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January 17, 2005

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Dear Ms. Lovett:

RE: Equal Employment Opportunity Commission: Agency Information  
Collection Activities (Revisions to Form EEO-1)

The Minority Media and Telecommunications Council ("MMTC") respectfully submits these Comments in response to the Final Notice of Submission for OMB Review, 70 Fed. Reg. 71294 (November 28, 2005) ("Final Notice"). \*/

Founded in 1986, MMTC has been the leading advocate for equal employment opportunity in the electronic media and telecommunications industries. MMTC represents 48 national organizations before the Federal Communications Commission ("FCC") in connection with the FCC's administration of its equal employment opportunity regulations.

The Final Notice proposes several revisions to the EEOC's Form EEO-1. Among the agencies potentially affected by these proposed revisions is the FCC, which for over 30 years has administered EEO enforcement programs for the nation's most influential industries -- broadcasting, cable television and other electronic media outlets -- as well as telecommunications, which comprises one-sixth of our national economy.

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\*/ The views expressed in these Comments are the institutional views of MMTC, and are not intended to reflect the individual views of each of its officers, directors, advisors or members. On December 21, 2005, MMTC sought leave to file its Comments today.

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The Final Notice proposes the addition of a “Two or More Races” category to Form EEO-1. Id. at 71296-97. As shown below, the creation of this category would compromise the FCC’s congressionally mandated efforts to prevent discrimination in the critical industries it regulates. It would burden and confuse the FCC’s licensees. Most of all, it would tend to diminish diversity of viewpoints in broadcasting, thereby harming members of the public who rely on broadcasting as their primary window to the social, entertainment, cultural and political world.

In 1968, the FCC became the first federal agency to bar its licensees from discriminating in employment.<sup>1</sup> The FCC has never been authorized to secure compensation and other individualized relief for persons subjected to employment discrimination. Instead, the FCC’s EEO rules advance diversity in the electronic media<sup>2</sup> and ensure that each FCC licensee deserves

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<sup>1</sup> Nondiscrimination in the Employment Practices of Broadcast Licensees (Memorandum Opinion and Order and Notice of Proposed Rulemaking), 13 FCC2d 766 (1968) (proscribing racial discrimination in broadcast employment); see id. at 771 and 775-77 (relying on and setting out the text of a May 21, 1968 Letter to the FCC Chairman Rosel H. Hyde from Stephen J. Pollak, Assistant Attorney General, Civil Rights Division, Department of Justice (“Pollak Letter”). The Pollak Letter relied on Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) in stating that “the use of the public domain would appear to confer upon broadcast licensees enough of a ‘public’ character to permit the Commission to require the licensee to follow the constitutionally grounded obligation not to discriminate on the grounds of race, color, or national origin.”) See also Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices (Report and Order), 18 FCC2d 240, 241 (1969) (citing the Pollak Letter in adopting the final employment nondiscrimination rule, and adding recruitment and outreach obligations (“1969 Rules”). The recruitment and outreach requirements of the 1969 Rules remained in effect (with relatively minor refinements) until 1998. See n. 2 infra.

<sup>2</sup> See NAACP v. FPC, 425 U.S. 662, 670 n.7 (1976) (observing in dictum that the FCC’s broadcast EEO rules “can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934...to ensure that its licensees’ programming fairly reflects the tastes and viewpoints of minority groups.”) After the recruitment and outreach portions of the 1969 Rules were struck down on equal protection grounds in Lutheran Church/Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir.), petition for rehearing denied, 154 F.3d 487, petition for rehearing en banc denied, 154 F.3d 494 (D.C. Cir. 1998) (“Lutheran Church”), the FCC adopted new recruitment and outreach rules. Review of the Commission’s Broadcast Equal Employment Opportunity Rules and Policies (R&O), 15 FCC Rcd 2329, recon. denied, 15 FCC Rcd 22548 (2000) (“2000 Rules”). In MD/DC/DE Broadcasters Association v. FCC, 236 F.3d 13, 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) (“MD/DC/DE Broadcasters”), the recruitment and outreach portions of the 2000 Rules were struck down, again on equal protection grounds. The FCC then issued the recruitment and outreach rules that are currently in effect. 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) (reconsideration petitions pending) (“2002 Rules”). The 2002 Rules, like the 2000 Rules, were aimed at preventing discrimination. 2002 Rules at 24039 ¶37 (“our policy is designed to prevent both intentional and unintentional

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the privilege of an authorization to serve the entire public by using a scarce public resource, the radiofrequency spectrum. Congress has proscribed discrimination by FCC licensees,<sup>3</sup> and intentional discrimination would disqualify a company from holding an FCC license.<sup>4</sup>

The FCC and the EEOC share authority to investigate employment discrimination complaints against FCC licensees. In 1978, the two agencies signed the FCC/EEOC Memorandum of Understanding, which delineates how these agencies work in concert to fulfill their closely related anti-discrimination objectives.<sup>5</sup> While the FCC usually defers to the EEOC in pursuing individual cases, it retains the authority to investigate a matter on its own, even before the EEOC concludes its review.<sup>6</sup>

The FCC's EEO regulations for electronic media companies<sup>7</sup> contain two specific obligations. First, the FCC bars these companies from discriminating in employment "because of race, color, religion, national origin, or sex."<sup>8</sup> Second, the FCC requires these companies to ensure that their

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discriminatory practices in the broadcast and MVPD industries, and to ensure equal opportunity in employment practices, including recruitment"); see also 2000 Rules, 15 FCC Rcd at 2331 ¶2. Neither the 2000 Rules nor the 2002 Rules were aimed at promoting diversity of viewpoints, although the FCC has never gone so far as to disown the diversity rationale for its EEO rules.

<sup>3</sup> The first section of the Communications Act, 47 U.S.C. §151, provides that the FCC was created inter alia, "so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service[.]" The emphasized words were added in the Telecommunications Act of 1996.

<sup>4</sup> See, e.g., Beaumont NAACP v. FCC, 854 F.2d 501, 507 (D.C. Cir. 1988); Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621, 628 (D.C. Cir. 1978). Former FCC Commissioner (and later Chairman) Michael Powell has stated that "[i]f the public interest means anything at all it cannot possibly tolerate the use of a government license to discriminate against the citizens from whom the license is ultimately derived." Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, 13 FCC Rcd 23004, 23052 (1998) (Separate Statement of Commissioner Michael K. Powell).

<sup>5</sup> Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission, 70 FCC 2d 2320, 2327 (1978) ("FCC/EEOC Memorandum of Understanding").

<sup>6</sup> Id. at 2327 (providing that the FCC may inquire into EEO complaints "even before the EEOC's conciliatory process ends"); see also id. at 2328 ¶21, 2328 n. 12, and 2331, Appendix B, §III (b). The FCC may also investigate and process a complaint where the EEOC lacks jurisdiction. See, e.g., Catocin Broadcasting of New York, 4 FCC Rcd 2553, 2558 ¶44 (1989) (holding that race discrimination by a radio station with five employees was sufficient to justify denial of the station's license renewal applicant).

<sup>7</sup> The FCC's EEO rules for common carriers, in effect since 1976, are seldom enforced and therefore are not addressed herein.

<sup>8</sup> See 47 C.F.R. §2080(a) and comparable provisions for cable and other electronic media.

recruitment efforts are broad enough to reach a wide spectrum of qualified candidates, including members of minority groups and women.<sup>9</sup>

In 1970, the FCC created Form 395, on which most broadcasters (and subsequently other regulatees) were to report the racial and gender compositions of their staffs.<sup>10</sup> Form 395, including its job categories and its definitions of protected groups, is modeled after and is generally congruent with Form EEO-1.<sup>11</sup> If OMB approves the EEOC's proposed changes to Form EEO-1, the FCC will probably be obliged to incorporate them into Form 395.<sup>12</sup>

Form 395 has two primary purposes. First, it yields longitudinal industry-wide data that has been vital to the ability of Congress,<sup>13</sup> the FCC,<sup>14</sup> and scholars<sup>15</sup> to track industry employment

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<sup>9</sup> See 47 C.F.R. §73.2080(b) and (c) and comparable provisions for cable and other electronic media. To comply with Lutheran Church and MD/DC/DE Broadcasters, all of the recruitment and outreach steps specified in these regulations are race and gender neutral.

<sup>10</sup> See Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices (Report and Order), 23 FCC2d 430 (1970) (“1970 Order”). Broadcasters with fewer than five fulltime employees are exempt from filing Form 395. The FCC is required to collect Form 395 data on certain broadcast and cable companies. 47 U.S.C. §334(a)(2) and 554(d)(3).

<sup>11</sup> 1970 Order, 23 FCC2d 430, 432 ¶5 (“use of the job categories in the EEO-1 form...would allow interindustry comparisons and would simplify the reporting for all stations, particularly those now supplying data on the EEO-1 form.”)

<sup>12</sup> See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and policies (Third Report and Order and Fourth Notice of Proposed Rulemaking), 19 FCC Rcd 9973, 9978 ¶12 (2004) (“2004 Order”) (stating that when the OMB completes its review of the changes to Form EEO-1, “we will review the annual employment reports to see what changes are needed to comply with the new OMB standards, and whether we can conform our forms to those standards consistent with Sections 334 and 634 [47 U.S.C. §§334 and 554(d)(3)(a)] of the [Communications] Act.”) As a practical matter, the FCC may have little choice but to conform Form 395 to the new Form EEO-1, since agencies generally follow OMB standards on racial classifications. See Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58782 (1997).

<sup>13</sup> Two examples illustrate this point. First, the House Report accompanying the Cable Communications Policy Act of 1984 (Pub. L. No. 87-549 §2, 98 Stat. 2279, 2797 (1984), codified as amended as 47 U.S.C. §554(c) (1984)) relied on Form 395 data in concluding that “while the employment record of the cable industry has improved in the years since the Commission first adopted equal employment opportunity regulations, women and minorities still are significantly underrepresented as employees and owners in the industry.” H.R. Rep. No. 98-934, at 85 (1984), reprinted in 984 U.S.C.C.A.N. 4655, 4723. Second, when Congress in 1992 barred the Commission from revising its EEO rules governing television stations (Pub. L. No. 102-385, 1065 Stat. 1460 (1992), codified as amended at 47 U.S.C. §334(a)(1)), Congress relied on Form 395 data when it found that “despite the existence of regulations governing equal employment opportunity, females and minorities are not employed in significant positions of management authority in the cable and broadcast industries...rigorous enforcement of equal

trends as well as the effectiveness of the FCC's EEO rules and policies.<sup>16</sup> Second, Form 395 data often figures prominently in the FCC's evaluation of allegations that a licensee has violated the FCC's nondiscrimination rules.<sup>17</sup> For example, the FCC regards a broadcast station's overuse of word of mouth recruitment as potentially discriminatory.<sup>18</sup> While staff heterogeneity is not the only factor relevant to whether word of mouth recruitment is discriminatory, it can be an important piece of evidence in this very common type of discrimination case.<sup>19</sup> As the courts

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opportunity rules and regulations is required in order to effectively deter racial and gender discrimination." Cable Television Consumer Protection and Competition Act of 1992, §22(a), 106 Stat. at 1498.

<sup>14</sup> See, e.g., Implementation of the Commission's Equal Employment Opportunity Rules (Report), 9 FCC Rcd 6276, 6314-15 ¶79 (1994) ("1994 EEO Report") (using, inter alia, Form 395 data in concluding that "a continuing need exists for EEO enforcement in the communications industry.")

<sup>15</sup> See, among many other studies, Fonda Leigh Whittaker, "Reflective Images: Personnel Diversity in the Public Broadcasting Industry," Department of Telecommunications, University of Georgia (2000); MMTTC, "FCC EEO Enforcement, 1994-1997" (1998).

<sup>16</sup> After Lutheran Church, the FCC suspended, then reinstated, the Form 395 filing requirement for broadcasters; the FCC suspended the requirement again after MD/DE/DE Broadcasters. Suspension of the Requirement for Filing of Broadcast Station Annual Employment Reports and Program Reports, 13 FCC Rcd 21998 ¶¶1-2 (1998); 2000 Rules, 15 FCC Rcd at 2332 ¶6; Suspension of the Broadcast and Cable Equal Employment Opportunity Outreach Program Requirements, 16 FCC Rcd 2872, 2873 n. 1 (2001). The FCC is still considering whether Form 395 data should continue to be publicly available, as it was from 1971 to 1998 and in 2000. See 2004 Order, 19 FCC Rcd at 2238-39 ¶¶14-17. Current Form 395 data is not publicly available.

<sup>17</sup> These allegations typically are brought by listeners and viewers in petitions to deny a broadcast licensee's application for license renewal, assignment or transfer of control. Petitions to deny are authorized by 47 U.S.C. §309(d) and 47 C.F.R. §73.3584.

<sup>18</sup> See, e.g., Jacor Broadcasting Corp., 12 FCC Rcd 7934, 7939 ¶14 (1997) (Commission was "troubled that a significant number of the station's hires, for which recruitment efforts were made, resulted from staff or client referrals.") The Commission has observed that it is necessary to "ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process." 2000 Rules, 15 FCC Rcd at 2331 ¶3.

<sup>19</sup> See U.S. v. New Hampshire, 539 F.2d 277, 280 (1st Cir. 1976), cert. denied, 429 U.S. 1023 (1977), which rejected a challenge by the state of New Hampshire to a requirement that it file an EEO-4 form containing statistics on the racial makeup of employees of the state. The First Circuit noted that this kind of information "is often highly useful when an agency or court attempts to make the often difficult inference that illegal discrimination is or is not present in a particular factual context.") The FCC will not use Form 395 data to evaluate whether a broadcaster has recruited sufficiently as required by 47 C.F.R. §73.2080(b) and (c). 2000 Rules, 17 FCC Rcd at 24025 ¶17 ("the data collected in the employment reports will be used only to compile trend reports and report to Congress. It will not be used to determine compliance with the EEO [recruitment and outreach] rules that we adopt today" (fn. omitted)). Obviously, however, like all other entities with EEO enforcement duties, the FCC is empowered to use this data to consider whether a licensee engaged in discrimination.

and the FCC have recognized, a determination of whether word of mouth recruitment is discriminatory depends partly upon the heterogeneity of the employer's staff that conducts the word of mouth recruitment.<sup>20</sup> Form 395 measures staff heterogeneity.<sup>21</sup>

In nations where employers are not required to report EEO data, intentional discrimination may become easier to conceal and go uncorrected.<sup>22</sup> Likewise, civil rights enforcement is impaired when the accuracy or granularity of the core EEO statistical database is compromised.

Therefore, MMTC opposes the creation of a "Two or More Races" category for EEOC Form EEO-1. Discrimination is seldom visited on a person specifically because she is multiracial. Rather, when it occurs, discrimination is generally visited on a person because of her membership in the race with which she primarily self-identifies.<sup>23</sup> Thus, adoption of a catch-all "Two or More Races" category would mask the racial identities that actually matter to discriminators in the workplace.<sup>24</sup>

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<sup>20</sup> See, e.g., Walton Broadcasting, Inc., 78 FCC2d 857, 865, 875, recon. denied, 83 FCC2d 440 (1980) (criticizing overuse of "'word of mouth' referrals from a predominately white work force, which, while unintended, effectively discriminated against minority group employment.") A similar principle applies to gender-based discrimination. See, e.g., EEOC v. N.Y. Times Broadcasting, Inc., 542 F.2d 356, 360-61 (6th Cir. 1976) (holding that a television station engaged in unlawful hiring practices when it recruited broadcast news personnel solely from two radio stations that had employed virtually no women in such positions).

<sup>21</sup> In the FCC's evaluation of a complaint that a broadcaster's word of mouth recruitment is discriminatory, Form EEO-1 data would be of little use because the majority of broadcasters' staff sizes are far smaller than the 100-employee staff size threshold for filing Form EEO-1. See 2004 Order, 19 FCC Rcd at 9977 ¶10 (finding, based on Form 395 data from 2000, that "if we obtained [Form 395] data only from employment units with 100 or more employees, the trend report would be significantly incomplete. It would not include 6,952 employment units (79%) out of a total of 8,395 units and would exclude 136,993 full-time employees (84%) out of the 163,868 full-time employees in broadcasting working at employment units employing five or more full-time employees.") The Form 395 size threshold is five full-time employees. Id.

<sup>22</sup> See, e.g. Molly Moore, "French Discrimination Suit Calls Égalité Into Question," Washington Post, Sunday, January 15, 2006, P. A-20 (reporting that one of France's largest hiring agencies for temporary employees indulged the anti-Black discriminatory employment preferences of 50 large companies (including even the Disneyland Resort Paris theme park) to the detriment of at least 1,500 applicants. The Post noted that "[h]uman rights organizations allege that some laws – intended to be so racially blind that private companies are prohibited from collecting statistics on numbers of minority employees – are used routinely to conceal poor hiring records and protect companies that discriminate.")

<sup>23</sup> Since the inception of FCC EEO regulation in 1968, there is no record of an allegation of discrimination against a person because of her multiracial status.

<sup>24</sup> As explained by the National Asian Pacific American Legal Consortium ("NAPALC", now the Asian American Justice Center), "[a] person who is White and Asian could be perceived very differently in the workplace than a person who is White and Black/African American....If an

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In a case involving allegations of over-reliance on word of mouth recruitment, a “Two or More Races” EEO reporting category would frustrate the FCC’s ability to fully and accurately evaluate the extent to which a licensee’s staff contains members of the racial group that allegedly was subjected to discrimination. As explained by NAPALC:

The EEOC’s proposed method of multiracial reporting is to collapse all multiracial responses into a Two or More Races category, and disregarding the actual self-identified races. This method offers no means of comparing this data with information reported under the old statistical standard. Such a comparison is necessary, for example, to determine whether an employer has corrected past discriminatory hiring practices....At a bare minimum, the race data breakdown of multi-racial respondents should be reported.<sup>25</sup>

If Form EEO-1 is changed, the FCC will probably be compelled to import the changes into its Form 395. See n. 12 supra. Consequently, the EEOC’s proposed revisions to Form EEO-1 could profoundly and adversely impact the FCC’s ability to fulfill its congressional mandate to prevent discrimination by its licensees. Further, a “Two or More Races” category would diminish the usefulness of the longitudinal industry-wide EEO database that Congress, the FCC and independent scholars use to evaluate the effectiveness of the FCC’s EEO enforcement efforts. Finally, FCC licensees would have to learn the new EEO reporting format, frustrating the FCC’s objective of avoiding “an undue burden” on its electronic media licensees.<sup>26</sup>

Therefore, before rendering its final decision in this matter, the OMB should invite the FCC to review the proposed revisions to Form EEO-1 that the FCC would be obliged to incorporate into Form 395, and comment on whether any of these changes to Form 395, and particularly the proposed new “Two or More Races” category, would, impede the FCC’s ability to ensure that its licensees do not practice discrimination, materially impair the integrity and usefulness of the FCC’s industry-wide longitudinal databases on its licensees’ employment patterns, or impose unnecessary regulatory burdens on licensees and on members of the public.

Sincerely,

*David Honig*

David Honig  
Executive Director

cc: Stephen Llewellyn, Acting Executive Officer, Executive Secretariat, EEOC  
Hon. Marlene Dortch, Secretary, Federal Communications Commission

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employer has prejudices against Asians but not Blacks, these two employees could be facing a very different workplace environment despite their both falling into the ‘Two or More Races’ category.” Comments of NAPALC before the EEOC, May 25, 2004, pp. 2-3.

<sup>25</sup> Comments of NAPALC before the EEOC, August 11, 2003, pp. 2-3.

<sup>26</sup> See 2002 Rules, 17 FCC Rcd at 24043 ¶71.