Multicultural Media, Telecom & Internet Council

1919 Pennsylvania Ave. N.W. Suite 725
Washington, D.C. 20006
Phone: 202-332-0500
www.mmtconline.org

December 11, 2019

Hon. Ajit Pai
Chairman
Hon. Michael O'Rielly
Hon. Jessica Rosenworcel
Hon. Brendan Carr
Hon. Geoffrey Starks
Commissioners
Rosemary Harold, Esq.
Chief, Enforcement Bureau
Federal Communications Commission
445 12th Street N.W.
Washington, D.C. 20554

Dear Chairman Pai, Commissioners, and Ms. Harold:

RE: Equal Employment Opportunity (FCC Docket Nos. MB-19-177 and 98-204)

The Multicultural Media, Telecom and Internet Council ("MMTC")[1] respectfully responds to new assertions raised or developed for the first time in the reply comments filed by these parties:[2]

[1] The views expressed in these Comments are the institutional views of MMTC, and are not intended to reflect the individual views of each MMTC officer, director or member.

[2] Reply Comments were also filed by the Leadership Conference on Civil and Human Rights *et al*. ("LCCHR November 4, 2019 Letter"), with which we are fully in agreement. We decline to respond to the Reply Comments of NCTA – The Internet & Television Association ("NCTA November 4, 2019 Reply Comments"), which set out the extraordinary diversity efforts of the cable industry and concluded that "the current EEO regime effectively promotes equal opportunity in employment and reinforces the cable industry's firm commitment to diversity and inclusion" and consequently "[a]dditional Commission-specific reporting requirements are therefore unnecessary, and the Commission should decline to impose them." *Id.* at p. 4. We do not agree that additional requirements are unnecessary, especially as applied toward eliminating intentional discrimination. But the NCTA's position is not unreasonable, and its support for the

- 82 Broadcast Station Licensees ("82 Licensees' November 4, 2019 Reply Comments");
- National Association of Broadcasters ("NAB November 4, 2019 Reply Comments");
- America's Communications Association ("ACA November 4, 2019 Reply Comments");
- Clarke Broadcasting Corporation *et al.* ("Clarke November 4, 2019 Reply Comments");
- State Broadcasters Associations ("STBAs' November 4, 2019 Reply Comments"); the New Jersey Broadcasters Association contains essentially the same arguments the State Associations made (*see* New Jersey Broadcasters November 4, 2019 Reply Comments); and
- Mentor Partners, Inc. ("Mentor November 5, 2019 Reply Comments").

These filings responded to MMTC's September 3, 2019 Letter to Ms. Harold ("MMTC September 3, 2019 Letter") and to the EEO Supporters' ("EEOS") September 20, 2019 Comments.[3] Leave is respectfully requested to respond, through this letter, to the reply comments of five previously non-participating parties, and to new arguments made by the 82 Licensees and the NAB in their reply comments.

Appended to this letter are the declarations of four expert witnesses on media diversity:

- Dr. Jannette Dates, Dean Emerita of the Howard University School of Communications, Dr. Dates has "trained or mentored hundreds of African American men and women who pursued careers in broadcasting. Dozens of these men and women have kept me informed of the progress of their careers and the personnel practices of their employers and other broadcast employers." Dates November 27 Declaration, p. 1.

- Dr. Valerie White, Associate Professor, School of Journalism & Graphic Communication, Florida A&M University and Chairwoman of the Black College Communication Association ("BCCA"), consisting of the 28 Historically Black Colleges and Universities ("HBCUs") offering accredited degree-granting programs in journalism or mass communication. Dr. White reported that "many of the hundreds of students I have taught over the years have kept me informed regarding the personnel practices of the companies for which they have attempted to build careers." White November 26, 2019 Declaration.

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rule is appreciated. For over 30 years, the NCTA has exercised considerable moral leadership in leading its industry into nearly full compliance.

[3] A current list of the EEO Supporters – 38 national organizations favoring strong EEO enforcement – can be found in the Annex to the EEO Supporters' November 4, 2019 Reply Comments ("EEOS November 4, 2019 Reply Comments"). Please note that the organization identified there as "Blacks in Government" should be identified by its official name, which is "National Blacks In Government, Inc." (with the "I" in "in" capitalized).

- Robert Neal, President and General Manager of WQID-LP, Hattiesburg, MS, and Founder, President and Executive Director of the International Black Broadcasters Association ("IBBA"). IBBA is the association of African American managers and professionals in broadcasting. Mr. Neal reported that "throughout my broadcast career, I have trained, mentored and placed dozens of African Americans in the radio and television industries. Several have kept in touch with me and other IBBA senior members, and have kept us informed on industry practices that have affected their careers." Neal November 25, 2019 Declaration, p. 1.

- Zemira Jones is the President and CEO of the All American Management Group and former Vice President of Operations, Radio One, where he oversaw 71 radio stations. Mr. Jones "still see[s] women and minority colleagues, who I've known for decades, not able to fulfill their career potentials while their white male peers continue to advance even when they possess inferior qualifications and pedestrian work ethics." Jones November 28, 2019 Declaration.

At the outset, we are pleased to report that there is some common ground among all parties. No one opposed MMTC's proposals that the Commission publicize its EEO whistleblower and anti-retaliation rules, and release other non-binding guidance on existing EEO compliance obligations. *See* ACA November 4, 2019 Reply Comments, p. 11; *see* discussion at p. 19 *infra*. Below, we addresss issues as to which the parties are some distance apart.

I. Comments Proposing Evisceration Of EEO Enforcement Are Unresponsive To The NPRM's Call For Ways To Improve EEO Enforcement.

This proceeding is not about how to totally eviscerate, diminish, or cripple EEO enforcement. Instead, the NPRM called for comments on how to *improve* the current EEO enforcement system:

> We seek comment on the Commission's track record on EEO enforcement and whether the agency *should make improvements to EEO compliance and enforcement*…. With respect to the Commission's current EEO enforcement efforts, we invite commenters to assess their effectiveness. What elements of the Commission's EEO enforcement program are effective? What elements of the program are not effective? What elements could be improved and how could they be improved? Are there elements that should be added to the EEO enforcement program to increase its effectiveness? Are there elements that should be removed from the program because they are not effective? (emphasis added).[4]

[4] *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries, Notice of Proposed Rulemaking, MB Docket No. 19-177,* 34 FCC Rcd ____, FCC 19-54 (June 21, 2019) ("NPRM") at p. 3 (fn. omitted).

These are excellent questions, especially considering the unfortunate, but nearly correct observation of the STBAs that the FCC "has not found a single broadcaster to have engaged in discrimination since the advent of the first EEO rule in 1969."[5] STBAs' November 4, 2019 Reply Comments, p. 3.[6] That is a damning indictment of the agency's enforcement program. It is simply not the case that broadcasting is the *only* industry in the nation whose thousands of employers included no racial or gender discriminators for the past 50 years. The fact that an industry contains discriminators, but they never get prosecuted, much less held liable, is certainly not a strong argument for *weakening* the obviously insufficient EEO compliance program in place now.

Several comments expressly advocated heading backward toward less enforcement, less accountability, and more opportunities for intentional discriminators. Their approach would help no one but the bad apples in their industries that seek to evade accountability for discrimination. Such comments are not responsive to the NPRM. Their premise – that less civil rights enforcement will miraculously yield greater civil rights compliance – is a facial absurdity.[7]

Zemira Jones, President and CEO of the All American Management Group and former Vice President of Operations at Radio One, commented on the 82 Licensees' suggestion that stations with fewer than 50 employees (rather than the current level of five employees) should be exempted from EEO outreach.[8] Jones November 28, 2019 Declaration. Mr. Jones concluded

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[5] There have been cases in which the FCC found that broadcasters had engaged in discriminatory practices, although these practices did not result in losses of licenses. *See, e.g., Jacor Broadcasting Corporation*, 12 FCC Rcd 7934 (1997); *Catoctin Broadcasting of New York*, 4 FCC Rcd 2553 (1989), and *Walton Broadcasting, Inc*. (KIKX, Tucson, AZ) (Decision), 78 FCC 2d 857, recon. denied, 83 FCC 2d 440 (1980).

[6] Relatedly, the NAB faulted the audit program for not being "able to ferret out at least one incident of intentional discrimination from all these inspections[.]" NAB November 4, 2019 Reply Comments, p. 4. But under current audit procedures, an audit cannot possibly identify discriminators. The only information available to the EEO Staff is recruitment data. The EEO Staff has no way of knowing whether station management used a homogeneous staff to recruit new employees in a manner likely to exclude minorities and women. *See* pp. 10-13 *infra*.

[7] Imagine the outcry if the USDA issued an NPRM asking how the department could improve its enforcement of the rules against food poisoning – but commenters responded by asserting that nearly all meat packers should be exempted from slaughterhouse inspections. And consider the outrage if the FAA stopped requiring air safety certifications of plane manufacturers on the theory that such certifications are unnecessary because so few airplanes crash these days.

[8] Mentor suggested that "small businesses" as defined by the SBA should have virtually no EEO responsibilities, even though small businesses are the entry point for most newcomers to broadcasting. *See* Mentor November 5, 2019 Comments, pp. 3-4. The SBA's test for small business status is $38.5M in annual receipts; thus, if the Commission granted Mentor's proposal, virtually every radio station – indeed, most radio *companies* – would be EEO-exempt.

that "[t]hat would be an awful mistake. It would exempt most of the industry from compliance, including the small and middle-sized stations where most women and people of color start their broadcasting careers." *Id.*

The Commission should be troubled by the hostile language in some of the filings. According to the 82 Licensees, EEO compliance imposes "a crippling resource burden that simply takes away from the important task of broadcasting." 82 Licensees' November 4, 2019 Reply Comments, p. 12. There is no evidence to support this assertion. Indeed, providing equal employment opportunity is an essential element of the "important task" of responding to the communications needs of *all* Americans. Broadcasting must maintain the trust and confidence of all Americans if the industry is to thrive in the digital age. The EEO rule helps broadcasters do this. It is a gift to the industry on top of the free use of spectrum attendant to a free public license.

Even worse, the STBAs would have the Commission believe that the funds necessary for "tower lighting to protect aircraft are instead drained at many a station by the need to respond to yet another EEO audit." STBAs' November 4, 2019 Comments, p. 13.[9] The STBAs further asserted that EEO audits could cause a station to be "driven out of business by growing costs and increased competition from unregulated entities." *Id.,* p. 15. *See also* STBAs' November 4, 2019 Reply Comments, p. 29 ("the risk of being subjected to FCC investigation. . .impermissibly pressures broadcasters to hire preferentially so as to avoid such "expensive and draining" audits "may have to be reported to their lenders under loan covenants, creating increased risk to a station's financing or its ability to secure refinancing.") Actually the "risk of being subjected to FCC investigations" is nonexistent as long as the licensee recruits broadly, as the rule requires. Recruiting broadly can be accomplished by free postings on the internet, so compliance is very easy. And regarding station financing, one way a licensee can truly frighten away investors and lenders is to be so unprofessional as to fail to recruit online and, in that way, fail to secure access to the huge, multicultural pool of quality candidates reachable online.

The NAB chose less provocative language, even as it failed to recommend any improvements to EEO enforcement, declaring that "while employment diversity in broadcasting has improved, it may be time for a different, more practical approach." NAB November 4, 2019 Comments, p. 7. But the NAB has proposed no "practical" steps other than to cite its management and sales training programs. These NAB programs are praiseworthy and should be encouraged, but they are unavoidably limited in scope, unavailable to most non-NAB members, and potentially terminable at the association's discretion.

The NAB further stated that "[t]here 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." NAB November 4, 2019 Reply Comments, p. 10; *see also* STBAs' November 4, 2019 Reply Comments, p. 13 (citing rules on "tower painting and lighting or RF exposure.") However, the engineering, tower lighting, structural ownership and attribution rules require no audits because violations of these rules are readily discernable by direct observation. On the

[9] So if an airplane crashes into a tower, the tower owner could defend herself by asserting that "we couldn't afford to light the tower because our EEO compliance costs were too high."

other hand, EEO compliance is uniquely audit-worthy because compliance is seldom knowable except by insiders. As the D.C. Circuit has pointed out, "[d]iscrimination may be a subtle process which leaves little evidence in its wake."[10] *See* MMTC October 11, 2019 Letter, pp. 1-2.

II. FCC EEO Enforcement Can Be Highly Beneficial.

In their reply comments, some of the parties introduced a new argument: that there is no evidence "that the current FCC documentation and record keeping requirements have either reduced discrimination, or led to an increase in diversity, in the workplace." *See, e.g.,* 82 Licensees' November 4, 2019 Reply Comments, p. 3; *id.* at pp. 5-6 (asserting that there is supposedly "no evidence, data or support" to show that the "EEO rules opened the doors of broadcasting to the two-thirds of our population who are not White men"); *see also* ACA November 4, 2019 Comments, p. 6 (asserting that there is no evidence that "discriminatory WOM [word of mouth] recruitment is prevalent among cable entities and other MVPDs.")[11]

The "current" FCC EEO program is not materially different from the EEO program that has been in effect for over 50 years – except for the fact that the current absence of Form 395 data renders the Commission unable to identify and prosecute those licensees that do not engage in broad recruitment. The Commission simply does not collect the data necessary to make the determination that employees were recruited primarily by WOM from a homogeneous workplace. With that caveat, the Commission may reasonably draw on the lessons of the past 50 years to discern some of the beneficial effects of EEO enforcement. In this way, the Commission can see for itself the extent to which the introduction, or diminution, of EEO enforcement has impacted minority representation in broadcasting over the past 50 years.

For those 50 years, it has been settled that broad outreach – ensuring that qualified minorities and women learn about job openings – reduces discrimination and increases workplace diversity. The direction taken by the Commission in the NPRM is premised on this fact. The burden of showing otherwise rests on those who seek not to improve but to eviscerate EEO enforcement.

Any "proof" of impact necessarily requires either a control group or "before and after" data – and, for EEO, "before and after" data does exist. From 1971 through 1999, the Commission maintained an annual compilation of minority and women employment statistics drawn from Form 395. When EEO enforcement began in earnest in 1971, minority employment in broadcasting stood only at about 5%, mostly in menial positions. Although discrimination in

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[10] *Bilingual Bicultural Coalition on the Mass Media v. FCC*, 492 F.2d 656, 659 (D.C. Cir. 1974).

[11] An irony alert: while demanding that the EEO Supporters provide proof that civil rights laws are beneficial to discrimination victims, some parties did not hesitate to throw out unproven and absurd claims that EEO enforcement costs will drive stations into bankruptcy and leave tower lights unlit. *See* STBAs' November 4, 2019 Reply Comments, pp. 13-15, and 82 Licensees' November 4, 2019 Reply Comments, p. 12. There is no evidence to support this claim that EEO enforcement costs will drive stations into bankruptcy and worse.

companies with more than 25 employees had been rendered unlawful by Title VII of the Civil Rights Act of 1964, minorities had few prospects for broadcast careers.

In 1968, recognizing that much more needed to be done to combat discrimination in broadcasting, the Commission adopted the broadcast nondiscrimination rule.[12] *By 1977, minority broadcast employment had doubled*.[13] It continued to gain steadily through 1999 except for 1982-1987 – during the Fowler administration, when the Commission almost entirely ceased enforcing the rule. Once routine enforcement resumed in 1987 under Chairman Dennis Patrick, minority employment rebounded.

This powerful historical record should surprise no one. The expansive dissemination of job openings – wide enough that minorities and women will learn of them – self-evidently translates into more opportunity.

Howard School of Communications Dean Emerita Dr. Dates pointed out that HBCUs only began to create degree-granting broadcasting programs after the Commission began enforcing the EEO rule. That step was necessary to give the HBCUs comfort that discrimination would no longer completely ruin any chances of their graduates securing employment in their chosen field:

> In 1971, Howard University opened its School of Communications, complete with a Radio, Television and Film Department. Howard's Board of Trustees had held off on creating the school because, in the late 1960s, there was little likelihood that its graduates would be considered for any but menial jobs in the industry. It was only after the FCC

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[12] *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, MO&O and NPRM,* 13 FCC2d 766 (July 3, 1968), including, particularly, the Pollak Letter (discussed in the EEO Supporters' September 20, 2019 Comments, pp. 7-8). Thirty-five parties supported the 1968 rule. The only opponent was the NAB, which asserted that the sole arbiter of EEO should be the EEOC (*id.* p. 766). This is basically the same stale argument the NAB makes today. Notwithstanding the NAB's historic opposition to FCC EEO regulation, the diversification of broadcasting that was facilitated by the EEO rule most likely rescued the industry from irrelevance, given that minorities are the most loyal radio listeners and television viewers. *See, e.g.,* Nielsen, Audio Today: A Focus on Black and Hispanic Audiences (July 11, 2018), available at https://www.nielsen.com/us/en/insights/report/2018/audio-today-a-focus-on-black-and-hispanic-audiences/ (last visited November 29, 2019), p 1 (reporting that "Black and Hispanic radio consumers make up a third of American radio listeners"); Nielsen, It's in the Bag: Black Consumers' Path to Purchase (September 12, 2019), available at https://www.nielsen.com/us/en/insights/report/2019/its-in-the-bag-black-consumer-path-to-purchase/ (last visited November 29, 2019), p. 1 (reporting that Black consumers "spend more time than the total population with media on traditional platforms like TV and radio.")

[13] Chairman Richard Wiley (Commissioner 1972-1977; Chairman 1974-1977) and Commissioner Benjamin Hooks (1972-1977) took EEO enforcement seriously. Their strict EEO enforcement profoundly transformed the broadcasting industry.

> adopted its EEO Rule in 1968 that any HBCUs began to consider it prudent to offer a broadcasting curriculum.
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> In the 1970s, at least ten other HBCUs, including Morgan State, opened broadcasting departments, often spurred by the advocacy before the FCC of the National Black Media Coalition, Black Efforts for Soul in Television (BEST), the Office of Communication of the United Church of Christ, and Citizens Communications Center.

Dr. Dates concluded that despite the stronger performance of on-air television news (at least relative to radio stations offering news), discrimination persists in local television in some markets based on "customer preference" discrimination, which has been unlawful since 1971.[14]

Black College Communication Association (BCCA) Chairwoman Dr. Valerie White concluded:

> It is astonishing to me that anyone would believe that discrimination might have disappeared from the broadcast industry. That is not the message my former students, and other HBCU faculty members representing their schools in BCCA, have reported. In fact, broadcast faculty say with the launch of new media there is still discrimination even though students are said to be better equipped to handle these new tools.[15]

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[14] *See Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971)) (customer preference discrimination held unlawful).

Dr. Dates commended the cable industry for being consistently pro-active in creating a culture of nondiscrimination:

> I do not have any information that suggests that cable television or satellite companies, both on the content aggregation and content creation sides of the business, still engage in unlawful personnel practices. It would not surprise me if such practices persist, but discrimination is not part of the culture of the cable and satellite industries anymore, and has not been for the past 20-plus years. For example, over the past generation, virtually all of the major cable and satellite companies have assiduously recruited at Howard, Morgan, and other HBCU campuses. I attribute cable's EEO best practices to the internal advocacy of a host of visionaries, including former NCTA President Decker Anstrom, former BET CEO Robert Johnson, TV One and Urban One Board Chair Cathy Hughes, Comcast EVP David Cohen, InterMedia Partners CEO and former AT&T Cable CEO Leo Hindery, and NCTA President and former FCC Chairman Michael Powell. They have been genuine leaders in setting high moral standards for their industry.

Dates November 27, 2019 Declaration, p. 2.

[15] There is data to support this observation. For several years concluding in 2013, the University of Georgia produced longitudinal data on the job market for graduates of the nation's journalism and mass communications programs. The 2013 report found that minority graduates "continue

International Black Broadcasters Association Founder, President and Executive Director Robert Neal concluded:

> It is absolutely without question that racial discrimination persists in the radio and television industries. I have seen extraordinarily well-qualified African American managers, announcers, and salespersons get shunted aside when jobs open up. Often they find out the jobs were available only after they were filled.

All American Management Group President and CEO Zemira Jones reported:

> I understand that some parties in this proceeding contend that there is no proof that discrimination persists in the broadcast industry. To be sure, there is not as much discrimination as there once was – and for that we can thank our vigilant civil rights organizations, especially MMTC, as well as the FCC for its five decades of EEO enforcement. But discrimination still infects our business. I still see women and minority colleagues, who I've known for decades, not able to fulfill their career potentials while their white male peers continue to advance even when they possess inferior qualifications and pedestrian work ethics.

Jones November 28, 2019 Declaration. Mr. Jones concluded that "[t]his is inefficient as well as immoral. The FCC should not rest until it eliminates discrimination in broadcasting 'root and branch.'" *Id.*

The NAB appeared to suggest that enough minorities and women are now employed in television journalism so that the rule is no longer necessary. *See* NAB November 4, 2019 Reply Comments, p. 4. But the NAB made no mention of, much less tried to explain, the persistently low levels of minority employment in radio journalism, a field in which the race of employees is invisible to the public and advertisers. *See* pp. 18-19 *infra* (discussing MMTC's and the EEO Supporters' requests for a Section 403 investigation of EEO in radio journalism).

Taking a somewhat opposite approach to that taken by the NAB, the 82 Licensees contended that EEO enforcement should be cut back because it has been *unsuccessful* in advancing minority *ownership*. *See* 82 Licensees November 4, 2019 Reply Comments, p. 6. The 82 Licensees, too, failed to remember the history. EEO enforcement had little to do with the stagnation in minority

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to find it more difficult to find a job than do graduates who are not members of racial or ethnic minority groups. The minority graduates also are less likely to be able to find a job in the field for which they studied. . . .The gap was dramatic. . . . minority bachelor's degree recipients continue to find it necessary to take jobs outside of the field of communication at a rate that is higher than for nonminority graduates." Lee B. Becker, Tudor Vlad and Holly Anne Simpson, Annual Survey of Journalism & Mass Communication Graduates, James M. Cox Jr. Center for International Mass Communication Training and Research, Grady College of Journalism & Mass Communication, University of Georgia (August 6, 2014), available at www.grady.uga.edu/annualsurveys/ (last visited December 9, 2019).

ownership since 1995. That unfortunate trend owes largely to the 1995 repeal of the Tax Certificate Policy,[16] and to a wave of consolidation, beginning in the late 1990's, that left minority owned broadcast companies unable to grow.[17] Without the EEO rule, the minority ownership situation would have been even worse.

III. The EEO Supporters' Anti-Cronyism Proposal For Identifying Discriminators, And The Use Of Form 395 Data For Research, Are Constitutionally Sound.

The EEO Supporters proposed that the Commission obtain a Form 395 for licensees and MVPDs that that the EEO Staff had found to be recruiting primarily by WOM, to determine whether these licensees and MVPDs were engaging in the inherently discriminatory practice of recruiting mostly by WOM from a homogeneous workplace ("the "EEOS Anti-Cronyism Proposal"); *see* EEOS September 20, 2019 Comments, pp. 13-18. As IBBA's Robert Neal explained, highly qualified minority employees can be passed over in favor of less qualified "inside" candidates, a pattern that:

> owes its persistence to the fact that when a homogeneous staff is given the task of delivering job applicants, the staff members will naturally "hook up" their friends and family members, a pool that typically includes few if any people of color. That is the most common discriminatory practice through which racial privilege is transmitted across generations in broadcasting.

Neal November 25, 2019 Declaration, p. 1.

However, the NAB and others have continued to suggest that the FCC may not even use Form 395 data in order to identify discrimination, or to track industry trends,[18] because licensees might

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[16] *See* Advisory Committee on Diversity and Digital Empowerment, Broadcasting Diversity and Development Working Group, "Exploring Strategies that Have Advanced Media Diversity," Broadcast Symposium, March 7 2019 (report issued June 24, 2019), p 3 (citing, *inter alia*, remarks of Spanish Broadcasting System Chair and CEO Raul Alarcon Jr.)

[17] *See, e.g., Prometheus Radio Project v. FCC*, 824 F.3d 33, 40-41 (3d Cir. 2016).

[18] Dr. Dates explained that anonymized Form 395 aggregate data is useful to universities as they consider the extent and venue of career opportunities potentially available to their graduates. She points out that in the 1970s,

> The FCC maintained a database of minority and women employment in broadcasting, so it was possible for HBCUs to see specifically how, and in which broadcast markets, the EEO Rule had spurred minority employment opportunities.

Dates November 27 Declaration, p. 1.

feel unconstitutionally "pressured" to hire minorities.[19] *See* STBAs' November 4, 2019 Reply Comments, p. 29 ("the risk of being subjected to FCC investigations. . .impermissibly pressures broadcasters to hire preferentially so as to avoid such expensive and draining proceedings[.]"[20]

Nonetheless, as the EEO Supporters explained, "[n]either of these uses of data is constitutionally controversial because in neither case would the licensee treat members of any race or either gender differently from others because of their race or gender."[21] Any "pressure" on licensees is simply pressure to recruit broadly, *e.g.*, online or through community groups. EEOS November 4, 2019 Reply Comments, p. 1.[22] There is no reason a rational broadcaster could feel that hiring by race would improve its chances for triggering or surviving an audit, or securing license renewal.

Under the EEOS Anti-Cronyism Proposal, it is only when homogeneous staff members, or other agents, are deployed by the licensee as agents to implement a discriminatory scheme, that the fact of staff homogeneity becomes relevant. The homogeneity of the staff as they do their

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[19] The NAB characterized the EEOS Anti-Cronyism Proposal as "imposing sanctions against broadcasters who recruit through personal referrals and have staffs below some racial composition threshold as shown on Form 395." NAB November 4, 2019 Reply Comments, p. 5; *see also* STBAs November 4, 2019 Reply Comments, p. 18 n. 55, and p. 19 (suggesting that EEO Supporters seek a "quota-based" approach; ACA November 4, 2019 Reply Comments, p. 7 (suggesting that EEO Supporters' proposal would pressure the cable provider "to make 'race-conscious' hiring decisions"); Clarke November 4, 2019 Reply Comments, p. 2 (suggesting that the EEO Supporters want the Commission to "adopt an unconstitutional and racially-biased quota system.") None of this is true. The Anti-Cronyism Proposal only targets broadcasters that engage their homogeneous staffs, or other agents, to perform recruitment from a homogeneous friends-and-family pool.

[20] The State Broadcast Associations suggested that the standard of review is strict scrutiny. STBAs' November 4, 2019 Reply Comments, p. 4. But since nothing in the rule or the audit program pressures broadcasters to hire or even recruit on the basis of race, the standard of review is rational basis. *See* EEOS September 20, 2019 Comments, pp. 30-31 n. 80, for a Brandeis Brief on why broad recruitment doesn't trigger strict scrutiny.

[21] EEOS November 4, 2019 Reply Comments, p. 1; *see also 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.") Not one of the opposition parties addressed this leading Supreme Court decision. *See also, e.g., 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).

[22] *See also* LCCHR November 4, 2019 Letter, p. l (correctly reminding the Commission that Form 395 data collection is required by the Communications Act.)

regular jobs is irrelevant.[23] *See* EEOS November 4, 2019 Reply, p. 3.[24] Here are seven examples encompassing the likeliest scenarios:

- Broadcaster "A" recruits online and e-mails job notices to community groups. The licensee is compliant on recruitment and on nondiscrimination. Data on staff homogeneity is irrelevant.

- Broadcaster "B" recruits mostly by WOM rather than online or through community groups, but has a staff that the licensee requires to perform outreach to ensure that it will reach diverse candidates. The licensee maintains records and monitors its staff to ensure that this instruction is carried out. The licensee has violated the recruitment rule, but is compliant on nondiscrimination. Data on staff homogeneity is irrelevant.

- Broadcaster "C" does not engage its staff members to conduct recruitment. That task is outsourced to a personnel recruiting firm that recruits broadly for all positions. The licensee monitors the personnel recruiting firm and maintains records to ensure that this instruction is carried out. The licensee is compliant on recruitment and on nondiscrimination. Data on staff homogeneity is irrelevant.

- Broadcaster "D" has a diverse staff that conducts "friends and family" WOM recruitment, it being likely that the targets will reach minorities and women due to the diversity of staff performing the recruitment and the licensee's instructions to and monitoring of the staff's recruitment work. The licensee has violated the recruitment provision of the rule, but is compliant on nondiscrimination. Data on staff homogeneity is relevant.

- Broadcaster "E" recruits mostly by WOM rather than online or through community groups. It has a mostly homogeneous staff, all of whose members are tasked with the responsibility of conducting "friends and family" WOM recruitment, it being apparent that the recruitment pool will seldom if ever include minorities or women. The licensee has violated the recruitment and nondiscrimination provisions of the rule. Data on staff homogeneity is relevant.

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[23] *See* EEOS November 4, 2019 Reply, p. 3 n. 10 ("The key distinction is between the staff's simply being homogeneous, and a licensee's *use of* the staff members to implement a discriminatory scheme.")

[24] The NAB was also incorrect in maintaining that the Commission cannot reinstate Form 395-B. *See* NAB September 20, 2019 Comments, p. 15. The NAB asserted that Form 395 "would enable" the Commission to take a "result-oriented approach in which EEO compliance rests on the inappropriate assumption that a station with a relatively homogeneous staff must have discriminatory hiring practices." *Id.* But the fact that data can theoretically be "enabled" to be misused is no reason to make the data unavailable for lawful purposes. *See* LCCHR November 4, 2019 Letter, p. 3 (citing *U.S. v. New Hampshire*, 539 F.2d 277 (1st Cir. 1976)).

- Broadcaster "F" recruits mostly by WOM rather than online or through community groups, has a diverse staff, but designates only a homogeneous subset of the staff to conduct "friends and family" WOM recruitment, it being apparent that the WOM targets will seldom if ever include minorities or women. Diverse members of the staff are specifically not engaged for recruitment. The licensee has violated the recruitment and nondiscrimination provisions of the rule. Data on staff homogeneity is relevant.

- Broadcaster "G" delegates recruitment to a personnel recruiting firm that recruits primarily by WOM and does not approach potential sources of diverse candidates. The licensee has violated the recruitment and nondiscrimination provisions of the rule. Data on staff homogeneity is irrelevant.

Notably, none of Broadcasters A through G would be, in any way, "pressured" to hire or recruit members of one race or either gender preferentially. The only "pressure" would be to recruit broadly enough (*e.g.,* online) to reach all qualified candidates, including minorities and women. The sanctions in each scenario are tailored to the extent and nature of any wrongdoing.[25]

Finally, the STBAs raised the old red herring that third parties hypothetically could use racial data to ask the FCC to sanction the broadcaster, citing the FCC's "*past practice* of then using that information to assess a station's suitability for punishment." STBAs' November 4, 2019 Reply Comments, pp. 28-29 (emphasis added). But there is zero chance that the Commission would consider such a filing even for a moment.

IV. There Are No Due Process Issues In Current EEO Enforcement.

ACA maintained that "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." ACA November 4, 2019 Reply Comments, p. 6.

This due process objection has no merit. A Notice of Apparent Liability (NAL) always cites comparable cases and explains the professional staff's reasoning, which may take several factors into account. Reconsideration of an NAL may be had under 47 CFR §1.106, and review to the full Commission is available under 47 CFR §1.115. Review of an order of the Commission is available in the District of Columbia Circuit under 47 U.S.C. §402(b).

[25] If other parties find any flaws in these examples, we would welcome hearing from them so that our analysis can be perfected.

V. If A Broadcaster Does Not Discriminate, And Maintains Customary Professional Personnel Records, EEO Compliance And Responsiveness To An Audit Should Cost Next To Nothing Beyond The Cost Of Customary Personnel Record Maintenance.

The NAB put the cost of an audit at $3,000 - $5,000.[26] Missing from those numbers is any indication of how the NAB arrived at them, and what specific additional costs are associated with day-to-day compliance.

Other parties appeared obsessed about costs they didn't identify or quantify,[27] even though the claimed costs were supposedly so high that stations risk bankruptcy because of them.[28] Actually, the reasonableness of EEO compliance costs is well established.[29] In the current digital age, the cost of compliance, including broad outreach, is virtually zero. Nearly every activity that must be undertaken to comply with the rule, or respond to an audit, is already performed in the normal course by any professionally operated business. All modern-day businesses keep thorough records of job applications, recruitment outreach activities, hiring, and firing. No party has identified any steps unique to EEO that are not performed in the normal course of personnel practice, apart from responding to an audit, which requires a few hours of staff time at most.[30] As All American Management Group President and CEO Zemira Jones explained:

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[26] The NAB candidly acknowledged that these numbers are "anecdotal." It provided no supporting documentation, or any explanation of what expenditures are included in these numbers. *See* NAB September 20, 2019 Comments, p. 8. And more critically, the NAB failed to explain why these supposed expenditures would not be cost-justified in deterring the scourge of race and gender discrimination in broadcasting. *See* MMTC October 11, 2019 Letter, p. 2 n. 7.

[27] *See* discussion at pp. 3-6 *supra*.

[28] One party offered a constructive cost-saving proposal: that a local broadcast station group should be able to file a single EEO report for all of its stations in its local market. We agree, as long as broad recruitment is performed for all of the licensee's stations in the local cluster. Such a step would be consistent with the repeal of the main studio rule. *See* Mentor November 5, 2019 Reply Comments, p. 5.

[29] In *MD/DC/DE Broadcasters Associations v. FCC,* 236 F.3d 13, 18 (D.C. Cir. 2001) (subsequent history omitted), state broadcast associations invited the D.C. Circuit to hold the Commission's recordkeeping requirements excessive, but the Court declined to do so. The Commission subsequently recognized the essential nature of recordkeeping and verification in EEO enforcement. *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Notice of Proposed Rulemaking,* 16 FCC Rcd 22843, 22853 ¶32 (2001) ("the justification for this documentation is self-evident. An employment unit must be able to demonstrate that it in fact took the steps required by our rules[.]")

[30] For example, the NAB identified one EEO compliance cost as "retain dated copies of all job vacancy announcements, or detailed information on persons not hired for a position, among other

> Broadcasting is highly labor-intensive. Apart from signal strength, the only attribute broadcasters can use to distinguish themselves from one another is human capital. As a heritage business seeking to compete with online and satellite services, the American radio industry must operate with the highest standards and procedures of professional personnel management. Every professional broadcast operator routinely observes these basic practices – internal monitoring to ensure nondiscrimination, broad online and community-based outreach, and thorough recordkeeping. Any manager not observing these basic personnel practices is guilty of malpractice and should be replaced.

Jones November 28, 2019 Declaration.

Only one EEO-specific, non-routine expense was mentioned by any party: hiring legal counsel. ACA November 4, 2019 Reply Comments, p. 3; *see also* Clarke November 4, 2019 Reply Comments, p. 4. But if a broadcaster or MVPD is complying with the rule, counsel is rarely, if ever needed. The EEO rule, and the audit questions, are not so esoteric that counsel would be required to assist a compliant licensee. That said, however, it would be desirable to have the EEO Staff produce a compliance guide and related materials that would make it easier for non-lawyers on station staffs to handle all EEO matters that might arise. *See* p. 19 *infra* (noting that no party has objected to this MMTC proposal).

VI. More Frequent Audits, Site-Visit Audits, And Audits When The EEOC Found Probable Cause, Would Serve As Powerful Deterrents To Discrimination.

The NAB maintained that the low number of NALs in response to audits justifies cutting back on the audit program. NAB September 20, 2019 Comments, pp. 4, 8. Yet as MMTC has pointed out, the rarity of proven violations of a law is not proof that there is too much prescriptive or proscriptive law enforcement. No one would cut back on clean water, clean air, food safety, or airline safety enforcement audits on the premise that these audits rarely apprehend violators. The small number of EEO NALs could mean (1) that the audit program is a powerful deterrent to wrongdoing; or (2) the audit bar is so low that it fails to catch violators; or (3) over time, violators have figured out how to work the system so as to mask their noncompliance; or (4) that the EEO Staff lacks the data sets necessary to determine whether the licensee discriminated in recruitment. *See* pp. 9-13 *supra.* Or it could mean a combination of these things. Non-enforcement rarely equates to nondiscrimination. *See* MMTC October 11, 2019 Letter, p. 2.

The STBAs opposed MMTC's request for an authorization to the EEO Staff to conduct site visits in appropriate cases. *See* STBAs' November 4, 2019 Reply Comments, p. 22. The STBAs believe that on-site audits would reveal no useful information. *Id.* That is incorrect. Site visits are common tools in regulatory enforcement. A compliance officer making a site visit can get to the bottom of allegations of illegality by interviewing staff members and others regarding promotions, recruitment, work assignments, hiring criteria, working conditions, and discipline,

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required information, but for the audit mandate." See NAB November 4, 2019 Reply Comments, p. 9 and n. 38. But these are just *storage* costs. Simply not throwing documents in the trash imposes almost zero expense on a business.

and to verify data already submitted. In this way, EEO site visits would enable the Commission to "trust but verify."

The STBAs preferred for the FCC *not* to know when the EEOC finds probable cause, even though such a finding would be highly probative of whether the employer engaged in intentional discrimination. *See* STBAs' November 4, 2019 Reply Comments, p. 25. The STBAs suggested that, after all, a court might look at the allegations. *Id.* But that is rare, because nearly all civil litigation settles.[31] The EEO Supporters' proposal would close that loophole by giving the FCC the information it needs to do its job.

VII. It Is Not Unreasonable For The Commission To Require Its Licensees To Check A Box To Certify That Broadcasters' Job Postings Are Not A Sham.

The EEO Supporters recommended that licensees be expected to check a box affirming that they did not fill positions before they issue a (false) online posting of the job's supposed availability. *See* EEOS September 20, 2019 Comments, pp. 22-23. In this way, a general manager would no longer be at liberty to advise a favored, non-minority candidate that "the job is going to be yours, but to satisfy the FCC, we have to go through the motions of an internet posting first. So we can't announce you as the selectee just yet."

If there is any doubt that this practice persists, here is what diversity experts say about it:

Dr. Janette Dates, Howard School of Communications Dean Emerita:

> Unfortunately, in recent years it has become very difficult for HBCUs to place even their strong students in broadcasting jobs. To be sure, the industry may be shrinking in size due to competition from other sources and distributors of content. But now even the top students often are no longer able to land entry-level jobs. We cannot rule out the likeliest explanation, which is that jobs are being set aside for pre-selected must-hire "friends and family" candidates. These special selectees are often less qualified than the candidates that HBCUs have trained and are trying to place. The "friends and family" pipeline is notorious as a route to avoid civil rights compliance.
>
> Repeatedly I have been informed, often by my former students, of instances in which they were not awarded an advertised position, and instead someone with inferior qualifications was selected.

[31] *See, e.g.,* Eisenberg, Theodore and Lanvers, Charlotte, "What is the Settlement Rate and Why Should We Care? (2009) Cornell Law Faculty Publications, Paper 203; *see also* Phoenix Business Journal, Government survey shows 97 percent of civil cases settled (May 30, 2004), available at https://www.bizjournals.com/phoenix/stories/2004/05/31/newscolumn5.html (last visited November 29, 2019).

> There is only one logical explanation for this: the "winning" candidate never had to compete for the job because they had been pre-selected before the job was even posted - if it was posted at all.

Dates November 27, 2019 Declaration, p. 2.

Dr. Valerie White, Chairwoman of the Black College Communication Association:

> I am so tired of having to console my mentees and protégés when they find themselves not able to secure jobs, or advance their careers, even as less qualified candidates are given entry-level and mid-level positions. Often the jobs had been filled before my students heard about them, or even before the openings were posted online.

White November 26, 2019 Declaration.

Robert Neal, Founder, President and Executive Director of the International Black Broadcasters Association:

> I have lost track of how many times my former trainees never heard of a job until after it was filled. Even worse, our candidates had superior qualifications but an "inside" candidate with lesser qualifications was chosen instead. In these instances, had the selectee had to compete on the merits with applicants of color, there is no way they would have been chosen.
>
> The only explanation for broadcasters' hiring inferior candidates is that the ultimate selectee had been pre-selected before the broadcast company went through the motions of faking broad outreach so as to appear EEO-compliant to the FCC. The pre-posting selectee never had to compete on the merits with those who responded to online or other widely disseminated postings. Because of this practice, highly qualified African American candidates had no chance of landing certain jobs. Their job applications were dead on arrival, and they wasted their time applying for them.
>
> Since no broadcast manager will admit to this kind of misconduct, the only cure is to require licensees to declare, under penalty of perjury, that they have ensured that their stations' online postings were not preceded by the secret selection of a favored candidate recruited through word-of-mouth.
>
> In this way, the Commission can shut down the practice of fraudulent, post-selection job postings – ads posted online or otherwise only for the purpose of falsely appearing to have complied with the FCC's broad recruitment requirement. Requiring broadcast licensees to certify that their online postings were genuine would be one of the most-needed EEO enforcement reforms the FCC could accomplish. The EEO Supporters, to which IBBA belongs, have proposed this straightforward solution to what is an elusive and complex problem.

Neal November 25, 2019 Declaration.

The NAB claimed that 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." NAB November 4, 2019 Reply Comments, p. 3. Actually, there is every incentive for a discriminator to behave in this way, as long as it is never going to have to affirm, to the Commission, under penalty of perjury, that it did *not* circumvent the EEO rule in this manner. For its part, ACA asserted without evidence that "its members do not engage in such discriminatory 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[.]" *See* ACA November 4, 2019 Reply Comments, p. 8. The ACA is half right: this practice is indeed contrary to the spirit of the rule. Unfortunately, the Commission presently has no way to verify compliance.

If the NAB and ACA are so certain that their members don't engage in this practice, they should not be heard to object to having broadcasters and MVPDs simply check a box to affirm that. That step would cost nothing and require no more than a minute of a licensee's time.

VIII. Investigating Discrimination In Radio Journalism Does Not Implicate The First Amendment.

For 10 years, MMTC has had pending a request for a Section 403 investigation into minority journalists' exclusion from the employment ranks of radio stations.[32] *See* EEOS September 20, 2019 Comments, pp. 28-29. Opposing this request, the STBAs asserted that it is "stunning" to suggest that an investigation of the staffing of radio news "has no First Amendment implications." *See* STBAs' November 4, 2019 Reply Comments, p. 17; *see also id*., p. 27.

In fact there is no First Amendment issue here. We are seeking an examination of *employment discrimination* in radio news – not of the *content* of the news itself. As the EEO Supporters declared, "[t]he inquiry should carefully avoid any detour into the content that is being broadcast. Instead, it should focus only on the extent to which the systemic exclusion of minorities from radio news jobs has been caused by discrimination on the basis of race." EEOS September 20, 2019 Comments, p. 29.

An employer is not immune from nondiscrimination enforcement simply because it is in the business of producing or distributing content. Otherwise, film studios, bookstores, and universities would be immune from enforcement of Title VII.

[32] Section 403 (47 U.S.C. §403) provides the Commission with "full authority and power… to institute an inquiry, on its own motion, in any case and as to any matter…relating to the enforcement of any of the provisions of this Act." Such investigations are typically assigned to an ALJ, who may authorize full discovery. The investigation may produce a report that becomes a guide to future legislation or action by another agency.

The Commission actually does a superb job keeping content issues out of broadcast adjudications. For example, the Commission eschewed any discussion of content when it designated the Sinclair/Tribune merger proposal for hearing.[33] And recently, the Commission designated a hearing in a real party in interest case without succumbing to the temptation to even mention that the applicant's programming featured white supremacy and bigotry.[34]

There is certainly good reason to inquire into EEO in radio journalism. As can be seen from RTDNA data, minority employment levels are low and all over the map for radio stations, while television stations do somewhat better. *See* EEOS September 20, 2019 Comments, p. 12 and n. 22 (citing RTDNA data that shows that that among stations offering news in 2019, minority employment in TV news departments stood at 25.9% with radio news departments' minority employment at only 14.5%; minority TV news directors at 17.2% but minority radio news directors at 8.2%; and minority TV general managers at 10.0% but minority radio general managers at 7.2%). Why are radio's numbers so low? And why is that acceptable? As Dr. Dates explained:

> On-air representation of African Americans in television tends to be higher than off-air representation, or of African Americans' representation in the radio industry (except at African American owned or programmed stations). This pattern, documented over the years for RTDNA by Hofstra University's Dr. Robert Papper, cannot be squared with the broad availability of well-trained African Americans available for broadcast employment at all levels.

Dates November 27, 2019 Declaration, p. 2.

IX. No Party Opposed The Outreach Measures Recommended By MMTC. They May Be Undertaken Immediately.

In a September 3, 2019 letter to Ms. Harold, MMTC recommended that the Commission take these outreach steps to educate and inform the public and broadcasters about the EEO rule and related policies:

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[33] *See Applications of Tribune Media Company (Transferor) and Sinclair Broadcast Group, Inc. (Transferee), MB Docket No. 17-179, Hearing Designation Order*, 33 FCC Rcd 6830 (2018) (subsequent history omitted).

[34] *See Entertainment Media Trust, Dennis J. Watkins, Trustee, MB Docket No. 19-156, Hearing Designation Order and Notice of Opportunity for Hearing,* 34 FCC Rcd ____, DA 19-506 (June 5, 2019).

- Issue a public notice reminding the public of the agency's whistleblower and anti-retaliation protections;
- Install a secure whistleblower phone line;
- Publish an EEO Primer, Best Practices, FAQs, and Model EEO Programs.

MMTC September 3, 2019 Letter, pp. 3-5. As the ACA noted, no party opposed these steps. *See* ACA November 4, 2019 Reply Comments, p. 11 (pointing out that no party opposed having the Commission "publicize its EEO whistleblower and anti-retaliation rules, and release other non-binding guidance on existing EEO compliance obligations[.]") Some of MMTC's proposals drew affirmative support. *See, e.g.*, Clarke November 4, 2019 Reply Comments, p. 6 (manifesting its support for a "straightforward, easy-to-use compliance guide" that would be "particularly helpful for those small broadcasters who lack the resources to consult outside counsel on a regular basis"); *see also* NAB September 20, 2019 Comments at 3 n. 11 (endorsing MMTC proposals for the Commission to publish EEO educational materials.

Conclusion

Media diversity experts agree that the Commission should strengthen EEO enforcement. As Howard University Communications Dean Emerita Dr. Jannette Dates put it, "stronger EEO enforcement would certainly help our HBCUs do their job of educating 'the best of the best' to work in the nation's most influential industries." Dates November 27, 2019 Declaration, p. 3. BCCA Chair Dr. Valerie White added that "[m]ore aggressive EEO enforcement is necessary to help our HBCUs maintain a highly motivated pipeline of superbly qualified broadcasters to work in an industry as critical to democracy as broadcasting." White November 26, 2019 Declaration. And IBBA President Robert Neal concluded that his organization's members "would experience diminished opportunities for career advancement if the FCC fails to step up EEO enforcement so as to prevent and proscribe racial discrimination in the broadcasting industry." Neal November 25, 2019 Declaration, p.1.

Thus, we recommend that in any future iterations of this debate, the parties should focus on these three fundamental questions, each of which corresponds to the Commission's stated goals for this proceeding:[35]

1. How can the Commission begin to identify discrimination and ensure compliance?

2. How can the Commission better educate and inform the public and its licensees regarding EEO program operations?

3. What else can the Commission do, right now, to finally and successfully finish the job of opening, to all, the doors of the nation's most influential industries – ones that build their businesses on the use of the public's licensed airwaves?

[35] *See* NPRM, p. 3 (seeking comment on "the Commission's track record on EEO enforcement and whether the agency should make improvements to EEO compliance and enforcement.")

Respectfully submitted,

David Honig

David Honig
President Emeritus and Senior Advisor
Multicultural Media, Telecom and Internet Council

Of Counsel:

Danielle A. Davis
Tech and Telecom Fellow
National Council of Negro Women

cc: Hon. Ajit Pai
Hon. Jessica Rosenworcel
Hon. Michael O'Rielly
Hon. Brendan Carr
Hon. Geoffrey Starks
Michelle Carey, Esq.
Radhika Karmarkar, Esq.
Lewis Pulley, Esq.
Matthew Berry, Esq.
Alexander Sanjenis, Esq.
Kate Black
Joel Miller, Esq.
Ben Arden, Esq.
Evan Swarztrauber
Michael Scurato, Esq.
Rick Kaplan, Esq.
Jerianne Timmerman, Esq.
Larry Walke, Esq.
Thomas Cohen, Esq.
J. Bradford Currier, Esq.
Jeffrey Scarpelli
John Garziglia, Esq.
Gregg P. Skall, Esq.
Sally A. Buckman, Esq.
Nancy A. Ory, Esq.
F. Scott Pippin, Esq.
Rick Chessen, Esq.
Radhika Bhat, Esq.
Paul S. Rotella

[continued on p. 22]

Scott R. Flick, Esq.
Lauren Lynch Flick, Esq.
Cheryl Leanza, Esq.
Kate Ruane, Esq.
Corrine Yu, Esq.

Attachments:

- Declaration of Dr. Jannette Dates, November 27, 2019
- Declaration of Dr. Valerie White, November 26, 2019
- Declaration of Robert Neal, November 25, 2019
- Declaration of Zemira Jones, November 28, 2019