

The Heritage Foundation  
214 Massachusetts Ave NE  
Washington, DC 20002

April 29, 2024

The Honorable Jessica Rosenworcel  
Chairwoman  
Federal Communications Commission  
45 L Street NE  
Washington, DC 20554

Dear Chairwoman Rosenworcel,

The Heritage Foundation respectfully submits a public comment opposing the “Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies; Fourth Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking (FNPRM); MB Docket No. 98-204.” In summary, we oppose this proposed rulemaking because it violates the Constitution, is arbitrary, goes beyond the scope of the statute, duplicates current data collection, and does not sufficiently provide evidence for how the benefits outweigh the potential harms.

The Fourth Report and Order reinstates collection of Form 395-B data and makes it publicly available. In 1992, Congress amended the Communications Act of 1934 and directed the FCC to collect employment data from radio and television broadcast stations.<sup>1</sup> The FCC followed that mandate and created Form 395-B for broadcasters to submit gender, race, and ethnicity information about their workforce on an annual basis. In the following years, the D.C. Circuit Court found in two separate cases that the FCC’s use of Form 395-B violated the equal protection rights within the Due Process Clause of the Fifth Amendment, and therefore violated the Constitution.<sup>2</sup>

The D.C. Circuit Court found in the 1998 case, *Lutheran Church-Missouri Synod v. FCC*, that the FCC used the forms and subsequent regulations to compel broadcasters to hire a workforce that mirrored the composition of racial minorities and women in their geographical area. The D.C. Circuit found that the FCC’s actions were unconstitutional because they “pressure[d] license holders to engage in race-conscious hiring.”<sup>3</sup> In response to this court ruling, the FCC amended its rules and required broadcasters to report the race and sex of each job applicant and demonstrate that the broadcaster was making a sufficient effort to reach out to the entire community, otherwise the broadcaster could face an FCC investigation. Again, the D.C. Circuit struck down the FCC’s actions in *MD/DC/DE Broadcasters Ass’n v. FCC* in 2001 saying the Commission “clearly does create pressure to focus recruiting efforts upon women and

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<sup>1</sup> 47 U.S.C. 334

<sup>2</sup> *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); see also *Adarand Constructors Inc. v. Peña*, 515 U.S. 200 (1995) (overruling *Metro Broadcasting, Inc., v. FCC*, 497 U.S. 547 (1990))

<sup>3</sup> *Lutheran Church*, 141 F.3d at 352.

minorities” and violates the Fifth Amendment.<sup>4</sup> Furthermore, as FCC Commissioner Brendan Carr notes in his dissenting statement, the Supreme Court has ruled against this sort of conduct, saying, “governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.”<sup>5</sup>

The Civil Rights Act of 1964 requires data to be kept confidential when the Equal Employment Opportunity Commission (EEOC) collects it. Private sector employers with 100 or more employees are required to submit annual data that includes sex, race, and ethnicity to the EEOC. This means there is duplication in collection efforts for any broadcasters with at least 100 employees. Additionally, the Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA) established a uniform policy of confidentiality for data federal agencies collect for statistical purposes. When the FCC requested comment in 2004 about whether this policy should apply to Form 395-B data, broadcasters argued that it did, and it was good policy.<sup>6</sup> In 2004, the FCC suspended requiring stations to submit the forms so that it could further explore whether the employment data could or should remain confidential.<sup>7</sup>

The FCC determined in its current proposed rulemaking that CIPSEA does not apply to Form 395-B because the FCC is not a “statistical agency or unit.” The agency also determined that it is not a “nonstatistical agency” pursuant to CIPSEA because the FCC uses IT contracts to maintain and operate its systems. CIPSEA restricts nonstatistical agencies from using agents or contractors to collect or use the protected information. This is different than using IT contractors to develop and maintain electronic filing systems, assist filers, and other activities to operate the system. We conclude that the FCC used arbitrary reasoning and makes leaps in its conclusions that CIPSEA does not apply to Form 395-B.<sup>8</sup>

Now, the FCC proposed requiring broadcasters to publicly disclose the racial and gender breakdown of every employee, which does not keep in line with the requirements of the Civil Rights Act of 1964 or CIPSEA. The FCC says its “[Equal Employment Opportunity] EEO rules prohibit employment discrimination on the basis of race, color, religion, national origin, or sex, and require broadcasters to provide equal employment opportunities.”<sup>9</sup> However, it ignores how requiring stations to publish race and gender employee data could compel stations to violate the FCC’s own rule and make hiring decisions based on an applicant’s gender or race in order to avoid public scrutiny and pressure. Additionally, it is naïve at best and misleading at worst for the Commission to ignore that investors, activist groups, or other arms of the government could use data they find to be unfavorable against a broadcast station. On the contrary, the Commission effectively encourages third-party involvement by stating that outside individuals or entities will be in a position to correct any errors if a station misreports its data, and the data is made public.<sup>10</sup>

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<sup>4</sup> *MD/DC/DE Broadcasters Ass’n*, 236 F.3d at 19.

<sup>5</sup> Brendan Carr, Dissenting Statement, FCC 24-18, p. 2, <https://docs.fcc.gov/public/attachments/FCC-24-18A2.pdf>.

<sup>6</sup> Fourth Report and Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, MB Docket 98-204, FCC, Footnote 90, p. 14, <https://docs.fcc.gov/public/attachments/FCC-24-18A1.pdf>.

<sup>7</sup> *Ibid.*, paragraph 11, p. 7.

<sup>8</sup> *Ibid.*, paragraph 28, p. 16.

<sup>9</sup> *Ibid.*, paragraph 4, p. 3.

<sup>10</sup> *Ibid.*, paragraph 15, p. 9.

It is difficult to see how the FCC is not repeating history by pressuring broadcasters to hire based on race and gender. As Commissioner Carr also noted in his dissenting statement, this proposed rule not only violates the Fifth Amendment but also the First Amendment. Requiring stations to publicly disclose their workforce composition is compelled speech on matters of race and gender.<sup>11</sup>

In addition to concerns about the rule's unconstitutionality and arbitrary reasoning, the proposed rulemaking goes beyond the scope of the statute. The FCC proposed in its rulemaking adding a new category of "non-binary gender" to Form 395-B without Congressional authority. The statute prohibits the FCC from revising the regulations unless it is "to make nonsubstantive technical or clerical revisions in such regulations as necessary to reflect changes in technology, terminology, or Commission organization."<sup>12</sup> The FCC did not claim or explain that this change was a nonsubstantive technical or clerical revision, and therefore acted outside of its Congressional authority.<sup>13</sup>

The FCC says that the benefits of public disclosure outweigh the harms and again states the potential for the public to correct inaccurate or incomplete filings.<sup>14</sup> The agency seems to assume broadcasters will submit inaccurate or incomplete filings, and it fails to consider the ways in which stations could be harassed or alienated if individuals or groups do not like the published data. Given the FCC's history of misusing the data, and the high potential for harassment and abuse if it is made public on an aggregate level, we are troubled that the FCC is once again seeking to make this data public. The FCC says it does not have any basis to conclude that making the forms public would lead to undue public pressure but does not provide any evidence for this conclusion.<sup>15</sup> The Order on Reconsideration adds a statement that that the FCC will not use Form 395-B data to assess compliance with both the equal employment opportunity requirements and nondiscrimination requirements. We do not think this is enough to prevent public pressure.

The Second FNPRM seeks comment on whether the FCC can use the race and gender data collected from broadcaster multichannel video programming distributor (MVPD) on FCC Form 395-A to assess compliance with both the nondiscrimination and EEO requirements of its rules. We argue it should not because this would pressure MVPD to engage in race and gender-based hiring decisions—the very thing the Commission said it was not doing by requiring this data collection and making it public.<sup>16</sup>

Like FCC Commissioners Carr and Nathan Simington wrote in their dissenting statements, we do not oppose collecting the data and making it available anonymously so that no data is attributable to a particular station. We urge the FCC to consider keeping the data confidential and not to finalize this rule in its current form.

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<sup>11</sup> Brendan Carr, Dissenting Statement, FCC 24-18, p. 5, <https://docs.fcc.gov/public/attachments/FCC-24-18A2.pdf>.

<sup>12</sup> 47 U.S.C. 334 (c).

<sup>13</sup> Fourth Report and Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, MB Docket 98-204, FCC, Paragraph 39, pp. 20 – 21.

<sup>14</sup> *Ibid.*, paragraph 35, p. 20.

<sup>15</sup> *Ibid.*, paragraph 17, p. 11.

<sup>16</sup> *Ibid.*, paragraph 12, p. 49.

Respectfully,  
The Heritage Foundation

by:

/s/ Annie Chestnut

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