

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

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

**REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ submits these reply comments on the above-captioned Notice of Proposed Rulemaking regarding the Commission’s equal employment opportunity (EEO) rules.² As expected, the record does not justify additional EEO obligations.³ The only commenters in support of more rules, the self-proclaimed EEO Supporters, provide an exhaustive recap of the benefits of EEO policies, but fail to offer any new arguments or evidence of discrimination in broadcasting that require additional Commission rules or reports. Nor do they justify approval of their request to reinstate Form 395-B (Annual Employment Report), an issue the Commission specifically omitted from the Notice.⁴

To the contrary, NAB demonstrated that broadcasters go beyond mere compliance with the Commission’s rules to foster employment diversity because doing so is critical to

¹ NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries*, Notice of Proposed Rulemaking, MB Docket No. 19-177, FCC 19-54 (rel. June 21, 2019) (Notice); 47 C.F.R. § 73.2080.

³ Comments of the EEO Supporters, MB Docket Nos. 19-177 and 98-204 (Sep. 20, 2019).

⁴ [Letter from Ajit Pai, Chairman, FCC, to Senator Chris Van Hollen and Representative Yvette D. Clark](#) (May 28, 2019); *but see* Notice at Separate Statement of Commissioner Geoffrey Starks Concurring.

succeeding in today's increasingly competitive media marketplace.⁵ We also note that Commission should be wary of imposing more EEO rules as the current regime already flirts with the edge of constitutionality, and there is no evidence of discrimination in broadcasting that justifies additional regulation or that more EEO rules will actually increase employment diversity.⁶ Instead of imposing more top-down, unproductive obligations, the Commission should focus its efforts on practical measures that will directly impact diversity, such as increasing public awareness of EEO opportunities and industry education. Finally, the Commission should reject the EEO Supporters' request for more frequent EEO audits given the inefficiency and significant burdens of the existing process. Rather, the Commission should minimize the unjustified burdens of EEO audits by eliminating audits for small broadcasters.

II. ADDITIONAL EEO RULES ARE UNJUSTIFIED AND UNNECESSARY

A. The Record Lacks Support for Additional EEO Regulations and Reporting

The EEO Supporters request additional backward-looking rules and reports, including more frequent EEO audits,⁷ a superfluous certification of compliance with the EEO rules and reinstatement of Form 395-B.⁸ Their main assertion is that broadcasters "commonly" hire people through personal referrals, or "word of mouth," and complete the EEO recruitment obligations afterward as a hollow gesture of compliance to escape enforcement.⁹ More galling, they presume that broadcasters who hire employees initially brought to their attention as the result of personal referrals and have staffs that fail to meet some undefined threshold

⁵ Comments of NAB, MB Docket Nos. 19-177 (Sep. 20, 2019), at 2.

⁶ *Id.* at 2-3 and 6.

⁷ Letter from David Honig, Multicultural Media, Telecom and Internet Council, to Rosemary Harold, Chief, Enforcement Bureau, FCC, MB Docket No. 19-177 (Oct. 11, 2109) (MMTC Letter).

⁸ EEO Supporters Comments at 13-21.

⁹ *Id.* at 14-16.

of diversity must be guilty of intentional discrimination. Hence, they seek restoration of Form 395-B so alleged perpetrators can be identified. Their attempts to justify these proposals fall short in several respects.

The record does not contain a shred of evidence of discrimination in broadcasting. The EEO Supporters provide an interesting tome on the importance of diversity, but rely purely on conjecture to argue that intentional discrimination is a widespread problem in broadcasting that demands more regulation. For example, they baldly cite their own “experience” as proof that broadcasters try to “fool” the Commission about their compliance with the EEO recruitment obligations, without any reference, data or other support.¹⁰ They also inappropriately dub hiring as the result of a personal referrals “cronyism.”¹¹ However, stamping a practice with a catchy nickname does nothing to demonstrate its prevalence or justify the adoption of unnecessary, potentially unconstitutional requirements as a result.

As a preliminary matter, the EEO Supporters’ claims are illogical. There is no reason for a broadcaster to select a favored job candidate before broadly recruiting for a position when they could do so just as easily after recruitment. There is no incentive to skip or fake the recruitment process, and risk violating the Commission’s rules prohibiting discrimination and requiring recruitment for all vacancies.¹² Also, as NAB discussed, broadcasters simply cannot afford to artificially limit their pool of job candidates if they want to survive in today’s increasingly competitive media marketplace.¹³ We agree with the EEO Supporters that a diverse staff is critical to improving the survivability and strength of broadcast stations.¹⁴

¹⁰ *Id.* at 22.

¹¹ *Id.* at 14.

¹² 47 C.F.R. § 73.2080(a) and (c).

¹³ NAB Comments at 2.

¹⁴ EEO Supporters Comments at 4.

Moreover, to our knowledge, the Commission has conducted tens of thousands of reviews of broadcasters' EEO programs since the rules became effective in 2003, without one finding of discrimination. This includes random EEO audits, mid-term reviews and license renewal examinations. Unlike the EEO Supporters, NAB is confident that the Commission's dedicated and experienced staff would be able to ferret out at least one incident of intentional discrimination from all these inspections, especially if recruitment violations are as common as the EEO Supporters assert.

The EEO Supporters also attempt to presume intentional discrimination from an analysis of broadcasters' workforce composition.¹⁵ However, even the data the EEO Supporters reference from RTDNA's annual newsroom survey reveals notable increases in the percentage of minorities and women in broadcast newsrooms. For example, the percentage of minority broadcast employment in TV newsrooms has increased over 43% since 2003, when the current EEO rules became effective, and over 123% in radio newsrooms during the same period. The data also shows that the percentage of women and people of color in TV newsrooms reached record highs for the second year in a row in 2019.¹⁶ The data also shows that virtually every TV newsroom with more than ten employees has at least one person of color, as do the vast majority of the very few TV newsrooms with smaller staffs.¹⁷ For radio, the local workforce of color is the highest in more than 20 years and the gap in representation is at a 14-year low. More than 75% of radio newsrooms have at least one person of color, and the percentage growth of women in radio newsrooms has grown substantially, reaching

¹⁵ *Id.* at 12.

¹⁶ Bob Papper, *2019 Research: Local newsroom diversity* (June 13, 2019)

¹⁷ See <https://www.rtdna.org/uploads/files/2019%20RTDNA-Lawrence%20Herbert%20School%20of%20Communication%20at%20Hofstra%20TV%20News%20Diversity%20Survey.pdf>.

almost half of all employees.¹⁸ Nevertheless, NAB recognizes the need to continue this progress, and conducts a variety of education and training initiatives to increase inclusion in broadcasting.¹⁹

B. Additional EEO Rules Would Be Constitutionally Suspect

As NAB explained, the existing rules already push the boundaries of constitutionality. No previous version of the Commission's EEO rule has survived judicial scrutiny, and the current rules persist in part because they have never been challenged.²⁰ Thus, the Commission should be extremely wary of imposing additional EEO requirements, such as those proposed by the EEO Supporters. Essentially, the EEO Supporters propose to combat word-of-mouth recruitment by the Commission imposing sanctions against broadcasters who recruit through personal referrals and have staffs below some racial composition threshold (as shown on Form 395-B).

The EEO Supports appear to ignore the fact that the Commission's rules have two components: a prohibition against employment discrimination and an obligation to engage in broad outreach. Whether a station recruits through personal referrals concerns only the second prong of the rules; it is irrelevant to a finding of discrimination.²¹ The EEO Supporters repeatedly fail to grasp this important distinction.²² The courts on two occasions have clarified

¹⁸ See <https://www.rtdna.org/uploads/files/2019%20RTDNA-Lawrence%20Herbert%20School%20of%20Communicaton%20at%20Hofstra%20Radio%20News%20Diversity%20Survey.pdf>. Stations in smaller markets often have lower percentages of minority newsroom employees, presumably due to smaller minority populations in such areas.

¹⁹ NAB Comments at 11-13.

²⁰ Joint Reply Comments of the Named State Broadcasters Assns., MB Docket No. 17-105 (Aug. 4, 2017), at 17 (NASBA Modernization Comments).

²¹ Joint Reply Comments of the Named State Broadcasters Assns., MB Docket Nos. 18-23 and 17-105 (May 15, 2019) (2019 NASBA Reply), at 4.

²² Additionally, in rejecting an earlier version of the EEO rule, the court in *Lutheran Church v. FCC* clarified that the racial and gender composition of a station's staff has no bearing on a station's employment practices. *Id.* at 5-6 citing *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), at 352, *rehearing denied*, 154 F.3d 487 (D.C. Cir. 1998), *rehearing*

that government mandates that pressure broadcasters to make race-based hiring decisions violate the Constitution. In 1998, the D.C. Circuit in *Lutheran Church* found that the Commission's EEO rule, which required stations to compare their workforce racial composition to the local population and correct any underrepresentation, imposed unlawful pressure on stations to recruit minorities in violation of the Fifth Amendment.²³ Two years later, the D.C. Circuit also dismissed the Commission's revision of the EEO rule as a race-based policy that pressured broadcasters to recruit minorities and women in order to avoid Commission sanctions.²⁴ The current rules therefore focus solely on broad outreach.²⁵

The carefully crafted current rules already push the boundaries of constitutionality, and imposing more rules, especially the collection of data about the racial and gender composition of a station's workforce on Form 395-B, could threaten their sustainability.²⁶ Penalizing stations because their staff composition fails to meet an arbitrary diversity threshold is the exact use of such employment data that the court has already rejected twice as unlawful pressure to hire based on race. The court further noted that no rational firm, especially one holding a government-issued license, would welcome a government audit.²⁷

en banc denied, 154 F.3d 494 (D.C. Cir. 1998) (*Lutheran Church*) (dismissing the Commission's conclusion that its EEO rule merely sought non-discriminatory treatment of women and minorities because it "presupposes that non-discriminatory treatment typically will result in proportional representation in a station's workforce.").

²³ *Lutheran Church*, 141 F.3d at 355-56.

²⁴ *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, 21-22, *rehearing den.*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 920 (2002) (*MD/DC/DE Assns.*); *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, Report and Order, 15 FCC Rcd 2329 (2000).

²⁵ *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Second Report and Order, 17 FCC Rcd 24018 (2002).

²⁶ NASBA Modernization Comments, at 21.

²⁷ *Lutheran Church*, 141 F.3d at 353.

The EEO Supporters' proposal makes even less sense given the existing prohibition against solely recruiting through personal referrals.²⁸ They urge the Commission to collect Form 395-B from stations found to have found recruited through personal referrals, and then determine culpability based on the station's staff composition indicated on the form. Thus, the EEO Supporters seemingly press the Commission to forbear general enforcement of the existing ban of word-of-mouth recruitment and enforce it only against stations with workforces that fail some diversity test. Such an approach is unsound. Given these constraints, the current EEO rules are likely as expansive and effective as possible.

Finally, the record contains no evidence that imposing additional rules or reports would further diversity in the broadcast workplace. The rules already require collection of information on all interviewees and new hires,²⁹ dated copies of vacancy advertisements and the sharing of job announcements with requesting organizations.³⁰ The rules also require completion of a menu of broad outreach activities.³¹ The current EEO rules have been in place for more than 16 years, and while employment diversity in broadcasting has improved, it may be time for a different, more practical approach. Simply added on more of the same kinds of regulations not only lacks imagination, it also is less likely to further the Commission's goal of increasing diversity.

III. PRO-ACTIVE INITIATIVES ARE MORE LIKELY TO IMPACT INDUSTRY DIVERSITY

NAB has described some of the efforts that broadcasters undertake to promote employment diversity, including initiatives by a range of media organizations such as Scripps,

²⁸ 47 C.F.R. 73.2080(a).

²⁹ *Id.* at § 73.2080(c)(5).

³⁰ *Id.* at § 73.2080(c)(1).

³¹ *Id.* at § 73.2080(c)(2).

CBS, NBC and PBS, among others.³² Additionally, the NAB Leadership Foundation (NABLF) has a long track record of sponsoring initiatives that run the gamut of industry participation, including facilitating entry into the Broadcast Leadership Training program, which helps prepare executives for station ownership. NAB also administers a certification program for broadcast engineers and a training program for media sales professionals. NAB submits that initiatives like these are the most successful way to impact employment diversity, and far more effective than more EEO regulation.

We also agree with MMTC that the Commission should increase efforts to educate industry about the EEO requirements. NAB supports MMTC's proposals that the Commission produce an EEO best practices with examples of successful EEO projects and create an outlet for exemplary EEO programs. Outreach could be conducted through Commission workshops and other methods.³³

The Commission should also consider ways to facilitate the job application process. For example, the Commission could coordinate with job boards such as NABLF's Broadcast Career Link.³⁴ This outlet, which currently lists more than 1,000 vacancies, could be even more successful with Commission support. For example, stations in certain rural or remote areas have found it challenging to find a diverse applicant pool. Commission outreach could be particularly helpful in these areas. NAB respectfully submits that the Commission could make a far more positive impact on employment diversity through direct initiatives like these than simply adding more burdensome, unproductive rules to the existing regulatory regime.

³² NAB Comments at 11-14.

³³ Letter from Maurita Coley, President and CEO, MMTC, to Rosemary Harold, Chief, Enforcement Bureau, MB Docket No. 19-177 (Sep. 3, 2019), at 5-6.

³⁴ <https://www.broadcastcareerlink.com/>.

IV. THE COMMISSION SHOULD REDUCE THE ADMINISTRATIVE BURDEN OF THE EEO RULES

The record describes the substantial burdens of the EEO rules,³⁵ including obligations to collect information about all candidates interviewed for all job vacancies, send vacancy notices to community organizations that rarely refer candidates, perform a menu of outreach activities and most troublesome, comply with the random EEO audit process.³⁶ Responding to an audit letter typically requires a station to collect and provide copies of the station's two most recent EEO public file reports, dated copies of all communications announcing all full-time positions filled, a log of on-air job vacancy ads, detailed information on all persons interviewed and hired for all job vacancies and documentation of all outreach initiatives, among other information.³⁷ NAB observed that the costs of compliance can exceed \$3,000.³⁸

Despite the time and effort needed to resolve an audit for both broadcasters and the Commission, the entire process has proven remarkably inefficient. The Commission has conducted EEO audits of at least 15,000 stations (and likely much more) since the rules became effective in 2003, but issued fewer than 20 Notices of Apparent Liability (NALs) or Admonishments for violations of the EEO rules. And most of those cases involved paperwork-related mistakes rather than a failure to properly recruit, or using only the Internet to

³⁵ Comments of ACA Connections, MB Docket No. 19-177 (Sep. 20, 2019); see also Comments of America's Public Television Stations, Corporation for Public Broadcasting, National Public Radio, Inc. and Public Broadcasting Service, MB Docket No. 17-105 (July 5, 2017), at 11-12 (the Commission should reduce the EEO rule "to a non-discrimination prohibition and a general obligation to recruit for full-time job vacancies, and by reducing required EEO filings to only those that would accompany license renewal applications.").

³⁶ 47 C.F.R. at § 73.2080(f)(4).

³⁷ *Media Bureau Commences 2018 EEO Audits*, Public Notice, DA 18-155 (Feb. 23, 2018).

³⁸ MMTC claims that the actual cost of responding to an audit is negligible because all the information is already maintained as part of "customary modern personnel practice." Honig Letter at 2. MMTC offers no support for this claim or attempts to define such a practice. Regardless, it seems reasonable that many radio and television stations would not choose to retain dated copies of all job vacancy announcements, or detailed information on persons not hired for a position, among other required information, but for the audit mandate.

announce job vacancies, which is now permitted.³⁹ EEO is also the only broadcast rule of which NAB is aware that relies on random audits to assess compliance. There is no reason for imposing a unique scheme on EEO when all other Commission rules are enforced through the resolution of complaints and the license renewal process.⁴⁰ Audits make even less sense now that the Commission and other stakeholders can easily access a station's EEO information in the online public inspection file. Given these circumstances, the burdens of the audit process clearly outpace its results, and could be cause for concern that the audit requirement is not a narrowly tailored measure that would survive judicial scrutiny.⁴¹

Nevertheless, MMTC urges the Commission to substantially increase the percentage of stations that are subject to EEO audits each year, asserting that the rarity of NALs is not proof of nondiscrimination.⁴² Paradoxically, MMTC claims that the lack of NALs is evidence that EEO audits are either an extremely effective deterrent to discrimination, or too ineffective to identify discrimination, or somehow both.⁴³ MMTC also contends that subjecting five percent of licensees to an annual audit means that stations are audited only once every 20 years.⁴⁴

³⁹ NAB Comments at 8-9.

⁴⁰ There is no legal bar to reducing or eliminating the EEO audits. EEO audits for broadcasters were imposed solely under the Commission's own perceived authority following the *Lutheran Church* court's rejection of the EEO rules in 1998. *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, Notice of Proposed Rulemaking, 13 FCC Rcd 23004 (1998). Congress also specifically refrained from requiring broadcast EEO audits in the Cable Television Consumer Protection and Competition Act of 1992, instead choosing to incorporate a mid-term review of EEO compliance and leaving the remainder of the Commission's rules unchanged. Pub. L. No. 102-385, 106 Stat. 1460 (1992). Contrast this to EEO audits of cable operators, which were statutorily mandated in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

⁴¹ *MD/DC/DE Assns.*, 236 F.3d at 21.

⁴² MMTC Letter at 2.

⁴³ *Id.*

⁴⁴ *Id.* at 1.

First, as discussed above, the existing EEO rules already push the outer boundaries of constitutionality. Increasing the frequency of the EEO audits could undermine the judicial viability of the entire regulatory regime. Moreover, as discussed, there is no evidence in the record of discrimination that demands heightened regulation. As an aside, we note that MMTC's request for more frequency audits is completely at odds with its support for eliminating Form 397 (Mid-Term Report). In that proceeding, MMTC explained that Form 397 was rarely used for EEO enforcement, and that outreach and recruitment were a better use of broadcasters' "limited resources."⁴⁵ NAB agreed because Form 397 imposed an unproductive, inefficient burden on broadcasters. The same logic should hold for reducing the burden of the random EEO audits. NAB queries why the Commission would devote even more resources to an already burdensome, inefficient process.

Second, MMTC's understanding of the audit process is flawed. On average, the EEO programs of radio and television stations are reviewed much more often than once every 20 years. An audit letter demands EEO information not only from the station in question, but all stations in the same station employment unit (SEU).⁴⁶ Radio stations are often part of an SEU comprised of two, three or more stations. Thus, instead of conducting audits of only five percent of stations each year, the Commission more likely audits 10 percent or 15 percent or even more stations each year. In turn, individual stations are not audited only once every twenty years, but perhaps two or three or more times during that period. To NAB's knowledge, stations are typically subject to an EEO audit at least once during their eight-year license term, and sometimes more depending on the frequency of audit letters targeting other stations in

⁴⁵ *Modernization of Media Regulation Initiative*, Comments of MMTC, MB Docket 17-105 (July 5, 2017).

⁴⁶ See, e.g., *Media Bureau Commences 2018 EEO Audits*, Public Notice, DA 18-155 (Feb. 23, 2018).

the same SEU. These examinations are in addition to the examination of a station's EEO compliance during the midterm review and license renewal process. Thus, a station's EEO compliance may be reviewed at least four or five times during the eight-year span from one renewal application to the next, or an average of at least every other year. Given the documented inefficiency of the audit process, and the related costs for both broadcasters and the Commission, there is no justification for increasing the frequency of audits.

Rather, NAB submits that the better course is for the Commission to reduce the burdens of the audit process, at the very least for small stations such as those with 10 or fewer employees. We note that the Notice emanates from the proceeding to eliminate the mid-term report,⁴⁷ which originated in Commission's proceeding to modernize media regulations,⁴⁸ in which the Commission seeks to "eliminate or modify regulations that are outdated, unnecessary or unduly burdensome."⁴⁹ Eliminating the random EEO audits for small broadcasters would be fully consistent with this goal, without meaningfully effecting enforcement of the EEO rules or employment diversity in broadcasting.

⁴⁷ Notice at ¶ 1.

⁴⁸ *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2)*, Notice of Proposed Rulemaking, MB Docket No. 18-23 (Feb. 22, 2018), at ¶ 1.

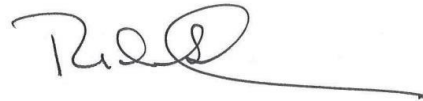
⁴⁹ Public Notice, *Commission Launches Modernization of Media Regulation Initiative*, MB Docket No. 17-105 (May 18, 2017).

V. CONCLUSION

For the reasons stated above, the Commission should forego additional EEO rules and reports and instead consider ways to reduce burdens on small broadcasters and implement practical measures that will more directly improve employment diversity in broadcasting.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal line extending to the right.

Rick Kaplan
Larry Walke

November 4, 2019