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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**BY HAND DELIVERY**

Roy Stewart, Chief
Renee Licht, Deputy Chief
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 314
Washington, D.C. 20554

Re: MM Docket No. 96-16, Negotiated Rulemaking for Streamlining EEO Rules

Dear Mr. Stewart and Ms. Licht:

By this letter, American Women in Radio & Television, Inc. ("AWRT") provides additional information and support for its request that the Commission transform its current rulemaking proceeding regarding the streamlining of the Commission's equal employment opportunity ("EEO") rules into a negotiated rulemaking. As a follow up to our meeting last month, AWRT has researched the value and appropriateness of such an approach under the Negotiated Rulemaking Act of 1990, 5 U.S.C. § 561, *et seq.*, and talked with other Commission staff members regarding the use of negotiated rulemakings. Based upon this research, AWRT continues to believe that a negotiated rulemaking is a reasonable and valuable approach to developing a consensus between broadcasters and minority and women's groups on appropriate means to streamlining the EEO process. In this letter, we review: (i) the intended use of negotiated rulemakings as determined by Congress, (ii) the process for convening and using a negotiated rulemaking, and (iii) the FCC's successful use of a negotiated rulemaking process.

## I. Congressional Goals for Negotiated Rulemakings

Significantly, Congressional findings surrounding the adoption of the Negotiated Rulemaking Act cite circumstances that appear to parallel those presented to the Commission in its current EEO rulemaking. Specifically, Congress found in adopting the Negotiated Rulemaking Act:

- Agencies currently use rulemaking procedures that may discourage the affected parties with different interests to assume conflicting and antagonistic positions and to engage in expensive and time-consuming litigation over agency rules.

- Adversarial rulemaking deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperating in developing and reaching agreement on a rule. It also deprives them of the benefits of shared information, knowledge, expertise and technical abilities possessed by the affected third parties.

- Negotiated rulemaking, in which the parties who will be significantly affected by a rule participate in the development of a rule, can provide significant advantages over adversarial rulemaking.

- Negotiated rulemaking can increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court. It may also shorten the amount of time needed to issue final rules.

## II. The Negotiated Rulemaking Process

Should the Commission choose to proceed with a negotiated rulemaking, the process could be initiated and completed in the following steps:

1. *A Finding a Negotiated Rulemaking Committee is in the Public Interest*. The Chairman, as the head of the FCC, would need to determine that it is in the public interest for the Commission to convene a negotiated rulemaking committee to develop rules to streamline the EEO rules. The finding must be based on the following seven statutory criteria, all of which we believe are met in the EEO context: (1) that there is a need for a rule (the Commission used this process to revise its rules in the hearing compatibility docket); (2) there are a limited number of identifiable interests that will be significantly affected by the rule; (3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who are willing to negotiate in good faith; (4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time; (5) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and issuance of final rules; (6) the agency has adequate resources and is willing to commit such resources, including technical assistance to the committee; and (7) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.

2. *Public Notice Announcing Intention to Establish a Committee*. Once the determination has been made to convene a negotiated rulemaking committee, the Commission would need to issue a public notice announcing this intention. The public notice should also: (1) include a description of the subject and scope of the rules to be developed and issues to be considered; (2) identify those interests likely to be significantly affected; (3) list proposed persons for the committee from the affected interests and the FCC; (4) specify the proposed agenda and target date for FCC issuance of a proposal based on the committee's report; (5) describe the administrative support provided by the FCC; and (6) solicit comment and explain the process for requesting appointment to the committee. Comments on the public notice should be accepted for 30 days.

3. *Establish the Committee*. After the public notice period, and based on a determination that a negotiated rulemaking committee can adequately represent the affected interests and that it is feasible and appropriate for this rulemaking, the Committee can be established. The Negotiated Rulemaking Act provides for a maximum of 25 committee members unless the Commission determines a greater number is necessary. The Commission should have one committee member who represents the Commission's interests. A facilitator also is required who may or may not come from within the Commission.

4. *Committee Negotiation*. Based on the agenda and work plan developed by the Commission and the committee, the committee proceeds to work on the proposed rules and issues in an attempt to reach consensus. The statute defines consensus as unanimous, however, the committee may chose to define consensus as less than unanimous.

5. *Committee Reports to the Commission*. the work product of the committee is a report to the Commission with recommendations for proposed rules.

6. *The Commission Rulemaking Process is Triggered*. After the committee submits its report to the Commission, the Commission can adopt an NPRM or Further NPRM and adopt rules that, based on the work of the negotiated rulemaking committee, should have strong support.

Finally, the Commission's decision to establish a negotiated rulemaking committee is not subject to judicial review although final rules adopted by the Commission, as always, may be challenged.

## III. The Commission's Success in Negotiated Rulemakings

The Commission used the process of convening a negotiated rulemaking committee to develop consensus and a recommendation for rules to address the issue of hearing aid compatibility of wireline phones in particular establishments. CC Docket No. 87-124. The negotiated rulemaking committee was convened in that proceeding after suspension of several of the Commission's rules in April 1993. According to Linda Dubroff, the FCC's representative on the Committee, the interested parties to the rulemaking also came to the rulemaking with fairly entrenched and divergent position on the issues. The members of the committee included those representing the hearing disabled, hotel representatives and equipment manufacturers. Ms. Dubroff served as the FCC's representative. In addition, an FCC staff member, William Luther, served as the facilitator for the negotiated rulemaking committee. One additional FCC staff member handled the administrative side of the committee's work. In a period of 8 weeks, the committee met and reached full consensus on the entire work program. In August 1995, the negotiated rulemaking committee's report was presented to the Commission with proposed new rules. In November 1995, the Commission adopted and released a Notice of Proposed Rulemaking. The Commission's Report and Order was adopted in June, 1996. The process worked well in an area otherwise bound by controversy and litigation. According to Ms. Dubroff, the success of the committee was aided by a specifically defined and focused work plan, the skills of the facilitator and the commitment of expert FCC resources. There were some specific representatives not chosen for the committee, however, no one appears to have challenged the rules on that basis. I would recommend that as you proceed to consider this approach, you speak with Ms. Dubroff about the Commission's successful experience with a negotiated rulemaking in this proceeding.

Based on our further investigation of the negotiated rulemaking process, AWRT reiterates its request and strong support for the FCC to establish a negotiated rulemaking committee in the EEO proceeding.

Sincerely,

Shelley L. Spencer

cc: William F. Caton
Phyllis Ingram (President, AWRT)
Terri Dickerson (Executive Director, AWRT)
Linda Eckard (Director, AWRT)

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