third Circuit is presently considering, for the third time since 2004, allegations that the Commission has failed repeatedly to assert a rational justification for ignoring proposals designed to advance minority ownership.⁹

Here, however, is the language in the *White Copy*'s Paragraph 10, which would be the Commission's entire ruling on the identification of practitioners of racially discriminatory "cronyism," and the publication of an anonymized EEO data summary:

As noted in the record, the EEO Supporters comments generally seek far-reaching substantive changes to the Commission's EEO rules, whereas the *NPRM*'s focus was on improvements to EEO compliance and enforcement. Therefore, we do not address these proposed broader changes in this item.¹⁰

This language is a mistake for three reasons:

- *First*, the EEO Supporters' proposals did *not* seek "far-reaching substantive changes to the Commission's EEO rules" or, in fact, *any* changes to the EEO rules. Rather, they addressed exactly what the *NPRM* specifically asked for: "the FCC's track record on EEO enforcement and how the agency can make improvements to EEO compliance and enforcement."
- *Second*, even if the proposals could be regarded as having sought "far-reaching substantive changes" to EEO compliance and enforcement protocols (albeit not to the rules), that is hardly a valid reason to reject the proposals.¹¹ Proposals may be rejected

⁹ See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 421 n. 59 (3d Cir. 2004 ("*Prometheus I*") (chastising agency for failing to act on 14 minority ownership proposals, eleven of which the agency failed even to mention in the order on review); *Prometheus Radio Project v. FCC*, 824 F.3d 33, 50 n. 11 (2016) ("*Prometheus III*") (stating that the agency declined to consider two dozen minority ownership proposals as allegedly "outside the scope of this proceeding", one of whose dockets actually was the *diversity* docket); and *MMTC and NABOB v. FCC*, No. 18-3335 *et al.* (filed December 21, 2018), pp. 32-38 (challenging Commission's long delay in meeting its promise to the *Prometheus III* Court to consider applying the Cable Procurement Rule to broadcasting).

¹⁰ Paragraph 10 of the *White Copy* dropped a footnote (fn. 47) that cited the NAB Reply, at 3-4, which claimed that the EEO Supporters sought to "overhaul the substantive EEO rules[.]" That assertion was incorrect. The EEO Supporters sought no changes in the substantive EEO rules.

¹¹ Even though the EEO Supporters did not propose a rule change, it should go without saying that rejecting a proposal in a *rulemaking* proceeding based on the (in this instance, mistaken) assertion that the proposal contemplated a *rule change* should not pass the "straight face" test.

because they are not substantive or far-reaching enough to address a systemic problem. But it should be unthinkable for an agency to reject a proposal *because* it may be substantive and far-reaching enough to cure the horrible persistence of racial and gender discrimination in broadcasting.¹²

- *Third*, although the record is more than sufficient to justify granting the proposals immediately, the proper course of action, if the Commission is not ready to do so, would be to put the proposals out for further comment, through an FNPRM, on any specific issues that the Commission feels would benefit from additional evidence or argument.

If additional comment is sought, the Commission should establish an expedited schedule. Fifteen years have elapsed since these proposals were first lodged, and during that time minorities and women in broadcasting have had no protection against “cronyism.” Race and gender discrimination in employment is just as top-line an issue as inter-carrier comp, undersea cables, or retransmission consent. The Commission should undertake to complete this proceeding no later than the 4th of July, 2019.

This letter is being filed electronically pursuant to Section 1.1206 of the Commission’s Rules.

Sincerely,

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cc: Hon. Brendan Carr

¹² It is unclear whether Paragraph 10 of the *White Copy* was meant as a rejection or simply a non-ruling on the EEO Supporters’ proposals. Paragraph 10 states “that we do not address these proposed broader changes in this item,” thereby suggesting that the proposals remain alive for consideration another day. However, Paragraph 20 states that unless reconsideration or judicial review is had, MB Docket 18-23 will be terminated and the docket will be closed. Thus Paragraph 20 appears to suggest that in Paragraph 10, the Commission would be denying the proposals.