

Minority Media and Telecommunications Council

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May 22, 2009

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Dear Ms. Dortch:

RE: Notice of Ex Parte Communication
MM Docket No. 98-204 (Broadcast Equal Employment Opportunity (“EEO”))

This Notice reports on a May 22, 2009 telephone conversation with Jamila Bess Johnson, Legal Advisor to the Chairman, Marilyn Sonn and William Scher of the Office of General Counsel, MMTC’s John W. Jones Fellow Joycelyn James, and myself.

The purpose of our conversation was to discuss proposals that the Commission treat the data captured on Form 395-B as confidential in nature and not freely available to the public. MMTC vehemently opposes such a proposal and sees this as nothing more than a means for those broadcasters who are not adhering to the Commission’s rules requiring broad outreach to continue to engage in discriminatory behavior and break the agency’s EEO rules. As discussed on our call, while the Commission cannot use the data for unconstitutional purposes,¹ the Supreme Court has made it clear that government agencies may collect data for permissible reasons such as tracking the progress of its goals and objectives related to the data.²

The raw data contained on Form 395-B may not be treated as “outputs” to set forth a prima facie case of discrimination; however, it may be used in a legitimate fashion to investigate layers of a

¹ See Lutheran Church/Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998), petition for rehearing denied, 154 F.3d 487, petition for rehearing en banc denied, 154 F.3d 494 (D.C. Cir. 1998); see also MD/DC/DE Broadcasters Association v. FCC, 236 F.3d 13 (D.C. Cir. 2001), petition for rehearing and rehearing en banc denied, 253 F.3d 732 (D.C. Cir. 2001), cert. denied sub nom., MMTC v. FCC, 534 U.S. 1113 (2002).

² See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 127 S.Ct. 2738, 2792 (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.”).

discriminatory scheme. This could be accomplished by analyzing stations that violate the Commission's rules by using word of mouth recruitment, then drilling down with Form 395 data to determine if this impermissible method of recruitment is performed by a homogeneous workforce, enabling employment discrimination. That is the primary method by which discrimination is practiced, and the Commission has sanctioned it several times in the past. In this context, Form 395-B data is treated as an input or part of the discriminatory scheme, not as an output or result of such a scheme. It is clear that the Commission would dismiss complaints based solely on the raw data or results of Form 395-B, and we do not object to a very strict dismissal procedure (same-day screening) to avoid any possibility that the data could be misused to "pressure" broadcasters to hire impermissibly. The Commission must be clear in properly stating that it is within its power to use Form 395-B data in a constitutionally permissible manner in investigating and sanctioning the inputs and root causes of discrimination in broadcast recruitment and employment.

Respectfully submitted,

David Honig

David Honig
Executive Director