

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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

Clarke Broadcasting Corporation, Galaxy Communications, LLC, Golden Isles Broadcasting, LLC, and HEH Communications, LLC (“Joint Commenters”), by their attorneys, submit these Reply Comments in support of comments filed by the National Association of Broadcasters (“NAB”), the 82 Broadcast Station Licensees, and others who encourage the FCC to update and modernize its EEO program rules (the “EEO Program Rules”) set forth at 47 C.F.R. § 73.2080, thereby improving the effectiveness of the EEO Program Rules while reducing unnecessary administrative burdens, especially for smaller broadcasters. In particular, Joint Commenters encourage the Commission to revise the small station exemption to reflect the realities of modern broadcast station ownership, operation, and employment, with the goal of continuing to increase diversity and inclusion in the broadcast industry.

Certain parties that filed comments in this proceeding have asked the FCC to expand the EEO Program Rules in a manner that would be constitutionally suspect. These commenters are referred to herein collectively as “EEO Rule Supporters.” At the outset, Joint Commenters respectfully request that the Commission’s analysis in this proceeding and consideration of the EEO Rule Supporters’ requests take into account the precedent and multiple decisions of the United States Court of Appeals for the District of Columbia Circuit that prohibit the FCC from

pressuring broadcasters to make unconstitutional and racially-based hiring decisions in order to avoid FCC enforcement action.¹ The proposals of the EEO Rule Supporters would do just that, by having the Commission adopt an unconstitutional and racially-based quota system. In particular, increasing the number of EEO audits conducted by the FCC is not justifiable. As NAB makes clear, “of the thousands of audits performed over the years, less than one percent has identified a violation of the EEO rules.”² The record in this proceeding demonstrates that there is no rationale or evidence for the FCC to impose additional burdensome EEO requirements on broadcasters, on top of already constitutionally-suspect, onerous EEO audits, which after years of enforcement have demonstrated no pattern of EEO violations. The additional regulations sought by the EEO Supporters are a “solution in search of a problem,” absent a record of any sort to justify new and more onerous rules under the Administrative Procedure Act or otherwise.

Given this backdrop, the FCC should seek ways to limit the burdensome impact the EEO Program Rules have on broadcasters, particularly smaller ones. Like many other broadcast policies and rules that the Commission has recently revised, modernized, and/or eliminated, such as the main studio rule, EEO midterm report filing rule, contest rule disclosure policy, license posting rule, and children’s television rules, the FCC’s EEO Program Rules were enacted decades ago and have become outdated. When the EEO Program Rules went into effect decades ago, the American broadcasting landscape was entirely different than it is today. Broadcasters could own no more than a single station (or sometimes an AM-FM combination) in a market and

¹ See *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), *rehearing denied*, 154 F.3d 487 (D.C. Cir. 1998), *rehearing en banc denied*, 154 F.3d 494 (D.C. Cir. 1998); *MD/DC/DE Broadcasters Ass’n v. FCC*, 236 F.3d 13, *rehearing denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 920 (2002).

² Comments of National Association of Broadcasters, MB Docket No. 19-177 (filed Sept. 20, 2019) at 4 (“NAB Comments”). Of the “miniscule number of stations [that] have violated the rules...none involve a finding of discrimination, and the few identified violations typically involve some documentation error.” *Id.* at 8-9.

could only own 21 broadcast stations (consisting of no more than 7 AM, 7 FM, and 7 TV stations) nationwide.³ There were many more station owners than there are today. With only one or two stations to operate, licensees employed smaller workforces, especially in sales and administrative operations. Therefore, it was reasonable for the FCC to establish an exemption to the EEO Program Rules for stations that employed fewer than five full time employees. At a time when the average number of employees that worked for a local broadcaster was likely 10 or 15 in a small market and 25 to 50 in a large market, an operation with fewer than five full-time employees truly represented a small broadcast operation.

The relaxation of the local radio ownership rules that was part of the Telecommunications Act of 1996 led to radical changes and rapid consolidation in the radio broadcast industry. Now, in even in the smallest markets, broadcasters typically operate clusters of stations from a central location.⁴ “Station employment units” now consist of employees at multiple stations, whereas when the EEO Program Rules were first implemented, an employment unit was typically a single station or an AM-FM combination.⁵ As a consequence, a more limited number of broadcasters operate with fewer than five full-time employees than was the case in decades long past. Few stations now qualify for the small station exemption, with the result being that stations that by any reasonable modern definition are “small” business operations must still comply with the multi-layered, complex, and expensive EEO Program

³ See *Renewals of Broadcast Licenses for Arkansas, Louisiana and Mississippi, 1973*, 42 FCC 2d 3 (1973) (“In 1971 . . . the Commission decided that ownership interest by anyone in more than seven AM, seven FM or seven television stations . . . would be contrary to the public interest (the so-called ‘7-7-7 rule.’).”

⁴ With broadcasters now facing an onslaught of competition from non-broadcast sources such as Sirius/XM, Google, Apple, and Amazon (none of which are subject to the EEO Program Rules), consolidated operations have, in many cases, become critical for broadcast operations to remain viable.

⁵ In fact, for radio-only station employment units, some units now consist of 8 stations – the maximum allowed under the current multiple ownership rules.

Rules. The five-employee limitation may have been reasonable when first implemented, but it is no longer realistic today.

Joint Commenters understand this all too well. By any reasonable definition, they are small broadcasters. Clarke Broadcasting Corporation operates a small radio station cluster in Tuolumne County, California, while HEH Communications, LLC operates a small cluster in Huntsville, Texas, and Golden Isles Broadcasting, LLC operates a small cluster in Brunswick, Georgia. Galaxy Communications, LLC operates one cluster in Syracuse, New York and one cluster in Utica, New York. But because these broadcasters employ more than four full-time employees, they do not qualify for the small station exemption. Therefore, despite their small size, Joint Commenters are subject to the full panoply of “prongs” imposed by the complex 1334-word⁶ EEO rule. The burdens of this compliance are not insubstantial. The paperwork and recordkeeping are costly and taxing, consisting of “reams of data.”⁷ Participation in and implementation of the multi-faceted “supplemental recruitment initiatives” adds another layer of time and expense. Operators pay fees to participate in job fairs and to conduct or participate in special employee training programs. For example, a single booth at a local job fair can cost hundreds of dollars, not to mention valuable employee time. To count as just one single initiative, a licensee must attend four such job fairs over a two-year period. EEO audits are extremely time consuming and costly, often resulting in expensive legal bills.⁸ NAB correctly points out that:

⁶ See Joint Comments of 82 Broadcast Station Licensees and Petition for Further Notice of Proposed Rule Making, MB Docket No. 19-177 (filed July 18, 2019) at 9 (“82 Broadcast Station Comments”).

⁷ NAB Comments at 7.

⁸ Joint Commenters agree with NAB that the Commission should consider eliminating the audit process, especially for smaller broadcasters, who can find the process overwhelming and shockingly expensive. See *id.* at 10.

collecting and uploading the required information, and responding to follow-up requests, can cost \$3,000 to \$5,000 for even the smallest of stations that can least afford the expense, and much more for larger station employment units that fill more job vacancies.

The audit process is so burdensome that some public broadcasting stations have been forced to hire additional staff just to upload all the required documents.⁹

The Commission should use this opportunity to reassess the burdensome impact that compliance with the EEO Program Rules has on small broadcasters, and should reduce, not add to, this burden. Joint Commenters are exactly the type of businesses – small broadcasters – that the Commission intended to exclude under the small station exemption. But because the small station exemption has not been updated to reflect modern marketplace realities, Joint Commenters are subject to the complexities, costs, and paperwork burdens of the EEO Program Rules. Joint Commenters agree with the 82 Broadcast Station Licensees that “[f]ive employees is an unrealistically low number for the imposition of extensive and burdensome governmental documentation and paperwork.”¹⁰ The Commission should update and modernize what constitutes a “small station” to reflect the spirit and intent of the exemption when it was created. Joint Commenters agree with the 82 Broadcast Station Licensees that a 50 full-time employee threshold for the entire broadcasting entity is the appropriate level. This is the number regarded by the human resources profession as demarcating smaller from larger entities.¹¹ Moreover, employees in non-broadcast-related roles should not count towards the 50-employee threshold. Many broadcasters, in order to diversify their businesses, have developed ancillary operations not related to their over-the-air business. For example, employees who work solely for an

⁹ *Id.* at 8.

¹⁰ 82 Broadcast Station Comments at 8-9.

¹¹ *Id.*

entity's event marketing or digital divisions – operations over which the FCC has no jurisdiction – should not count towards the 50-employee threshold.

Joint Commenters agree with NAB that there are better ways to achieve the laudable goals of the EEO Program Rules than “taking the easy, familiar path of focusing on additional rules and regulations.”¹² The Commission should commit greater resources to EEO compliance training, education, and outreach, rather than to enforcement and review of increased paperwork obligations.¹³ Initiatives such as those suggested by NAB to help connect broadcasters with women and minority job seekers would be of great assistance to smaller broadcasters, who may struggle to identify minority candidates, and would also assist job seekers who otherwise may not be aware of the opportunities offered by smaller broadcasters. The Commission should also assist small broadcasters by simplifying the current structure and language of Section 73.2080 of the Rules, which is overly complex and difficult to follow. It should create a straightforward, easy-to-use compliance guide that small broadcasters can consult as EEO issues arise in their day-to-day operations. Such a guide would be particularly helpful for those small broadcasters who lack the resources to consult outside counsel on a regular basis.

¹² NAB Comments at 3.

¹³ *Id.* at 13-15.

For the reasons set forth above, Joint Commenters respectfully ask that the Commission use this proceeding to modernize the EEO Program Rules, and in particular the small station exemption.

Respectfully submitted,

JOINT COMMENTERS

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