

May 29, 2018

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

Dear Ms. Dortch:

RE: Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2) (MB Docket No. 18-23); Modernization of Media Regulation Initiative (MB Docket No. 17-105); Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (MB Docket No. 98-204 and MB Docket No. 16-410)

This letter is submitted by the EEO Supporters¹ to briefly respond to five erroneous assertions contained in the May 15, 2018 Reply Comments of the National Association of Broadcasters ("NAB Reply") and in the May 15, 2018 Joint Reply Comments of the [49] Named State Broadcasters Associations ("NSBA Reply").

1. **Whether the EEO Supporters deserve to be heard.** The NAB believes that the EEO Supporters' Comments "should be disregarded as unrelated" to the NPRM. NAB Reply at 4; *see also* NSBA Reply at 3, 9-10. Yet the NPRM expressly invited comment on the FCC's "track record on EEO enforcement and how the agency can make improvements to EEO compliance and enforcement." The EEO Supporters' comments fall squarely within that request for comment. Our request for enforcement of the FCC's policy prohibiting the predominant use of word-of-mouth recruitment from homogenous workplaces, aka "cronyism," has been fully briefed since 2004 and is ripe for resolution.
2. **Whether our proposal to prosecute inherent discrimination creates new law.** According to the NAB, the EEO Supporters "ask the FCC to completely upend the substantive EEO rules." NAB Reply at 3. In fact, the EEO Supporters' Comments asked the FCC for *no changes* to the rules at all, or in the adjudicative² and rulemaking³ holdings that word-of-mouth recruitment from a homogeneous

¹ An additional organization has joined the EEO Supporters: the LGBT Technology Partnership and Institute. Consequently, there are now 34 EEO Supporters. Further, the name of one of the EEO Supporters was stated incorrectly in the April 30, 2018 Comments' Annex. The correct name is "US Black Chambers, Inc." A revised Annex is attached to this letter. If leave to file this letter is required, the same is respectfully requested.

² *See, e.g., Jacor Broadcasting Corporation*, 12 FCC Rcd 7934 (1997); *Walton Broadcasting, Inc.* (KIKX, Tucson, AZ) (Decision), 78 FCC 2d 857, recon. denied, 83 FCC 2d 440 (1980); *Triple R, Inc.*, 42 RR2d 907 (1979).

³ *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 (2002) ("2002 EEO Rules") ("[t]he new broadcast EEO Rule and modified EEO rules for MVPDs, adopted herein, emphasize outreach in recruitment to all qualified job candidates and ban discrimination on the

workplace is inherently discriminatory. Rather, we asked the Commission to *enforce* the rules by sanctioning those broadcasters who continue to engage in cronyism in violation of 47 C.F.R. §2080(a). That regulation, adopted July 3, 1968, unequivocally bans racial discrimination in broadcast employment,⁴ and so does the 2002 version now in effect.⁵

Similarly, NSBA is incorrect in asserting that the “broad outreach” requirement goes “solely to whether a station has engaged in Broad Outreach, and not to whether a station is...an ‘intentional discriminator.’” NSBA Reply at 4. Outreach that is not broad can be conducted in a discriminatory way. Examples abound of outreach performed in a manner that is inherently discriminatory: newspaper advertising that specifies that members of only one race may apply for a job or for housing;⁶ recruiting and placing students in schools in a manner that exacerbates the effects of past segregation;⁷ and placing radio advertising with “no urban” or “no Spanish” dictates to discourage patronage by Black or Hispanic customers.⁸ Certainly the enlightened broadcaster of today would not want to operate in a manner analogous to these odious practices.

3. **Whether word-of-mouth recruitment from a homogeneous workplace is inherently discriminatory.** NSBA asserts that “a station with the ‘right’ staff demographics ... may nonetheless be violating the Broad Outreach prong of the EEO Rule.” NSBA Reply at 5. Actually, a station with *any* demographics can violate the broad outreach prong of the EEO Rule. Further, if the station *also* engages primarily in word-of-mouth recruitment, such that minorities or women are likely to be unaware of job openings, then the station *also* has violated the “inherent discrimination” prong of the EEO Rule. While NSBA is technically correct that (on occasion) “[r]eliance solely on Word of Mouth recruiting may indicate a lack of Broad Outreach, but not intentional discrimination”, NSBA Reply at 5, the determination of whether reliance solely on word-of-mouth recruiting from a homogeneous workforce represents intentional (and not merely “inherent” yet unintentional) discrimination is the purpose of an evidentiary hearing, which must be

basis of race, color, religion, national origin or gender.”)

⁴ *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices*, Docket 18244, MO&O and NPRM, 13 FCC2d 766 (rel. July 3, 1968) (“1968 EEO Rules”).

⁵ 2002 EEO Rules, *supra*.

⁶ *See Pittsburgh Press v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).

⁷ *See Freeman v. Pitts*, 503 U.S. 467, 494 (1992).

⁸ *See Promoting Diversification of Ownership in the Broadcasting Services*, R&O and Third FNPRM, 23 FCC Rcd 5922, 5940-42 ¶¶43-50 (2008); *see also id.* at 5941-42, paras. 49-50 (requiring broadcasters renewing their licenses to certify that their advertising sales contracts contain nondiscrimination clauses that prohibit all forms of discrimination).

held if intentional discrimination cannot be ruled out. A licensee that intentionally discriminates is *prima facie* unqualified.⁹

4. **Whether prosecuting discriminators is unconstitutional.** The NAB claims that our proposal that the FCC prosecute intentional discriminators would place “unlawful pressure on station hiring decisions.” NAB Reply at 4. But unlike in *Lutheran Church/Mo. Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998) (subsequent history omitted), cited in the NSBA Comments at 6, our proposed “screen” is for predominant word-of-mouth recruitment, not staff composition. Only those broadcasters that unlawfully engaged in predominant word-of-mouth recruitment would be asked whether they also have a homogeneous staff and, thus, may be engaging in an inherently discriminatory recruitment practice.¹⁰ Thus, if there would be “pressure”, it is “pressure” to obey settled law by recruiting broadly, *e.g.*, online and by e-mailing notices to community groups, as the Commission has quite properly expected of broadcasters for years.¹¹

NSBA characterizes our proposal as unconstitutional. *See* NSBA Comments, pp. 5-6. However, our proposal does not treat persons differently because of their race. A station with a homogeneous workplace would be treated in the same manner regardless of which race or gender predominates.¹² The Commission would say to broadcasters, in effect, if your workforce is homogeneous but you have recruited broadly, and there is no other evidence of discrimination, you are clear. But if your workforce is homogeneous, then irrespective of the race of your homogeneous workforce, if you recruit in a manner that excludes persons of other races, we need to determine whether you discriminated intentionally. That is not differential treatment according to the race of the perpetrator: it is routine civil rights enforcement.¹³ Thus,

⁹ *See* 1968 EEO Rules, 13 FCC2d at 771 ¶13 (citing, *inter alia*, 42 U.S.C. §309); *see also Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969); *cf. Catoctin Broadcasting Corp. of New York*, 4 FCC Rcd 2553, 2558 (1989).

¹⁰ *See* n. 2 *supra*.

¹¹ Online recruitment, coupled with e-mailed job notices to community groups (which takes ten seconds) usually would yield a diverse applicant pool, thereby resulting in the diversification of the workplace. That is what the Commission aspires to bring about. All we seek is the application of settled non-discrimination law to the bad apples who refuse to engage in broad recruitment, and who generally do this with the intention of perpetuating their homogeneous workplaces across generations. That is the principal means by which racial discrimination continues to infect the broadcasting industry.

¹² *See Lutheran Church*, 141 F.3d at 356; *see also MD/DC/DE Broad. Ass’n v. FCC*, 236 F.3d 13, 18 (D.C. Cir. 2001) (subsequent history omitted) (holding that strict scrutiny applies only if the government’s actions lead to people being treated unequally on the basis of their race).

¹³ If the Equal Protection Clause does not permit the FCC to proscribe racial discrimination by being aware of racial statistics, then it would also prevent the enforcement of laws against school segregation including pupil placement, teacher recruitment, teacher placement and extracurricular activities; *see generally Green v. County School Board of New Kent County*, 391 U.S. 430 (1968); or housing segregation including racial steering, *see Smith v. City of Cleveland Heights*, 760 F.2d 720 (6th Cir. 1985); indeed, every civil rights law or rule that proscribes the

we seek only for the FCC to remain within the mainstream of national civil rights jurisprudence and practice.

5. **Whether Form 395 data should be sequestered.** We proposed that Form 395, the Annual Employment Report, would be collected by the Commission for the preparation of an anonymized tracking of aggregate EEO data, and would also be collected by the Enforcement Bureau from licensees that engage in predominant word-of-mouth recruitment. *See* EEO Supporters Comments (filed April 30, 2018) at 4. NSBA is concerned that once the Commission’s research staff obtains this information, the EEO enforcement staff could easily access it. *See* NSBA Comments at 8. The Commission can put NSBA’s concern entirely to rest by issuing a directive to the effect that the research database (presumably housed in the Office of Strategic Planning and Policy Analysis) cannot not be accessed by the EEO enforcement staff.

We would respectfully encourage our nation’s broadcast associations to embrace constructive, effective recruitment measures consistent with the law and with FCC requirements for licensed broadcasters. “Cronyism” has no place in the public airwaves, particularly given the nation’s increasingly diverse workforce. By supporting the approach presented by the EEO Commenters, the nation’s broadcast associations have an opportunity to be leaders in diversity and inclusion.

Respectfully submitted,

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use of a racially exclusionary cabal to exclude others in order to replicate racial exclusion over time. We do not believe that our nation’s broadcasters genuinely intend such a result.

EEO Supporters

Asian American Journalists Association
Blacks in Government
Common Cause
Dialogue on Diversity
Hispanic Technology and Telecommunications Partnership
International Black Broadcasters Association
League of United Latin American Citizens
LGBT Technology Partnership and Institute
MANA, A National Latina Organization
Multicultural Media, Telecom and Internet Council
National Action Network
National Asian American Coalition
National Association for the Advancement of Colored People
National Association of Black Journalists
National Association of Black Owned Broadcasters
National Association of Multicultural Digital Entrepreneurs
National Coalition on Black Civic Participation
National Council of Negro Women
National Diversity Coalition
National Hispanic Foundation for the Arts
National Indian Telecommunications Institute
National Newspaper Publishers Association
National Organization of Black County Officials
National Organization of Black Elected Legislative Women
National Puerto Rican Chamber of Commerce
National Urban League
National Utilities Diversity Council
Native American Journalists Association
Public Knowledge
Rainbow PUSH Coalition
Transformative Justice Coalition
US Black Chambers, Inc.
Vision Maker Media
Women in Cable Telecommunications