

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Review of EEO Compliance and Enforcement)	MB Docket No. 19-177
in Broadcast and Multichannel Video)	
Programming Industries)	

**REPLY COMMENTS OF
ACA CONNECTS – AMERICA’S COMMUNICATIONS ASSOCIATION
ON THE NOTICE OF PROPOSED RULEMAKING**



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I. INTRODUCTION AND SUMMARY

ACA Connects – America’s Communications Association (“ACA Connects”) hereby submits reply comments in response to the Notice of Proposed Rulemaking (“*NPRM*”) regarding improvements to the Commission’s equal employment opportunity (“EEO”) compliance and enforcement processes.¹ The EEO rules help encourage a diverse workforce, which benefits the public as well as the cable and broadcasting industries.² ACA Connects has long supported

¹ *Review of EEO Compliance and Enforcement in Broad. and Multichannel Video Programming Indus.*, MB Docket No. 19-177, 34 FCC Rcd 5358 (June 21, 2019) (“*NPRM*”). ACA Connects filed initial comments in response to the *NPRM*. See Comments of ACA Connects – America’s Communications Association on the Notice of Proposed Rulemaking, MB Docket No. 19-177 (Sep. 20, 2019) (“ACA Connects Comments”).

² ACA Connects Comments at 1-2. See Comments of the National Ass’n of Broadcasters, MB Docket No. 19-177, 2 (Sep. 20, 2019) (stating that “[a] diverse workforce . . . is key to survival in today’s media marketplace because it allows stations to harness the different experiences and strengths of their employees to produce content that reflects their community.”) (“NAB Comments”); Comments of the EEO Supporters, MB Docket Nos. 19-177, 98-204, 2-8 (noting that the EEO rules help prevent discrimination, promote competition, and advance minority media ownership) (“EEO Supporters Comments”); Letter from David Honig, President Emeritus and Senior Advisor, Multicultural Media, Telecom and Internet Council, to Rosemary Harold, Chief, Enforcement Bureau, Federal Communications Commission, MB Docket No. 19-177, 1-2

Commission efforts to increase workplace diversity and offered recommendations to improve and streamline the EEO rules in its initial comments. At the same time, ACA Connects cautioned that any EEO reforms the Commission adopts in this proceeding should not unduly burden smaller cable entities and other multichannel video programming distributors (“MVPDs”), which have limited financial and other resources.

In these reply comments, ACA Connects addresses the comments of other stakeholders in this proceeding and builds on its earlier recommendations. First, ACA Connects agrees with the National Association of Broadcasters (“NAB”) that current EEO compliance obligations come with significant costs and, should the Commission find it appropriate to raise the employment unit threshold for applying certain EEO compliance obligations to broadcast stations, it should do the same for MVPDs. Second, the Commission should refrain from adopting proposals that would impose new, overly prescriptive EEO requirements on smaller providers with no corresponding benefit. Finally, ACA Connects agrees with other commenters that the Commission can help increase industry EEO knowledge without imposing additional regulatory burdens by better publicizing its existing EEO requirements and issuing other non-binding guidance to foster industry compliance.

II. THE COMMISSION SHOULD ENSURE EEO REFORMS DO NOT UNDULY BURDEN SMALLER MVPDS

As ACA Connects explained in its initial comments, Congress and the Commission have repeatedly acknowledged the regulatory challenges faced by smaller MVPDs and the need to provide relief in certain circumstances to foster a vibrant cable industry.³ In particular, the Commission adopted an exception to many of its EEO requirements for MVPD employment

(Oct. 11, 2019) (highlighting the EEO rules’ importance in deterring discrimination in the cable and broadcast industries) (“MMTC Letter”).

³ See ACA Connects Comments at 2-3 (providing examples of regulatory relief for smaller MVPDs in the context of rate regulation, leased access, accessibility, and other compliance obligations).

units with fewer than six people.⁴ Thus, while these units must comply with the general EEO obligations to widely disseminate job vacancies and not discriminate in hiring decisions, they do not need to meet the stringent EEO outreach, recordkeeping, and reporting requirements set forth in the Commission's rules.⁵

However, ACA Connects noted that the current exception threshold still requires many smaller MVPDs with six or more people to divert resources away from already lean budgets to meet their EEO compliance obligations.⁶ This places smaller MVPDs at a competitive disadvantage compared to larger providers, who often have sizable human resources teams that can be dedicated to EEO issues. ACA Connects also emphasized that the costs associated with responding to even a limited Commission EEO audit can be significant – often involving substantial outlays of money, time, and administrative resources to collect and produce requested information as well as hire legal counsel.⁷ ACA Connects submitted that these costs can be especially detrimental to entities serving small subscriber bases in rural markets, reducing the resources available to support network expansions and upgrades.⁸ To address these issues, ACA Connects observed that a group of broadcast stakeholders proposed reforming the EEO exception threshold to exclude those entities likely lacking significant human resources staffs.⁹ ACA Connects recommended that, if the Commission finds

⁴ See 47 C.F.R. § 76.75(i).

⁵ See 47 C.F.R. §§ 76.73, 76.75(b), 76.75(i).

⁶ ACA Connects Comments at 8-9.

⁷ *Id.* at 5.

⁸ *Id.* at 8-9.

⁹ *Id.* at 8 (citing Joint Comments of 82 Broadcast Station Licensees and Petition for Further Notice of Proposed Rulemaking, MB Docket No. 19-177, 7-10 (July 18, 2019)). ACA Connects noted that all employee units, regardless of size, should still be required to comply with the general EEO obligations to widely disseminate job vacancies and not discriminate in hiring decisions. See *id.* at 9, n. 29.

it appropriate to raise the EEO exception threshold for broadcast stations, it should do the same for MVPDs.¹⁰

NAB largely echoed the concerns raised by ACA Connects. NAB stated the current EEO rules “already impose substantial burdens, as they require significant time and expense filling out government-mandated paperwork.”¹¹ NAB also highlighted the significant costs associated with collecting and storing “reams of data” on vacancy announcements and interview candidates as well as engaging in mandatory EEO outreach activities.¹² In addition, NAB focused on the periodic EEO audit process, which acts as a “material drain” on smaller providers’ resources and puts them at a disadvantage compared to larger competitors.¹³ NAB asserted that EEO audits “can be extremely taxing” and “require a significant amount of staff and/or outside attorney time, which can be extremely burdensome, especially for smaller providers.”¹⁴ NAB estimated that the cost to respond to an EEO audit and follow-up requests can be \$3,000 to \$5,000 for even the smallest providers and often requires the hiring of additional, temporary staff to handle the workload.¹⁵ NAB also demonstrated that EEO audits rarely result in enforcement actions, undercutting the return on the Commission’s investment of investigative resources.¹⁶ As a result, NAB recommended that the Commission exempt smaller broadcast stations (*i.e.*, those with 10 or fewer employees) from the periodic audit process in

¹⁰ *Id.* at 8-9. ACA Connects also urged the Commission to ensure that the recently-implemented shift of EEO compliance responsibilities from the Media Bureau to the Enforcement Bureau did not expand the scope of EEO enforcement and that existing protections for smaller MVPDs in Commission audits and investigations are preserved. *Id.* at 4-5.

¹¹ NAB Comments at 3.

¹² *Id.* at 7.

¹³ *Id.* at 4.

¹⁴ *Id.* at 7-8.

¹⁵ *Id.*

¹⁶ *Id.*

order to “streamline EEO compliance for both the Commission and those broadcasters that can least afford administrative burdens.”¹⁷ NAB contended that this reform would allow the Commission to redirect resources to better publicize current EEO rules and issue guidance on EEO best practices and model programs.¹⁸

NAB couched its recommendation in terms of the regulatory obligations imposed on broadcast stations, but the same rationale applies to extending the proposal to MVPDs. The Commission has sought to ensure conformity between the EEO rules for broadcasters and MVPDs.¹⁹ As ACA Connects explained when addressing the employment unit exemption threshold for EEO outreach, recordkeeping, and reporting obligations, smaller MVPDs face the same financial and administrative resource constraints as smaller broadcasters.²⁰ Current EEO compliance obligations divert resources away from meeting the challenges of building, operating, and upgrading modern video, telecommunications, and broadband networks. Consequently, should the Commission find it appropriate to exempt smaller broadcast stations from the periodic EEO audit process, it should do the same for smaller MVPDs. Consistent with existing rules, the Commission would still be able to launch an inquiry of any employment unit – regardless of size – if it receives evidence of possible EEO violations, or on its own initiative, to ensure compliance.²¹

The Commission also should refrain from adopting proposals that would add to the compliance burdens of smaller MVPDs with no corresponding benefit. For example, the group

¹⁷ *Id.* at 10.

¹⁸ *Id.* at 10-13.

¹⁹ See *Review of the Commission’s Broad. and Cable Equal Emp’t Opportunity Rules and Policies*, MM Docket No. 98-204, Second Report and Order and Third Notice of Proposed Rulemaking, 17 FCC Rcd 24018, para. 1 (2002) (amending the MVPD EEO rules “to conform them, as much as possible,” to the broadcast EEO rules).

²⁰ ACA Connects Comments at 8.

²¹ 47 C.F.R. § 76.77(d).

of organizations known as the EEO Supporters reiterated its request that the Commission address the effects of word-of-mouth (“WOM”) recruiting by racially homogenous staff in hampering diversity efforts.²² Under the EEO Supporters’ proposal, the Commission would identify broadcast stations that recruit primarily through WOM and then require each such station to provide demographic data about the racial composition of its staff.²³ If the racial composition of the staff is homogeneous, the EEO Supporters urge the Commission to conduct an EEO investigation and potentially impose sanctions against the station.²⁴

In its initial comments, ACA Connects recognized that recruiting efforts primarily reliant on WOM are not conducive to increasing workplace diversity.²⁵ But the Commission should reject the EEO Supporters’ WOM proposal for a number of reasons. First, the EEO Supporters provide no evidence that discriminatory WOM recruitment is prevalent among cable entities and other MVPDs. Thus, at a minimum, more analysis is needed before the Commission considers imposing new data collection and compliance burdens on MVPDs in addition to broadcast stations. Second, the EEO Supporters do not explain what criteria the Commission would use in determining whether a provider primarily recruits through WOM and whether a provider would be allowed to contest such a determination. Without such due process protections, the EEO Supporters’ proposal would lead to the unfair assumption that an employment unit with a relatively racially homogenous staff must have discriminatory recruitment practices.²⁶ Third, by focusing in part on whether the employment unit allegedly engaging in discriminatory WOM

²² EEO Supporters Comments at 13-18.

²³ *Id.* at 16-17.

²⁴ *Id.*

²⁵ ACA Connects Comments at 5-6.

²⁶ See NAB Comments at 15 (arguing the EEO Supporters’ proposal “would enable the Commission to take a results-oriented approach in which EEO compliance rests on the inappropriate assumption that a station with a relatively homogenous staff must have discriminatory hiring practices”).

recruitment is racially homogenous, the EEO Supporters' proposal may actually undermine EEO compliance by pressuring providers to make "race-conscious" hiring decisions to meet "some undefined measure of diversity" and avoid Commission scrutiny.²⁷ Fourth, existing EEO rules appear to be sufficient to address the EEO Supporters' WOM concerns. The EEO Supporters stated that providers would be able to show that they do not engage in discriminatory WOM practices under their proposal by demonstrating that: (1) they recruit primarily online and (2) use other readily available outreach methods, such as providing job notices to community groups that request them."²⁸ The Commission's rules already allow such actions. Specifically, the Commission's rules already: (1) allow providers to recruit exclusively through online job postings²⁹ and (2) require MVPDs with six or more employees to provide full-time employment vacancy notifications upon request to any organization that distributes employment information.³⁰ Moreover, the Commission gives MVPDs significant flexibility to use recruitment sources "sufficient in [their] reasonable, good faith judgment to widely disseminate information concerning [a] vacancy."³¹ Indeed, the EEO Supporters acknowledged that the Commission's rules "are designed to afford broadcasters and MVPDs wide latitude on how to recruit" and "have always required broadcasters and MVPDs to hire only the best-qualified persons."³² Thus, it appears that compliance with current Commission rules would address many of the EEO Supporters' concerns and, on balance, negate the need to adopt the EEO Supporters' WOM proposal.

²⁷ *Id.* at 6 (citing *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998)).

²⁸ EEO Supporters Comments at 16, n. 35.

²⁹ *Petition for Rulemaking Seeking to Allow the Sole Use of Internet Sources for FCC EEO Recruitment Requirements*, MB Docket 61-410, Declaratory Ruling, 32 FCC Rcd 3685, para. 5 (2017) ("*Internet Recruitment Declaratory Ruling*").

³⁰ 47 C.F.R. § 76.75(b)(1)(ii).

³¹ 47 C.F.R. § 76.75(b)(1)(i).

³² EEO Supporters Comments at 3, 29-30.

The Commission similarly should not adopt the EEO Supporters' request to require providers to certify that a job posting remained open for one week before the position was filled.³³ ACA Connects supported Commission efforts to proscribe discriminatory employment practices, including through sham post-hoc hiring rationalizations, in its initial comments.³⁴ But there is no evidence that the problem the EEO Supporters seek to fix actually exists. Beyond vague assertions based on their "experience," the EEO Supporters provide no analysis or other support suggesting that providers are regularly manipulating recruitment windows to give an inside track to preferred, non-minority candidates.³⁵ ACA Connects is not surprised by this dearth of evidence, as its members do not engage in such discriminatory practices. ACA Connects' members do not engage in such practices because they are contrary to the spirit of the EEO rules and because the Commission could readily identify such practices through the current EEO audit process or targeted inquiries for smaller providers as discussed above. The audit process requires voluminous documentation providing detailed recruitment and hiring data that can reveal discriminatory practices in employment outreach and decision-making. Moreover, as noted above, the Commission can launch an inquiry if it receives evidence of possible EEO violations or on its own initiative.³⁶ Even the EEO Supporters recognized that the Commission would need to request further information through an audit or other investigation to identify violations under its proposal.³⁷ Consequently, the Commission's existing EEO rules provide robust mechanisms to identify and address unlawful discrimination in recruitment without the adoption of overly-prescriptive hiring timeframes and certification requirements. As

³³ *Id.* at 22-23.

³⁴ ACA Connects Comments at 6-7.

³⁵ See EEO Supporters Comments at 22.

³⁶ 47 C.F.R. § 76.77(d).

³⁷ See EEO Supporters Comments at 23 (suggesting questions for the Commission to ask).

discussed above and acknowledged by the EEO Supporters, the Commission affords MVPDs considerable flexibility in their outreach and hiring procedures, and the Commission should safeguard such flexibility in this proceeding.³⁸

In addition, the Commission should not adopt MMTC's proposal to substantially increase the number of EEO audits per year and the scope of such audits.³⁹ This proposal represents a retread of MMTC's prior recommendations, which ACA Connects addressed in its initial comments.⁴⁰ MMTC argued that "[t]he actual cost of responding to an audit is negligible."⁴¹ However, MMTC provided no study or other analysis in support of this claim.⁴² As both NAB and ACA Connects demonstrated, the costs associated with responding to even a limited EEO audit can be significant and divert resources away from important network expansions and upgrades. MMTC failed to show that the benefits of increasing the number and scope of EEO audits (if any) would not be outweighed by the added costs imposed on smaller providers. MMTC also failed to show that its proposal would actually result in improved EEO compliance and workplace diversity. As NAB demonstrated, the Commission conducted EEO audits of at

³⁸ As ACA Connects noted in its initial comments, it takes no position on the EEO Supporters' proposal concerning the general collection and publication of employment unit demographic data, which is closely related to issues raised in a separate proceeding pending with the Commission. See ACA Connects Comments at 7, n. 23 (citing *Review of the Commission's Broad. and Cable Equal Emp't Opportunity Rules and Policies*, MM Docket No. 98-204, Third Report and Order and Fourth Notice of Proposed Rulemaking, 19 FCC Rcd 9973 (2004)). ACA Connects also takes no position on the EEO Supporters' proposal relating to changes to the Memorandum of Understanding between the Commission and the Equal Employment Opportunity Commission. EEO Supporters Comments at 24-28. However, ACA Connects observes that the EEO Supporters provided few details regarding how the proposed changes would work in practice. The EEO Supporters also failed to address how their proposal would impact the agencies' authority to determine the best allocation of their enforcement resources.

³⁹ See MMTC Letter at 1-4.

⁴⁰ ACA Connects Comments at 7, n. 22.

⁴¹ MMTC Letter at 2. See EEO Supporters Comments at 11 (claiming that the costs of EEO enforcement and compliance are "minimal").

⁴² Compare NAB Comments at 8 (estimating the cost to respond to a Commission EEO audit and follow-up requests can be \$3,000 to \$5,000 for even the smallest providers).

least 15,000 broadcast stations over the past 17 years.⁴³ However, according to NAB's estimate, these audits produced only 20 proposed fines or admonishments for alleged violations of the EEO rules.⁴⁴ In other words, the audits identified a potential EEO rule violation less than one percent of the time.⁴⁵ NAB further explained that the most common EEO violations identified by the audits concerned "recordkeeping-related mistakes like failing to track recruitment sources or the number of interviewees, or neglecting to send vacancy announcements to a requesting organization."⁴⁶ Notably, NAB estimated that one-third of the proposed fines for alleged EEO violations over the past 17 years stemmed from online-only recruitment practices which, as noted above, are now permissible.⁴⁷ Accordingly, the Commission's current EEO audit process has not revealed widespread violations involving discrimination in recruitment or hiring decisions and should not be expanded.

MMTC asserted that ACA Connects did not prove that MMTC's proposal to expand the number and scope of Commission EEO audits would fail a cost/benefit test.⁴⁸ But this argument flips the normal approach to recommending changes to Commission rules. It is MMTC, not ACA Connects, that asked the Commission to reform its audit processes and it is MMTC that should provide sufficient evidence showing that the reforms it advocates will further the Commission's EEO goals without unduly burdening smaller providers. Absent such a showing,

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ MMTC provides no evidence, and there is no basis to assume, that Commission EEO audits of MVPDs do not have similar results.

⁴⁶ NAB Comments at 8-9. See EEO Supporters Comments at 17 (stating there was only one completed EEO adjudication involving allegations of insufficiently broad recruitment in 2017-2018).

⁴⁷ *Id.* at 9 (citing *Internet Recruitment Declaratory Ruling*).

⁴⁸ MMTC Letter at 3.

ACA Connects has no affirmative obligation to prove otherwise and the Commission should not adopt MMTC's proposal.

While the Commission should not adopt new, overly prescriptive EEO compliance obligations that would unduly burden smaller MVPDs, it can still undertake practical measures to better educate industry stakeholders regarding existing EEO requirements. None of the commenters opposed MMTC's recommendations that the Commission publicize its EEO whistleblower and anti-retaliation rules and release other non-binding guidance on existing EEO compliance obligations.⁴⁹ NAB urged the Commission to play a larger role in educating regulatees about the EEO rules and agreed with MMTC that releasing an EEO best practices guide with examples of model EEO programs would engender industry compliance.⁵⁰ ACA Connects similarly found that such initiatives can help increase industry knowledge of the EEO rules without imposing additional compliance burdens on smaller entities.⁵¹ As a result, the Commission should take action to better publicize its existing EEO rules and issue other guidance to foster industry compliance.

ACA also believes that many, if not all, of the MMTC concerns can be addressed outside of the Commission's rulemaking processes by private parties working either alone or with one another on commonly shared objectives. Accordingly, ACA Connects commits to undertaking outreach to its membership about ways to encourage a diverse workforce. Moreover, ACA Connects would welcome joining with MMTC to better promote equal employment opportunities, such as by conducting joint webinars on the subject.

⁴⁹ *Id.* at 4.

⁵⁰ NAB Comments at 13.

⁵¹ ACA Connects Comments at 7, n. 22.

III. CONCLUSION

In these reply comments, ACA Connects reiterates its support for Commission efforts to improve EEO compliance and enforcement processes. However, the Commission should ensure that any EEO reforms it adopts do not impose unnecessary burdens on smaller MVPDs and consider proposals to further streamline EEO requirements.

Respectfully submitted,

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