



January 15, 2020

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The Honorable Frank Pallone
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The Honorable Mike Doyle
Chairman
Subcommittee on Communications and
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House Committee on Energy and Commerce
Washington, DC 20515

The Honorable Greg Walden
Ranking Member
House Committee on Energy and Commerce
Washington, DC 20515

The Honorable Robert Latta
Ranking Member
Subcommittee on Communications and
Technology
House Committee on Energy and Commerce
Washington, DC 20515

PROTECT AND PROMOTE MEDIA DIVERSITY

Dear Chairman Pallone, Ranking Member Walden, Chairman Doyle, and Ranking Member Latta:

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, we thank you for the opportunity to submit our views regarding diversity in media ownership and ask that this statement to be entered into the record of the Subcommittee hearing entitled "Lifting Voices: Legislation to Promote Media Marketplace Diversity," scheduled for Wednesday, January 15, 2020. Media diversity has long been a top priority of The Leadership Conference and its members because we understand that meaningful protection of civil rights and advancement of key policy objectives rely in great measure on an accurate, diverse, and independent media that serves our constituencies. We support the need for additional action by the Federal Communications Commission (FCC) and Congress to promote diversity in ownership of, and employment in, media outlets in our country.

We believe the record compiled in this hearing will show that the Commission should: (1) reverse course in the pending 2018 Quadrennial Review and comply with the most recent remand by the U.S. Court of Appeals for the Third Circuit; (2) release the 2017 ownership data immediately and the 2019 data by April 30, 2020; (3) substantially improve response rates to the FCC's ownership data collection and correct older incomplete data where the Commission's records permit it; and (4) comply with its legal obligation to collect Equal Employment Opportunity data.

Current Media Ownership Rates are Dismal

The available FCC ownership data paint a dire picture of ownership diversity. As of 2015, the most recent data released by the FCC:

- Women own only 7.4 percent of all full power TV stations, Hispanics and Latinos control 4.5 percent of those stations, and all tracked racial groups collectively controlled 2.6 percent of all full power TV stations.ⁱ Numbers for Asian Americans, American Indian and Alaska Native Ownership and Native Hawaiian and Pacific Islander Ownership are: 0.7, 0.9, and 0.1 percent, respectively.ⁱⁱ
- Women control 8.1 percent of all commercial FM radio stations, Hispanics and Latinos control 4.2 percent of those stations, and racial groups collectively controlled 6.5 percent of all commercial FM radio stations. Numbers for Asian Americans, American Indian and Alaska Native Ownership and Native Hawaiian and Pacific Islander Ownership are: 0.4, 0.3, and 0.4 percent, respectively.ⁱⁱⁱ
- Women control 8.9 percent of all commercial AM stations, Hispanics and Latinos control 5 percent of those stations, and racial groups collectively controlled 10.8 percent of all commercial AM stations. Numbers for Asian Americans, American Indian and Alaska Native Ownership and Native Hawaiian and Pacific Islander Ownership are: 3, 0.2, 0.1 percent, respectively.^{iv}

The FCC Should Reverse Course in the Pending 2018 Quadrennial Review

The Commission inappropriately proposed to modify or eliminate several important media ownership rules in its most recent 2018 Quadrennial Review.^v That proposal was based on many flawed conclusions, including, as set forth in our comments to the FCC, the mistaken characterization of the availability of content *distributed* through the Internet as content *created* by online-only sources; and the assumption that all audiences and people have equal access to Internet content—a fact the Commission knows too well is incorrect.^{vi} In addition, the FCC incorrectly relies upon a flawed assumption that media ownership rules and increased media concentration do not harm ownership rates by women and people of color,^{vii} an assumption based on an analysis that was recently invalidated by U.S. Court of Appeals for the Third Circuit as “so insubstantial that it would receive a failing grade in any introductory statistics class.”^{viii} The current proposals to remove important ownership protections in the 2018 Quadrennial Review must be withdrawn.

The FCC Should Release and Correct Flawed Ownership Data and Improve Reporting

The Leadership Conference supports legislative proposals that will ensure continued collection of ownership data, timely release and analysis of that data, and public access to it through a publicly searchable database. For decades, the FCC has struggled to meet its obligations for collecting race and gender ownership data. These data are essential to Congress’ goal of increasing race and gender ownership diversity.

Most egregious is the FCC’s failure to release or analyze biennial Form 323 Ownership data. The Commission has not yet released a report summarizing the 2017 data, although the filing period ended on March 5, 2018.^{ix} The new data from 2019 is due at the FCC by the end of January.^x The Commission should also provide an analysis of the data, instead of relying on its past practice of merely issuing tables of numbers without any indication of what transaction or trends underlie the data.^{xi} The FCC should

immediately release 2017's data and release 2019's data within 3 months of collecting it, by April 30, 2020.

The FCC must also correct the significant flaws in its data collection processes. Since the inception of the FCC's media ownership data collection in 2000, the Commission's data have often been unreliable, difficult to use, and impossible to verify.^{xii} Although over time the FCC adopted some improvements,^{xiii} the FCC data continue to be substantially incomplete and fail to allow any meaningful tracking of particular owners across ownership data.

As we explained in our comments to the FCC, some broadcasters fail to file in some years, resulting in inconsistent data sets from year to year, rendering trend analysis between years problematic. The failure to file is often dramatic. For example:

- In 2011, 165 more full-power TV stations filed than in 2009. The inconsistency in data sets calls into question whether apparent increases in ownership by various ethnic groups were real.^{xiv}
- In 2013, the number of AM stations that did not file (759) far exceeded the number of stations controlled by women (310), calling into question conclusions based on that data.^{xv}
- By 2015, full-power TV reporting was at 99 percent, but, 980 of the total 4,489 AM radio stations did not report ownership data.^{xvi}

Because the Commission tracks every license transfer, it has in its possession considerable information that could complete its ownership data.^{xvii} The Subcommittee should direct the Commission to use its licensing records to correct its ownership records.

In addition, the FCC's mechanism for tracking the individuals who must file is unreliable. The FCC has relied on a process involving a "special use FCC Registration Number" that allows an individual to use multiple numbers or multiple individuals to use the same number,^{xviii} leading to obviously incorrect data. Although the FCC recently eliminated the use of this flawed tracking number for most filers,^{xix} it has never corrected the previous erroneously-filed data. Thus, approximately 30 percent of entries in the FCC's ownership database do not reliably identify owners.

We urge the Subcommittee to take additional action to ensure the FCC corrects these omissions in the existing database and guarantees that new data are complete.

The FCC Must Comply with its EEO Obligations

The Commission is statutorily required to collect industry-wide broadcast television and cable employment data under the Communications Act.^{xx} Despite this obligation, the FCC stopped collecting these data in the early 2000s.

Without detailed analysis, FCC Chairman Pai has claimed that EEO data collection raises constitutional concerns. As set forth in The Leadership Conference's comments in the FCC's docket on the matter,^{xxi} no court has seriously questioned the constitutionality of demographic employment data collection.^{xxii} For example, the U.S. Court of Appeals for the Second Circuit summarily dismissed constitutional challenges to such data collection in *Caulfield v. Bd. of Ed. of City of New York*, writing that "the Constitution itself

does not condemn the collection of [demographic] data.”^{xxiii} The U.S. Court of Appeals for the First Circuit recognized in *U.S. v. New Hampshire* that collecting demographic employment data “is both reasonable and fully consistent” with goal of “achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past.”^{xxiv} In neither *Lutheran Church Missouri Synod v. FCC* (“*Lutheran Church*”) and *MD/DC/DE Broadcasters Association v. FCC* (“*State Broadcasters*”) did the court conclude the collection or publicizing of employment data was itself unconstitutional.^{xxv}

The FCC has not complied with these laws in nearly twenty years and it should do so immediately. The Leadership Conference supports legislative efforts to ensure that the FCC complies with its EEO obligations.

A commitment to promoting diverse media ownership is a fundamental component of the nation’s communications policy. In order to make progress on media ownership diversity and diversity in employment, the FCC must collect and utilize accurate and complete data and conduct sophisticated, not slipshod, analysis. We appreciate the Subcommittee’s attention to this important issue and look forward to working with you to encourage and promote media ownership and employment opportunities for women and people of color. Please contact Leadership Conference Media/Telecommunications Co-Chairs Cheryl Leanza, United Church of Christ, Office of Communication, Inc., at 202-904-2168; or Kate Ruane, American Civil Liberties Union, at (202) 675-2309; or Corrine Yu, Leadership Conference Senior Program Director, Special Projects, at 202-466-5670, if you would like to discuss the above issues or any other issues of importance to The Leadership Conference.

Sincerely,



Vanita Gupta
President & CEO

ⁱ *Federal Communications Commission’s* Industry Analysis Division of the Media Bureau, “Third Report on Ownership of Commercial Broadcast Stations: FCC Form 323 Ownership Data as of Oct 1, 2015,” May 2017, <https://www.fcc.gov/document/form-323-ownership-report-data-october-1-2015> (“*Third Media Ownership Report*”).

ⁱⁱ *Id.* at 6.

ⁱⁱⁱ *Id.* at 12.

^{iv} *Id.* at 14.

^v *2018 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 33 F.C.C.Rcd. 12111 (2018) (“*2018 Quadrennial NPRM*”) (proposing to relax or eliminate the Local Radio Ownership Rule, the Local Television Ownership Rule, and the Dual Network Rule).

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- ^{vi} Comments of The Leadership Conference on Civil and Human Rights, 2018 Quadrennial Review, MB Docket No. 18-349 (filed April 29, 2019) at 5, 7-8.
- ^{vii} 2018 *Quadrennial NPRM* at ¶¶ 37, 72.
- ^{viii} *Prometheus Radio Project v. FCC*, 939 F.3d 567, 586 (3d Cir. 2019).
- ^{ix} Media Bureau Restricted FRN Public Notice, DA 17-1088, 32 F.C.C.Rcd. 9330 (2017).
- ^x Order, Promoting Diversification in the Broadcasting Services, MB Docket No. 07-294, DA 19-919 (Sept. 17, 2019).
- ^{xi} The FCC has made clear these reports are “not studies...that would help support the adoption of race- or gender-based preferences or policies.” 2010/14 *Quadrennial Review*, Second Report and Order, 31 F.C.C.Rcd. 9864, 9975 (2016) (“*Second R&O*”).
- ^{xii} *Prometheus II*, 652 F.3d at 470-71.
- ^{xiii} See, e.g., Promoting Diversification of Ownership, R&O/Fourth FNPRM, 24 F.C.C.Rcd. 5896 (2009) (uniform filing date, broadened mandatory filers).
- ^{xiv} 2012 *Media Ownership Report*, 27 F.C.C.Rcd. 13814 at n.10.
- ^{xv} 2014 *Media Ownership Report*, 29 F.C.C.Rcd 7835, Table D(1a).
- ^{xvi} *Third Media Ownership Report* at 25, Table A(1b) (2017); see, e.g., *id.* at 55, Table D(1b).
- ^{xvii} Reply Comments of The Leadership Conference on Civil and Human Rights, MB Docket No. 18-349 at 8-9.
- ^{xviii} Promoting Diversification of Ownership, Seventh FNPRM, 30 F.C.C.Rcd. 1725, 1732 (2015); *Second R&O* at 9973.
- ^{xix} Promoting Diversification of Ownership, Reconsideration Order, 32 F.C.C.Rcd. 3440 (2017).
- ^{xx} 47 U.S.C. § 334(a) (mandating retention of broadcast reporting rules); 47 U.S.C. § 554(d)(3)(A) (imposing obligation on MVPDs).
- ^{xxi} Comments of The Leadership Conference on Civil and Human Rights, Review of EEO Compliance and Enforcement, MB Docket Nos. 19-177, 98-204 (filed Nov. 4, 2019) (“Leadership Conference EEO Comments”).
- ^{xxii} See, e.g., *Caulfield v. Bd. Of Ed. Of City of New York*, 583 F.2d 605 (2nd Cir. 1978); *U.S. v. New Hampshire*, 539 F.2d 277 (1st Cir. 1976); *Berkley v. United States*, 48 Fed. Cl. 361, 378–79 (2000).
- ^{xxiii} *Caulfield*, 583 F.2d at 611-12.
- ^{xxiv} *U.S. v. New Hampshire*, 539 F.2d at 280 (quoting *Griggs v. Duke Power Co.*, 401 U.S 424, 429-30 (1971)).
- ^{xxv} Leadership Conference EEO Comments at 2.