

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

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

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (“NAB”)¹ does not oppose reinstatement of FCC Form 395-B (Annual Employment Report),² provided the form data remains confidential and disassociated from any specific broadcast stations or groups, and any related analysis or reports are published in an anonymized, aggregated format.³ Publicly releasing such data about the race, ethnicity, and gender of stations’ employees would exceed the Commission’s legal authority by imposing unlawful pressure on stations to hire preferentially and would thus jeopardize the entire data collection.⁴ The brief record submitted in response to the Further Notice offers no substantive counter to this position, as commenters in support of

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

² *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Further Notice of Proposed Rulemaking, MB Docket No. 98-204 (rel. July 26, 2021) (Further Notice).

³ Comments of the National Association of Broadcasters at 1-2, MB Docket No. 98-204 (Sep. 30, 2021) (NAB Comments).

⁴ *Id.* at 1 citing *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh’g denied*, 154 F.3d 487, *pet. for reh’g en banc denied*, 154 F.3d 494 (D.C. 1998) and *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13 (2001), *pet. for reh’g denied.*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 920 (2002).

restoring Form 395-B merely repeat previously refuted arguments.⁵ If anything, the record supports NAB's calls for confidentiality of the form and reducing the burdens on companies that also must file the nearly identical EEO-1 Report with the U.S. Equal Employment Opportunity Commission (EEOC).⁶ All parties agree that diversity is critical to broadcast service and that more needs to be done;⁷ however, no one disputes NAB's view that the FCC could improve broadcasting diversity far more effectively by working with stations to attract, retain, and advance minorities and women, instead of simply imposing more rules and reports that have never proven successful.

II. THE FCC SHOULD SUPPORT INDUSTRY ON DIVERSITY EFFORTS

NAB has previously described broadcasters' voluntary efforts to improve the diversity, equity and inclusion (DE&I) of their workforce that go above and beyond the FCC's equal employment opportunity (EEO) rules.⁸ Investing resources in such initiatives helps broadcasters attract and retain talented staff of various backgrounds who can bring their unique perspectives, experiences and viewpoints to the workplace. Diversity can help promote an engaged and respectful workplace and can offer stations invaluable perspectives that allow them to better serve the needs and interest of their local community.⁹ Such initiatives include creating a diversity committee of senior leaders to steer a company's efforts and ensure accountability,¹⁰ guaranteeing that a certain percentage of

⁵ Comments of the EEO Supporters at 4, MB Docket Nos. 19-11 and 98-204 (Sep. 29, 2021) (ES Comments); Comments of the Leadership Conference on Civil and Human Rights (LCCR) at 2, MB Docket Nos. 19-11 and 98-204 (Sep. 30, 2021) (LCCR Comments)

⁶ Comments of the Center for Workplace Compliance (CWC) at 6-9, MB Docket No. 98-204 (Sep. 30, 2021) (CWC Comments); <https://eeocdata.org/EEO1/support/faq..>

⁷ Comments of the National Association of Broadcasters at 2, MB Docket No. 19-177 (Sep. 20, 2019) (2019 NAB EEO Comments).

⁸ NAB Comments at 7-10.

⁹ *Id.* at 6 citing Graham Media Group's DE&I Commitment Statement.

¹⁰ *Id.* at 7-9 (describing initiatives of Viacom CBS and Hearst Television).

new programming is authored by diverse creators,¹¹ providing inclusive internships and fellowships with a proven track of permanent employment,¹² and establishing aggressive goals to increase the diversity of senior leadership and linking executive compensation to meeting quantifiable diversity goals.¹³ The success of these industry-generated endeavors is undeniable. Even the FCC's own EEO audit program has revealed only a handful of minor rules violations and paperwork mistakes out of more than 15,000 audits conducted since 2003,¹⁴ none of which involved an allegation of discrimination.¹⁵

Nevertheless, the FCC seems to ignore the value of supporting such concrete, effective initiatives in favor of more command-and-control regulatory fiats that have never borne results. There is no evidence, including in the comments on the Further Notice, that more paperwork obligations or data will actually increase employment diversity in broadcasting. The wiser course is for the FCC to direct its resources toward outreach and education initiatives about opportunities in broadcasting and the benefits of working for a local radio or television station. At a minimum, the FCC should support or partner with industry on such efforts.

III. THE FCC MUST ENSURE THE CONFIDENTIALITY OF FORM 395-B DATA

NAB has previously established that, if Form 395-B data is restored, publishing the data on a station- or group-attributable basis would violate D.C. Circuit Court of Appeals precedent rejecting earlier versions of the EEO rule as race-based measures that unlawfully

¹¹ *Id.* (describing initiatives of iHeart Media).

¹² *Id.* (describing initiatives of Hearst Television and Audacy).

¹³ *Id.* (describing initiatives of TEGNA).

¹⁴ 47 C.F.R. § 73.2080(f)(4).

¹⁵ NAB Comments at 10.

pressured broadcasters to hire preferentially, in violation of their equal protection rights.¹⁶ Thus, the FCC has promised to use the data only to analyze industry employment trends and draft reports to Congress, and not for enforcement purposes.¹⁷ Commenters supporting reinstatement of Form 395-B do not offer any new facts or justifications for making the data publicly available, and in fact, further highlight their intentions to use the data to pressure broadcasters to hire based on race or gender.¹⁸

A self-styled group of “EEO Supporters” repeats an old canard that the FCC should restore Form 395-B so the data can be used to penalize stations that hire some employees through personal referrals and whose workforce composition does not meet some arbitrary diversity threshold.¹⁹ However, this group ignores the fact that the FCC may not, and will not, legally use the data to assess a station’s compliance with the EEO rules or to determine if a station has engaged in discrimination. The group makes no attempt to address the strict limits imposed by the D.C. Circuit on use of the data. Most galling, the EEO Supporters essentially presume that any hiring through personal referrals is tantamount to discrimination if a station’s racial make-up is not up to their standards.²⁰ In any event, if the form is reinstated, confidentiality treatment of the data would not hinder the FCC’s ability to carry out its intended use of the data.²¹

¹⁶ NAB Comments at 11-14 citing *Lutheran Church*, 141 F.3d at 352; see also *MD/DC/DE Broadcasters*, 236 F.3d at 21-22.

¹⁷ 47 C.F.R. § 73.3612 Note.

¹⁸ ES Comments at 3-4; LCCR Comments at 3.

¹⁹ ES Comments at 3-4.

²⁰ *Id.* at 4; LCCR Comments at 3.

²¹ All of the proposals regarding EEO audits and other issues raised by the EEO Supporters are outside the scope of the Further Notice and fully refuted in separate proceedings. ES Comments at 2-3; Reply Comments of the National Association of Broadcasters at 7-12, MB Docket No. 19-177 (Nov. 4, 2019).

LCCR makes a fleeting, unsupported claim that employment data is central to the FCC's goal of preventing discrimination, and then unrelatedly urges the FCC to collect stations' mid-term EEO reviews and other EEO information in a searchable public database.²² First, it should be obvious that broadcasters have no interest in discriminating against qualified job candidates. To the contrary, broadcasters have every incentive to nurture the most diverse, talented staff possible to help them compete in today's challenging media marketplace.²³ Again, we note that none of the EEO audits conducted since 2003 found any evidence of discrimination by a broadcaster.

Second, to the extent LCCR is implying that Form 395-B data should be publicly available in a searchable database, such an approach would only facilitate the ability of third party groups (such as the "EEO Supporters") to pressure broadcasters to hire based on race. LCCR's proposal would promote frivolous complaints seeking FCC enforcement based on the racial make-up of a station's staff, and even if there is zero evidence of untoward behavior, the risk of such investigations alone would unlawfully pressure broadcasters to hire preferentially just to avoid the legal fees and negative publicity of an FCC proceeding.

In addition, CWC explains that public disclosure of the Form 395-B employment data of stations or groups would reveal trade secrets and commercial information to competitors.²⁴ The form is a snapshot of the exact number of a broadcaster's employees by race, ethnicity, and gender, and in each job category. Collectively, this data could reveal information about a station's human resources strategy, such as the ratio of managers to

²² LCCR Comments at 2-3.

²³ 2019 NAB Comments at 2.

²⁴ CWC Comments at 8.

employees, how many sales workers are employed, and when considered with other public data, revenue generated per worker.²⁵

CWC further notes that the EEOC's EEO-1 Report is confidential, partly for the reason above, but also to encourage employees to voluntarily self-identify their race or ethnicity. Employees of companies required to file the EEO-1 Report have an understanding that their identifiable information will not be publicly available. Otherwise, for example, employees at a company's sub-location may be identifiable if the box on the company's EEO-1 Report for a particular race or ethnicity and job category displays a small number like one or two. Thus, the EEO has implemented strict disclosure limits on the publication of even aggregated, anonymized EEO-1 Reports and the data for company's physical sub-locations.²⁶

Form 395-B provides no such assurances to companies or employees, even though the forms collect the same information about employees.²⁷ We agree with CWC that broadcasters and their employees deserve no less protection than those of companies required to file the EEO-1 Report.²⁸ The risk of disclosure is likely to discourage broadcast employees from self-identifying their race, ethnicity, and gender for Form 395-B, thereby reducing the quality and usefulness of the data for the FCC's analysis of industry trends.²⁹ If the FCC decides to restore Form 395-B, the only permissible, practical approach is for the FCC to collect Form 395-B on a confidential basis and ensure that any related information is published on an anonymized, aggregated basis.

²⁵ *Id.* at 9.

²⁶ *Id.* at 10.

²⁷ *Id.* at 9; *Commission Proposes Changes to FCC Forms 395-A and 395-B*, Public Notice, MM Docket No. 98-204, 23 FCC Rcd 13142-43 (MB 2008).

²⁸ CWC Comments at 9. CWC correctly equates an individual broadcast station to the sub-location of a company required to file the EEO-1 Report in describing the risk of revealing identifiable information about specific employees.

²⁹ CWC Comments at 10-11.

Finally, NAB has previously explained that Form 395-B data need not be publicly available for the FCC to fulfill its intended purposes for the data.³⁰ We continue to believe that collecting the data pursuant to the Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA) would appear to be a reasonable mechanism.³¹

IV. THE FCC SHOULD CONSIDER THE REQUIREMENT TO FILE EEO-1 REPORTS AND MAKE CERTAIN UPDATES TO FORM 395-B

Given that Form 395-B and the EEO-1 Report collect virtually the same data, NAB renews its request that the FCC consider exempting broadcasters that must file the EEO-1 Report from filing the Form 395-B. Such an approach would prevent duplicative burdens without reducing the FCC's ability to implement its EEO policies.³² At a minimum, the FCC should consider CWC's proposal to at least explore the degree to which it can fulfill its purposes for the data by using the data collected by the EEOC.³³ For example, the FCC could work with the EEOC to produce a special report on the demographics of the broadcasting industry, similar to a report published by the EEOC in 2003 and more recent reports for other sectors.³⁴

Finally, NAB supports the request of the Foster Garvey Coalition that Form 395-B be updated to include additional non-binary options for responding to the question of gender. Such a change would be consistent with steps by other federal agencies and serve the public interest in accurate data.³⁵

³⁰ NAB Comments at 17.

³¹ *Id.* at 19; Pub. L. 107-347, 116 Stat. 2962 (2002).

³² NAB Comments at 22.

³³ CWC Comments at 6.

³⁴ *Id.* at 6; *Special Report: Broadcasting*, U.S. Equal Employment Opportunity Commission (Sep. 2003), available at <https://www.eeoc.gov/special-report/executive-summary-broadcasting#analysis> (comparing 1995-2000 EEO-1 Reports to Census data).

³⁵ Comments of the Foster Garvey Coalition at 2-3, MB Docket No. 98-204 (Sep. 30, 2021).

V. CONCLUSION

Accordingly, NAB does not object to reinstatement of Form 395-B, provided that individual filers are not publicly identifiable. Indeed, this is the only permissible approach. NAB also believes that a more effective use of Commission time in this arena would be to work with broadcasters to help them hire and retain a more diverse workforce. NAB looks forward to partnering with the Commission on measures toward our shared goal of increased diversity in broadcasting.

Respectfully submitted,

Handwritten signature in black ink, appearing to read "Rick Kaplan" and "Larry Walke".

Rick Kaplan
Larry Walke

NATIONAL ASSOCIATION OF BROADCASTERS
1 M Street SE
Washington, DC 20003
(202) 429-5430

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