Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of		
Modernization of Media Regulation Initiative	)	MB Docket 17-105

To The Commission

COMMENTS OF THE MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL ON THE MODERNIZATION OF MEDIA REGULATION INITIATIVE:

NINE RULES AND POLICIES THE FCC CAN MODIFY, IMPROVE, OR REPEAL TO ADVANCE MINORITY PARTICIPATION IN BROADCASTING

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July 5, 2017

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Summary and Introduction

The Multicultural Media, Telecom, and Internet Council ("MMTC") respectfully submits these Comments in response to the Modernization of Media Regulation Initiative.[1] MMTC asks that the Commission consider nine proposals that would have a positive impact on minority station owners and minority career broadcasters.

MMTC does not read the Modernization Public Notice as inexorably leading only toward deregulation. Nonetheless, sometimes an archaic rule should be repealed because it needlessly harms small entities and no longer serves a regulatory purpose. We have identified three such rules and policies:

Proposal 1 (to relax 47 C.F.R. §1.47 by allowing e-mail service of documents);

Proposal 2 (to relax 47 C.F.R. §73.3580 by allowing local public notices to be posted online); and

Proposal 3 (to relax the policy on fees to permit blanket waivers, deferrals or reductions for classes of similarly situated applicants).

We have also identified three rules and policies, each a consequence of minorities' late entry into broadcasting, that continue to hold back minority broadcasters from reaching their audiences:

Proposal 4 (to relax a transmitter siting rule, 47 C.F.R. §73.24(g));

Proposal 5 (urging repeal of the Rural Radio Policy); and

[1] *Commission Launches Modernization of Media Regulation Initiative*, Public Notice, MB Docket No. 17-105, 32 FCC Rcd 4406 (2017) ("Modernization Public Notice").

Proposal 6 (to enable some FM translators to originate programming).

Recognizing that it has often taken the FCC decades to address civil rights concerns, MMTC has proposed a one-year shot clock for rulings on policy-oriented petitions for rulemaking, after which the petitions would be deemed rejected and the petitioner could proceed to a U.S. Court of Appeals under 47 U.S.C. §402(a). *See* **Proposal 7 (revision 47 C.F.R. §1.407).**

The rule requiring the reporting of material updates to applications, has generated confusion for years because of lack of clarity regarding what must be reported after an application has been granted. We have proposed that the Commission issue a comprehensive clarification, which would greatly benefit small broadcasters. ***See*** **Proposal 8 (discussing 47 C.F.R. §1.65).**

Finally, we introduce here a proposal to align EEO enforcement with the Commission's stated purpose for the EEO rule – to prevent discrimination. Presently, the Commission regularly and unfairly punishes non-discriminators, and does not even make itself aware of broadcasters that engage in discrimination. Thus, as presently applied, the EEO rule is both over-inclusive and under-inclusive, as well as being profoundly ineffective. We offer a straightforward cure. ***See*** **Proposal 9 (discussing 47 C.F.R. §73.2080).**

Adoption of these nine largely deregulatory and entirely race-neutral proposals would promote diversity and competition, combat discrimination, and mitigate its present effects. We appreciate the Commission's vision in challenging its stakeholders to wade through Parts 1 and 73 of the C.F.R. with these goals in mind.

I. Administrative Rules And Policies Whose Repeal Would Aid Small Businesses

1. Allow Parties to Serve One Another by E-mail (*see* 47 C.F.R. §1.47)

According to 47 C.F.R. §1.47(d), "[d]ocuments that are required to be served must be served in paper form, even if documents are filed in electronic form with the Commission."[2] MMTC suggests the Commission replace this language with, "documents that are required to be served *may be served electronically*, provided the person being served has a valid email address."

E-mail service will expedite proceedings, conserve costs, and create paper trails to verify delivery. It would be similar in impact to the Commission's recent decision to assist small businesses by eliminating the public file requirement, which would "allow [commercial broadcasters] to realize the cost savings and other efficiencies by filing entirely online.[3]

2. Allow Local Public Notices to be Posted Online (*see* 47 C.F.R. §73.3580)

Although the number of internet connections has surpassed the total population of the United States, and eighty-five percent of Americans have access to broadband internet service at home or through their smartphones,[4] broadcasters are forced to set money aside to post filing notices in publications that the majority of the population no

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[2] 47 C.F.R. §1.47(d).

[3] *Revisions to Public Inspection File Requirements—Broadcaster Correspondence File and Cable Principle Headend Location*, MB Docket 16-161, 32 FCC Rcd 1565, 1571 ¶15 (2017).

[4] *Petition for Rulemaking to Allow the Sole Use of Internet Sources for FCC EEO Recruitment Requirements*, MB Docket No. 16-410, Declaratory Ruling, 17 FCC Rcd 3685, 3687 ¶6 (2017) (*Sole Use of Internet Sources*).

longer consume. Posting notices in newspapers is expensive, time consuming and inefficient relative to posting online.[5]

The Commission should assist small businesses by replacing the requirements of public notice in a local newspaper with a requirement that public notices be posted online on the station's website. This rule change would be in line with the Commission's recent declaratory ruling allowing broadcasters to place job postings online in order to meet the "wide dissemination" requirement.[6]

3. Allow Reductions of Fees for Classes of Stations

MMTC proposes allowing the Commission to consider *classes* of stations whose members are eligible for waivers, deferrals or reductions of application or regulatory fees, instead of considering relief for only one applicant at a time.

The Commission can waive or defer application or other fees if "good cause is shown, where such an action would promote public interest."[7] Regulatory fees are applied to the same waiver and deferral conditions. The only difference is that regulatory fees may be reduced;[8] application and other fees may not.[9] As of now, the Commission has interpreted the relevant statutes on application and regulatory fee reductions to apply to individual applicants, but not for a whole class of applicants.[10] Although the

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[5] *See id.* at 3689.

[6] *Sole Use of Internet Sources,* 17 FCC Rcd at 3685 ¶1.

[7] 47 C.F.R. §1.1117(a) (implementing 47 U.S.C. §158(d)(2)).

[8] 47 U.S.C. §159(d).

[9] 47 U.S.C. §158(d)(2).

[10] *See*, as to application and other processing fees, 47 C.F.R. §1.1117(b) (interpreting 47 U.S.C. §158(d)(2), and providing that "requests for waivers or deferrals will only be considered when received from applicants acting in respect to their own applications.")

Commission has only found one justification for waiver or deferral of an application or processing fee (*i.e.* financial hardship),[11] the statute does not bar the Commission from finding other public interest justifications, such as overcoming disadvantages or providing safety and security.

Presently, even if the Commission finds that an entire class of entities has experienced financial hardship or has satisfied a public interest factor, each applicant from that class must file an *individual* request for relief. This type of system is costly for the Commission to administer and places the burden on individual applicants to prosecute fee petitions. Going forward, the Commission should declare that members of a class of eligible entities are eligible for waivers, reductions or deferrals of fees.

Examples of classes that the Commission could find capable of satisfying the public interest justification could include, *inter alia*: very small or low wealth entities; new entrants; those serving Gigabit Opportunity Zones;[12] those serving as "designated hitters" to provide multilingual emergency broadcast service;[13] those who have overcome

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Requests for waivers or deferrals of entire classes of services will not be considered.") *See*, as to regulatory fees, 47 C.F.R. §1.1166 (interpreting 47 U.S.C. §159(d), and providing that "[r]equests for waivers, reductions or deferrals of regulatory fees for entire categories of payors will not be considered.")

[11] 47 C.F.R.§1.1117(c) (application and other processing fees); 47 C.F.R. §§1.1166(c) and (d) (regulatory fees).

[12] *See Remarks of FCC Commissioner Ajit Pai at the Brandery*, "A Digital Empowerment Agenda" (Sept. 13, 2016), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A1.pdf (last visited July 4, 2017).

[13] *See* MMTC, *26 National Orgs Urge FCC to Require Multilingual Emergency Alerts as 10 Year Anniversary of Hurricane Katrina Nears"* (Aug. 26, 2015), available at http://broadbandandsocialjustice.org/2015/08/26-national-orgs-urge-fcc-to-mandate-multilingual-emergency-alerts-in-wake-of-10-year-anniversary-of-hurricane-katrina/ (last visited July 4, 2017).

social and economic disadvantages;[14] or broadcasters serving Native American reservations or communities.

II. Technical Rules And Policies Whose Relaxation Would Correct Historic Injustices Experienced By Minority Broadcasters

It has been well documented that minorities were only able to enter broadcasting decades after the industry began. By 1978, when the Tax Certificate Policy was enacted, there were only 60 minority owned radio stations and one minority owned television station. Most of the stations licensed to large urban cities were largely already taken, and minorities were only able to enter the industry with inferior suburban "rim shot" facilities that did not offer full market coverage.[15] Ironically, these stations often put only weak signals over segregated inner city neighborhoods where minorities had been forced to live as a consequence of federal and state prohibitions on banks lending to them, as documented in Richard Rothstein's *The Color of Law.*[16]

The consequences of years of licensing under the archaic Part 73 rules have been profound. Today, minorities continue to operate stations with far less asset value due to historic restrictions on where they can locate their transmitters. Minority owned AM

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[14] *See* Advisory Committee on Diversity For Communications in the Digital Age, *Recommendation on Preference for Overcoming Disadvantage* (Oct. 14, 2010), available at https://www.fcc.gov/DiversityFAC/101410/preference-101410.doc (last visited July 4, 2017).

[15] *See* David Honig, *How the FCC Helped Exclude Minorities From Ownership of the Airwaves* (Oct. 5, 2006), available at http://mmtconline.org/lp-pdf/DH-McGannon-Lecture-100506.pdf (last visited July 4, 2017).

[16] Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017), p. vii ("[U]ntil the last quarter of the twentieth century, racially explicit policies of federal, state, and local governments defined where whites and African Americans should live).

stations are often so weak that they can only survive if their AM stations were coupled with FM translators.

MMTC proposes three curative steps below.

4. Relax AM Transmitter Site Location Restrictions (*see* 47 C.F.R. §73.24(g))

The regulation reads:

> An authorization for a new AM broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:
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> > (g) That the population within the 1 V/m contour does not exceed 1.0 percent of the population within the 25 mV/m contour: *Provided, however,* that where the number of persons within the 1 mV/m contour is 300 or less the provisions of this paragraph are not applicable.[17]

This regulation arbitrarily restricts the ability of an AM station to move its transmitter to an urbanized, populated location. This provision restricts the owners of stations not already located in a densely populated area to compete with other stations fortunate enough to have been licensed to urbanized communities decades ago, during segregation days. Zoning restrictions already make it difficult enough to find a location for a tower in an urbanized area; broadcasters hardly need additional hurdles presented by archaic FCC rules that no longer serve a regulatory purpose.

5. Repeal the Rural Radio Policy

For its first three generations, the Commission strived to ensure that every incorporated and even unincorporated place should have a radio station licensed to

[17] 47 C.F.R. §73.24(g).

"serve" that community.[18] In its 2011 *Rural Radio* decision,[19] the Commission went overboard and created an assumption that any change in the community of license specifying a city within an urbanized area or that resulted in covering 50% or more of an urbanized area would be presumed to be service to entire urbanized area.

This "Rural Radio Policy" reversed nearly 30 years of case law and is detrimental to localism, competition and diversity. It has served only to protect incumbent broadcasters in the larger markets from competing with new entrants. Commenters overwhelmingly opposed adoption of this policy, and it continues to be universally unpopular among broadcasters.

Section 307(b) imposes an obligation upon the Commission to *distribute* frequencies among the various communities equitably, efficiently and fairly. The statute requires the distribution of frequencies based on demand for its use. The Commission had always based the distribution of frequencies on a market demand approach. But the Rural Radio policy forces broadcasters to maintain their operations in areas where, over a period of time, the demand for service may have declined, population may have shifted, or the economy may no longer support the station. As a result, many large deserving communities are unable to obtain local service.

The Commission purports to justify the new policy by trumpeting the virtues of preserving rural service. However, there is no factual evidence that rural service is lacking or that demand for such service is not being met. Indeed, evidence to the

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[18] *See Clear Channel Broadcasting,* Further Notice of Proposed Rule Making, 24 FCC 303, 305 (1958).

[19] *See Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures,* MB Docket 09-52, 26 FCC Rcd 2556 (2011), recon. denied, 27 FCC Rcd 12829 (2012).

contrary shows that in virtually every instance where a station moves from outside an urbanized area into an urbanized area, the previous (rural) service has been replaced by a new service and, in some cases, multiple new services that were not possible without the urban move.

In every market across the nation, there are numerous suburban communities without local service. These communities have grown in past decades for many reasons including population growth, urban flight, new housing developments, shopping centers, and transportation systems. Each community has its own character and unique qualities that set it apart from the central city or other suburban communities. Some are characterized by a concentration of ethnic or racial populations, some by military families, some by large business centers. Unlike the central city, which usually consists of a diversity of cultural or ethnic groupings, these suburbs tend to be more homogeneous. Their needs are more easily defined and well suited for a radio station with a specialized program format.

Not all suburban communities develop at the same rate. Some have shown substantial growth only in the last decade. But, unlike in rural areas, the availability of radio spectrum for a suburban community rarely exists. When the spectrum does open up due to a move by another station, for example, a suburban community may benefit. To allow some suburban communities to enjoy their own local service during the past 30 years, but to cut off those communities that have only recently undergone growth or only recently have found spectrum availability, is arbitrary and unreasonable.

On the other hand, there are numerous reasons why a station may desire to leave its community. For example, at the time the station commenced operations, it may have

been the only station in town and was economically viable. However, over time, there may have been two or three additional stations added to the community and the station can no longer compete relying on such a limited advertising base and listenership; or the community has declined in population in recent years and has become unable to support the station as businesses have moved elsewhere and residents have relocated. The Commission does not acknowledge these scenarios at all. The Commission should consider these facts as part of the showing if the new proposed suburban community is otherwise eligible for a first local service. A station should not be forced to remain in a community that has other stations but can no longer support all of them. Section 307(b) contemplates a distribution based on demand for service in a particular community. If the demand is not there, the station should not be forced to remain.

The station owner is the one who is best positioned to determine whether there are indications of support. It is the broadcaster who should decide to take the business risk based on its determination of local support and its ability to deliver on those expectations. The fallacy in the Commission's assumptions is that radio stations will not provide local programming when there are "economic incentives" to serve a larger audience. The fact is, broadcasters recognize that localism is the lifeblood of the station's survival. It is what sets them apart from all other forms of delivery services. Broadcasters cannot ignore their communities without risking their station's viability.

The Rural Radio Policy is especially harmful to minority broadcasters, who got into radio two or three generations later than other broadcasters, and often found themselves with licenses to "serve" outlying areas when their listeners are located in the urban regions or growing suburbs.

The Commission must cure this historic wrong. Repealing the Rural Radio Policy would help minority owned and ethnic stations, which often have fringe signals, to compete effectively with other stations in their markets, overcoming, at least to some extent, the present effects of past discrimination. All stations would benefit from repeal of the policy by gaining greater flexibility in locating their transmitters to better serve their audiences as demographics change. Such flexibility is especially valuable to the industry in light of growing competition from other media.[20]

The Rural Radio Policy was a mistake and the Commission should repeal it.

6. Enable some FM Translators to Originate Programming

On October 23, 2015, the Commission opened FM translator windows primarily for AM stations.[21] This directive has been a positive foot forward for the survival of AM radio. FM translators give AM stations another avenue for which they can reach a broader audience. Minorities tended to be more likely to

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[20] *See, e.g.,* Louis Frenzel | Feb 17, 2016, "The Future of AM Radio," *Electronic Design*. N.p., 17 Feb. 2016. Web. 23 June 2017, available at http://www.electronicdesign.com/blog/future-am-radio (last visited July 4, 2017) ("Only 10 to 20 % of all radio listeners listen to it [AM], and that depends upon the locale. It may be less that 10 % in some places. Most of the listeners moved on to FM or other radio sources"); Hugh McIntyre, "Millennials Aren't Very Interested in Traditional Radio Any More," Forbes Magazine, 12 July 2016. Web. 23 June 2017, available at https://www.forbes.com/sites/hughmcintyre/2016/07/12/millennials-arent-very-interested-in-traditional-radio-any-more/#1c59d51d37c4 (last visited July 4, 2017) "Millennials don't listen to as much radio as those that came before them because they have much better options these days. Smartphones are now responsible for 41% of their listening, which is much higher than the average when taking into account all age groups, which is just 18%.")

[21] *See Revitalization of the AM Radio Services,* First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry, MB Docket No. 13-249, 30 FCC Rcd 12145, 12151 ¶12 (2015).

own AM stations[22], and minority owned AM stations tended to have weaker technical parameters and thus be more in need of translators.

However, more can be done to help AM station owners who have acquired translators. Three scenarios the Commission might consider are:

1. Allowing AM station owners who have FM translators to broadcast original content from their translators under certain circumstances, such as when the AM station is a "failing station."[23] This would open up another stream for AM stations to broadcast content.

2. Allow AM station owners to turn in their AM licenses and begin operating their FM translators as a "protected low power" FM station.

3. Open a five-year window during which AM stations owners can broadcast original content from both the AM station and FM translator. Then after the five-year window, the owners could choose to either return to broadcasting primarily from the AM station and stop originating content from the translator or, they can turn in their AM license and continue broadcasting from the FM translator.

These scenarios, as well as additional permutations, could provide AM station owners with a progressive approach to regenerating interest in AM stations. The Commission should seek comments on the viability of these suggestions in helping revitalize AM radio.

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[22] *See* Advisory Committee on Diversity For Communications in the Digital Age, *Recommendation for FCC Consideration of Nine Means of Diversifying Ownership in the Commercial FM Radio Band (92.1 – 107.9 mHz)* (June 11, 2004), available at www.fcc.gov/DiversityFAC/041004/FMRadioWhitePaper.doc (last visited July 4, 2017).

[23] The well-known "failing station" concept can be borrowed from the television ownership rules, 47 C.F.R. §73.3555, Note 7(2).

III. An Administrative Law Reform That Would Dramatically Advance Civil Rights Jurisprudence At The FCC

7. Act on Rulemaking Petitions in One Year (*see* 47 C.F.R. §1.407)

Agency delay is a common issue faced by many petitioners for rulemaking. The Commission experiences serious delay in handling petitions to advance civil rights goals.[24]

As it stands, if the Commission fails to make a final decision on a rulemaking petition, a party's only remedy is to file a petition for writ of mandamus in a court of appeals. Rarely are these petitions granted.[25] Mandamus is only available in extraordinary circumstances where there is a specific emergency or an issue of profound public importance.[26] Courts will compel action on an administrative agency only if they

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[24] For example, in 2008 the Commission released an Order that adopted the broadcast advertising nondiscrimination rule. *See Promoting Diversification of Ownership In the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking,* MB Docket No. 07-294, 23 FCC Rcd 5922, 5941-42 ¶¶49-50 (released Mar. 5, 2008) ("*Broadcast Diversity Order*"). The *Broadcast Diversity Order* required broadcasters that were renewing their licenses to certify on Form 303-S that their advertising contracts do not discriminate on the basis of race or gender and that such contracts contain nondiscrimination clauses. *See id.* However, this Order came *24 years* after the Commission held its first public hearing on advertising discrimination. *Id.* It then took three more years for the Commission to assign a staff member to handle inquiries and enforcement of the rule. *See FCC Enforcement Advisory, Non-Discrimination in Broadcast Advertising*, 26 FCC Rcd 3875 (2011). Among many other egregious examples, *see Commission Policies and Procedures Under Section 310(b)(4) of the Communications Act, Foreign Investment in Broadcast Licensees*, Declaratory Ruling, 28 FCC Rcd 16244 (2013) (relaxing the Commission's Section 310(b)(4) foreign ownership policy nine years after the petition for rulemaking was filed), and the 19-year history of the still unresolved MB Docket 98-204 (the EEO Rule), which continues to this day (*see* proposal 10 *infra*).

[25] *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957); *United States v. McGarr*, 461 F.2d 1 (7th Cir. 1972).

[26] *See id.*

find that the delay was unreasonable.[27] More specifically, a petitioner must demonstrate that "the agency's delay is so egregious that it warrants mandamus," which can be met if the court finds that a six-factor test (set out in the margin) has been met.[28] Consequently, petitioners are almost always powerless and are forced to wait years for the Commission to make a decision on the merits.

In 2009, faced with state and local authorities' delay on wireless tower and antenna siting requests, the FCC issued a "shot clock" declaratory ruling that imposed deadlines on state and local authorities to review completed applications within a specific time frame.[29] An NPRM presently seeks comment on a similar issue relating to wireless infrastructure reviews.[30] In this NPRM, the Commission goes as far as to recommend that:

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[27] *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984).

[28] Courts regularly apply the six factors set forth in *Telecomm. Research & Action Ctr. v. FCC* (the "TRAC factors"), which are: (1) "the time an agency takes to make a decision should be governed by a 'rule of reason'" (2) "[t]he content of a rule of reason can sometimes be supplied by a congressional indication of the speed at which the agency should act"; (3) "the reasonableness of a delay will differ based on the nature of the regulation; that is, an unreasonable delay on a matter affecting human health and welfare might be reasonable in the sphere of economic regulation"; (4) "the effect of expediting delayed actions on agency activity of a higher or competing priority . . . [and] the extent of the interests prejudiced by the delay"; (5) "a finding of unreasonableness does not require a finding of impropriety by the agency"; and (6) "the court need not find any impropriety lurking behind the agency lassitude in order to hold that the agency action is unreasonably delayed." *Telecomm. Research & Action Ctr.* 750 F.2d at 80; *see also Hyatt v. United States PTO,* 146 F. Supp. 3d 771, 780 (E.D. Va. 2015).

[29] *See, e.g., Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review, Declaratory Ruling,* 24 FCC Rcd 13994 (2009), *aff'd, City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

[30] *Accelerating Wireless Broadband Development by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking and Notice of Inquiry,* 17 FCC Rcd 3330 (2017) (*Shot Clock NPRM*).

> [W]e believe one option for establishing a "deemed granted" remedy for a State or local agency's failure to act by the applicable deadline would be to convert this rebuttable presumption into an irrebuttable presumption. Thus, our determination of the reasonable time frame for action (*i.e.,* the applicable shot clock deadline) would "set an absolute limit that – in the event of a failure to act – results in a deemed grant."[31]

If a shot clock is good enough for the Commission to apply to a state or local government for interminable, delay, then it is also good enough for the Commission to apply to itself for interminable delay.[32]

Thus, MMTC proposes that when the Commission fails to rule within a reasonable time – such as twelve months - on a §1.407 substantive petition for rulemaking that has been fully pled through the reply comments stage,[33] the petition should be considered denied on the merits, and the petitioner should be permitted to use 47 U.S.C. §402(a) to petition a court of appeals for a review on the merits.

IV. Clarification Of An Administrative Rule To Assist Small Businesses

8. Clarify the Ambiguous Mid-License Term Reporting Requirements (*see* 47 C.F.R. §1.65)

Accuracy and completeness is the driving purpose behind 47 C.F.R. §1.65. A substantial and significant change in the information previously provided by the applicant can be the difference between whether the applicant is considered eligible for a license or not. According to 47 C.F.R. §1.65, the burden to maintain such accuracy and completeness is on the applicants themselves. However, the ambiguous nature of 47

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[31] *See id* at 3334 ¶10.

[32] *Cf. Gardner v. FCC*, 530 F.2d 1086, 1089 (D.C. Cir. 1976) ("[Notice] is also required in light of the established Commission practice of providing such notice, under the principle that an agency is bound to obey its own rules.")

[33] At this time, MMTC is not proposing to apply the shot clock to petitions to amend the tables of TV or FM allotments. (47 C.F.R. §§73.202, 73.606 and 73.622).

C.F.R. §1.65 creates difficulties for applicants – especially small businesses - trying to maintain an accurate application.

47 C.F.R. §1.65 reads:

> **(a)** Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Except as otherwise required by rules applicable to particular types of applications, whenever the information furnished in the pending application is no longer **substantially accurate and complete in all significant respects**, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of the application so as to furnish such additional or corrected information **as may be appropriate**. Except as otherwise required by rules applicable to particular types of applications, whenever there has been a **substantial change** as to any other matter which may be of **decisional significance** in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information **as may be appropriate**, which shall be served upon parties of record in accordance with §1.47. Where the matter is before any court for review, statements and requests to amend shall in addition be served upon the Commission's General Counsel. For the purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.
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> **(b)** Applications in broadcast services subject to competitive bidding will be subject to the provisions of §§1.2105(b), 73.5002 and 73.3522 of this chapter regarding the modification of their applications.
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> **(c)** All broadcast permittees and licensees must report annually to the Commission any adverse finding or adverse final action taken by any court or administrative body that involves conduct bearing on the permittee's or licensee's character qualifications and that would be reportable in connection with an application for renewal as reflected in the renewal form. If a report is required by this paragraph(s), it shall be filed on the anniversary of the date that the licensee's renewal application is required to be filed, except that licensees owning multiple stations with different anniversary dates need file only one report per year on the anniversary of their choice, provided that their reports are not more than one year apart. Permittees and licensees bear the obligation to make

> diligent, good faith efforts to become knowledgeable of any such reportable adjudicated misconduct.[34]

Missing from the regulation is a definition for the terminology that determines an applicant's eligibility for a license or permit. What is meant by "significant respects?" Which sections are considered to have "decisional significance" on an application? What is considered a "substantial and significant" change? These terms are ambiguous and leave applicants in a state of confusion as to what is required of them. Consequently, many applicants ask, "What exactly are they responsible to report and what is superfluous?" Practitioners consulted by MMTC for guidance regarding this matter are weary of the ambiguities laden throughout 47 C.F.R. §1.65. They will err on the side of caution by telling their clients to report every change, regardless of how irrelevant those changes may seem.

An additional issue with 47 C.F.R §1.65 is it has different standards for reporting embedded in the rule. For example, 47 C.F.R. §1.65(a) says that any substantial and significant changes are to be reported promptly within 30 days of the change.[35] Subsection (c) of the regulation says applicants are to report annually.[36] Subsection (c) seems to imply that this portion of the rule applies to applicants wishing to renew a license or permit. Yet it is unclear why an application for renewal is treated differently than the initial application to obtain a license or permit.

Practitioners have expressed concerns with asking applicants for renewal to document and remember every change that has occurred within a twelve-month time

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[34] 47 C.F.R. §1.65 (emphasis supplied, identifying ambiguous terms).

[35] 47 C.F.R. §1.65(a).

[36] 47 C.F.R. §1.65(c).

frame. According to these practitioners, this documentation approach is significantly harder to perform when there is no clear guidance on what changes must be reported. Additionally, asking applicants to wait a year to report is likely to result in inaccuracies. What an applicant remembers at the time of the change can be different from what they remember when it is time to report. As a result, an applicant that fails to remember a change correctly will lead to an inaccurate application, which is what the regulation is supposed to guard against.

Therefore, the Commission should clarify what applicants are required to report. The Commission can accomplish this by defining what a "substantial and significant" change is, what is meant by "significant respects," and what specific facts have a "decisional significance" in the determination of the applicant's eligibility. Additionally, the Commission should hold all applicants to the same standards of reporting. This will likely require striking subsection (c) from the statute and maintaining subsection (a) as the overarching standard. These changes will promote the purpose of the rule, which is to maintain an application's accuracy and completeness.

V. Commence Meaningful EEO Enforcement That Combats Discrimination

9. In EEO Enforcement, Stop Prosecuting Non-Discriminators and Start Prosecuting Discriminators (*see* 47 C.F.R. §73.2080)

The purpose of the Commission's broadcast Equal Employment Opportunity (EEO) rules is to prevent discrimination.[37] To accomplish this, the Commission prohibits

[37] *See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Second Report and Order and Third Notice of Proposed Rule Making, 17 FCC Rcd 24018 (2002) ("2002 EEO Order").

the excessive use of word-of-mouth (WOM) recruiting.[38] Although it is well intended, this approach has been a failure. It wrongly targets and punishes nondiscriminators while failing to target and punish intentional discriminators.

The recruiting requirements fall victim to a superficial analysis that automatically labels all stations recruiting largely by WOM as discriminators, when in actuality a discriminator is a station which exhibits *both* of *two* key attributes: (1) excessive use of WOM recruiting; *and* (2) the WOM recruiting is performed by the members of a homogeneous station staff. The law on this critical point is well-established and black letter.[39]

MMTC requests that the Commission stop prosecuting those whose "offense" is recruiting primarily by WOM from a heterogeneous staff—a practice that is not discriminatory; and instead (b) prosecute the "bad apples" who recruit primarily by WOM from a homogeneous staff—a practice that is "inherently discriminatory"[40] and that MMTC recognizes as the primary reason why key sectors of the industry remain largely homogeneous.

It is no secret that WOM recruiting plays a major role in the hiring process in the broadcast and radio industry. "[W]ord-of-mouth recruitment is very significant in the

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[38] *MMTC Ex Parte Letter re Preserving the Open Internet and Equal Employment Opportunity,* WC Docket No. 17-108 and MB Docket 98-204, MMTC (June 2, 2017), available at https://ecfsapi.fcc.gov/file/1060219293493/MMTC%20ExParte%20060217.pdf (last visited July 4, 2017).

[39] *See Jacor Broadcasting Corporation*, 12 FCC Rcd 7934 (1997) (*Jacor*); *Walton Broadcasting, Inc*. (KIKX, Tucson, AZ) (Decision), 78 FCC 2d 857, recon. denied, 83 FCC 2d 440 (1980) (*Walton*).

[40] *Id.*

broadcast industry…if a company is not ethnically diverse at the outset, the word-of-mouth process can be detrimental to minorities seeking full time jobs."[41] Therefore, if the group of employees using WOM recruitment is homogeneous, their recruitment will primarily reach the employees' family and social affinity groups. This creates a cycle of homogeneous recruiting, which generally leads to a non-diverse staff.

The Commission has a policy against excessive WOM recruitment in place that is intended to prevent discrimination. However, the analysis used for this policy is superficial because it only considers whether broadcasters recruited widely or by WOM.

Historically, because the Commission had found that a homogeneous staff that recruits primarily by WOM was inherently discriminatory, the Commission needed a way to determine when a staff has become homogeneous. The Commission used to determine this by taking a snapshot of the staff using Form 395. Courts have called into question the constitutionality of some uses of the data collected from Form 395;[42] however, the mere collection and publication of this data is permissible.[43] An agency is allowed to collect

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[41] *See* Statement of W. Don Cornwell, Chairman and CEO, Granite Broadcasting Corporation, New York City, in Comments of EEO Supporters, MM-Docket 98-204 (Broadcast and Cable EEO Rules), filed Mar. 5, 1999, Vol. III, Exhibit 3 (EEO Supporters 1999 Comments), available at https://ecfsapi.fcc.gov/file/6513295240.pdf (last visited July 4, 2017).

[42] *See Lutheran Church/Mo. Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), petition for rehearing denied, *Lutheran Church/Mo. Synod v. FCC*, 154 F.3d 487 (D.C. Cir. 1998), (petition for rehearing *en banc* denied, *Lutheran Church/Mo. Synod v. FCC*, 154 F.3d 494 (D.C. Cir. 1998) ("*Lutheran Church*") and *MD/DC/DE Broad. Ass'n v. FCC*, 236 F.3d 13 (D.C. Cir. 2001), petition for rehearing and rehearing *en banc* denied, *MD/DC/DE Broad. Ass'n v. FCC*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied sub nom. MMTC v. FCC*, 534 U.S. 1113 (2002) *("MD/DC/DE Broadcasters"*) (invalidating the former recruitment and outreach portions of the EEO rules on equal protection grounds).

[43] *See Lutheran Church*, 141 F.3d at 356; *see also MD/DC/DE Broadcasters,* 236 F.3d at 18 (holding that strict scrutiny applies only if the government's actions lead to people being treated unequally on the basis of their race).

data and create classifications so long as the collection is for a legitimate purpose that does not lead to disparate treatment.[44]

Certainly, the use of this data to combat intentional discrimination in employee recruitment is not unlawful. The collection of data is considered relevant if it relates to the statutory duties of the government agency,[45] and this data may be collected so long as it is not used in an unconstitutional manner.[46] The data on Form 395 does not imply preference to any race or ethnicity, and the Commission's consideration of such data would not give effect to such a preference. More importantly, Form 395 has served as an essential tool for Congress,[47] the Commission,[48] and the public to both track industry

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[44] In Justice Kennedy's controlling opinion, he encouraged the collection of data by race as a constitutionally permissible means to achieve a diverse student body. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 768 (2007) (Kennedy, J., concurring) ("Schools may pursue the goal of bringing students of diverse backgrounds and races through other means, including…tracking enrollments, performance, and other statistics by race.")

[45] *See Safeway Stores v. NLRB,* 691 F.2d 953, 956 (10th Cir. 1982 (citing *NLRB v. Acme Indus. Co.,* 385 U.S. 432 (1967)); *see also Caulfied v. Bd. of Educ. City of New York,* 583 F.2d 605, 611 (2d Cir. 1978) (collection of racial and ethnic data of school employees was determined to relate to the government's statutory authority and duty to alleviate discrimination).

[46] *See Bush v. Vera,* 517 U.S. 952, 969-971 (1996) (rejecting a redistricting plan formulated with computer software that made racial classification a dominant factor).

[47] Congress relied on Form 395 data while considering the Cable Communications Policy Act of 1984 (Pub. L. No. 87-549 §2, 98 Stat. 2279, 2797 (1984), codified as amended as 47 U.S.C. §554(c) (1984)), and concluded that "while the employment record of the cable industry has improved in the years since the Commission first adopted equal employment opportunity regulations, women and minorities still are significantly underrepresented as employees and owners in the industry." H.R. Rep. No. 98-934, at 85 (1984), reprinted in 984 U.S.C.C.A.N. 4655, 4723. Congress also relied on Form 395 data in 1992 to bar the Commission from revising its EEO rules governing television stations (Pub. L. No. 102-385, 1065 Stat. 1460 (1992), codified as amended at 47 U.S.C. §334(a)(1)), finding that "despite the existence of regulations governing equal employment opportunity, females and minorities are not employed in significant positions of management authority in the cable and broadcast industries...rigorous enforcement of equal opportunity rules and

employment trends and measure the effectiveness of EEO rules and policies. Of course, the Commission can request the submission of supplemental information in any format if the use of Form 395 is inappropriate for any reason.

In order to be compliant with the FCC's EEO recruitment policies, a broadcaster is able to choose from a wide range of recruitment sources so that they meet the requirement of wide dissemination.[49] WOM recruiting alone is not sufficient to meet the wide dissemination rule, but the Commission has made it clear that WOM recruiting is neither unlawful nor inappropriate, so long as it is supplemented with other recruitment sources that reach a diverse audience.[50]

The reason the Commission prohibited recruiting primarily by WOM was because it was seen as the "good old boys" network of recruiting that barred many women and minorities across the industry from job opportunities. The problem today is that this blanket prohibition wrongfully targets stations with diverse workforces who use WOM as their primary recruiting source. Despite the fact they may primarily use WOM recruiting, those with diverse workforces are not hampering women and minorities from job opportunities. Thus, they should not be sanctioned. If the goal is to create diverse

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regulations is required in order to effectively deter racial and gender discrimination." Cable Television Consumer Protection and Competition Act of 1992, §22(a), 106 Stat. at 1498.

[48] *See, e.g., Implementation of the Commission's Equal Employment Opportunity Rules (Report),* 9 FCC Rcd 6276, 6314-15 ¶79 (1994) (using, *inter alia*, Form 395 data in concluding that "a continuing need exists for EEO enforcement in the communications industry.")

[49] *See* 47 C.F.R. §§73.2080(c)(1)(i), 76.75(b)(1)(i); *see also* 2002 EEO Order at 24049 ¶94 (adopting new EEO enforcement rules based on audits of recruitment efforts).

[50] *See id.* at 24052 ¶101.

workforces and these stations have diverse workforces, then there is no need for FCC intervention.

To ensure that its EEO enforcement program stays true to its mission of preventing (and, to achieve that, *prosecuting*) discrimination, the Commission should first identify the stations recruit primarily by WOM.[51] The Commission can then ask these stations to submit *in camera*[52] a Form 395. If the Commission finds that the staff which conducted the primarily WOM recruitment is homogeneous, then that station has met both prongs of inherent discrimination and may be eligible to receive sanctions under the *Jacor* and *Walton* precedents. If the Commission finds that the staff is heterogeneous, then the station is not in violation of the rule and is unsanctionable under the EEO rule. This two-step method will allow the Commission to find and bring to justice the "bad apples" that inherently discriminate, thereby fulfilling the purpose of the EEO rule. Further, it will prevent the Commission from continuing to sanction nondiscriminators.

In sum, the Commission should identify broadcasters who (1) recruit primarily by WOM and (2) performs this WOM recruitment from a homogeneous staff. Together, these two components build a *prima facie* case of intentional discrimination. Using this method, those that fail only those that fail both components may be discriminators and should rightfully be prosecuted.

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[51] *See generally* 2002 EEO Order. Those not recruiting primarily by WOM could show, for example, that they recruit primarily online and through other readily available methods such as providing notices to community groups that request them. *See Sole Use of Internet Sources, supra* n. 4.

[52] MMTC is not seeking public availability of the reports.

Respectfully submitted,[53]

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July 5, 2017

[53] MMTC recognizes and appreciates the guidance of its AM Glidepath Task Force, as well as the research support of its Cathy Hughes Fellow Stephanie Martin-Thom of Syracuse University College of Law and its Earle K. Moore Fellow Alexander Petak of the University of Miami School of Law.