

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
 )  
Review of EEO Compliance and Enforcement in ) MB Docket No. 19-177  
Broadcast and Multichannel Video Programming )  
Industries )

COMMENTS OF  
THE NATIONAL ASSOCIATION OF BROADCASTERS

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**I. INTRODUCTION AND SUMMARY**

The National Association of Broadcasters (NAB)<sup>1</sup> submits comments on the above-captioned Notice of Proposed Rulemaking,<sup>2</sup> in which the Commission seeks comment on potential changes to its equal employment opportunity (EEO) rules.<sup>3</sup> As a preliminary matter, we note that broadcasters take seriously their commitment to diversity and inclusion. Far beyond mere compliance with the Commission’s rules, broadcasters value employment diversity as critical to the future of the industry, as well as their own success. Efforts begin even before job vacancies are available. Local radio and television stations cultivate relationships in their local community and with organizations that can help expand recruitment.<sup>4</sup> Then, once these networks and other outreach efforts help to identify

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<sup>1</sup> NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

<sup>2</sup> *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries*, Notice of Proposed Rulemaking, MB Docket No. 19-177, FCC 19-54 (rel. June 21, 2019) (Notice).

<sup>3</sup> 47 C.F.R. § 73.2080.

<sup>4</sup> [Exploring Strategies That Have Advanced Media Diversity](#), Broadcast Symposium Co-Sponsored by the Media Bureau and the Broadcasting Diversity and Development Working Group of the Advisory Committee on Diversity and Digital Empowerment (Mar. 7, 2019)

outstanding female and minority candidates, broadcasters take steps to hire, train and advance talented staff through the ranks to senior leadership positions. Promoting women and minorities can help raise awareness about career opportunities in broadcasting, further expand the pool of job applicants and raise the bar for the entire industry. A diverse workforce, moreover, is key to survival in today's media marketplace because it allows stations to harness the different experiences and strengths of their employees to produce content that reflects their community.<sup>5</sup> The programming and local public service produced by a diverse workforce increases loyalty among listeners or viewers and translates into ratings and revenues. Given the increasingly competitive media marketplace, local broadcasters make every effort to nurture a diverse local workforce. Several organizations assist by conducting initiatives that promote diversity in broadcasting, such as the National Association of Broadcasters Leadership Foundation (NABLF), which seeks to advance broadcasting through leadership, diversity and community service.<sup>6</sup>

The Notice seeks comment on the Commission's track record of EEO enforcement and whether any "improvements" to EEO compliance and enforcement are needed.<sup>7</sup> Having represented local broadcasters during the entire history of the Commission's EEO program, NAB is uniquely situated to provide feedback on these issues. First, as a backdrop, it is critical to understand that the existing EEO regulations already push the outer limits of constitutionality, and the Commission should therefore tread carefully before investing in

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(Diversity Symposium), Transcript at 188 (remarks of Dr. Sheila Brooks, Founder/CEO, SRB Communications, LLC).

<sup>5</sup> Jason Lynch, [ABC's Success with Diversity Comes from Focusing on Creators, Not Just Stars](#), AdWeek.com (Jan. 15, 2015).

<sup>6</sup> See <https://www.nabfoundation.org/default.asp>.

<sup>7</sup> Notice at ¶ 5.

more intrusive rules. Second, the current rules already impose substantial burdens, as they require significant time and expense filling out government-mandated paperwork. Third, there is simply no evidence that increasing EEO requirements and/or reporting will meaningfully improve diversity in the broadcast workplace. Seventeen years of experience demonstrates that the existing regulatory approach is likely as effective as possible.<sup>8</sup> If anything, the Commission should consider ways to streamline the current procedures.

NAB suggests a new paradigm. Instead of taking the easy, familiar path of focusing on additional rules and regulations,<sup>9</sup> the Commission should center its efforts on two areas in particular. First, the Commission should take pro-active, concrete steps that will actually increase employment diversity. For example, the Commission could work with industry to further raise public awareness of equal employment opportunities,<sup>10</sup> expand industry education<sup>11</sup> and facilitate connections among job applicants and employers. NAB already participates in such programs, and the Association stands ready to work with the Commission to ensure these opportunities are as robust as possible for both broadcasters and their potential employees. NAB respectfully submits that the Commission can be far more than a

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<sup>8</sup> *Id.* at ¶ 9.

<sup>9</sup> See Comments of the EEO Supporters (ES Commenters), MB Docket Nos. 18-23 and 17-105 (Apr. 30, 2019), at 4-5 (claiming that broadcasters who hire some employees through personal referrals and whose staff composition fails to meet some undefined threshold of diversity should be deemed intentional discriminators and sanctioned for violating the EEO rules).

<sup>10</sup> The Commission has successfully promoted other important initiatives like the digital television transition and robocall prevention, and there is no reason to doubt the potential success of an effort to educate the public and industry about EEO.

<sup>11</sup> NAB supports MMTC's recent proposal that the Commission produce materials designed to educate industry and consumers regarding EEO. Letter from Maurita Coley, President and CEO, MMTC, to Rosemary Harold, Chief, Enforcement Bureau, MB Docket No. 19-177 (Sep. 3, 2019), at 5-6 (Coley Letter).

1950s-style command-and-control governmental entity. Rather than writing new rules, the Commission should join NAB in rolling up our sleeves and making a real dent in the challenges broadcasters face in hiring the most diverse workforce possible.

Second, the Commission should take steps to reduce unnecessary burdens on broadcasters, especially small stations. Currently, the FCC's EEO audit program is a material drain on local broadcasters' resources. Also, NAB knows of no other context – apart from instances where the Commission grants money to an outside entity – where the Commission aggressively audits compliance with its rules. Rather, in nearly every other instance, the agency adopts rules and then expects compliance. If an entity is found to have violated FCC rules, it faces various consequences. This is the same approach the Commission should take to EEO compliance. After all, of the thousands of audits performed over the years, less than one percent has identified a violation of the EEO rules. The Commission thus has little justification for retaining its unnecessarily burdensome broadcast audit process. It should consider reducing its audits, in particular to afford relief to small broadcasters.

## **II. THE CURRENT EEO RULES ARE AS EXPANSIVE AND EFFECTIVE AS POSSIBLE**

The Notice seeks comment on potential “improvements” it should make to the EEO rules.<sup>12</sup> NAB submits that imposing additional EEO obligations, such as those proposed by the ES Commenters,<sup>13</sup> would be legally tenuous because courts have made clear that government mandates that pressure broadcasters to make race-based hiring decisions run afoul of the Constitution. In 1998, the D.C. Circuit, in *Lutheran Church-Missouri Synod v. FCC*, rejected the Commission's EEO rule, which required stations to compare the racial

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<sup>12</sup> Notice at ¶ 5.

<sup>13</sup> See *supra* note 9.

composition of their staff with that of the local population, and take steps to address any underrepresentation.<sup>14</sup> The court held that the rule was a race-based measure and therefore subject to strict scrutiny. It then invalidated the EEO rule because it impermissibly pressured stations to recruit minorities in violation of the equal protection clause of the Fifth Amendment.<sup>15</sup>

As a result, the Commission created a new EEO rule consisting of two options.<sup>16</sup> Under Option A, stations could conduct certain recruitment activities, with compliance evaluated based on the performance of specified outreach activities. Under Option B, stations could design their own recruitment programs, but compliance rested on analysis of certain racial data to discern if the station's EEO program was sufficiently inclusive.<sup>17</sup> In 2000, the court in *MD/DC/DE Broadcasters Association v. FCC* again invalidated the Commission's efforts. In this instance, the court rejected the revised rule because Option B was a race-based policy subject to strict scrutiny that was not narrowly tailored to the Commission's stated purpose.<sup>18</sup> The court found that Option B placed unlawful pressure on broadcasters to focus their recruitment efforts on minorities and women to avoid Commission enforcement.<sup>19</sup> To remedy these concerns, the Commission adopted the current EEO rule, which eschewed race-based

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<sup>14</sup> 141 F.3d 344 (D.C. Cir. 1998), *rehearing denied*, 154 F.3d 487 (D.C. Cir. 1998), *rehearing en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) (*Lutheran Church*).

<sup>15</sup> *Id.* at 355-56.

<sup>16</sup> *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, Report and Order, 15 FCC Rcd 2329 (2000).

<sup>17</sup> *Id.* at 2364-65.

<sup>18</sup> 236 F.3d 13, *rehearing den.*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 920 (2002) (*MD/DC/DE Assns.*).

<sup>19</sup> *Id.* at 21-22.

measures and instead focused exclusively on stations' broad outreach and recruitment efforts rather than workforce composition.<sup>20</sup>

Thus, the Commission's rules are already operating at the outer bounds of what federal courts have deemed constitutionally acceptable. Imposing additional rules or reports aimed at the racial composition of a station's staff would jeopardize the sustainability of the FCC's EEO regime.<sup>21</sup>

The legal backdrop also makes plain why the ES Commenters' proposal to collect data on the racial and gender composition of a station's workforce from broadcasters who hire some employees through personal referrals would not withstand judicial scrutiny.<sup>22</sup> Penalizing stations with staffs that do not meet some undefined measure of diversity as so-called "intentional discriminators" would not only wrongly malign broadcasters,<sup>23</sup> it would clearly violate *Lutheran Church's* prohibition against government mandates that pressure broadcasters to make race-conscious hiring decisions to avoid Commission enforcement. The fact that radio and television stations hold a temporary government-issued license to operate would only heighten this unlawful pressure.<sup>24</sup> The Commission should reject the ES Commenters' misguided proposal.

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<sup>20</sup> *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Second Report and Order, 17 FCC Rcd 24018 (2002).

<sup>21</sup> Joint Reply Comments of the Named State Broadcasters Assns., MB Docket No. 17-105 (Aug. 4, 2017), at 21 (NASBA Modernization Comments).

<sup>22</sup> ES Commenters Comments at 5.

<sup>23</sup> Joint Reply Comments of the Named State Broadcasters Assns., MB Docket Nos. 18-23 and 17-105 (May 15, 2019), at 4-7.

<sup>24</sup> *Id.* citing *Lutheran Church*, 141 F.3d at 353.

Furthermore, even if permitted, there is no evidence that additional government mandates would be effective in promoting greater diversity in the broadcast workplace. The rules already require broadcasters to collect reams of data on all candidates interviewed or hired for job vacancies,<sup>25</sup> retain copies of vacancy advertisements and forward copies of announcements to requesting organizations.<sup>26</sup> Stations must also perform non-vacancy-specific outreach activities.<sup>27</sup>

If anything, the Commission should consider ways to reduce the administrative burdens on regulated parties instead of imposing additional rules.<sup>28</sup> A prime candidate for streamlining is the EEO audit process, where the Commission annually selects at random approximately five percent of radio and television stations for an audit of their EEO compliance.<sup>29</sup> This process places heavy burdens on stations without a corresponding public benefit. First, responding to an EEO audit can be extremely taxing. The audits require stations to collect and submit a substantial amount of information, including copies of the station's two most recent EEO public file reports, dated copies of all communications announcing every full-time position filled, a log of on-air job vacancy ads, information on interviewees and

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<sup>25</sup> 47 C.F.R. § 73.2080(c)(5).

<sup>26</sup> *Id.* at § 73.2080(c)(1).

<sup>27</sup> *Id.* at § 73.2080(c)(2).

<sup>28</sup> For example, a coalition of public broadcasting organizations have urged the Commission to streamline the rule by “reducing it to a non-discrimination prohibition and a general obligation to recruit for full-time job vacancies, and by reducing required EEO filings to only those that would accompany license renewal applications.” Comments of America’s Public Television Stations, Corporation for Public Broadcasting, National Public Radio, Inc. and Public Broadcasting Service (Public Broadcasters), MB Docket No. 17-105 (July 5, 2017), at 11-12.

<sup>29</sup> 47 C.F.R. at § 73.2080(f)(4).

persons hired for every position, documentation of non-job-specific recruitment initiatives, and information about any complaints involving the station, among other things.<sup>30</sup>

Resolving an audit can also require a significant amount of staff and/or outside attorney time, which can be extremely burdensome, especially for small broadcasters. NAB has obtained anecdotal information that collecting and uploading the required information, and responding to follow-up requests, can cost \$3,000 to \$5,000 for even the smallest of stations that can least afford the expense, and much more for larger station employment units that fill more job vacancies. The audit process is so burdensome that some public broadcasting stations have been forced to hire additional staff just to upload all the required documents.<sup>31</sup>

Second, the audit process has proven to be inefficient, for both industry and the Commission. During the 17 years of audits since the rules became effective in 2003, NAB estimates that the Commission has conducted audits of at least 15,000 broadcast stations, and likely far more since the audit letters direct stations to submit a response on behalf of all the stations in their station employment unit. However, to our knowledge, all of these inquiries have produced fewer than 20 Notices of Apparent Liability (NALs) or Admonishments to broadcasters for violating the EEO rules.<sup>32</sup> In other words, the audits have found that only a miniscule number of stations have violated the rules. The most common violations concern recordkeeping-related mistakes like failing to track recruitment sources or the number of

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<sup>30</sup> *Media Bureau Commences 2018 EEO Audits*, Public Notice, DA 18-155 (Feb. 23, 2018).

<sup>31</sup> Public Broadcasters Comments at 11 n. 8.

<sup>32</sup> We also note that the number of NALs has slowed to a trickle of only one or two per year over the past decade, likely reflecting broadcasters' increased familiarity with the EEO rules and the consequent decline of inadvertent errors.

interviewees, or neglecting to send vacancy announcements to a requesting organization. A handful involve failures to complete the minimum number of non-job-specific outreach initiatives, and others concerned recruitment mistakes because stations identified some new employees solely through on-air advertisements, unsolicited applications, personal referrals or Internet announcements. Notably, about one-third of the NALs we found reference Internet-only recruitment of some job candidates, which is now permissible since the Commission authorized it in a 2017 Declaratory Ruling.<sup>33</sup> In short, violations of the EEO rules are exceedingly rare, none involve a finding of discrimination, and the few identified violations typically involve some documentation error. Adding insult to injury, broadcasters must pay burdensome regulatory fees to fund the work of Commission staff on these unproductive exercises.<sup>34</sup>

Finally, EEO is the only broadcast rule NAB can identify for which the Commission conducts random audits to check whether licensees have complied.<sup>35</sup> All other Commission rules have the expectation that licensees will comply, and rule violations are complaint-driven or considered during the license renewal process. Random audits of broadcaster EEO compliance were initially imposed because broadcast license terms had been extended to eight years, and the Commission determined it should actively review compliance on an ongoing basis during this longer license term.<sup>36</sup> However, that decision was made long before

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<sup>33</sup> *Petition for Rulemaking Seeking to Allow the Sole Use of Internet Sources for FCC EEO Recruitment Requirements*, Declaratory Ruling, 32 FCC Rcd 3865 (2017).

<sup>34</sup> *Assessment and Collection of Regulatory Fees for Fiscal Year 2019*, Report and Order and Further Notice of Proposed Rulemaking, MD Docket No. 19-105 (rel. Aug. 27, 2019) at ¶ 3.

<sup>35</sup> NASBA Modernization Comments at 14.

<sup>36</sup> *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, MM Docket Nos. 98-204

much of the relevant information submitted during an audit became readily available in a station's online public inspection file. Both the Commission and consumers are now free to review a station's EEO compliance at any time, and if needed, the Commission can always follow-up with a station. Only seven months ago, the Commission eliminated the EEO Mid-Term Report (Form 397) because the relevant information on the form is generally available through other sources, rendering the form redundant and unnecessary.<sup>37</sup> The Commission also noted that eliminating Form 397 was consistent with its ongoing efforts to modernize its media rules and reduce unnecessary requirements.<sup>38</sup> The same logic dictates reducing the burdens of EEO audits, especially for small broadcasters.<sup>39</sup>

NAB thus submits that eliminating the audit process, at the very least for stations with 10 or fewer employees, would streamline EEO compliance for both the Commission and those broadcasters that can least afford administrative burdens. Doing so will not meaningfully reduce Commission enforcement of the EEO rules nor affect industry efforts to promote diversity. To the contrary, doing so may enable the Commission to refocus some resources on practical initiatives that will more effectively enhance employment diversity in broadcasting.

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and 96-16, Report and Order, 15 FCC Rcd 2329, 2388 (2000); *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, MM Docket Nos. 98-204 and 96-16, Notice of Proposed Rulemaking, 13 FCC Rcd 23004, 23030 (1998).

<sup>37</sup> *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2), Modernization of Media Regulation Initiative*, Report and Order, MB Docket Nos. 18-23 and 17-105, 34 FCC Rcd 668 (2019).

<sup>38</sup> *Id.*

<sup>39</sup> We note that other stakeholders have also proposed changes to the EEO rule that would reduce the recordkeeping burdens imposed on small broadcasters. Joint Comments of 82 Broadcast Station Licensees and Petition for Further Notice of Proposed Rulemaking, MB Docket No. 19-177 (July 18, 2019), at 7.

### III. PRACTICAL MEASURES ARE THE BEST APPROACH TO INCREASING INDUSTRY DIVERSITY

Broadcasters go above and beyond mere compliance with the Commission's EEO rules to promote employment diversity, administering some initiatives that could serve as a model for Commission efforts. For example, the E.W. Scripps Company has a corporate equity, diversity and inclusion (EDI) team dedicated to creating and implementing strategies for inclusive hiring practices, vendor selection and management philosophies. The goal is to have employees from diverse backgrounds at the table to serve its mission of providing all people equal access to news and information, and reflect the diverse audiences it serves.<sup>40</sup>

Broadcasters such as CBS also have a diversity council or similar group that supports company initiatives to build a diverse workforce at every level, provide outreach to the community and implement other initiatives to expand inclusion.<sup>41</sup> For its part, NBC has created a program aimed at diversifying representation among production coordinators and assistants. These pipeline programs supplement other successful company initiatives and provide training for diverse talent who want to work in television production, and can be important stepping-stones toward career advancement.<sup>42</sup>

These are only a few examples of company initiatives to grow diverse workforces. Associations and organizations also manage industry-wide projects that promote inclusive employment at all levels. The NAB Leadership Foundation (NABLF) is a long-standing model of

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<sup>40</sup> Press Release, [Scripps Grows Team Focused on Diversity Initiatives with Hire of Former Kroger Leader](#) (May, 21, 2019); see also Diversity Symposium Transcript at 324-327 (describing Scripps's mentorship and training program for new graduates interested in television journalism).

<sup>41</sup> See <https://www.cbcorporation.com/diversity/>.

<sup>42</sup> See Dino-Ray Ramos, [NBC Creates Networks' First Below-the-Line Diversity Initiatives](#), Deadline.com (May 30, 2019).

success.<sup>43</sup> For over twenty years, NABLF has sponsored a range of programs to provide students and professionals entrance into the broadcasting industry. In addition to widely-attended career fairs, NABLF hosts a free six-month Technology Apprenticeship Program, which prepares diverse talent for the broadcast engineering workforce through hands-on training with a local station and networking opportunities with potential employers. Apprentices ultimately receive education to become a Certified Broadcast Technologist. NABLF also oversees the Media Sales Academy, a year-long program that provides college students with the tools and resources needed to start their career at any station in any market, large or small. NABLF also runs the First Time Manager Series, which helps individuals transition to an effective team leader role.

NABLF's flagship program, the Broadcast Leadership Training (BLT) program, offers MBA-style executive training for station managers and others who want to advance to senior management or aspire to own stations. BLT provides hands-on training from industry experts including Commission staff and communications attorneys, members of Wall Street, and leading broadcast executives. Participants also build a network of industry contacts. To date, numerous BLT graduates have been promoted within their companies and dozens have purchased radio or television stations, with others in various stages of station acquisition.

Finally, in 2016 NAB and NABLF founded the Awareness in Reporting initiative, which produces educational toolkits designed to help stations improve the breadth, depth and accuracy of coverage of communities of color and issues related to them. Broadcasters use

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<sup>43</sup> NABLF was formerly known as the National Association of Broadcasters Education Foundation.

these educational materials in part to have newsroom staffing reflect the diverse communities these stations serve.<sup>44</sup>

Other broadcast organizations also provide programs and initiatives designed to foster the hiring and promotion of minority and women professionals, such as PBS's Next Generation Leadership program<sup>45</sup> and the Radio Television Digital News Foundation, which cultivates cultural diversity in America's newsrooms and seeks to promote and increase the minority participation in newsroom management.<sup>46</sup> NAB believes that Commission engagement in such efforts, either in partnership with industry or in government-lead enterprises, could substantially increase employment diversity far more effectively and efficiently than additional regulations.

The Commission should also play a larger role in educating broadcasters about the EEO rules. We support MMTC's proposals that the Commission produce a guide to EEO best practices that includes examples of effective EEO initiatives, and create a resource for effective model EEO programs. These items could be promoted through Commission workshops and in other venues.<sup>47</sup>

Finally, NAB submits that the Commission could make a significant impact in fostering connections among broadcasters and potential job applicants. NABLF administers a job board called Broadcast Career Link, where radio and TV stations post jobs and receive applications.<sup>48</sup> There are currently more than 1,000 vacancies listed. We are proud to provide

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<sup>44</sup> More information on NABLF's initiatives is available here: <https://www.nabfoundation.org/default.asp>.

<sup>45</sup> <http://www.pbs.org/ngl/program-overview/eligibility/>.

<sup>46</sup> [https://www.rtdna.org/content/diversity\\_toolkit](https://www.rtdna.org/content/diversity_toolkit).

<sup>47</sup> Coley Letter at 5-6.

<sup>48</sup> <https://www.broadcastcareerlink.com/>.

this service, but recognize that it could be even more effective with Commission support. For example, the Commission could help promote this outlet through broad nationwide outreach as well as targeted communications to universities and other organizations that assist women and minority job-seekers. In particular, the Commission could make a valuable contribution to raising awareness in rural areas, where it can be more difficult for broadcasters to identify minority job candidates.

Any of these endeavors could serve as a model for a Commission initiative designed to address disproportionate hiring trends in the broadcasting industry. These kinds of programs help produce the women and minority professionals that will lead the industry into the future. A commitment to training, education and outreach would be a far better use of the Commission's resources than merely reworking the existing unproductive rules. NAB stands ready to partner with the Commission on any initiatives towards this goal.<sup>49</sup>

#### **IV. PRECEDENT CONFIRMS THAT FORM 395-B CANNOT BE CONSIDERED IN EEO COMPLIANCE**

Although not raised in the Notice, NAB takes this opportunity to briefly reiterate our concerns about the lawfulness of reinstating the Annual Employment Report (Form 395-B). We agree with Chairman Pai that there are "serious statutory and constitutional concerns" with collection of the race- and gender-based data on Form 395-B.<sup>50</sup>

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<sup>49</sup> NAB also observes that, while much more needs to be done to promote greater diversity and inclusion among women and people of color in the broadcast industry, there has been notable increases in the percentage of minorities and, especially, women in broadcast newsrooms in recent years. According to RTDNA, for example, the percentage of women and people of color in TV newsrooms reached record highs for the second year in a row in 2019. See Bob Papper, *2019 Research: Local newsroom diversity* (June 13, 2019).

<sup>50</sup> [Letter from Ajit Pai, Chairman, FCC, to Senator Chris Van Hollen and Representative Yvette D. Clark](#) (May 28, 2019).

Since the current EEO rules became effective in 2003, the Commission has considered whether to reinstate Form 395-B. However, concerns over the use and confidentiality of the data have presented obstacles. Specifically, the form would enable the Commission to take a results-oriented approach in which EEO compliance rests on the inappropriate assumption that a station with a relatively homogeneous staff must have discriminatory hiring practices. Third-party groups would routinely file objections to stations' license renewal applications based on the same presumption, requiring the Commission and broadcasters to expend considerable resources to resolve such complaints. And there is no doubt that third-party groups will employ this tactic if allowed, given the ES Commenters' ongoing push to prosecute alleged discriminators based partly on the diversity of a station's workforce.<sup>51</sup>

Reinstating Form 395-B would clearly impose the exact same pressure on broadcasters to make race-based hiring decisions that is prohibited under *Lutheran Church and MD/DC/DE Assns.* As the court previously found, the same information collected on Form 395-B is little more than a government tool for imposing an unconstitutional hiring quota.<sup>52</sup> The court concluded that because “[n]o rational firm – particularly one holding a government issued license – welcomes a government audit,” the EEO rule, including the Form 395-B,

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<sup>51</sup> ES Commenters Comments at 4 (stating that broadcasters that hire some employees through personal referrals should be required to submit a Form 395-B to “allow the Commission to find and bring to justice those broadcasters that inherently discriminate.”). See also MMTC Comments, MM Docket Nos. 98-204 and 96-16 (Apr. 15, 2002) at 315 n. 459 (stating that MMTC will “liberally draw inferences from [the] statistics” on Form 395-B in determining whether individual stations discriminate in hiring.).

<sup>52</sup> *Lutheran Church*, 141 F.3d at 353-56.

“induces an employer to hire with an eye toward meeting the numerical target.”<sup>53</sup> The court thus determined that the previous EEO program requirements were unconstitutional because they “pressure – even if they do not explicitly direct or require – stations to make race-based hiring decisions.”<sup>54</sup>

The court in *MD/DC/DE Assns.* agreed: “[The agency with life and death power over the licensee is interested in results, not process, and is determined to get them. As a result, the threat of being investigated creates an even more powerful incentive for licenses to focus their recruiting efforts upon women and minorities.”<sup>55</sup> For these reasons, the Commission’s current EEO rules focus on broadcasters’ broad recruitment and outreach efforts, rather than workforce composition. The Commission should not turn back the clock by reinstating Form 395-B and impermissibly collecting data on the race and gender composition of a broadcaster’s workforce.

## V. CONCLUSION

For the reasons stated above, the Commission should forego imposing additional EEO rules and reports on top of the already burdensome regime, and instead focus its resources

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<sup>53</sup> *Id.* at 453.

<sup>54</sup> *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Second Report and Order and Third Notice of Proposed Rulemaking, 17 FCC Rcd 24018, 24020 (2002) citing *Lutheran Church*, 154 F.3d at 491.

<sup>55</sup> *MD/DC/DE Assns.*, 236 F.3d at 15.

on streamlining the current procedures and implementing practical initiatives that will actually increase employment diversity.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal flourish extending to the right.

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September 20, 2019