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September 18, 2014

MEMORANDUM

TO: FCC GN Dockets 14-28 and 10-27 (Protecting and Promoting the Open Internet Framework for Broadband Internet Service)

RE: Application of the EEOC Complaint Process to 1996 Telecommunications Act Section 706 Complaints Regarding the Open Internet

Summary

This memorandum provides a summary of the U.S. Equal Employment Opportunity Commission (EEOC) process for resolving complaints of employment discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”),¹ and describes how this enforcement paradigm could be imported into the FCC’s Internet regulatory process under Section 706 of the Telecommunications Act of 1996. In their formal comments and reply comments in the Open Internet rulemaking proceeding, the 45 National Minority Organizations have proposed importing the Title VII complaint model to facilitate enforcement of the open Internet.²

Title VII provides that a possible victim of discrimination, before she institutes a civil suit, must first submit a complaint, or charge, of discrimination to the EEOC and

¹ While the EEOC enforces numerous laws dealing with employment discrimination, *see Federal Laws Prohibiting Job Discrimination Questions and Answers*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Nov. 21, 2009), <http://www.eeoc.gov/facts/qanda.html> (last visited Sept. 15, 2014), this Memorandum focuses on the complaint process for Title VII. The complaint processes for most other anti-discrimination statutes are similar, although the exhaustion requirements may differ. For example, exhausting EEOC remedies is optional under the Equal Pay Act.

² *See* Comments of the National Minority Organizations in GN Dockets 14-28 and 10-27, Protecting and Promoting the Open Internet Framework for Broadband Internet Service, (filed July 15, 2014) (“National Minority Organizations’ Comments”), pp. 12-14; Reply Comments of the National Minority Organizations in GN Dockets 14-28 and 10-27, Protecting and Promoting the Open Internet Framework for Broadband Internet Service, (filed Sept. 15, 2014).

obtain a “Notice of Right to Sue.”³ In this way, the EEOC’s complaint process is designed to promote informal, expeditious and affordable resolution of disputes without requiring resort to the court system.

After an individual files a charge of discrimination with the EEOC, the complaint proceeds through multiple levels of review and informal settlement efforts. If the complaint is not resolved or acted upon by the government, the EEOC issues a Notice of Right to Sue to the complaining individual, allowing them to pursue their claim on their own through the court system.

A similar process could be instituted by the FCC as part of its open Internet enforcement program to ensure expeditious and cost-efficient resolution of complaints of potential violations of open Internet rules.

Filing an EEOC Charge

The EEOC enforces violations of Title VII, which prohibits employment discrimination based on sex, race, color, religion, and national origin.⁴ Any individual who is “aggrieved” by an employment action may file a charge of discrimination with the EEOC, including individuals who are not in a direct employer-employee relationship but are nevertheless affected by discriminatory employment action.⁵ If the aggrieved individual cannot or does not wish to come forward, another individual or organization can file a charge on their behalf.⁶ A member of the EEOC can also file a charge of discrimination on behalf of others.⁷

EEOC charges must be filed in person at one of the EEOC’s 53 field offices or by mail, and individuals can use the EEOC’s online assessment system and a telephone hotline to provide basic information about a potential charge and determine whether the EEOC can help. The EEOC has also entered into work-sharing agreements with certain state and local agencies, such as human relations or human rights commissions, that enforce state and local laws related to employment discrimination. Under these work-sharing agreements, any charge filed with the EEOC is automatically filed with the appropriate state and local agency.⁸

³ 42 U.S.C. §2000e-5(f)(1).

⁴ *Id.* at §2000e-2(a)(1).

⁵ *Id.* at §2000e-5.

⁶ 29 C.F.R. §1601.7(a) (“A charge on behalf of a person claiming to be aggrieved may be made by any person, agency, or organization.”)

⁷ 42 U.S.C. §2000e-5(a) and (b).

⁸ *How to File a Charge*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/employees/howtofile.cfm> (last visited Sept. 15, 2014). *But see* LARSON ON EMPLOYMENT DISCRIMINATION §70.05 n. 3 (noting that the EEOC has discontinued the practice of using work-sharing agreements where a charge filed with a state human rights agency would be automatically filed with the EEOC).

Information obtained from individuals who contact the EEOC is not disclosed to an employer unless a charge is filed. Once a charge is filed, the EEOC must send a copy of a charge to the employer within 10 days of the filing date.⁹ The EEOC will disclose the individual's name and basic information about the allegations in the charge. An individual can only remain anonymous if another individual or organization files a charge with the EEOC on their behalf. The employer will learn the identity of the individual who filed the charge, but the identity of the alleged victim of discrimination will not be disclosed by the EEOC.¹⁰

Employers are not allowed to retaliate against any individuals who file an EEOC charge or take part in an EEOC investigation or lawsuit. If an employer does so, an EEOC investigator can amend the charge to add allegations of retaliation. Additional non-retaliation charges can be added to a previous EEOC charge or can be the subject of a new EEOC charge.¹¹

Dismissal and Mediation

Once an individual has filed an EEOC charge, the EEOC can choose to dismiss the charge, refer it to mediation, or move directly to investigating the charge. If the EEOC lacks jurisdiction over a charge, or if a charge is untimely, the EEOC will dismiss it without further action. The EEOC also dismisses certain charges if they decide that they cannot prove discrimination.¹²

Upon receiving a charge, the EEOC may ask the individual and the employer to try to settle the charge through mediation. Mediation of EEOC charges is voluntary, and if either party does not agree to enter into mediation, the charge will be referred directly to an investigator. If the parties are able to reach an agreement through mediation, the agreement is enforceable as a contract.¹³ If an agreement is not reached, the charge will be referred to an investigator.

Investigation, Prosecution, and Settlement

If the parties do not agree to mediate a charge or cannot reach an agreement through mediation, the charge proceeds to the EEOC's investigation phase. In this phase, the EEOC determines whether there is probable cause that a violation of the law has occurred. During its investigation, the EEOC can obtain information through voluntary

⁹ 42 U.S.C. §2000e-5(b).

¹⁰ *Confidentiality*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/employees/confidentiality.cfm> (last visited Sept. 15, 2014).

¹¹ *Id.*

¹² *Filing a Charge of Discrimination*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/employees/charge.cfm> (last visited Sept. 15, 2014).

¹³ *Mediation*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/employees/mediation.cfm> (last visited Sept. 15, 2014).

cooperation or through use of administrative subpoenas to obtain documents, testimony, or access to facilities.¹⁴

If the EEOC determines that a violation of the law has not occurred, the EEOC provides the individual who filed the charge with a Notice of Right to Sue. This notice allows the individual to file a lawsuit in a court of law. If the EEOC determines that a violation of the law has occurred, it will attempt to reach a voluntary settlement with the employer. If a settlement cannot be reached, the charge is referred to the EEOC's legal staff or the Department of Justice for enforcement. The EEOC or the Department of Justice will then determine whether to file a lawsuit. If a suit is not filed, the EEOC will issue a Notice of Right to Sue to the individual who filed the charge.¹⁵

Individuals who have filed a Title VII charge can request a Notice of Right to Sue, but usually must wait 180 days after filing the claim to make the request.¹⁶ Title VII encourages the EEOC to determine whether a charge is supported by reasonable cause within 120 days, but this is more of a goal than a hard deadline.¹⁷ The EEOC's website states that while charges referred to mediation are resolved in an average of three months, charges that proceed through the investigation process take an average of six months to reach resolution.¹⁸ This delay is often attributed to the high number of complaints the EEOC receives.¹⁹

The Complaint Process for the Open Internet

Neither Title II of the Communications Act,²⁰ nor Section 706 of the Telecommunications Act²¹ provides an effective or affordable enforcement process for

¹⁴ For more information on the EEOC's subpoena power, *see* 29 C.F.R. §1601.16.

¹⁵ *The Charge Handling Process*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/employees/process.cfm> (last visited Sept. 15, 2014).

¹⁶ *After You Have Filed a Charge*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/employees/afterfiling.cfm> (last visited Sept. 15, 2014).

¹⁷ 42 U.S.C. §2000e-5(b) (“The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge.”)

¹⁸ *The Charge Handling Process*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/employees/process.cfm> (last visited Sept. 15, 2014).

¹⁹ *See* LARSON ON EMPLOYMENT DISCRIMINATION §73.02 n. 5 (noting that in 2006, “the EEOC took in 75,768 new private-sector charges and investigators resolved 74,308; 403 charges resulted in filed lawsuits.”)

²⁰ For reasons unrelated to enforcement, the National Minority Organizations generally oppose reclassification of broadband as a common carrier service under Title II. *See* National Minority Organizations' Comments, pp. 8-10. As it happens, the Title II complaint process is highly specialized and consumer-unfriendly. Under Section 208 of the Communications Act, a consumer may submit a petition that sets forth a statement of facts; then the FCC then forwards the complaint to the common carrier, which must then

consumer complaints about open Internet rule violations in the manner the FCC seeks to resolve them.²²

Unlike in the field of employment discrimination, open Internet violations are likely to be rare.²³ However, as in the field of employment discrimination, resolution of complaints needs to be very expeditious. If a job seeker is faced with expensive, protracted anti-discrimination litigation, she may easily become discouraged, stop fighting, and focus on trying to seek employment elsewhere. Similarly, if faced with an expensive, protracted enforcement process at the FCC, a consumer experiencing an open Internet violation could also quickly become discouraged, stop fighting, and focus on obtaining service elsewhere. Further, even a few days of a serious violation could undermine consumer confidence in the Internet and, potentially, alter consumers' patterns of online use and functionality. Faced with high barriers to enforcement, most complainants will simply move on, and the underlying violation could thus become "capable of repetition, yet evading review."²⁴ Further, if a violation persists unremedied

resolve the complaint or submit a reply. *See* 47 U.S.C. §208(a); 47 C.F.R. §1.717 (the FCC's corresponding regulation on common carrier complaint procedure). Assuming the common carrier resolves the matter within the timeframe allotted, the common carrier is relieved of its legal liability to that complainant for the instance at issue. The Section 208 process is expensive – highly specialized lawyers are almost always required – and time consuming. Certainly it was not designed with the open Internet in mind, and if the Commission chose to regulate broadband under Title II, the agency would need to develop much more consumer-friendly regulations to implement Section 208.

²¹ *See* 47 U.S.C. §1302 (Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, §706, 110 Stat. 56, 153 (1996), as amended by Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008), now codified in Title 47, Chapter 12 of the United States Code. *See* 47 U.S.C. §1301 *et seq.*

²² *See Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking*, 29 FCC Rcd 5561, 5618 ¶163 (May 15, 2014) ("We tentatively conclude that an effective institutional design for the rules proposed in today's Notice must include at least three elements. *First*, there must be a mechanism to provide legal certainty, so that broadband providers, end users and edge providers alike can better plan their activities in light of clear Commission guidance. *Second*, there must be flexibility to consider the totality of the facts in an environment of dynamic innovation. *Third*, there must be effective access to dispute resolutions by end users and edge providers alike.")

²³ *See* David Honig, Esq. and Nicol Turner Lee, Ph.D., *Refocusing Broadband Policy: The New Opportunity Agenda For People Of Color*, Nov. 21, 2013 ("MMTC Broadband White Paper"), available at <http://mmtconline.org/wp-content/uploads/2013/11/Refocusing-Broadband-Policy-112113.pdf> (last visited Sept. 18, 2014), p. 12.

²⁴ *See, e.g., Roe v. Wade*, 410 U.S. 113, 114 (1973) (An injury, which is "capable of repetition, yet evading review," is an exception to the usual federal rule that an actual controversy must exist at review stages and not simply when the action is initiated). This term usually arises when an issue becomes moot when the harm occurs over too short a time to allow the injury to be litigated while it was occurring, and there is a reasonable

for a substantial length of time, it could damage the fabric of the network compact and undermine consumer confidence in the online ecosystem.

While the FCC surely possesses the authority to regulate broadband under Section 706,²⁵ this section fails to specify an enforcement procedure.²⁶ Consequently, the procedure for adjudicating complaints under Section 706 would be the FCC's default procedure applicable to any statutory provision that implicitly leaves it to the agency to decide how complaints should be handled.²⁷ Alternatively, perhaps the Commission would revert to a paradigm similar to its 2010 open Internet complaint rules, which are highly specialized and not expedited.²⁸

A key element of the Commission's general complaint handling procedure is that the agency is only compelled to render a decision that is both appealable and precedential. That takes time. Drafts must circulate within the Enforcement Bureau, the relevant operating bureau, OGC and, sometimes, OSPP and the 8th floor. On the other hand, an EEOC probable cause determination can often be rendered in a matter of days. This determination is neither appealable nor precedential, but it is rapid and efficient in enabling the EEOC's expert staff to advise the parties regarding the likely merits of a complaint. As a practical matter, after a cause or no cause determination by the EEOC, most cases settle in or out of mediation. Further, the parties still have the opportunity to proceed to court and obtain an appealable, precedential decision if they choose to do so.

This paradigm is a very neat fit for the open Internet. It would enable the FCC's expert staff to provide expeditious guidance to the parties, and it would enable the parties to then resolve their differences or proceed to litigation with the benefit of an expert early appraisal of the merits. In this way, the Title VII model would provide an excellent, consumer-friendly means of resolving open Internet complaints rapidly, efficiently, and affordably.

expectation that the party or other similarly situated parties may be subject to a reoccurrence of the harm. *See Turner v. Rogers*, 131 S. Ct. 2507, 2515 (2011).

²⁵ *See Verizon v. FCC*, 740 F.3d 623, 637-642 (2014).

²⁶ *See* 47 U.S.C. §1302.

²⁷ *See* 47 C.F.R. §1.41 (“Except where formal procedures are required under the provisions of this chapter, requests for action may be submitted informally. Requests should set forth clearly and concisely the facts relied upon, the relief sought, the statutory and/or regulatory provisions (if any) pursuant to which the request is filed and under which relief is sought, and the interest of the person submitting the request. In application and licensing matters pertaining to the Wireless Radio Services, as defined in §1.904 of this part, such requests may also be sent electronically, via the ULS.”)

²⁸ *See* 47 C.F.R. §§8.12-17.

Adapting the EEOC's Title VII Complaint Process to the FCC's Open Internet Complaint Process

The FCC could adapt the in-person EEOC filing requirements by creating online assessment and hotline assistance programs and creating a digital complaint form. Upon receiving a complaint, the Enforcement Bureau would promptly review the case, provide guidance to the parties regarding their likelihood of success on the merits, and decide whether to 1) dismiss the complaint for failure to establish a *prima facie* case of a violation; 2) refer it to the FCC's Administrative Law Judge or his designee for mediation; or 3) open an investigation.

Upon determining that a violation has not occurred, the Enforcement Bureau would dismiss the case and provide the complainant with a Notice of Right to Litigate - similar to the EEOC's Notice of Right to Sue, except that the FCC's Notice of Right to Litigate would authorize the complainant to file a formal charge with the full Commission or its designee, such as the ALJ or a Special Master. When a case is especially egregious, the Bureau could bring a complaint to the full Commission on its own, much as the EEOC can proceed to court if it is presented with an especially egregious case.²⁹ Finally, regardless of the disposition of the case, the complainant could always request and receive a Notice of Right to Litigate.

Conclusion

The EEOC's complaint process serves a vital role in resolving most employment discrimination complaints before they reach the court system. By encouraging voluntary mediation and informal settlement, the EEOC reduces the strain on the judiciary while promoting swift resolution of discrimination claims. At the same time, the EEOC retains the ability to investigate and pursue legal action against employers that have violated Title VII. If no action is taken, individuals can pursue their legal claims privately through civil lawsuits. In so doing, the EEOC complaint process acts as a first line of defense against Title VII violations, guaranteeing that individuals will have their complaints heard by the EEOC or will be free to proceed on their own.

In the same way, this process, if adapted to open Internet enforcement, could be a first line of defense for consumers who believe they are aggrieved by an apparent violation of Internet openness. The Title VII framework would provide the FCC with a flexible and enforceable legal framework, a clearly established set of factors and guidance, and a mechanism to allow the FCC to evaluate challenged practices on a case-by-case basis affordably, efficiently and expeditiously.³⁰ Such a procedure should help alleviate any misimpression that Section 706 is insufficiently muscular to preserve Internet openness, while at the same time building consumer confidence in the FCC's stewardship of the open Internet.

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²⁹ See n. 15 *supra*.

³⁰ 47 C.F.R. §8.9; *Open Internet Order*, 25 FCC Rcd at 17964-65, para. 111.