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June 29, 2010

Hon. Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street N.W.
Washington, D.C. 20554

RE: Request for Three Month Suspension of the Broadcast EEO Rule Upon the Passage of a Year With No EEO Enforcement (MB Docket No. 98-204)

Dear Chairman Genachowski:

As the leading civil rights organization in the media and telecommunications industries, we herewith take an extraordinary step: we ask the Commission to direct the Media Bureau suspend enforcement of its broadcast equal employment opportunity (EEO) rules, 47 C.F.R. §73.2080 et seq.

Today marks the passage of a full year since Commission last issued an EEO decision.¹ On June 29, 2009, three such decisions were reached – and those decisions failed to advance equal opportunity, since each was leveled against a diverse broadcaster for technical rule violations.²

¹ See EEO Headlines, Media Bureau EEO page, FCC website, available at <http://www.fcc.gov/mb/policy/eoo/> (last visited June 28, 2010). This year there were two forfeiture orders based on public file violations that also included missing EEO information. See Gaston College, Forfeiture Order, 25 FCC Rcd 982 (2010); Virgin Islands Public Television, Forfeiture Order, 25 FCC Rcd 1158 (2010).

² Cox Radio, Inc., NAL, 24 FCCs Rcd 8889, 8890 ¶3, 8891 ¶9 (2009) (\$9,000 forfeiture for failure to self-assess or recruit widely for eight positions. Two of the four sanctioned stations carry African American programming.); Entravision Holdings, NAL, 24 FCC Rcd 8894 8895 ¶3, 8897 ¶9 (2009) (\$12,000 forfeiture for failure to self-assess or recruit widely for four positions. Entravision is a Spanish-language media company and the sanctioned stations, located near the Mexican border, broadcast in Spanish.); CMP Houston-KC, NAL, 24 FCC Rcd 8900, 8901 ¶3, 8902 ¶7 (2009) (\$3,000 forfeiture for failure to self-assess. CMP Houston's five-station Kansas City cluster includes the market-dominant African American programmed station.) None of the stations sanctioned in 2009 recruited primarily by word-of-mouth from a homogeneous workplace – a practice the Commission has long recognized to be inherently discriminatory. See, e.g., Jacor Broadcasting Corp., Memorandum Opinion and Order, 12 FCC Rcd 7934, 7940 ¶14 (1998) (“Jacor”). Heterogeneous staffs that excessively disseminate vacancy notices by word-of-mouth might be recruiting inefficiently, but such recruitment generally reaches diverse applicants. It is not discriminatory.

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Whether measured in caseload or in forfeiture amounts, EEO enforcement has dropped to one percent (1%) of where it stood from 1994 – 1997.³

The last twelve-month period in which there was no EEO enforcement was June 1968 through June 1969 - before the Commission adopted its EEO rule.⁴

The decline in EEO enforcement cannot be attributed to court decisions.⁵ Instead they are an indication that EEO has been a low priority at the Commission for far too long. Here are the facts:

- MMTC's analysis of Radio-Television News Directors Association (RTNDA) data shows that by 2006, minorities had virtually been purged from English language, non-minority owned radio journalism.⁶ The Commission has not responded to this crisis.

³ In 2008, MMTC published the results of EEO enforcement analysis:

- 1994-1997: 251 cases decided; 86 of which resulted in forfeitures totaling \$2,149,000, or \$312,250 per year.
- 2004-2007: 10 cases decided, eight of which resulted in forfeitures totaling \$97,000, or \$24,250 per year.

See Comments of the Minority Media and Telecommunications Council in Response to the Third Report and Order and Fourth Notice of Proposed Rulemaking, MM Docket No. 98-204 (May 22, 2008), p. 8 (citing David Honig, "Are the Current FCC EEO Rules Effective?" FCBA CLE Program, February 12, 2008), p. 4 ("MMTC 2008 EEO Comments"). In 2008, EEO enforcement levels increased slightly, but in 2009 EEO enforcement went almost to zero:

- 2008: 11 cases decided, six of which resulted in forfeitures totaling \$71,000.
- 2009: three cases decided, resulting in forfeitures totaling \$24,000.

⁴ See Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, 18 FCC2d 240 (June 4, 1969).

⁵ The decline to nearly zero in FCC EEO enforcement cannot be blamed on MD/DC/DE Broadcasters Ass'n. v. FCC, 236 F.3d 13, 22 (D.C. Cir.), rehearing denied, 253 F.3d 732 (D.C. Cir. 2001), cert. denied sub nom. MMTC v. MD/DC/DE Broadcasters Ass'n., 534 U.S. 1113 (2002). While wrongly decided, this case only constrained some of the methods used in the Commission's program – not the program's intensity of effort, resources and initiative, or its ability to root out and prosecute cases of intentional discrimination.

⁶ See MMTC 2008 EEO Comments, pp. 7-8 (using data from B. Papper, "Women and Minorities in the Newsroom," RTNDA Communicator, July/August 2007, at 20, available at http://www.rtna.org/media/pdfs/communicator/2007/julaug/20-25_Survey_Communicator.pdf (last visited May 20, 2008). See also Bob Papper, Women In TV News At A Record High But Minorities Drop, RTNDA, available at

- This is the tenth consecutive year with no longitudinal FCC EEO reporting (Form 395).⁷ Data-driven analysis should be the earmark of FCC policymaking,⁸ and your administration's record on science in the public sphere been first rate. Yet the 48 national organizations seeking EEO reports have received none since 2000.
- With the broadcasting industry steadily shrinking, in 2004 the FCC Diversity Advisory Committee recommended that EEO compliance begin to focus more on retention than recruitment.⁹ The Commission has yet to act on this recommendation, which enjoyed unanimous industry and public interest group support.
- The EEO audit program is a meaningless exercise in paperwork and postage. Virtually all licensees pass. The Commission has not found that a single station audited engaged in discrimination; thus, discriminators have been passing their audits with ease. A 2009 MMTTC study of 20 randomly selected, racially diverse radio markets found that 40 out of 141 reporting units (28.4%) did not use minority sources – including, e.g., seven of the fourteen reporting licensees in Riverside-San Bernadino (population 52.2% African American and Hispanic). Yet the FCC's audits – over the course of five years – have identified at only 24 licensees in the nation that supposedly were not compliant. If there is a saving grace, it is that a station only experiences one of these audits once every 20 years.¹⁰

<http://www.rtdna.org/media/pdfs/Women%20and%20Minorities%20Survey1.pdf> (last visited June 25, 2010).

⁷ Although the Office of Management and Budget (OMB) has granted its approval for the Commission's revised Form 395, collection of Form 395 data has been suspended due to unresolved questions of data confidentiality. See Notice of Public Information Collections Approved by the Office of Management and Budget (OMB), 73 FR 62991 (Oct. 22, 2008). See also Review of the Commission's Broadcast and Cable Equal Opportunity Rules and Policies (Third R&O and Fourth NPRM), 19 FCC Rcd 9973 ¶9 (2004).

⁸ See MMTTC 2008 EEO Comments, pp. 6-10. See also Philip M. Napoli, Toward a Federal Data Agenda for Communications Policymaking, 16 CommLaw Conspectus 53, 63-66 (2007).

⁹ See Recommendation for a Regulatory Initiative for Career Advancement (Dec. 10, 2004), available at <http://www.fcc.gov/DiversityFAC/recommendations.html> (follow link "EEO Rule") (last visited June 25, 2010).

¹⁰ See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second R&O and Third NPRM), 17 FCC Rcd 24018, 24067 ¶155 (2002) (announcing that the Commission would "...monitor EEO compliance through random audits and targeted investigations resulting from information received as to possible violations. Each year we will select for audit approximately five percent of all licensees in the radio and television services, ensuring that, even though the number of radio licensees is significantly larger than television licensees, both services are represented in the audit process.") Two years after this Order was adopted, Commissioners Copps and Adelstein issued a joint statement noting their

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- Disproportionately, as noted above, the stations the Commission has selected for sanctions are among the most diverse in the industry.¹¹ Many are minority owned or controlled. Yet they failed to meet obscure paperwork requirements, and for that, heavy fines were levied upon them.
- In 2007-2008, four of the 16 cases went unprosecuted because the stations' licenses had already been renewed,¹² and two more cases went unprosecuted because the Commission missed its own statute of limitations.¹³

In short, FCC EEO enforcement has no apparent mission, no focus, no data for evaluation, and no results except sanctioning the innocent while ignoring the guilty. Such a program only creates the false security that comes when the constable is on duty yet asleep.

We therefore ask that the Commission immediately suspend EEO enforcement for three months and, during that period of suspension, revitalize the program and reaffirm the agency's commitment to ensuring opportunities for minorities and women in broadcasting and all of the Commission's regulated industries. We recommend that the Commission promptly take these ten specific steps:

concerns about enforcement of these provisions: "The Commission stated that it would audit five percent of all licensees each year in order to monitor compliance with our rules. Yet, even as this [2004] Order is adopted, the Commission has yet to conduct a single audit." See Joint Dissenting Statement of Commissioners Michael J. Copps and Jonathan S. Adelstein Approving In Part and Dissenting In Part, Third R&O and Fourth NPRM, 19 FCC Rcd at 9973.

¹¹ See Puerto Rico Public Broadcasting, 23 FCC Rcd 18418 (Dec. 30, 2008), Urban Radio, 23 FCC Rcd 18453 (Dec. 30, 2008), Liberman Television of Dallas License Corp., 22 FCC Rcd 2032 (Feb. 9, 2007), and Emmis Television License, LLC, 20 FCC Rcd 13860 (Aug. 26, 2005; erratum Sept. 21, 2005). The licensees in the first three of these cases are minority controlled, and the licensee in Emmis operated, in Hawaii, possibly the most racially diverse television stations in the nation.

¹² See Cumulus Licensing LLC, 23 FCC Rcd 4471 (March 25, 2008) (admonished because the EEO violations "...occurred during the prior license term and the stations' renewal applications have since been granted..."); Entravision Holdings, 23 FCC Rcd 4477 (March 25, 2008) (to the same effect); Seehafer Broadcasting Corp., 23 FCC Rcd 3504 (March 6, 2008) (to the same effect), Roser Communications Network, Inc., 23 FCC Rcd 3507 (March 6, 2008) (to the same effect).

¹³ RCN Corporation, 22 FCC Rcd 11182 (June 22, 2007) (admonished because EEO violations "occurred more than 12 months ago"); Time Warner Cable, 22 FCC Rcd 4547 (March 7, 2007), modified, 22 FCC Rcd 6707 (April 3, 2007) ("But for the expiration of the one-year statute of limitations...[the Media Bureau] would propose a forfeiture against Time Warner for its violations....")

Ten Ways to Improve the FCC EEO Enforcement Program During its Suspension

1. Relocate the EEO staff from the Media Bureau to the Enforcement Bureau.
2. Triple the number of EEO enforcement staff – thus bringing it to mid-1990’s levels - and restore to the EEO enforcement unit the designation of being the “EEO Branch” instead of being the “EEO Staff.”
3. Revise the EEO rules to reflect the recommendations of the Diversity Committee.
4. Issue a Report and Order that adopts the Form 395 annual employment reports, and describes in plain language the proper and improper uses of Form 395 data.
5. Quintuple the percentage of licensees audited each year, conduct some of the audits with on-site review of hard-copy documentation, and revise the audit instrument so that it uncovers discriminatory applicant screening at the points of recruitment, interviewing and selection.
6. Ensure that the Office of General Counsel tracks EEO cases to ensure that the Commission never again misses a statute of limitations or renews a license while an EEO audit is underway.
7. Investigate whether licensees engage in the discriminatory practice of relying on word-of-mouth recruitment from a homogeneous workforce. First, determine the station’s recruitment practices; if recruitment is not broad, then obtain Form 395 data to determine whether the workforce from which recruitment is performed is homogeneous; if it is, designate the case for an evidentiary hearing by specifying a Jacor issue under 47 U.S.C. §309(e).
8. Ensure that broadcasters with very diverse workforces, who obviously had to have operated broad recruitment programs to generate such a workforce, are not penalized anymore under the EEO program.
9. Work with the Equal Employment Opportunity Commission (EEOC) to update the agencies’ Memorandum of Understanding¹⁴ to ensure that the FCC will special-audit licensees and report its findings to the EEOC and the public, and that when the EEOC receives a serious complaint of discrimination by a broadcaster, the FCC will special-audit the licensee. Further, when a standard FCC EEO audit uncovers possible discrimination, the FCC should notify the EEOC.

¹⁴ See Memorandum of Understanding between the Federal Communications Commission and the Equal Employment Opportunity Commission, 70 F.C.C. 2d 2320 (1978).

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10. Using the procedures authorized by 47 U.S.C. §403, including subpoena power, designate an ALJ to conduct an inquiry into how minorities came to be purged from radio journalism and why minority representation in television journalism is in decline. Upon receiving the results of the inquiry, the Commission should act promptly to ensure that systemic discrimination never again takes root in the broadcasting or any other FCC-regulated industry.

When tackling high priority issues, the Commission often creates multidisciplinary task forces comprised of senior staff.¹⁵ To reform EEO enforcement, an EEO Task Force should be empanelled to holistically examine the issue, consult with industry and civil rights organization stakeholders, and recommend a plan of action.

Finally, to ensure that the industry knows that the Administration is serious about civil rights enforcement, we respectfully request that you deliver a major address affirming your commitment to diversity in all communications industries.

We would welcome an opportunity to meet with you to explore these issues, and we look forward to the Commission's leadership in restoring the aggressive civil rights enforcement that will be needed to provide the American people with "a rapid, efficient, nationwide, and world-wide wire and radio communication service..." that is free from discrimination "on the basis of race, color, religion, national origin, or sex".¹⁶

Sincerely,



David Honig
President and Executive Director

¹⁵ See, e.g. Spectrum Policy Task Force, *News Release: Chairman Genachowski Announces Launch of Spectrum Task Force* (April 26, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297722A1.pdf, available at <http://www.fcc.gov/sptf/> (last visited June 28, 2010).

¹⁶ 47 U.S.C. §151 (as amended in the Telecommunications Act of 1996).