

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

In the Matter of

)	
Data Innovation Initiative; Review of Media)	
Bureau Data Practices; Review of Wireline)	MB Docket No. 10-103
Competition Bureau Data Practices; Review)	WC Docket No. 10-132
of Wireless Telecommunications Bureau Data)	WT Docket No. 10-131
Practices)	

To The Commission

**COMMENTS OF THE MINORITY MEDIA
AND TELECOMMUNICATIONS COUNCIL**

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SUMMARY

The Minority Media and Telecommunications Council (“MMTC”) respectfully submits these comments in response to the Commission’s three concurrent Public Notices released June 29, 2010, by the Media, Wireline Competition, and the Wireless Telecommunications Bureaus.¹ MMTC has long recognized the need for data innovation at the Commission in the areas of data collection, dissemination, and analysis.

Commission policy should be driven and supported by relevant and complete data sets. As Chairman Genachowski recently declared at the MMTC Access to Capital and Telecommunications Policy Conference, “promoting equal opportunity, driving private sector investment, fostering an environment where new and emerging businesses can thrive...are vitally important to our nation’s future.”² These goals cannot be achieved if the Commission fails to act and instead maintains its record of poor data collection in the areas of equal employment opportunity (“EEO”), media, telecom and broadband ownership, broadband deployment and broadband adoption.

The Commission’s civil rights and social justice initiatives, many of which have been pending for years, cannot move forward unless the agency changes course. The agency needs

¹ See Review of Media Bureau Data Practices, Public Notice, MB Docket No. 10-103 (released June 29, 2010); Review of Wireline Competition Bureau Data Practices, Public Notice, WC Docket No. 10-132 (released June 29, 2010); and Review of Wireless Telecommunications Bureau Data Practices, Public Notice, WT Docket No. 10-131 (released June 29, 2010) (collectively “Data Innovation Public Notice”).

² Prepared Remarks of FCC Chairman Julius Genachowski, MMTC Access to Capital and Telecommunications Policy Conference, July 20, 2010 at 1, available at http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0720/DOC-299976A1.pdf (last visited August 13, 2010) (“Genachowski MMTC Conference Remarks”).

reliable, transparent data that Commission staff, other government agencies, researchers, and advocates alike can use to shape policy to ensure greater opportunity for all.

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The Minority Media and Telecommunications Council respectfully submits these comments in response to the Commission’s three concurrent Public Notices released June 29, 2010, by the Media, Wireline Competition, and the Wireless Telecommunications Bureaus.³ The Commission seeks to modernize and streamline how it collects, uses, and disseminates data in an effort to reform the agency’s fact-based, data-driven decision-making.⁴

Data-driven analysis should be the hallmark of Commission policymaking. However, in recent years the Commission has not met this goal. MMTC hopes that with this proceeding, the Commission will ensure that the agency’s shortcomings in data collection and transparency over the past several years are corrected.

³ See Data Innovation Public Notice, supra p. 2.

⁴ See FCC Launches Data Innovation Initiative, Press Release (June 29, 2010).

I. THE NEED FOR NEUTRAL, RELIABLE, TRANSPARENT DATA

The need for new methods for the Commission to secure relevant data cannot be understated. In recent years, the Commission has come under fire for not collecting, maintaining, or supplying clear and accurate data in a transparent manner.⁵ In an effort to deregulate and lift reporting burdens on regulated entities over the past three decades, data collection became less of a priority to regulators generally.⁶ Private companies began to provide agencies such as the Commission with data.⁷ Unfortunately, this data is often gathered for the purpose of providing marketing and investment information, not for policy making, and often leaves out data on marginalized and commercially unattractive communities.⁸

An agency must examine relevant data and be able to explain the connection between this data and its policy decisions.⁹ Research indicates that there are significant problems with gathering and analyzing data on Forms 323 (ownership), 395 (equal employment opportunity or

⁵⁵ See generally Philip M. Napoli and Joe Karaganis, *Toward A Federal Data Agenda for Communications Policymaking*, 16 *CommLaw Conspectus* 53 (2007); and Catherine J.K. Sandoval, *Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity and Service in the Public Interest* (2009), available at http://mmtconline.org/lp-pdf/Minority_Commercial_Radio_Broadcasters_Sandoval%20MMTC_2009_final_report.pdf (last visited July 31, 2010). Napoli further cites how other agencies that review the Commission's work found that data to be flawed. Napoli at 67 (citing Government Accounting Office ("GAO") report criticizing data collection).

⁶ Napoli at 55-56 (discussing how the wave of deregulation in the 1980s led to reduction or elimination of federal agency's reporting requirements generally).

⁷ *Id.* at 57.

⁸ *Id.* at 57-58. For example, data on minority ownership is of great value to the Commission, but unfortunately private corporations sometimes fail to afford this data the value it deserves, making the agency's role in collecting the data that much more important. *Id.* at 61.

⁹ See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 398-90 (D.C. Cir. 2004) (discussing the court's scope of review in determining whether agency action was arbitrary and capricious).

“EEO”), and 477 (broadband deployment). However, the Commission does not often rely on the data it collects or on independent research, instead using the facts provided by interested parties in a proceeding.¹⁰ At times, even these interested parties are left searching for relevant details of matters before the Commission.¹¹ Independent researchers that have limited access to Commission data also find that it lacks details relevant to make effective policy decisions.¹² Limiting access to data that should face critical review often produces flawed conclusions by the Commission and other government entities.¹³ An agency that regulates one-sixth of the nation’s economy cannot afford to operate without robust, transparent and longitudinal data.

II. DATA INNOVATION INITIATIVE – HOW THE COMMISSION CAN IMPROVE DATA COLLECTION TO FURTHER CIVIL RIGHTS OBJECTIVES

The Commission seeks comment on the utility and rationale behind existing data, the scope of additional data that the Commission needs that is not being collected; how to improve data collection and analysis processes for existing data, and how to improve the dissemination of Commission reports and analysis.¹⁴

¹⁰ Philip J. Weiser, Institutional Design, FCC Reform, and The Hidden Side of The Administrative State, 61 Admin. L. Rev. 675, 681-82 (2009). For example, in 2007, the Commission was encouraged by then-Chairman Martin to rely on a single source of data to support a conclusion without adjudication or notice-and-comment proceedings. Id. at 686.

¹¹ Id. at 698-99. This “fundamentally undermines that agency’s ability to execute on its mission.” Id. at 716.

¹² Napoli at 81-82.

¹³ Rob Frieden, Lies, Damn Lies and Statistics: Developing a Clearer Assessment of Market Penetration and Broadband Competition in the United States, 14 Va. J.L. & Tech. 101, 112 (2009) (discussing how the Department of Commerce relied on flawed data in concluding the nation achieved its goals of affordable and ubiquitous broadband coverage).

¹⁴ See Data Innovation Public Notice at 1.

The Commission has extensive general authority to collect evidence needed to support its civil rights rules and policies through Sections 257, 303(g) and 403 of the Communications Act. As discussed herein, the Commission should improve its data collection on employment, ownership, and broadband deployment.

A. Employment Data – Form 395

Form 395 collects employment data for broadcasters and multichannel video programming distributors (“MVPDs”).¹⁵ This information, when collected, is profoundly useful in assessing diversity in employment of minorities and women in these fields. It is also useful in determining what, if any, measures industry or the government could take to improve diversity of employment. Unfortunately, as detailed in our June 29, 2010 letter to Chairman Genachowski (attached), the Commission’s EEO program has failed to live up to these goals.¹⁶

Sections 334 and 634 of the Act authorize the Commission to collect employment data.¹⁷ While MMTC continues to hold that collection and dissemination of employment data, including ethnicity and gender, are lawful and fall squarely within the Commission’s duties,¹⁸ the Commission has refused to collect employment data from its broadcast licensees for the past 10

¹⁵ Form 395-A is used by broadcasters, while Form 395-B is used by MVPDs.

¹⁶ See Letter to Chairman Genachowski from David Honig, MMTC, Regarding Request for Three Month Suspension of the Broadcast EEO Rule Upon the Passage of a Year With No EEO Enforcement, MB Docket No. 98-204 (June 29, 2010) (“MMTC 2010 EEO Letter”).

¹⁷ See Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies, Third Report and Order and Fourth Notice of Proposed Rulemaking, 19 FCC Rcd 9973, 9974 ¶3 (2004) (citing 47 U.S.C. §554(d)(3)(A) (requiring annual EEO filing) and 47U.S.C. §334(a)-(c) (specifying the extent of the Commission’s authority to revise its EEO regulations)) (“Fourth EEO NPRM”).

¹⁸ See Comments of the Minority Media and Telecommunications Council in Response to The Third Report and Order and Fourth Notice of Proposed Rulemaking, MM Docket No. 98-204 at 4-5 (May 22, 2008) (“2008 Form 395 Comments”).

years.¹⁹ In 2008, the agency sought comment on what racial/ethnic categories should be included on Form 395.²⁰ However, no effort is currently underway to collect this or other employment data from broadcasters beyond recruitment efforts, leaving the Commission with no data upon which to improve its EEO policies.

As explained in our 2008 comments on this matter, the raw data obtained from broadcasters and MVPDs neither contains nor implies a preference for one race or gender, nor would the Commission's consideration of this data imply such a preference.²¹ The Commission acknowledged as much in its 2004 EEO Order.²² Further, Commission licensees have no significant interest, much less a constitutionally protected interest, in concealing from their own listeners and viewers a highly relevant, though not necessarily dispositive, piece of evidence of whether their recruitment, hiring and retention efforts have helped prevent discrimination.²³ Broadcasters made such information public for over 30 years, without harm.

The Commission's reluctance to collect EEO data is no excuse for its failure to enforce its current rules. The Commission may compile and publish racial and gender statistics for the

¹⁹ See Lutheran Church/Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998) (“Lutheran Church”); see also MD/DC/DE Broadcasters Association v. FCC, 236 F.3d 13 (D.C. Cir. 2001) (“MD/DC/DE Broadcasters”) (both decisions invalidated the quantitative guidelines of the EEO program on equal protection grounds, but left data collection measures intact).

²⁰ See Media Bureau Seeks Comment on Possible Changes to FCC Forms 395-A and 395-B, MM Docket No. 98-204, Public Notice, DA-08-752, 23 FCC Rcd 544 (2008).

²¹ 2008 Form 395 Comments at 5.

²² See Broadcast and Cable Equal Employment Opportunities Rules and Policies, Third Report and Order and Fourth Notice of Proposed Rule Making, 19 FCC Rcd. 9973, 9982-83 ¶7 (2004) (stating “[t]he 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.”)

²³ See discussion in 2008 Form 395 Comments at 5.

purpose of developing and improving anti-discrimination policies and regulations.²⁴ However, enforcement efforts can never be viable as long as the EEO data that is collected from the Commission's audit program is meaningless. MMTC observed that in 2009, the Commission's random audits failed to uncover violations of the EEO rules.²⁵ The Commission's shortcomings in this area date to the early 2000s.²⁶ The need for the Commission to resume meaningful EEO enforcement is urgent because discriminatory practices have already caused minorities to be almost entirely purged from radio journalism.²⁷ Further, employment data aids the Commission not only in EEO policy, but in media ownership policy as it concerns the impact of consolidation on employment patterns.²⁸

B. Broadcast Ownership Data – Form 323

The Commission currently collects broadcast ownership data on Form 323. This data is vital because it informs the Commission of how its decisions on licensing and consolidation affect broadcasters of all sizes, particularly women and minority broadcasters. Proposals that rely on this data, such as the Full File Review proposal submitted almost two years ago by the Commission's Advisory Committee on Diversity for Communications in the Digital Age,²⁹

²⁴ Id. at 6.

²⁵ MMTC 2010 EEO Letter at 2-3.

²⁶ Napoli at 74 (discussing how the Commission failed to uncover data reporting issues in 2003 and 2004).

²⁷ MMTC 2010 EEO Letter at 2.

²⁸ Napoli at 63.

²⁹ See Report and Recommendation of the Eligible Entities Subcommittee, Advisory Committee on Diversity for Communications in the Digital Age (approved October 28, 2008) ("2008 Eligible Entities Report") (proposing Full File Review as a race-neutral method of increasing diversity in Commission licensees).

languish because without a solid, accurate administrative data on the record, the Commission cannot adopt constitutionally permissible regulations that aid minority broadcast ownership.

Unfortunately, researchers find that the Commission's methods of collecting this data are "highly inefficient, incomplete and burdensome" and "[frustrate] analysis and monitoring of important trends."³⁰ The Commission has acknowledged its shortcomings in this regard.³¹ As stated in the DCS 2008 Media Ownership Comments, modifications to data collection procedures would improve the ownership database and provide the agency with solid, reliable data upon which to shape broadcast media policy.³² There is no constitutional impediment preventing the Commission from collecting data on minority or women's ownership, and any argument for maintaining the *status quo* is heavily outweighed by the agency's need to collect, compile, and analyze current media ownership data so that it may craft sound policies.³³

³⁰ Sandoval at 25. Then-Commissioner Adelstein pointed to the fact that "there is no accurate census of women- and minority owned stations. As [FCC consultants] Professors Arie Beresteanu and Paul B. Ellickson said, 'the data currently being collected by the FCC is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis.'" See Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294, 23 FCC Rcd 5922, 5987 (2008) ("Broadcast Diversity Order") (Statement of Commissioner Jonathan S. Adelstein Concurring in Part and Dissenting in Part).

³¹ See Broadcast Diversity Order, 23 FCC Rcd at 5942 ¶53 ("we do recognize that our current data-collection efforts could be improved.")

³² DCS 2008 Ownership Comments at 2.

³³ DCS 2008 Ownership Comments at 17. To be sure, the Commission may collect data that will aid in the administration of its Congressional mandates. See United States v. New Hampshire, 539 F.2d 277, 282 (1st Cir. 1976) cert. denied, 429 U.S. 1023 (1976) (holding that collection of data about race was within Congress' enforcement powers under the Fourteenth Amendment); see also Madison-Hughes v. Shalala, 80 F.3d 1121, 1129-30 (6th Cir. 1996) (Congress may ensure compliance with federal regulations by collection of data, but the type of data to be collected falls within agency discretion in the absence of specific guidelines).

Researchers have suggested a number of steps the Commission could take to improve access to ethnicity, gender, and ownership structure, which are not currently searchable. First, the Commission could revise and simplify the public display of individual Form 323 station filings.³⁴ As it stands currently, those searching for the owner of a local station cannot easily ascertain the identity of a station owner.³⁵ As recommended in the 2007 Free Press “Off The Dial” report, each station should file a single form detailing the racial/ethnic/gender ownership of the ultimate voting and equity owners of the license holder.³⁶

The Commission should also extend the obligation of filing Form 323 to include LPTV stations and translators, as they are important entry points for minority and women owners.³⁷ Form 323-E, for non-commercial educational broadcasters, should also be revised because this form does not currently solicit information about the gender, race, and ethnicities of station owners.³⁸

The Commission should establish a separate filing category for transfers to bankruptcy trustees, debtors-in-possession or trusts established as a lender workout, recognizing the extraordinary nature of such transactions.³⁹ The current impedes scholarly, public, or

³⁴ See S. Derek Turner, *Off The Dial: Female and Minority Radio Station Ownership in the United States at 57* (2007) (Free Press) available at http://www.stopbigmedia.com/files/off_the_dial.pdf (last visited August 5, 2010); S. Derek Turner & Mark Cooper, *Out of The Picture 2007: Minority & Female TV Station Ownership in the United States 38-39*, (2007) (Free Press), available at <http://www.freepress.net/files/otp2007.pdf> (last visited August 5, 2010).

³⁵ Id.

³⁶ Id.

³⁷ Id.

³⁸ Id.

³⁹ See Sandoval at 10.

Commission identification of broadcast failures or distress.⁴⁰ As DCS stated in its comments, Form 323 should be collected annually to aid in longitudinal research by Commission staff, researchers, and advocacy groups.⁴¹ These issues are crucial to examining the status of broadcast ownership and the effect of agency rules on the broadcasting industry and the public its stations are licensed to serve.⁴²

C. Broadband Data – Form 477

The Commission currently collects broadband deployment data on Form 477. This data is vital as the nation moves toward attaining the goal of ubiquitous broadband deployment. Deployment rates are key to analyzing adoption rates and adjusting policies accordingly.

The Broadband Diversity Supporters (“BDS”) have offered numerous suggestions as to data collection.⁴³ Broadband data should be “collected and reported in a manner that produces verifiable, auditable and useful source data for evaluation by the public and by regulators.”⁴⁴ Data should be collected on a longitudinal basis and reported quarterly, to keep pace with rapidly evolving internet technology and allow regulators to plan and adjust policies in this arena.⁴⁵ As stated by BDS:

⁴⁰ Id.

⁴¹ DCS 2008 Ownership Comments at 18.

⁴² Id.

⁴³ See Initial Comments of the Broadband Diversity Supporters, In the Matter of A National Broadband Plan for Our Future, GN Docket 09-51, filed June 8, 2009 (“BDS National Broadband Comments”); see also See Comments of the Broadband Opportunities Coalition In Response to the Section 706 Notice of Inquiry, and A National Broadband Plan for Our Future, GN Docket Nos. 09-51 and 09-137 (September 4, 2009) (“BBOC Section 706 Comments”).

⁴⁴ BDS National Broadband Comments at 13.

⁴⁵ See id. The Broadband Data Improvement Act (“BDIA”) mandated certain data collection reforms that will improve the Commission’s data collection process. See Broadband Data

A comprehensive, consistent and transparent data collection system will: (1) help foster transparency, cohesiveness and interoperability across different federal agencies and different initiatives; (2) provide consistent and comparable metrics throughout the country; (3) confirm what aspects of deployment should be targeted and ensure that any race-conscious measures are narrowly tailored; (4) identify geographic and social gaps in broadband deployment; (5) facilitate compliance and accountability standards; (6) provide ways to accurately measure the efficacy of initiatives and (7) inform any new policy directions.⁴⁶

BDS provided a number of suggestions as to how the Commission could develop a full record on the matter. These data collection practices include:

- using socioeconomic data in addition to general technical information;
- making data multifunctional and layered to include social metrics. Tracking data on poverty status, employment status, income, race, language, public education, housing, health care, resource management, banking and credit availability, pollution,⁴⁷ electoral participation,⁴⁸ and insurance⁴⁹ is as crucial to designing inclusive broadband policies as tracking traditional penetration benchmarks such as speed, price, and adoption rates.⁵⁰ Further, such data should be obtained on a longitudinal basis, updated at least every three months, and rely upon granular, census-tract data.⁵¹

Improvement Act of 2008, Pub. L. No. 110-385, 122 Stat. 4097 (codified at 47 U.S.C. §§1301-04).

⁴⁶ BDS National Broadband Comments at 43-44.

⁴⁷ See, e.g., Robert Bullard *et al.*, Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years, 38 *Envtl. L. J.* 371 (2008) (discussing the disproportionate location of environmental hazards in or near minority and low-income communities).

⁴⁸ See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 340-42 (1960) (where the boundaries of the town of Tuskegee, Alabama, were redrawn “from a square to an uncouth twenty-eight-sided figure” in an effort to deprive Black citizens of voting rights); see also Amanda K. Baumle, Strategic Annexation Under the Voting Rights Act: Racial Dimensions of Annexation Practices, 24 *Harv. BlackLetter J.* 81 (2008) (exploring how annexation of territories with high populations of non-minorities often results in dilution of the minority votes).

⁴⁹ See, e.g., *Saunders v. Farmers Insurance Exchange*, 440 F.3d 940, 942-43 (8th Cir. 2006) (discussing allegations that insurance companies discriminated against minorities by charging rates other than the rate filed with the regulatory agency based on geography).

⁵⁰ See *id.*

⁵¹ BBOC Section 706 Comments at 2-3.

- expanding Form 477 data collection to include information from commercial carriers regarding their tier pricing, credit and deposit requirements across various communities;⁵²
- making ongoing assessments of socially and economically disadvantaged businesses (“SDBs”) and minority or woman-owned business entities (“MWBEs”) engagement;⁵³ and
- collecting specific information regarding hardware and software availability in underserved and underserved areas.⁵⁴

Reports should be uniform to ensure interoperability with other federal, state and municipal mapping and data collection initiatives.⁵⁵ Reports should also be sure to cover the availability of broadband in multiple-occupant dwellings, particularly low-income dwellings subsidized with federal funds.⁵⁶

D. Reporting and Monitoring Applicant Demographics in Wireless Services

The Commission should extend race and gender reporting requirements to all wireless services and auctions. Ethnicity and gender are currently optional on some forms,⁵⁷ but this data is not collected on other wireless forms, including the Ownership Disclosure Form 602. The Commission currently collects demographic information on race and gender for auction and licensing proceedings on a voluntary basis. This aggregate database is certain to be skewed since those not responding to requests for data typically are those not proud of what would be disclosed; hence most nonrespondents to a voluntary survey about race are unlikely to manifest any diversity. Thus the Commission should require reporting on these demographics by all

⁵² Id. at 13-14.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id. at 13 (citing BDIA at §1304).

⁵⁶ Id. at 13.

⁵⁷ See e.g. Form 608 – Application or Notification for Spectrum Leasing Arrangement.

wireless licensees. This data is important for longitudinal research on wireless ownership and could be helpful in developing policies that identify market entry barriers⁵⁸ and increase ownership and other opportunities for SDBs and MWBEs in the wireless space.

E. Voluntary SDB/MWBE Clearinghouse

The Commission should assemble a database of information about SDBs and MWBEs who are interested in partnering or subcontracting with larger companies or providing services to the public and who wish to become more widely known to potential contractors.⁵⁹ This information could be collected by the Office of Communications Business Opportunities, updated quarterly, and made available electronically on demand and by hard copy upon request for those who cannot access the information online. Availability of the data would not act as an endorsement by the agency. The Commission would only act as an aggregator of data for the benefit of its regulatees and the public.

⁵⁸ See 47 U.S.C. §257.

⁵⁹ See Reply Comments of the Minority Media and Telecommunications Council in Response to NBP #9, In the Matter of Opportunities For Disadvantaged Businesses In The Age of Broadband, GN Docket Nos. 09-47, 09-51, 09-137 at 7 (Nov, 17, 2009) (“MMTC DBE Reply Comments”).

CONCLUSION

The Commission must move toward transparent, data-driven policy making in all areas of licensing. Collecting data on minority and women's participation in the Commission-regulated fields is essential to ensuring opportunity for all. The necessity of data on employment, race, and gender is essential and should not be limited to traditional media. This data must be collected to protect and promote civil rights and social justice in all aspects of media and telecommunications. The Commission should expand its data collection efforts on all fronts to make certain that staff, researchers, and advocates have the information necessary to form policies that promote diversity and inclusion.

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