

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries)	MB Docket No. 19-177
)	
Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies)	MM Docket No. 98-204
)	
To the Commission		

REPLY COMMENTS OF THE EEO SUPPORTERS

David Honig
President Emeritus and Senior Advisor
Multicultural Media, Telecom and Internet Council
Convenors, EEO Supporters (*see Annex*)
1919 Pennsylvania Ave. N.W., Suite 725
Washington, DC 20006
(202) 332-0500
dhonig@mmtconline.org

Of Counsel:

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

November 4, 2019

Table of Contents

	<u>Page</u>
Summary and Introduction	1
I. EEO Data Should Be Obtained To Combat Intentional Discrimination And To Facilitate Research On Employment Trends and EEO Program Effectiveness.	1
II. Renewal Application Forms, And EEO Audits, Should Include A Certification That Job Postings Preceded Hiring Decisions	5
Annex: The EEO Supporters	7

Summary and Introduction

In the Comment round of this proceeding, the EEO Supporters¹ proposed that EEO data should be available to Commission staff as part of an investigation of whether a licensee engaged in race or gender discrimination in recruitment. An employer's staff's homogeneity may be relevant in such an investigation where the staff of a licensee that lacks diversity has been put to work by the licensee to perpetuate the lack of diversity by recruiting by "word of mouth." The EEO Supporters also urged the Commission to restore the use of Form 395-B data for scholarly research on EEO and other industry labor market trends. Neither 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. Any "pressure" on licensees is simply pressure to comply with FCC rules to "recruit broadly," *e.g.* by recruiting online or through community groups.

The EEO Supporters also have urged the Commission to require licensee certifications that job postings preceded hiring decisions. If a candidate has been pre-selected before broad recruitment commences, the broad recruitment process is meaningless inasmuch as minorities and women would not have learned of the opening in time to be considered for it. A check-the-box certification is an appropriate remedy for this form of recruitment discrimination.

I. EEO Data Should Be Obtained To Combat Intentional Discrimination And To Facilitate Research On Employment Trends and EEO Program Effectiveness.

The EEO Supporters proposed that EEO data—drawn from Form 395-B—should be available to the EEO Staff when they investigate cases of possible race or gender discrimination in recruitment.² In particular, this data would be available as part of an investigation of whether a licensee—which would already have been found to have violated its broad recruitment

¹ The views expressed in these Reply Comments are the institutional views of the commenting organizations, and are not intended to reflect the individual views of each officer, director, or member of these organizations. Thirty-eight national organizations support the September 20, 2019 Comments as well as these Reply Comments (*see* Annex).

² *See* Comments of EEO Supporters, September 20, 2019 ("EEO Supporters' September 20, 2019 Comments") at 13-18.

obligations—had also used its homogeneous staff members to perpetuate homogeneity by recruiting primarily by word-of-mouth.³

The EEO Supporters also urged the Commission to restore the use of Form 395-B data for scholarly research on EEO and other industry labor market trends.⁴

The NAB maintains that collecting data on a station staff’s homogeneity, even where most recruitment is performed by word-of-mouth (“WOM”), “would not withstand judicial scrutiny” because it would be “penalizing stations with staff that do not meet some undefined measure of diversity as so-called ‘intentional discriminators.’”⁵ Specifically, the NAB contends that giving the FCC EEO Staff access to data on broadcast station staff homogeneity would violate the *Lutheran Church*⁶ “prohibition against government mandates that pressure broadcasters to make race-conscious hiring decisions to avoid Commission enforcement.”⁷

The NAB’s contention is poorly taken. A licensee with a homogeneous staff could avoid sanctions simply by using the internet or community groups to seek job candidates. Thus, if there is

³ This practice, “cronism,” is the primary method by which discrimination occurs in FCC-regulated media industries. *See id.* at 14.

⁴ *Id.* at 18-22.

⁵ NAB September 20, 2019 Comments at 6. Intentional discrimination is inherently disqualifying; *see Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) and subsequent authorities. It is well established that intent can be discerned from such factors as (1) a discriminatory impact; (2) a historical background of discrimination; (3) the sequence of events leading up to the challenged practice; (4) procedural or substantive deviations from the normal decision-making process; and (5) contemporaneous viewpoints expressed by the decision-makers. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 25-68 (1977). Even where discrimination is not intentional, the Commission can impose especially strong sanctions, short of disqualification, where it finds (through a hearing, or before one) that the licensee should have known that its behavior violated the broad-recruitment rule in a manner that appeared calculated to prevent minorities or women from learning about job openings; *see, e.g., Jacor Broadcasting Corporation, Memorandum Opinion and Order*, 12 FCC Rcd 7934, 7940 ¶14 (1997) (holding that over-reliance on WOM recruitment may “have the effect of discriminating against qualified minority groups or females.”)

⁶ *Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998) (subsequent history omitted).

⁷ NAB September 20, 2019 Comments at 6.

any “pressure”, it is just pressure to take the simple and almost zero-cost step of recruiting broadly.⁸

It follows that the availability of racial data for civil rights enforcement is constitutionally non-controversial because it does not “pressure” licensees to treat members of any race or either gender differently from others because of their race or gender.⁹ It is only when homogeneous staff members are engaged as the licensee’s agents to implement a discriminatory and unlawful scheme that the fact of staff homogeneity becomes relevant. The homogeneity of the staff doing their regular jobs isn’t an issue. But when the staff, because of its homogeneity, is deployed by the licensee for the purpose of perpetuating the staff’s own composition, that is inherently discriminatory.¹⁰

Consequently, we deliberately have not set out a particular percentage of job positions that would manifest homogeneity. That is the kind of fact-specific evaluation the Commission’s expert EEO Staff would routinely make. In determining whether to issue and how to craft an NAL, the EEO Staff would necessarily consider the role of staff homogeneity in recruitment discrimination. This determination might involve, for example, consideration of how many employees, and of what race and gender, are deputized as the licensee’s job recruitment agents to seek out job candidates when that activity—WOM recruitment—is performed as the licensee’s

⁸ ACA Connects – America’s Communications Association (“ACA”) takes the position that “compliance with current Commission rules” (*i.e.*, recruiting other than by WOM) “would address many of the EEO Supporters’ concerns.” ACA September 20, 2019 Comments at 5-6. Of course that is partly true, but it does not address the regulatory consequences when an employer’s staff members, because of their homogeneity, are used as a tool of intentional discrimination. That happens when the homogeneous staff members’ friends and family members will be the only candidates advised of job openings.

⁹ See Remarks of Commissioner Geoffrey Starks, Media Institute Free Speech America Gala, Washington, DC, October 7, 2019, at 3 (“[C]ollecting and analyzing data is a core function of an expert agency, and having a better understanding of the industries that we regulate is also just common sense.”)

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. Further support for this approach is the fact that the statistical profile of the staff would not be reviewed by the Enforcement Bureau’s staff except where a licensee is already violating the broad recruitment obligation under the rule. But that said, this is important enough to merit an opinion by OGC before the agency proceeds. We will be glad to cooperate with the staff in exploring that approach.

primary recruitment methodology instead of broad recruitment. If recruitment is broad, the racial composition of the staff would not be relevant.¹¹

What is conspicuously absent from the NAB's presentation are any suggestions on what the Commission can do to combat "cronyism" or any other forms of discrimination.¹² Looking back at the nation's history, and particularly at the history of broadcasting pre-1968,¹³ it cannot be said that federal *non*-intervention, or federal looking-the-other-way, or federal cutbacks in civil rights enforcement, or civil rights "self-regulation," *ever* were effective strategies in combating race and gender discrimination. Aggressive, pro-active federal leadership was manifestly required and still is today. The question all parties, including the NAB, should be answering is "what can the Commission do, right now, to finally and successfully finish the job

¹¹ Racial data in an employment discrimination case may be relevant to additional factors beyond whether staff homogeneity is part of a discriminatory recruitment scheme. In EEO cases, racial employment data is most commonly used not by complainants, but by *respondents*, to deflect allegations that the respondent discriminates. If this data cannot be used to support a case of discrimination, it also cannot be used to defend against one.

¹² The NAB does not, nor could it, claim that broadcasting has overcome race and gender discrimination in employment. Indeed, what else but the persistence of discrimination could explain the vast gap between radio news employment and television news employment that shows up year after year in the RTDNA's annual statistical surveys? *See* data summarized in EEO Supporters' September 20, 2019 Comments (showing, *e.g.*, 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%). *See* EEO Supporters September 20, 2019 Comments at 12 n. 22 (citing RTDNA data)). Radio journalism requires no greater skill set than television journalism, but radio journalists, unlike many television journalists, are not visible to the public. Consequently, because of radio staff's inherent invisibility, intentional discriminators can much more easily act upon and conceal their discriminatory hiring proclivities in radio employment than in television employment. The EEO Supporters have sought a Section 403 investigation of this issue (*see* 47 U.S.C. §403). *See* EEO Supporters September 20, 2019 Comments at 28-28.

¹³ *See, especially, Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC2d 766, 769 (July 3, 1968) (citing the "National policy against discrimination in hiring" and finding that "we simply do not see how the Commission could make the public interest finding as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination—of violating the National policy.")

of opening, to all, the doors of the nation’s most influential industries?”¹⁴

II. Renewal Application Forms, And EEO Audits, Should Include A Certification That Job Postings Preceded Hiring Decisions.

The EEO Supporters have urged the Commission to amend renewal application forms, as well as EEO audit protocols, to include a check-the-box certification that job postings preceded hiring decisions.¹⁵ ACA opposes this proposal, declaring that “the solutions already exist in the Commission’s EEO rules” which “require cable entities to instruct personnel with hiring and promotional authority to consider minority and female candidates without discrimination.”¹⁶ ACA’s objection is misplaced, however. The “solution” to which it points is focused on preventing discrimination at the point of candidate *selection*, whereas the issue we are addressing is a form of discrimination in employee *recruitment*. If a candidate has been pre-selected before broad recruitment commences, recruitment is meaningless: there may have been no minority or women candidates to consider hiring. The remedy for this form of misconduct must be directed to recruitment reform.

¹⁴ The NAB is also incorrect in maintaining that the Commission cannot reinstate Form 395-B. See NAB September 20, 2019 Comments at 15. The NAB says 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.” But the fact that data—like automobiles, or broadcast licenses—can theoretically be “enabled” to be misused is no reason not to make them available for lawful and useful purposes.

¹⁵ See EEO Supporters September 20, 2019 Comments at 22-24.

¹⁶ ACA September 20, 2019 Comments at 6-7.

Respectfully submitted,

David Honig

David Honig
President Emeritus and Senior Advisor
Multicultural Media, Telecom and Internet Council
Convenors, EEO Supporters (*see Annex*)
1919 Pennsylvania Ave. N.W., Suite 725
Washington D.C. 20006
(202) 332-0500
dhonig@mmtconline.org

Of Counsel:

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

November 4, 2019

ANNEX

EEO Supporters

1. American Indians in Film and Television
2. Asian American Journalists Association
3. Black College Communication Association
4. Black Entertainment and Sports Lawyers Association
5. Blacks in Government
6. Dialogue on Diversity
7. Hispanic Federation
8. International Black Broadcasters Association
9. International Business Kids Foundation
10. Japanese American Citizens League
11. League of United Latin American Citizens
12. LGBT Technology Partnership and Institute
13. MANA, A National Latina Organization
14. Multicultural Media Correspondents Association
15. Multicultural Media, Telecom and Internet Council
16. National Action Network
17. National Asian American Coalition
18. National Association for the Advancement of Colored People
19. National Association of Black Journalists
20. National Association of Multicultural Digital Entrepreneurs
21. National Bar Association
22. National Black Caucus of State Legislators
23. National Coalition on Black Civic Participation
24. National Congress of Black Women
25. National Council of Negro Women
26. National Diversity Coalition
27. National Hispanic Caucus of State Legislators
28. National Hispanic Foundation for the Arts
29. National Newspaper Publishers Association
30. National Organization of Black County Officials
31. National Puerto Rican Chamber of Commerce
32. National Urban League
33. National Utilities Diversity Council
34. Native American Journalists Association
35. Rainbow PUSH Coalition
36. TechLatino: The National Association of Latinos in Information Sciences and Technology
37. Transformative Justice Coalition
38. Vision Maker Media