

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	DA 08-752
Review of the Commission's Broadcast)	
and Cable Equal Employment Opportunity)	MM Docket No. 98-204
Rules and Policies)	

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)¹ submits its comments in response to the above-captioned Public Notice in which the Commission seeks comment on possible changes to its annual reporting forms that request employee data from broadcasters (FCC Form 395-B) and multichannel video programming distributors (“MVPDs”) (FCC Form 395-A).²

In the Third Report and Order in this proceeding,³ the Commission stated its intention to conform the racial and employment categories contained on Forms 395-B and 395-A to those on the Equal Employment Opportunity Commission’s (“EEOC”) Form EEO-1. At the time, however, the EEOC was in the midst of revising Form EEO-1 to incorporate new categories adopted by the Office of Management and Budget

¹ NAB is a nonprofit, trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission, the Courts, and other federal agencies.

² Public Notice, *Media Bureau Seeks Comment on Possible Changes to FCC Forms 395-A and 395-B*, MM Docket No. 98-204, DA 08-752 (April 11, 2008).

³ *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, 9977-78 (2004) (“Third Order” or “Fourth Notice”).

(“OMB”); therefore, the Commission delayed adoption of the forms until the EEOC released a new Form EEO-1. Third Order, 19 FCC Rcd at 9977-78. Now that the EEOC has acted, the Commission seeks comment on whether it should incorporate the EEOC’s revised racial and employment categories in Forms 395-A and 395-B. Public Notice at 1.

NAB respectfully takes this opportunity to restate the importance of collecting the information on Form 395-B on an anonymous basis to prevent unlawful pressure on broadcasters to adopt race or gender-based hiring policies. In particular, NAB reiterates our support for collecting the Form 395-B data pursuant to the Confidential Information Protection and Statistical Efficiency Act of 2003 (“CIPSEA”).⁴

The Commission’s current equal employment opportunity (“EEO”) rules represent the Commission’s third attempt at crafting constitutionally permissible EEO policies.⁵ In 1998, the D.C. Circuit in *Lutheran Church-Missouri Synod v. FCC* held that the Commission’s EEO program requirements for broadcasters were unconstitutional because they imposed unlawful “pressure” on “stations to make race-based hiring decisions.”⁶ Similarly, in 2001, the D.C. Circuit in *MD/DC/DE Broadcasters Association*

⁴ Pub. L. 107-347, 116 Stat 2962, Dec. 17, 2002, codified in 44 U.S.C. § 3501 note. The Commission sought comment on applying CIPSEA to Form 395-B in the Fourth Notice, 19 FCC Rcd at 9978-9979. See Comments of the National Association of Broadcasters, MM Docket No. 98-204 (July 29, 2004) (“NAB Fourth Notice Comments”); Reply Comments of the National Association of Broadcasters, MM Docket No. 98-204 (Aug. 9, 2004) (“NAB Fourth Notice Reply Comments”).

⁵ *Second Report and Order and Third Notice of Proposed Rulemaking* in MM Docket No. 98-204, 17 FCC Rcd 24018 (2002) (“*Second Order*”).

⁶ 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh’g denied*, 154 F.3d 487,491, *pet. for reh’g en banc denied*, 154 F.3d 494 (D.C. 1998) (“*Lutheran Church*”). The Commission used certain processing guidelines to select licensees for an EEO audit, which the

v. FCC rejected the Commission's revised EEO policies because part of these rules required broadcasters to report on the race and sex of job applicants. The court found that this EEO option placed unlawful pressure on broadcasters to focus their recruitment efforts on minorities and women or otherwise face a Commission investigation.⁷

Accordingly, the Commission specifically crafted the current rules to avoid these constitutional problems by emphasizing "outreach in recruitment to all qualified job candidates." Second Order, 17 FCC Rcd at 24019. However, broadcasters have argued on several occasions that the data collected on Form 395-B, if available on a station-by-station attributed basis, is a potential vehicle for the exact sort of unlawful pressure prohibited in *Lutheran Church and Association*.⁸ This report instructs all television and radio stations with five or more full-time employees to report annually on the ethnic, racial and gender composition of their full-time and part-time work staff. The form collects data on the number and staff position of all male and female Whites, African Americans, Hispanics, Native Americans, among others. Determination of an employee's status may be made by self identification or by an employer's "visual survey" of their staff, and an employee "may be included in the minority group to which she or he appears to belong."⁹ The Commission promises to use this data only to

court held "induces an employer to hire with an eye toward meeting the numerical target." *Id.* at 353-354.

⁷ 236 F.3d 13, 21-22 *rehearing den.* 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 920 (2002) ("*Association*").

⁸ See, e.g., NAB Fourth Notice Comments at 8-11; Joint Comments of the Named State Broadcasters Associations, MM Docket No. 98-204 (July 29, 2004); Comments of the National Association of Broadcasters, OMB Control No. 3060-0390 (Aug. 4, 2003).

⁹ Instructions for Completing FCC Form 395-B, Item No. (10)(a).

analyze industry hiring trends and to create reports to Congress, and not to assess an individual licensee's compliance with the EEO rules. Third Report and Order, 19 FCC Rcd at 9974.

As NAB has long contended, station specific data is not needed for this purpose. In contrast, station-by-station Form 395-B data may impose unlawful pressure on licensees to focus on certain racial and gender classifications when hiring employees, in violation of Lutheran Church and Associations. For example, third parties may leverage the data to influence a licensee's hiring decisions; a risk that even the *Lutheran Church* court recognized: "As a matter of common sense, a station can assume that a hard-edged factor like statistics is bound to be one of the more noticed screening criteria. The risk lies not only in attracting the Commission's attention, but also that of third parties." *Lutheran Church*, 141 F.3d at 353.

For these reasons, broadcasters have long supported a process that would allow broadcasters to submit Form 395-B on an anonymous basis, thereby enabling the Commission to collect and use the data as needed while at the same time sheltering licensees from unconstitutional hiring pressures. As the Commission explored in the Fourth Notice, collecting Form 395-B pursuant to CIPSEA appears extremely promising. Under CIPSEA, data acquired by a government agency under a pledge of confidentiality for "exclusively statistical purposes" may not be disclosed by the agency in identifiable form, for any use other than an exclusively statistical purpose, except with the informed consent of the respondents.¹⁰ CIPSEA defines "statistical purpose" as the "description,

¹⁰ CIPSEA, § 512(b). The purpose of CIPSEA is to establish a "clear and consistent" standard for government use of statistical information, and to enhance confidentiality protections designed to improve the quality of Federal statistics. H.R. Rep. 107-778, 107th Cong., 2nd Sess. 2002, at 8.

estimation, or analysis of the characteristics of groups, without identifying the individuals or organizations that comprise such groups.” CIPSEA, § 502(9). The term “nonstatistical purpose” is defined as “the use of data in identifiable form for any purpose that is not a statistical purpose, including any administrative, regulatory, law enforcement, adjudicatory, or other purpose that affects the rights, privileges, or benefits of a particular identifiable respondent.” *Id.* at § 502(5).

NAB submits that the information on Form 395-B fits squarely within these parameters. First, the form data is clearly of a statistical nature as filers must only complete a grid indicating the number full-time employees in various job categories broken down by gender and race/ethnicity. The report requires no descriptions, explanations or other text. Second, the annual employment reports must be intended for “statistical purposes” because they will not be used for “nonstatistical purpose,” as defined under CIPSEA.¹¹ The Commission has repeatedly emphasized that the information collected on Form 395-B will not be used in any way to assess broadcasters’ compliance with the EEO rules, and that it will dismiss any petition filed by a third party based on Form 395-B data.¹² For instance, the Commission stated in the Third Order that “the data collected in the employment reports will be used to compile industry employment trends reports and reports to Congress and will not be used to determine compliance with our EEO rules.” Third Order, 19 FCC Rcd at 9975. The information on Form 395-B is merely a compilation of data submitted by all broadcast licensees that, as required under CIPSEA’s definition of “statistical purpose,” will be

¹¹ CIPSEA, § 502(5).

¹² See, e.g., *Report and Order*, 15 FCC Rcd at 2417-18.

used only to “estimate” and “analyze” the characteristics of the broadcasting industry. In fact, the Commission even added a special note to the EEO rules designed to assuage the worries of the “wariest” broadcasters:¹³

Data concerning the gender, race and ethnicity of a broadcast station’s workforce collected in the annual employment report will be used only for purposes of analyzing industry trends and making reports to Congress. Such data will not be used for the purpose of assessing any aspect of an individual broadcast licensee’s compliance with the equal employment opportunity requirements of § 73.2080.¹⁴

Clearly, the Commission wants to assure licensees that Form 395-B data will not be used for any “nonstatistical” purpose. Although the Commission to date has rejected the recommendations of industry to collect Form 395-B on an anonymous basis, it has never done so because it would make it more difficult for the Commission to analyze the industry. To the contrary, the Commission has repeatedly expressed an interest in allowing licensees to file Form 395-B anonymously, but determined that once the data was in the Commission’s hands, there was no way for the Commission to prevent disclosure under the Freedom of Information Act (“FOIA”).¹⁵ Moreover, the Commission found that protecting the filer’s identity through other means was not feasible. For instance, the Commission rejected suggestions to use a tear-off sheet to separate the identity of the filer from the report, and to use an independent third party to collect and collate the data, because they could compromise the data by making it difficult for the Commission to contact individual filers who submitted incomplete data.

¹³ *Id.* at 22560.

¹⁴ 47 C.F.R. § 73.3612 Note.

¹⁵ *Memorandum Opinion and Order*, 15 FCC Rcd 22548, 22559 (2000) (“2000 Order”).

However, no such problem would exist if the annual employment reports were collected under CIPSEA, as licensees submit the entire Form 395-B, including the identifying information, enabling the Commission to follow-up if needed.

NAB believes that the most workable solution to all the obstacles impeding anonymous filing of Form 395-B is to collect the forms under a pledge of confidentiality pursuant to CIPSEA. Such a process will mitigate the constitutional problems raised in *Lutheran Church and Associations* by breaking any link between a licensee's filing of the report and its hiring practices or EEO compliance, thereby providing licensees with maximum comfort that their hiring information will remain confidential and protected from misuse. CIPSEA would be a valuable tool for strengthening the Commission's goal of using the data only for statistical purposes, and the result would be entirely consistent with the expressed purpose of CIPSEA, which cites a "declining trust of the public" in the protection of information provided to federal agencies, and finds that "protecting the confidentiality interests of . . . organizations who provide information . . . for Federal statistical programs serves both the interests of the public and the needs of society."¹⁶

For the foregoing reasons, NAB respectfully requests that the Commission should collect FCC Form 395-B pursuant to CIPSEA in order to ensure the confidentiality of broadcast licensees' submitted data.

¹⁶ CIPSEA, § 511(4) and (5).

Respectfully submitted,

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A handwritten signature in cursive script, appearing to read "Marsha MacBride".

Marsha MacBride
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