



MEMORANDUM

January 9, 2020

**To: Subcommittee on Communications and Technology Members and Staff**

**Fr: Committee on Energy and Commerce Staff**

**Re: Legislative Hearing on “Lifting Voices: Legislation to Promote Media Marketplace Diversity”**

On **Wednesday, January 15, 2020, at 10:30 a.m. in room 2322 of the Rayburn House Office Building**, the Subcommittee on Communications and Technology will hold a legislative hearing entitled, “Lifting Voices: Legislation to Promote Media Marketplace Diversity.”

**I. BACKGROUND**

**A. The Current Landscape**

There is wide consensus that ownership of traditional media distribution outlets – broadcast and multichannel video programming distributor (MVPD) - by women and people of color is very low.<sup>1</sup> According to the most recent data from the Federal Communications Commission (FCC), from October 2015, ownership of full power commercial television stations and commercial FM radio stations by women and people of color was around 10 percent.<sup>2</sup> The FCC does not collect similar ownership data for MVPDs.

Historically, a tax certificate program helped increase diversity of broadcast ownership. Using authority granted it by Congress in 1943,<sup>3</sup> the FCC created the minority ownership tax certificate program in 1978, to address the dearth of broadcast ownership by people of color.<sup>4</sup> The program provided tax breaks to companies that sold a radio or television station to a

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<sup>1</sup> See, e.g., Federal Communications Commission, *Third Report on Ownership of Commercial Broadcast Stations* (May 10, 2017); Government Accountability Office, *Economic Factors Influence the Number of Media Outlets in Local Markets, While Ownership by Minorities and Women Appears Limited and Is Difficult to Assess* (April 11, 2008) (GAO 08-383).

<sup>2</sup> Federal Communications Commission, Media Bureau, *Third Report on Ownership of Commercial Broadcast Stations* (May 10, 2017). Ownership by women and people of color of Class A television stations, low power television stations, and commercial AM radio stations did not fare any better. *Id.*

<sup>3</sup> 47 U.S.C. § 1071(a) (1994).

<sup>4</sup> Federal Communications Commission, *Statement of Policy on Minority Ownership of Broadcast Facilities, Public Notice* (May 25, 1978) (FCC 78-322).

minority-owned business.<sup>5</sup> Congress eliminated the tax certificate program in 1995.<sup>6</sup> During the tax certificate program's tenure, minority broadcast ownership increased from 40 radio and TV stations in 1978, to 288 radio and 43 TV stations in 1995.<sup>7</sup> Courts have since prevented government agencies from adopting race-specific policies without sufficient data demonstrating the need for the race-specific measures.<sup>8</sup>

## **B. Importance of Viewpoint and Ownership Diversity**

Viewpoint and ownership diversity have long been cited by Congress (as well as the FCC) as constituting a compelling governmental interest both for Congress and the FCC.<sup>9</sup> Media outlets provide viewers with educational, political, entertainment, and news programming. Diversity helps to ensure that programming offers different perspectives and that viewers have access to programming that is relevant to them.<sup>10</sup>

The past decade has seen an explosion of new media sources. Despite the proliferation of these new sources, traditional media sources continue to be dominant sources for programming.<sup>11</sup> Recent data shows that the majority of households receive broadcast programming from an MVPD provider, but that the number of households relying solely on over-the-air television service is rising.<sup>12</sup>

## **C. Factors Affecting Participation by Women and People of Color**

Some argue that certain factors, including systemic discrimination, lack of access to capital, and limited opportunities, have resulted in women and people of color being shut out of

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<sup>5</sup> Erwin G. Krasnow and Lisa M. Fowlkes, *The FCC's Minority Tax Certificate Program: A Proposal for Life After Death*, Federal Communications Law Journal (1999).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See Leonard M. Baynes, *Life After Adarand: What Happened to the Metro Broadcasting Diversity Rationales for Affirmative Action for Affirmative Action in Telecommunications Ownership*, University of Michigan Journal of Law Reform (1999).

<sup>9</sup> Michelle C. Forelle, *The FCC and the Problem of Diversity*, International Journal of Communication (2015).

<sup>10</sup> See, e.g., Carolyn M. Byerly, *Behind the Scenes of Women's Broadcast Ownership*, Howard University Journal of Communications (2011).

<sup>11</sup> See, e.g., Wayne Friedman, *Broadcast TV Maintains Media Dominance*, Media Post (May 18, 2017) (<https://www.mediapost.com/publications/article/301434/broadcast-tv-maintains-media-dominance.html>).

<sup>12</sup> Federal Communications Commission, *Communications Marketplace Report* (Dec. 26, 2018) (FCC 18-181).

ownership opportunities.<sup>13</sup> According to the FCC, the lack of ownership diversity can affect the viewpoint diversity in the marketplace.<sup>14</sup>

While the FCC granted the first broadcast license to a woman in 1922, the FCC did not begin granting radio licenses to applicants of color until 1949, nor television licenses to applicants of color until 1973.<sup>15</sup> When initially licensing broadcast stations, the FCC and its predecessor agency, the Federal Radio Commission, denied applications to qualified African Americans, yet allowed known segregationists to hold broadcast licenses.<sup>16</sup> This imbalance continued and was exacerbated by a licensing process that favored applicants with prior broadcasting experience, which women and people of color did not generally have.<sup>17</sup> It was not until 1978 that the FCC adopted policies to promote ownership opportunities for people of color.<sup>18</sup> By that time, the most sought-after radio and television licenses had already been awarded.<sup>19</sup>

Employment discrimination also affects viewpoint and ownership diversity.<sup>20</sup> It was not until 1969 that the FCC adopted its first employment nondiscrimination rule, which was extended to gender discrimination in 1971.<sup>21</sup> The FCC has acknowledged that the underlying rationales of the equal employment opportunity (EEO) rules are to promote “varying perspectives” and to deter employment discrimination, which can harm “efforts to diversify

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<sup>13</sup> Ivy Planning Group LLC, Prepared for the Office of General Counsel, FCC, *Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing*, (Dec. 2000).

<sup>14</sup> See, e.g., Federal Communications Commission, *Quadrennial Review of the Commission’s Broadcast Ownership Rules* (Aug. 10, 2016) (FCC 16-107).

<sup>15</sup> See note 13; Antoinette Cook Bush and Marc S. Martin, *The FCC’s Minority Ownership Policies from Broadcasting to PCS*, Federal Communications Law Journal (1996).

<sup>16</sup> David Honig, *How the FCC Suppressed Minority Broadcast Ownership, and How the FCC Can Undo the Damage it Caused*, Southern Journal of Policy and Justice (Oct. 2018). At that time, the FCC also denied licenses to Jewish Americans because of their religion. *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See note 4.

<sup>19</sup> Antoinette Cook Bush and Marc S. Martin, *The FCC’s Minority Ownership Policies from Broadcasting to PCS*, Federal Communications Law Journal (1996).

<sup>20</sup> Federal Communications Commission, *Streamlining Broadcast EEO Rule and Policies*, Order and Notice of Proposed Rulemaking (Feb. 8, 1996) (FCC 96-49).

<sup>21</sup> Theresa Brunson, *The Federal Communications Commission’s Commitment to Regulating Equal Employment Opportunity in The Broadcast Industry*, Howard Scroll Social Justice Law Review (1993). The EEO rules were extended to MVPDs in 1972 and FCC’s rules also prohibit age discrimination by MVPDs.

media ownership by impeding opportunities” for women and people of color to gain broadcasting experience.<sup>22</sup>

The EEO rules prohibit employment discrimination on the basis of race, color, religion, national origin, or gender. The rules also require broadcasters to create a recruitment and outreach program to provide notice of job vacancies.<sup>23</sup> Some argue that the FCC has done little to enforce its own EEO rules,<sup>24</sup> even though the FCC has said it will consider, among other things, compliance with the EEO rules when determining whether a broadcast license should be renewed.<sup>25</sup> Additionally, the FCC is required to collect employment demographic data.<sup>26</sup> Despite the statutory requirement to collect employment data, the FCC has failed to collect this data for nearly two decades.<sup>27</sup>

Women and people of color also face hurdles when it comes to financing, and research by the FCC and National Telecommunications and Information Administration has shown that access to capital is a barrier to entry.<sup>28</sup> This can be due to discrimination or the bank’s lack of familiarity with the broadcasting industry.<sup>29</sup> Even overcoming the hurdle of financial resources, there are fewer opportunities for women and people of color to enter the market because there are limited broadcast properties available for purchase.<sup>30</sup>

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<sup>22</sup> See note 20.

<sup>23</sup> Federal Communications Commission, *EEO Rules and Policies for Radio, Broadcast TV and Non-Broadcast TV* (<https://www.fcc.gov/consumers/guides/eeo-rules-and-policies-radio-and-broadcast-and-non-broadcast-tv>).

<sup>24</sup> See note 16. At that time, the FCC also denied licenses to Jewish Americans because of their religion. *Id.*

<sup>25</sup> See note 23.

<sup>26</sup> Federal Communications Commission, *Review of The Commission’s Broadcast and Cable EEO Rules and Policies* (April 19, 2004) (FCC 04-103).

<sup>27</sup> Letter from Senator Chris Van Hollen and Representative Yvette D. Clarke to FCC Chairman Ajit V. Pai (May 10, 2019).

<sup>28</sup> Government Accountability Office, *Economic Factors Influence the Number of Media Outlets in Local Markets, While Ownership by Minorities and Women Appears Limited and Is Difficult to Assess* (March 2008) (GAO 08-383). See also, Carolyn M. Byerly, *Behind the Scenes of Women’s Broadcast Ownership*, Howard University Journal of Communications (2011).

<sup>29</sup> Government Accountability Office, *Economic Factors Influence the Number of Media Outlets in Local Markets, While Ownership by Minorities and Women Appears Limited and Is Difficult to Assess* (March 2008) (GAO 08-383).

<sup>30</sup> *Id.*

## II. LEGISLATION

### A. H. Res. 549

Rep. Demings (D-FL) reintroduced H. Res. 549 after first introducing the legislation in the 115<sup>th</sup> Congress. The resolution resolves to reaffirm the commitment of the House of Representatives to media diversity and pledges that Congress will work with media entities and diverse stakeholders to develop common ground solutions to eliminate barriers to media diversity.

### B. H.R. 3957, the “Expanding Broadcast Ownership Opportunities Act”

Rep. Butterfield (D-NC) reintroduced H.R. 3957, the “Expanding Broadcast Ownership Opportunities Act of 2019”, after first introducing the legislation in the 115<sup>th</sup> Congress. The Expanding Broadcast Ownership Opportunities Act would reinstate the tax certificate program at the FCC, which would incentivize sales to women and members of minority groups and encourage investment of capital in stations owned by women and members of minority groups. The bill also requires the FCC to make recommendations to Congress for increasing the number of broadcast stations owned by women and members of minority groups and submit to Congress a report every two years that states the total number of broadcast stations that are owned by women and members of minority groups.

### C. H.R. 5564, the “Enhancing Broadcaster DIVERSITY Data Act”

Rep. Clarke (D-NY) introduced H.R. 5564, the “Enhancing Broadcaster Diversity and Inclusion by Verifying and Ensuring the Reporting required by Statute Is Transpiring and Yielding Data Act” or the “Enhancing Broadcaster DIVERSITY Data Act”. H.R. 5564 would require the FCC to complete its rulemaking reviewing the FCC’s broadcast and cable equal employment opportunity rules. The bill would also prohibit the FCC from substantially revising broadcast ownership data reporting requirements and requires the FCC to include an analysis of the data in its communications marketplace report. The bill also requires the FCC to create a public, searchable database of the broadcast ownership data collected by the FCC.

### D. H.R. 5567, the “MEDIA Diversity Act”

Rep. Long (R-MO) introduced H.R. 5567, the “Measuring the Economics Driving Investments and Access for Diversity Act of 2020” or the “MEDIA Diversity Act of 2020”. The MEDIA Diversity Act would require the FCC to consider, with the input of its Office of Communications Business Opportunities of the Commission, market entry barriers for socially disadvantaged individuals in the communications marketplace.

### **III. WITNESSES**

The following witnesses have been invited to testify:

**Ms. Maurita Coley, Esq.**

President and CEO

Multicultural Media, Telecom and Internet Council

**Mr. Clint Odom**

Senior Vice President, Advocacy & Policy &

Executive Director, Washington Bureau

National Urban League

**Ms. Catherine J.K. Sandoval**

Associate Professor

Santa Clara University School of Law

**Ms. Diane Sutter**

President/CEO

ShootingStar Inc.