Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
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

To: The Commission

JOINT REPLY COMMENTS OF THE
NAMED STATE BROADCASTERS ASSOCIATIONS

The Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Carolina Association of Broadcasters, North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of

Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Radio Broadcasters Association of Puerto Rico, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (collectively, the "State Associations"), by undersigned counsel, hereby file these Joint Reply Comments in response to the Commission's Notice of Proposed Rule Making released February 22, 2018 in the above-captioned proceeding.[1]

I. The Form 397 Filing Requirement Should Be Eliminated

The State Associations noted last year in the *Media Modernization* proceeding that "the Form 397 serves little purpose (if any) now that broadcasters subject to the rule are required to upload their Annual EEO Public Inspection File Reports to the online public inspection file."[2] A review of the comments filed in this proceeding reveals no disagreement with that statement, and all but one of the commenters specifically advocate for elimination of the now largely redundant Form 397.[3]

In recognition of this consensus, the State Associations urge the Commission to move promptly to eliminate the Form 397 filing requirement. They also agree with NAB that,

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[1] *See Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2)*, Notice of Proposed Rule Making, MB Docket No. 18-23, FCC 18-20 ("NPRM") (rel. Feb. 22, 2018).

[2] Joint Reply Comments of the Named State Broadcasters Associations at 10 (filed August 4, 2017), *Modernization of Media Regulation Initiative*, Public Notice, MB Docket No. 17-105, FCC 17-58 ("*Public Notice*") (rel. May 18, 2017) ("*Media Modernization Comments*").

[3] *See* Comments of National Association of Broadcasters ("NAB Comments"), Comments of Nexstar Broadcasting, Inc., and Comments of Meredith Corporation.

following such elimination, the best approach for broadcasters to convey whether their staff size triggers a Mid-Term EEO review requirement is via their Annual EEO Public Inspection File Report, which can now be found on both station websites and in stations' online public inspection files.[4] These changes will preserve the Commission's ability to conduct Mid-Term EEO reviews as they are currently conducted, while reducing unnecessary burdens on both broadcasters and FCC staff in filing and processing such reports.

II. Proposals Submitted in the "Comments of the EEO Supporters" Are Outside the Scope of this Proceeding and/or Unconstitutional

The one set of comments that did not address the Commission's proposal to eliminate the Form 397 filing requirement is the "Comments of the EEO Supporters" ("ES Comments"). Those comments instead focused on a single sentence in the NPRM in which the Commission invited comments "on the FCC's track record on EEO enforcement and how the agency can make improvements to EEO compliance and enforcement."[5] Unfortunately, the great bulk of the ES Comments propose substantive changes in EEO requirements rather than addressing "how the agency can make improvements to EEO compliance and enforcement." As a result, most of the proposals are simply beyond the scope of this proceeding. To the extent the ES Comments seek Commission consideration of specific proposals, however, the State Associations wish to ensure the Commission has a more complete record by which to assess those proposals.

A. The Central Proposal of the ES Comments Is Unconstitutional and Threatens the Judicial Viability of the Commission's EEO Rule

As the State Associations noted in their *Media Modernization Comments*, no FCC EEO Rule has survived judicial scrutiny, with the prior two versions having been found

[4] NAB Comments at 4.

[5] ES Comments at 1 (quoting NPRM at ¶ 11).

unconstitutional, and the current rule having not yet been reviewed by the courts.[6] In light of this, modifications of the current rule that resurrect the very aspects of the prior rules found to be unconstitutional are not only unwise, but undercut the FCC's ability to defend the EEO Rule before the courts.

In that regard, one does not need to delve deeply to discern the problem, as it is apparent from the very first caption of the ES Comments: "**Prosecuting Discriminators While Stopping Prosecutions Of Nondiscriminators**,"[7] which it explains as:

> To become fully aware of which broadcasters are engaging in intentional discrimination, the Commission must make itself aware of: (1) which stations recruit primarily by [Word of Mouth] from their workplaces; and (2) which of those stations' workplaces are virtually homogeneous. Importantly, to evaluate this information, the Commission should consider recruitment methodology first. Then the Commission would consider Form 395 data for the sole purpose of evaluating whether the primary use of WOM recruitment comes from the "mouths" of a homogeneous station staff that performs the WOM recruitment.[8]

As an initial point, the quoted language misapplies the EEO Rule. The EEO Rule has two principal components: (1) the prohibition on employment discrimination, and (2) the requirement that FCC licensees engage in "Broad Outreach" (which includes both Vacancy-Specific and Non-Vacancy-Specific outreach).[9] The Commission's policies regarding the use of Word of Mouth recruitment go solely to whether a station has engaged in Broad Outreach, and not to whether a station is, in the words of the ES Comments above, an "intentional discriminator."

The flawed premise of the ES Comments is that stations relying on Word of Mouth recruiting are intentional discriminators (or are not intentional discriminators) based solely on the

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[6] *Media Modernization Comments* at 18.

[7] ES Comments at 2 (bolding in original).

[8] ES Comments at 4.

[9] *See* 47 C.F.R. § 73.2080.

racial and gender makeup of their staff. That premise is false and finds no support in the EEO Rule. Reliance solely on Word of Mouth recruiting may indicate a lack of Broad Outreach, but not intentional discrimination. Similarly, the corollary proposition—that a station with the "right" staff demographics should not be prosecuted for violating the EEO Rule—is equally flawed, in that such a station may nonetheless be violating the Broad Outreach prong of the EEO Rule.

To state it simply, the ES Comments urge the Commission to prosecute stations that don't have the right staff composition under the EEO Rule while ignoring violations where the staff composition meets with the Commission's approval. In overturning a prior iteration of the EEO Rule, the court in *Lutheran Church v. FCC* made clear such an approach is unconstitutional:

> The very term "underrepresentation" necessarily implies that if such a situation exists, the station is behaving in a manner that falls short of the desired outcome. The regulations pressure stations to maintain a workforce that mirrors the racial breakdown of their "metropolitan statistical area." Recall that in this case, the NAACP argued that the station should be given no credit for hiring Hispanics because of their small representation in the relevant workforce. In his decision, the ALJ discounted the hire of the Hispanic woman because her employment did not flow from the "type of evaluation contemplated in the Commission's rules." *Initial Decision*, 10 F.C.C.R. at 9912. That means that either the ALJ agreed with the NAACP (because if the Church had focused on the SMSA profile, it would have hired a black rather than a Hispanic) or he thought that the station was insufficiently race conscious when it hired her (which, admittedly, sounds somewhat Orwellian).
>
> The Commission and DOJ nevertheless insist that the FCC's program should be regarded as if it did no more, or not significantly more, than seek non-discriminatory treatment of women and minorities. That argument—which logically suggests the government should have challenged the very applicability of the Fifth Amendment—presupposes that non-discriminatory treatment typically will result in proportional representation in a station's workforce. The Commission provides no support for this dubious proposition and has in fact disavowed it, saying that "we do not believe that fair employment practices will necessarily result in the employment of any minority group in direct proportion to its

> numbers in the community." *EEO Processing Guidelines for Broadcast Renewal Applicants*, 79 F.C.C.2d 922, ¶ 19 (1980).[10]

Having concluded that the racial and gender makeup of a station's staff demonstrates nothing about the station's employment practices as a logical matter, the *Lutheran Church* court proceeded to note the constitutional infirmities of the FCC seeking to assess a station's compliance with the EEO Rule on that basis:

> It cannot seriously be argued that this screening device does not create a strong incentive to meet the numerical goals. No rational firm—particularly one holding a government-issued license—welcomes a government audit. Even DOJ argued, in comments to the Commission recommending that these guidelines be changed, that they operated as a "*de facto* hiring quota," and that "broadcasters, in order to avoid the inconvenience and expense of being subjected to further review, will treat the guidelines as 'safe-harbors.'" Amendment of Part 73, 2 F.C.C.R. 3967, ¶ 45 (1987).[11]

The *Lutheran Church* court therefore found the EEO Rule to be an unconstitutional quota, stating "the EEO regulations before us extend beyond outreach efforts and certainly influence ultimate hiring decisions."[12]

Aware that its proposals implicate constitutional concerns, the ES Comments seek to sidestep that fact by merely asserting that its goal "we believe, is or easily ought to be regarded as a 'compelling governmental interest' as that term is defined by *Adarand*."[13] However, the court in *Lutheran Church* fundamentally disagreed:

> As a final point, we note the sort of diversity at stake in this case has even less force than the "important" interest at stake in *Metro Broadcasting*. While the minority ownership preferences involved in *Metro Broadcasting* rested on an inter-station diversity rationale, the EEO rules seek intrastation diversity. It is at least understandable why the Commission would seek station to station differences, but its purported goal of making a single station all things to all people makes no sense. It clashes with the reality of the

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[10] *Lutheran Church-Missouri Synod v. FCC*, 141 F.3rd 344 (DC Cir. 1998), at 352, *rehearing denied*, 154 F.3d 487 (DC Cir. 1998), *rehearing en banc denied*, 154 F.3d 494 (DC Cir. 1998) ("*Lutheran Church*").

[11] *Lutheran Church*, 141 F.3d at 353.

[12] *Lutheran Church*, 141 F.3d at 351.

[13] ES Comments at 5.

> radio market, where each station targets a particular segment: one pop, one country, one news radio, and so on.[14]

A curious aspect of the ES Comments is that while not mentioned as an action item for the Commission, the proposals specifically rely on the FCC reinstating Form 395—the Annual Employment Report—that collects the very information the court in *Lutheran Church* found to be logically unrelated to compliance with the EEO Rule, and merely a tool for implementing unconstitutional quotas. In making its "Word of Mouth" proposal, the ES Comments state that the Commission should require

> primarily WOM recruiting stations to submit, *in camera*, a Form 395. If the station's staff that conducted the primarily WOM recruitment is homogeneous, the station has met both prongs of inherent discrimination and may receive sanctions under the *Jacor* and *Walton* precedents."[15]

That is precisely the situation—making a station face audits and sanctions for not having the proper staff composition—that the court in *Lutheran Church* found to have no logical basis, while improperly pressuring stations to meet a government-mandated staff composition ("It cannot seriously be argued that this screening device does not create a strong incentive to meet the numerical goals. No rational firm—particularly one holding a government-issued license—welcomes a government audit."[16]). The ES Comments assert that reviewing staff composition as the second step in bringing the weight of the FCC down on a licensee rather than as the first step makes it somehow constitutional. But that is a meaningless distinction for the licensee receiving a sanction that would not have been imposed had the licensee's staff composition been deemed "appropriate" by the Commission.

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[14] *Lutheran Church*, 141 F.3d at 355-56.

[15] ES Comments at 3-4.

[16] *Lutheran Church*, 141 F.3d at 353.

Nor would these improper governmental pressures be limited to stations relying on Word of Mouth recruiting. The ES Comments also state:

> To ensure that the Commission's EEO enforcement efforts are bearing fruit, and to be aware of industry trends in broadcast employment that would help the Commission frame and fine-tune its EEO enforcement program, the Commission should collect and publish an annual anonymized summary of aggregate Form 395 data.[17]

Of course, the only way to "collect and publish an annual anonymized summary of aggregate Form 395 data" is to have *all* broadcasters complete and file Form 395 Annual Employment Reports. This would place at the Commission's fingertips the very information that the ES Comments themselves suggest may only be considered *after* a station is found to have engaged in Word of Mouth recruiting. To say the least, it will be difficult for the Commission to assert it only looked at the Form 395 data *after* making a determination as to Word of Mouth recruiting when it in fact already possessed that staff composition data.

Collecting such information also creates the very governmental pressures on stations that the courts have found unconstitutional, and it is clear that is in fact the very purpose of the ES Comments' proposals. It is no accident that the quoted language above urges the FCC to implement a Form 395 filing requirement *"[t]o ensure that the Commission's EEO enforcement efforts are bearing fruit*." Demanding Annual Employment Reports cannot be justified when the courts have discredited any connection between that data and compliance with the permissible objectives of the EEO Rule. In addition to the *Lutheran Church* language quoted above, when the FCC's later attempt to craft a constitutional EEO Rule failed, the court in *MD/DC/DE*

[17] ES Comments at 5. While the ES Comments are ambiguous as to who would be making Form 395 filings, if the intent is to have them submitted only by stations that the Commission had found to be potentially deficient in achieving Broad Outreach, such reports would be highly deceptive in terms of assessing "industry trends in broadcast employment."

Broadcasters similarly noted the fallacy of collecting station staff composition data in connection with assessing EEO compliance:

> Were [the FCC's only goal that licensees recruit with "broad outreach"], then it would scrutinize the licensee's outreach efforts, not the job applications those efforts generate. Measuring outputs to determine whether readily measurable inputs were used is more than self-evidently illogical; it is evidence that the agency with life and death power over the licensee is interested in results, not process, and is determined to get them. As a consequence, the threat of being investigated creates an even more powerful incentive for licensees to focus their recruiting efforts upon women and minorities, at least until those groups generate a safe proportion of the licensee's job applications.[18]

So collecting such data in order to assess whether "the Commission's EEO enforcement efforts are bearing fruit" is, by the courts' measure, respectively illogical, unconstitutional, and pointless.

B. The ES Comments Far Exceed the Scope of This Proceeding

Beyond the constitutional and logical infirmities of the ES Comments' proposals, those proposals are also completely out of place in this proceeding, which at its broadest, seeks comment on "how the agency can make improvements to EEO compliance and enforcement."[19] A pragmatic assessment of how far outside the scope of this proceeding such proposals lie can be found in the NPRM itself, which admonishes those commenting in this proceeding that "[i]n proposing alternatives to Form 397, commenters should keep in mind that our goal is to reduce the regulatory burden on regulatees while at the same time minimizing the administrative burden and costs on the Commission in its effort to satisfy the statutory objectives of Section 334 of the Act."[20]

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[18] *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, *rehearing 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*").

[19] NPRM at ¶ 11.

[20] NPRM at ¶ 9.

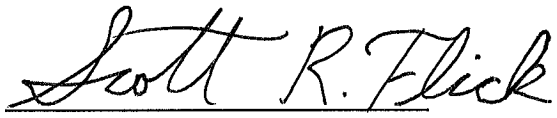
Proposals such as creating a new "intentional discrimination" test that bears no relation to intentional discrimination, imposing a new filing burden on broadcast stations nationwide, and placing an obligation on the FCC to "collect and publish" employee data that the courts have found bears no relation to the permissible objectives of the EEO Rule are hardly consistent with the Commission's stated goal, and as noted above, cannot be justified in any event.

Conclusion

For the reasons stated herein, the State Associations urge the Commission to (1) eliminate from its Rules the requirement to file Form 397, (2) reject the ES Comments' proposals discussed above, and (3) decline the invitation to use this proceeding to increase the burden on broadcasters and FCC staff by replacing a form that is filed every eight years (Form 397) with a form that would need to be filed annually (Form 395) by a far larger number of stations.

Respectfully submitted,

THE NAMED STATE BROADCASTERS ASSOCIATIONS



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