



November 4, 2019

Officers
Chair
Judith L. Lichtman
National Partnership for
Women & Families
Vice Chairs
Thomas A. Saenz
Mexican American Legal
Defense and Educational Fund
Hillary Shelton
NAACP
Secretary/Treasurer
Lee A. Saunders
American Federation of State,
County & Municipal Employees

Board of Directors
Kevin Allis
National Congress of American Indians
Kimberly Churches
AAUW
Kristen Clarke
Lawyers' Committee for
Civil Rights Under Law
Alphonso B. David
Human Rights Campaign
Lily Eskelsen Garcia
National Education Association
Falima Goss Graves
National Women's Law Center
Mary Kay Henry
Service Employees International Union
Sherrilyn Ifill
NAACP Legal Defense and
Educational Fund, Inc.
David H. Inoue
Japanese American Citizens League
Gary Jones
International Union, UAW
Derrick Johnson
NAACP
Virginia Kase
League of Women Voters of the
United States
Michael B. Keegan
People for the American Way
Samer E. Khalaf
American-Arab
Anti-Discrimination Committee
Marc Morial
National Urban League
Janet Murguía
UnidosUS
Debra L. Ness
National Partnership for
Women & Families
Rabbi Jonah Pesner
Religious Action Center
Of Reform Judaism
Lisa Rice
National Fair Housing Alliance
Anthony Romero
American Civil Liberties Union
Maria Town
American Association of
People with Disabilities
Richard L. Trumka
AFL-CIO
Toni Van Pelt
National Organization for Women
Randi Weingarten
American Federation of Teachers
John C. Yang
Asian Americans Advancing Justice |
AAJC

Chairman Ajit Pai
Commissioner Michael O'Rielly
Commissioner Brendan Carr
Commissioner Jessica Rosenworcel
Commissioner Geoffrey Starks
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: Review of EEO Compliance and Enforcement in Broadcast and Multichannel
Video Programming Industries, MB Docket 19-177; Review of the
Commission's Broadcast and Cable Equal Employment Opportunity Rules and
Policies, MB Docket 98-204

Dear Chairman Pai and Commissioners:

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 the undersigned members of its Media/Telecommunications Task Force, we write to urge the Federal Communications Commission to remedy the near 20-year failure to collect industry-wide employment statistics as required by law. In this letter, The Leadership Conference responds to the statements of Commissioner Starks and Commissioner Rosenworcel on the *Review EEO Compliance and Enforcement* Notice of Proposed Rulemaking (NPRM). Both commissioners called for on-the-record discussion of data collection as an integral part of the Commission's renewed focus on EEO policy.¹

As discussed in more detail below, the Commission should comply with its statutory obligation to collect employment data. There are neither constitutional nor statutory barriers to reinstating demographic employment reports (Form 395-B), as required by the Communications Act. Data collection is a vital part of any EEO program. Failure to collect data makes it difficult if not impossible for the FCC to evaluate industry trends that may shed light on the overall effectiveness of the FCC EEO rules protecting against unlawful discrimination.

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

The Commission is statutorily required to collect industry-wide broadcast television employment data under the Communications Act. In 1992, Congress added Section 334 to

Policy and Enforcement
Committee Chair
Michael Lieberman
Anti-Defamation League
President & CEO
Vanita Gupta



the Communications Act, mandating the collection of demographic employment reports.² Section 334 prohibits the FCC from revising the EEO regulations in effect for broadcast TV stations in 1992, including “the forms used by [TV broadcast station licensees] to report pertinent employment data to the Commission.” By freezing the EEO obligations for broadcast TV licensees, Congress incorporated employment reports into the Communications Act as a statutory obligation.

After suspending the data collection, the Commission reauthorized those obligations in 2004, but it has failed to act on its responsibility to collect employment reports from broadcast TV and multichannel video programming distributors (MVPDs) since 2001.³ The Commission concluded in 2004 that it is “directed by statute to require the submission of [employment reports] by broadcast television stations and MVPDs,” and has the discretion to require such reports for all broadcasters and MVPDs.⁴ The Office of Management and Budget (OMB) granted the Commission approval to use the new EEO filing forms, but that decision was never implemented.⁵

Collection of Employment Reports is Constitutional

It is constitutional for the Commission to collect statistical employment data to analyze industry employment trends and prepare annual trend reports. Further, this action does not pressure broadcasters and MVPDs to engage in preferential hiring in violation of the Equal Protection Clause.

No court has seriously questioned the constitutionality of demographic employment data collection.⁶ 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.”⁷ Indeed, as the U.S. Court of Appeals for the First Circuit recognized in *U.S. v. New Hampshire*, 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.”⁸

Nor have courts ever invalidated the FCC’s collection of statistical employment data on constitutional grounds. In two cases—*Lutheran Church Missouri Synod v. FCC* (“*Lutheran Church*”) and *MD/DC/DE Broadcasters Association v. FCC* (“*State Broadcasters*”)—the U.S. Court of Appeals for the D.C. Circuit held that the *particular use* of employment reports to assess the licensee’s compliance with EEO obligations violated the Equal Protection Clause.⁹ Both cases were predicated on the idea that the FCC’s review of station employment data and comparison with local workforce demographics during the license renewal process pressured licensees to hire women and people of color.¹⁰ But in neither opinion did the court conclude that the collection or publicizing of employment data was itself unconstitutional. Broadcasters will experience no unconstitutional pressure to engage in preferential hiring if the FCC uses employment reports to assess and publicize industry performance and trends and to evaluate the effectiveness of EEO efforts. The FCC can easily pass constitutional scrutiny by ensuring that the process invalidated in *Lutheran Church* and *State Broadcasters* is not used to trigger audits or forfeiture, or deny license renewals.

Indeed, under similar circumstances—where demographic record collection is required but cannot trigger any remedial action against the hiring entity—courts have clearly held that this action does not violate the Equal Protection Clause. In *Sussman v. Tanoue*, the D.C. District Court upheld the Federal Deposit



Insurance Corporation's (FDIC) affirmative action plan under a similar Equal Protection challenge to the one mounted in *Lutheran Church*.¹¹ The FDIC (1) collected data about racial and gender make-up of FDIC workforce, (2) noted where dramatic statistical disparities with the civilian labor force exist, and (3) made efforts to reduce the disparities through monitoring and elimination of artificial barriers, but without granting preferential treatment to any person on account of race or gender.¹² The court distinguished the FDIC program from the FCC program overturned in *Lutheran Church*, holding that where the record collecting entity has neither remedial authority nor authority over hiring practices, there is no pressure to engage in preferential hiring, and therefore no disparate treatment.¹³ Like in *Sussman*, once the FCC reinstates the mandatory demographic employment reports, the mere existence of those reports would be so attenuated from the FCC's remedial powers that broadcasters could face no hiring pressure significant enough to trigger constitutional concern.

Courts have made it clear that a merely hypothetical misuse of demographic employment data does not invalidate demographic record collection. In *U.S. v. New Hampshire*, the First Circuit upheld the collection of demographic employment data under Title VII against a constitutional challenge.¹⁴ The court emphasized that the "possible and purely hypothetical misuse of data does not require the banning of reasonable procedures to acquire such data. Statistical information as such is a rather neutral entity which only becomes meaningful when interpreted."¹⁵

In its 2004 rulemaking, the Commission itself determined that *Lutheran Church and State Broadcasters* did not invalidate the employment reports.¹⁶ As the Commission stated at that time, "the court did not conclude that the Commission lacks authority to collect statistical employment data . . . or that collecting employment data for [analyzing and compiling trend reports] would unconstitutionally pressure broadcasters to adopt race or gender-based hiring policies."¹⁷

Conclusion

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.¹⁸ The lack of broadcast industry employment data, given this trend toward greater transparency, is problematic. Accurate record collection is essential for an effective and efficient EEO program. Removing artificial barriers to entry across the industry increases diversity, allowing stations to better serve the public interest. However, employment data is necessary to understand whether the FCC's existing EEO rules are working.

Data collection is essential to achieving a diverse workplace in the media. The FCC's quest to improve compliance and enforcement of EEO rules is paramount, and to do so properly, the Commission must follow through with its statutory obligations. We urge the Commission to immediately begin collecting aggregate industry employment data on Form 395-B. If you have any questions or would like to discuss



this matter further, please contact Media/Telecommunications Task Force Co-Chair Cheryl Leanza, United Church of Christ, Office of Communication, Inc., at (202) 904-2168 or cleanza@alhmail.com, or Kate Ruane, American Civil Liberties Union, at (202) 675-2336 or kruane@aclu.org, or Corrine Yu, Leadership Conference Senior Program Director, Special Projects, at (202) 466-5670 or yu@civilrights.org.

Sincerely,

The Leadership Conference on Civil and Human Rights
American Civil Liberties Union
Asian Americans Advancing Justice | AAJC
Common Cause
Communications Workers of America
Institute for Intellectual Property and Social Justice
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.

¹ *Review of EEO Compliance and Enforcement in Broad. and Multichannel Video Programming Indus.*, MB Docket No. 19-177, FCC 19-54 at 13 (June 21, 2019) (Statement of Commissioner Rosenworcel); *Id.* at 14-15 (Statement of Commissioner Starks).

² 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).

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

⁴ *Id.* at 2.

⁵ See Notice of Public Information Collections Approved by the Office of Management and Budget (OMB), 73 FR 62991 (Oct. 22, 2008).

⁶ 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).

⁷ *Caulfield*, 583 F.2d at 611-12.

⁸ *Id.* at 280 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)).

⁹ *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998); *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13 (D.C. Cir. 2001).

¹⁰ *Lutheran Church*, 141 F.3d at 352-53; *MD/DC/DE Broadcasters*, 236 F.3d at 18-20



¹¹ *Sussman v. Tanoue*, 39 F.Supp. 2d 13 (D.D.C. 1999).

¹² *Id.* at 25.

¹³ *Id.* at 26.

¹⁴ *New Hampshire*, 539 F.2d 277.

¹⁵ *Id.* at 280.

¹⁶ See Third Report & Order, *supra* note 3.

¹⁷ *Id.* at ¶ 7.

¹⁸ See, e.g., Inclusion & Diversity, Apple, <https://www.apple.com/diversity/> (last visited October 17, 2019); Our Workplace, Google, <https://diversity.google/commitments/> (last visited October 17, 2019); Facebook Diversity Update, <https://diversity.fb.com/read-report/> (last visited October 17, 2019); Corporate Social Responsibility, Intel, <https://www.intel.com/content/www/us/en/diversity/diversity-at-intel.html> (last visited October 17, 2019); Inclusion & Diversity, Netflix, <https://jobs.netflix.com/diversity> (last visited October 17, 2019).