



July 2010

MMTC Calls For Suspension Of EEO Enforcement

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In a surprising move, the Minority Media & Telecom Council (MMTC) has requested that the Commission suspend its Equal Employment Opportunity (EEO) rules for three months. As MMTC sees it, during those three months the Commission should completely overhaul its current EEO system.

MMTC is perhaps the most prominent advocate on behalf of the interests of racial and ethnic minorities in the area of communications. One would therefore not expect MMTC to call for the suspension of rules and policies designed to assist MMTC's primary constituents. But that would assume that the FCC's EEO rules are working properly and, therefore, benefiting MMTC's interests. MMTC does *not* share that assumption. Rather, it has concluded that the FCC's EEO enforcement program "has no apparent mission, no focus, no data for evaluation, and no results except sanctioning the innocent while ignoring the guilty."

In the face of that harsh assessment, MMTC proposes that the FCC put its existing EEO program on hold for three months, during which time the Commission should take a number of steps aimed at revamping the program.

Some of MMTC's proposals are relatively simple and could, theoretically, be easily handled. For example, MMTC would have the FCC move its EEO staff from the Media Bureau to the Enforcement Bureau, where it would re-gain the designation of "EEO Branch", rather than "EEO Staff". While MMTC provides no particular justification for these proposals, they are presumably intended to increase the apparent stature of the EEO enforcement efforts.

Similarly, MMTC would have the FCC's General Counsel track EEO cases to make sure that possible violators do not escape punishment because, for example, a statute of limitations is allowed to pass before appropriate enforcement action is taken. While this might require the establishment of some internal case-monitoring arrangements, it would probably not impose an insurmountable burden.

Another proposal: the FCC should work with the Equal Employment Opportunity Commission (EEOC) to update the agencies' Memorandum of Understanding (MOU) to assure, in particular, cross-reporting between the two agencies relative to situations warranting special attention by both. While the concept of effective inter-agency cooperation can't possibly be objectionable in principle, in practice this proposal might involve considerable complications both in the drafting of the MOU revisions and in implementing the additional cross-reporting process.

MMTC also suggests that the FCC adopt recommendations that were first set out in a resolution from the FCC's Advisory Committee on Diversity for Communications in the Digital Age in 2004. Those recommendations would result in limited revision of the EEO rules to include an obligation for larger employers to provide career advancement programs. Since, in the abstract, the imposition of some additional obligations would not in and of itself create new burdens for the Commission, this suggestion might not seem all that difficult or complicated. But since the proposal has already been on the table for six years without action, there may be more here than meets the eye. Also, if the FCC were to propose this change, it would require a rulemaking proceeding to implement it. Even if the proposal encountered no opposition at all – an unlikely scenario, at best – it would take a lot longer than three months to get these changes on the books.

Other MMTC ideas appear even less susceptible of easy adoption.

For example, MMTC's proposal that the size of the EEO Staff (or EEO Branch) be tripled is problematic from the get-go. It's one thing to move staff around within the agency and maybe give them a different title; it's quite another to expand that staff substantially, particularly in difficult economic times, in an agency whose primary focus is (at least for the foreseeable future) broadband, not EEO. Of course, such an expansion would likely be necessary if the Commission were to embrace another of MMTC's proposals – *i.e.*, that the percentage of licensees subjected to EEO audits each year be *quintupled*, with the audits to include "on-site review" and more detailed reporting requirements. If the FCC were to increase the amount of work generated by EEO enforcement dramatically, it would logically have to increase the staff available to do that work.

MMTC would also have the Commission impose a revised version of Form 395-B, the annual employment report. But the Form 395-B requirement was suspended more than a decade ago (in the wake of a D.C. Circuit decision) and, despite subsequent efforts to revive it, it remains on the shelf because of various problems which need to be resolved before it can be unleashed. In particular, the thorny issue of public access to race- and ethnicity-based information has been pending unresolved for some six years, at least. While it is theoretically possible that the Commission might be able to resolve all such

issues in short order (say, three months), it seems unrealistic to expect that to happen. Moreover, if the FCC were to impose this reporting requirement, that would further add to the work load of those charged with EEO enforcement. So unless the Commission is prepared to increase the EEO enforcement staff, the prospects for re-implementing the Form 395 in the short run are doubtful.

Two of MMTC's proposals reflect what appears to be a tension in its position. On the one hand, MMTC would have the FCC undertake detailed investigations into whether licensees are engaged in "word-of-mouth recruitment from a homogeneous workforce". If evidence of such recruitment surfaces, then the FCC should drill deeper into the situation, even designating the license for an evidentiary hearing in a worst case scenario.

But on the other hand, MMTC urges the Commission to ensure that broadcasters "with very diverse workforces" be largely exempt from any EEO-related penalty because they "obviously had to have operated broad recruitment programs". In other words, in some cases the FCC should take aggressive actions to ferret out possible misconduct where none may have been alleged, while in other cases it should be prepared to ignore apparent procedural problems and, instead, hand out "Get Out Of EEO Jail Free" cards.

This tension arises from the fact that, in recent history, the FCC's EEO enforcement activities have been directed at licensee failures to jump through the various procedural hoops of the EEO rules. That is, the targeted licensees were not found to have discriminated in their employment practices; instead, they had simply fallen a bit short in one or more of their record-keeping chores. MMTC sees this as an ineffective way of policing employment practices – sort of like lunging at the capillaries rather than the jugular. MMTC is particularly concerned because several recent targets of such enforcement actions have been large, prominent licensees with extensive minority hiring.

It's difficult to argue that actual discrimination should be permitted to continue while the FCC shuffles the deck chairs by hassling licensees about record-keeping. But that assumes that actual, actionable discrimination has occurred and is occurring, with the FCC looking the other way. Such discrimination may indeed be occurring – but if it is, shouldn't there be some prima facie evidence that could be presented to the agency first, to get the ball rolling?

But that's one of the reasons why the EEO rules are set up as they are. In order to discourage the likelihood of actual discrimination and to flag its possible existence, the FCC has imposed a range of employment processes which licensees must follow and as to which licensees must maintain records. Those records provide a preliminary indication of the licensee's EEO performance, so it's not entirely unreasonable – and it's for sure a lot easier – for the FCC to want to make sure that proper records are being kept.

In short, while the MMTC's proposals along these lines are understandable, they are by no means simple to reconcile, either with each other or with the realities of the FCC's regulatory circumstances. It is particularly unrealistic to think that new rules and policies along these lines could be crafted in three months.

Finally, MMTC urges the FCC to "conduct an inquiry into how minorities came to be purged from radio journalism and why minority representation in television journalism is in decline".

The MMTC's list of proposals is a bold move, particularly in view of the accompanying suggestion of a three-month suspension of all enforcement of the EEO rules. MMTC seems to be indicating that it believes that the FCC's existing EEO enforcement program is of, at most, only limited utility, creating "the false security that comes when the constable is on duty yet asleep." MMTC may be running the risk that, in response, the FCC could simply abandon its existing program without replacing it with anything more effective for the foreseeable future. Having now taken the public position that the existing program has only very limited, if any, value, MMTC may be hard-pressed to argue in favor of retaining or reinstating that program if it were to be ditched by the Commission.