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June 21, 2018

**Chairman Ajit Pai**  
**Federal Communications Commission**  
**445 12<sup>th</sup> Street SW**  
**Washington, D.C. 20554**

**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**

**Dear Chairman Pai:**

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the rights of all persons in the United States, and its Media/Telecommunications Task Force undersigned below, we write to offer our views regarding the proposed repeal of equal employment opportunity (EEO) Form 397. We believe Form 397 should not be repealed until the Federal Communication Commission remedies its near 20-year failure to collect industry-wide employment statistics as required by law. The Leadership Conference is concerned that the Commission's "Modernization of Media Regulation Initiative" is a rush to deregulate without adequately considering how existing regulations serve the public interest and equity.<sup>1</sup> In this docket, the Commission's focus on repealing a minor administrative burden while disregarding its own 2004 decision to collect EEO employment data is a clear example of that rushed approach.

As discussed in more detail below, the Commission should not only comply with its statutory obligation to collect employment data, it should also implement an automated, searchable, and uniform electronic database of EEO employment and recruitment data. Moreover, the Commission should adopt a transparent mechanism to trigger mid-term license review to replace the function of Form 397.

***The Failure to Collect EEO Data Violates the Communications Act and Commission Precedent***

The FCC is statutorily required to collect industry-wide broadcast television employment data under the Communications Act.<sup>2</sup> The Commission reauthorized those obligations in 2004.<sup>3</sup> The Commission has acknowledged this responsibility in the present Notice of Proposed Rulemaking, conceding that it is currently required to collect industry data on Form 395-B.<sup>4</sup> Despite these responsibilities, the FCC has ignored its obligations by failing to collect industry EEO data since 2001.



After the D.C. Circuit's rulings in *Lutheran Church Missouri Synod v. FCC*<sup>5</sup> and *MD/DC/DE Broadcasters Association v. FCC*,<sup>6</sup> the Commission suspended filing EEO reports. However, in 2004 under then-Chairman Michael Powell, the Commission determined that its obligation to gather EEO data did not violate the D.C. Circuit decisions.<sup>7</sup> Specifically, the Commission stated, "The court did not conclude that the Commission lacks authority to collect statistical employment data for the purpose of analyzing industry employment trends or preparing annual employment trend reports, or that collecting employment data for those purposes would unconstitutionally pressure broadcasters to adopt race or gender-based hiring policies." The Commission continued, "Nothing in the Court's opinion ... suggests that the collection of the FCC Form 395-B data regarding the filer's employees for the purpose of compiling trend reports and reports to Congress is by itself subject to strict scrutiny or unconstitutional." It concluded that filing annual employment reports would not "unconstitutionally pressure entities to adopt racial or gender preferences in hiring."<sup>8</sup> OMB granted the Commission approval to use the new EEO filing forms, but that decision was never implemented.<sup>9</sup>

Collecting employment data is central to the FCC's obligation to ensure nondiscriminatory employment practices and to track the success of its policies. Many industries are now voluntarily holding themselves accountable by collecting and disseminating their employment data to ensure diversity in hiring.<sup>10</sup> The lack of broadcast industry employment data, given this trend toward greater transparency, is problematic.

#### *Recruitment Reports Should be Automated, Uniform, Aggregated, and Searchable*

In contrast with the FCC's failure to collect employment data, the FCC's broad nondiscrimination<sup>11</sup> and outreach<sup>12</sup> EEO rules do require broadcasters with more than five employees to retain records demonstrating compliance with their outreach and recruitment obligations.<sup>13</sup> The FCC enforces these provisions by randomly auditing five percent of radio and five percent of television licensees each year, and responding to complaints.<sup>14</sup> Licensees maintain this EEO data in annual reports kept in their online public files on broadcasters' individual websites and on the Commission's website.

The FCC is statutorily required to conduct mid-term reviews of licensees' EEO compliance.<sup>15</sup> Form 397 is a cover sheet used to submit copies of EEO recruitment data to the Commission for the mid-term review. However, as of 2013 the Commission began requiring all EEO recruitment records to be maintained on the Internet – on broadcasters' and the Commission's websites instead of in paper files at broadcaster local main studios around the country. Therefore, as a purely administrative matter, physical submission of recruitment records is no longer necessary; but the FCC has not proposed a replacement transparent and accountable mechanism to conduct the mid-term reviews. EEO advocates have generally opposed keeping EEO data confidential.<sup>16</sup>

The Leadership Conference supports an electronic, uniform database that is searchable and aggregated. The current public file reports are not uniform, as the Commission notes, and therefore it is burdensome for the FCC to compile the necessary information.<sup>17</sup> A database would allow licensees to update changes to pertinent information, such as an EEO contact point, while making the data continually available to the Commission and the public.<sup>18</sup> Furthermore, the database could automatically notify the FCC when a licensee's review is approaching, thereby creating efficiencies.



We further urge the FCC to make it easier to locate and use station public files on its website, as they are currently not readily accessible from the FCC's homepage and they contain virtually no guidance to help an average person understand the contents or usefulness of a broadcaster's public file. We strongly encourage the Commission to improve this display of this information so as to increase the utility of the data to members of the general public, for example, by requiring recruitment EEO data to be separately labelled or highlighted on any job posting websites maintained by broadcasters.

#### *Other Concerns*

In addition, The Leadership Conference agrees with The Minority Media and Telecommunications Council (MMTC) that a broadcaster that relies primarily on word-of-mouth to fill vacancies, regardless of staff composition, is a red flag as the Commission has long held that word-of-mouth recruiting does not comply with its EEO rules.<sup>19</sup> We also believe MMTC's proposal to transfer EEO enforcement from the Media Bureau to the Enforcement Bureau deserves serious consideration, given the Enforcement Bureau's experience enforcing FCC regulations.<sup>20</sup>

Adequate and transparent data collection is essential to achieving a diverse workplace in the media. While the FCC's quest to eliminate truly unnecessary rules is understandable, the Commission must focus its resources on ensuring compliance with existing EEO obligations before attempting further deregulation. Before eliminating Form 397, the Commission should immediately begin collecting aggregate industry employment data on Form 395-B while also improving the usability of all EEO data. If you have any questions or would like to discuss this matter further, please contact Media/Telecommunications Task Force Co-Chairs Cheryl Leanza, United Church of Christ, Office of Communication, Inc., at (202) 904-2168 or [cleanza@alhmail.com](mailto:cleanza@alhmail.com), or Michael Macleod-Ball, American Civil Liberties Union, at (202) 253-7589 or [macleod@627consulting.com](mailto:macleod@627consulting.com), or Corrine Yu, Leadership Conference Managing Policy Director, at (202) 466-5670 or [yu@civilrights.org](mailto:yu@civilrights.org).

Sincerely,

American Civil Liberties Union  
Asian Americans Advancing Justice – AAJC  
Common Cause  
Communications Workers of America  
The Leadership Conference on Civil and Human Rights  
NAACP  
National Consumer Law Center, on behalf of its low-income clients  
National Hispanic Media Coalition  
National Urban League  
OCA-Asian Pacific American Advocates  
United Church of Christ, OC Inc.



<sup>1</sup> See, e.g., Leadership Conference Modernization of Media Regulation Comments, MB Docket 17-105 (filed August 17, 2017) (opposing reduction in collection of broadcast ownership data).

<sup>2</sup> 47 U.S.C. § 334(a) (mandating retention of broadcast reporting rules); see also 47 U.S.C. § 554(d)(3)(A) (imposing obligation on MVPDs).

<sup>3</sup> *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Third Report & Order and Fourth NPRM, 19 FCC Rcd 9973.

<sup>4</sup> *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2)*, MB Docket No. 18-23, Notice of Proposed Rulemaking, FCC 18-20 ¶6 (published February 22, 2018) (“EEO Form 397 NPRM”).

<sup>5</sup> *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998).

<sup>6</sup> *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13 (D.C. Cir. 2001).

<sup>7</sup> Statement of Chairman Powell, 19 FCC Rcd 9973, 9990 (2004) (“I am proud to support this item, which revises and re-implements annual employment reports from broadcasters and MVPDs”).

<sup>8</sup> *Id.* at 9976.

<sup>9</sup> See Reply Comments of the National Hispanic Media Coalition, MB Docket 10-103 at note 20 (Sept. 30, 2010) (explaining the Commission deferred utilizing its approved forms until it could determine whether it should maintain the new EEO data confidentially or publicly).

<sup>10</sup> See e.g., *Inclusion & Diversity*, Apple, <https://www.apple.com/diversity/> (last visited June 7, 2018); *Our Workplace*, Google, <https://diversity.google/commitments/> (last visited June 7, 2018); *Facebook Diversity Update*, [https://fbnewsroomus.files.wordpress.com/2017/08/fb\\_diversity\\_2017\\_final.pdf](https://fbnewsroomus.files.wordpress.com/2017/08/fb_diversity_2017_final.pdf) (last visited June 20, 2018); *Corporate Social Responsibility*, Intel, <https://www.intel.com/content/www/us/en/corporate-responsibility/corporate-responsibility.html> (last visited June 7, 2018); *Inclusion & Diversity*, Netflix, <https://jobs.netflix.com/diversity> (last visited June 7, 2018).

<sup>11</sup> 47 C.F.R. § 73.2080(a) (“equal opportunity in employment shall be afforded by all licensees or permittees...no person shall be discriminated against in employment by such stations because of race, color, religion, national origin, or sex”); see 47 CFR 73.2080(c) (detailing obligations to recruit and evaluate efforts).

<sup>12</sup> 47 C.F.R. § 73.2080(b) (“Each broadcast station shall establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity and nondiscrimination in every aspect of station employment policy and practice”).

<sup>13</sup> See 47 C.F.R. § 73.2080(c)(6) (broadcasters must file annually, in their public files, for the preceding year: all full-time vacancies and the recruitment sources used to publicize and ultimately fill the vacancy; data describing the total number of interviews and the total number of interviewees referred from each recruitment source; and a description of the broadcaster's efforts or participation in job fairs, mentoring programs, internships, and other initiatives as described in 47 C.F.R. § 73.2080(c)(2)).

<sup>14</sup> 47 C.F.R. § 73.2080(f)(4).

<sup>15</sup> 47 U.S.C. § 334(b).

<sup>16</sup> Comments of NOW, UCC OC Inc., MMT, Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, MM Docket No. 98-204 (July 29, 2004) (“strongly urge the Commission to make annual employment forms public”).

<sup>17</sup> EEO Form 397 NPRM at ¶8.

<sup>18</sup> See *id.* at ¶10.

<sup>19</sup> See, e.g., In the Matter of Cumulus Licensing, LLC, NAL/Acct. No. MB-201741410009, (rel. Dec. 11, 2017) (“Relying solely on a licensee's own private contacts, such as word-of-mouth referrals, does not constitute recruitment under the Commission's rules, which require public outreach.”)

<sup>20</sup> See Comments of the EEO Supporters, *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2)*, MB Docket No. 18-23, at 5-6 (filed April 30, 2018).