

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)

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

Rick Kaplan
Larry Walke

NATIONAL ASSOCIATION OF BROADCASTERS
1 M Street S.E.
Washington, D.C. 20003
(202) 429-5430

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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (“NAB”)¹ does not object to the Commission reinstating FCC Form 395-B (Annual Employment Report), so long as station- and group-level information is kept confidential, and any related information made publicly available is provided on an anonymized, aggregated basis.² Making individual or group station data public would again risk upending the entire data collection process following the D.C. Circuit’s decisions in *Lutheran Church-Missouri Synod v. FCC*³ and *MD/DC/DE Broadcasters Association v. FCC*.⁴ NAB also requests that any reinstatement of the form also consider the fact that many broadcasters already are required to make substantially similar

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).

³ 141 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).

⁴ 236 F.3d 13 (2001), *pet. for reh'g denied.*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 920 (2002).

and ultimately duplicative filings with the U.S. Equal Employment Opportunity Commission (EEOC).⁵

NAB believes strongly that diversity is critical for broadcasters to compete and effectively serve local communities across the country. Radio and television stations value diversity, equity and inclusion (DE&I) as critical to building an engaged and productive workplace. That is why broadcasters have worked hard to recruit, train and retain top talent from all backgrounds.⁶ As a result, broadcasting is replete with opportunities for talented individuals of every race, ethnicity or gender.

While NAB does not object to the reinstatement of FCC Form 395-B, the revitalized form is likely to merely increase paperwork burdens without offering much corresponding value. At the outset, the form is duplicative of EEOC requirements, thereby creating make work for broadcasters already required to file with the EEOC. It makes little sense for the Commission to obligate companies already collecting data and filling out one set of government forms for one agency to have to do essentially the same for another. The left hand of the government should be talking to the right one, instead of putting unnecessary additional burdens on broadcasters.

Beyond the duplicative requirements, the Further Notice provides no evidentiary support for why such a data collection is necessary or how it will help further the goal of increased diversity in the broadcasting industry.⁷ No one contests whether the industry should continue to strive to hire, retain and promote more women and people of color.

⁵ See <https://eeocdata.org/EE01/support/faq>.

⁶ Comments of NAB, MB Docket No. 19-177, at 2 (Sep. 20, 2019) (2019 NAB EEO Comments).

⁷ Further Notice at ¶¶ 11-13.

Broadcasters share that belief. Rather than focus efforts on reporting data that is already largely apparent, a far better use of the Commission's time would be to reach out to broadcasters and ask exactly how the Commission can be helpful to our efforts to increase diversity. The Commission's EEO rules themselves demonstrate that government rules and regulations cannot achieve its' diversity aims. Strong evidence of this can be found in the Commission's unprecedented EEO audit program, which has conducted approximately 15,000-20,000 EEO audits since the current rules became effective in 2003. Notably, the Commission has uncovered only a handful of FCC paperwork violations, none of which revealed a finding of discrimination.⁸ Based on that metric, one would think broadcasters have reached nearly an optimal level of diversity. But we know that is not the case. Rather, it is time for the Commission to put more sweat equity into helping the broadcasting industry achieve its diversity goals, instead of simply adding more government burdens that serve to check a box but have little or no impact.

If the Commission nevertheless moves forward with restoring the Annual Employment Report, NAB renews our concerns that making publicly available the required employment data on a station-attributable basis stations will unlawfully pressure broadcasters to adopt race- or gender-based hiring practices.⁹ Given that collection of Form 395-B has been suspended for two decades,¹⁰ we understand the Commission's interest in refreshing the record on the legal and logistical implications of restoring the form. However, despite the passage of time, there have been no changes regarding the Commission's legal authority or

⁸ 2019 NAB EEO Comments at 8-9.

⁹ Comments of NAB, MM Docket No. 98-204, at 4 (May 22, 2008) (2008 NAB Comments).

¹⁰ *Suspension of the Broadcast and Cable Equal Employment Opportunity Outreach Program Requirements*, Memorandum Opinion and Order, 16 FCC Rcd 2872 (2001).

related facts that would allow or justify publishing the form data in a station-attributable manner. Publishing the racial composition of each broadcaster's workforce would clearly exceed the FCC's authority. And this would hold true even if the FCC itself did not use the Form 395-B data for enforcement purposes, as self-styled "public interest" groups have urged the FCC to pursue stations for discriminatory hiring practices based on the racial and gender composition of their staffs, or may file complaints themselves against stations or otherwise pressure stations.¹¹ The FCC may not enable such "raised eyebrow" regulation.¹²

Accordingly, if the FCC elects to restore Form 395-B, it must do so confidentially and only report any analysis of the data on an anonymous, aggregated basis. Such an approach would have no effect on the FCC's ability to fulfill its expressed, permitted purposes for the data, namely, to "monitor industry employment trends and report to Congress."¹³

Importantly, such an approach would also coincide with the EEOC's EEO-1 Component 1 Report (EEO-1 Report), which requires employers with 100 or more employees to annually file the same data as on Form 395-B.¹⁴ The EEO-1 Report is collected on a confidential basis, and the EEOC may only publish aggregated data and only in a manner that does not identify any particular filer.¹⁵ It would be illogical for the FCC to impute more need or flexibility to publish such sensitive data than the nation's leading organization on civil rights and EEO enforcement.

¹¹ See, e.g., Comments of the EEO Supporters, MB Docket No. 19-177, at 4 (Sep. 20, 2019) (2019 ES EEO Comments).

¹² *MD/DC/DE Broadcasters* at 19, quoting *Community-Service Broadcasting of Mid-America v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978).

¹³ Further Notice at ¶¶ 6 and 19.

¹⁴ See <https://eeocdata.org/EE01/home/index>.

¹⁵ See <https://eeocdata.org/EE01/support/faq>.

There is no statutory bar to such an approach. As NAB has explained in the past and as detailed below, collecting Form 395-B pursuant to the Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA) would appear to provide an option for ensuring the confidentiality of Form 395-B filings.¹⁶ Finally, NAB requests that the FCC: (1) take steps to ensure that Form 395-B remains harmonized with the EEO-1 Report and (2) either exempt broadcast companies that must file the EEO-1 Report from the requirement to submit Form 395-B, or allow such companies to submit the EEO-1 Report to the FCC in lieu of Form 395-B.

II. THE FURTHER NOTICE OFFERS NO EVIDENTIARY NEED FOR RESUMING COLLECTION AND PUBLIC REPORTING OF FORM 395-B EMPLOYMENT DATA

For nearly two decades, the FCC has required broadcasters to file reams of information to document their compliance with the EEO rules,¹⁷ and there is no evidence that piling on more rules or reports like Form 395-B will actually further what should be the FCC's primary goal: to increase employment diversity in the broadcast industry. NAB has previously urged the FCC to eschew the easy, familiar path of imposing more rules and reports in favor of more concrete, pro-active steps that will directly increase diversity in broadcasting,¹⁸ such as increasing awareness of job opportunities in broadcasting and adopting a proposal by MMTC to help educate industry and consumers regarding EEO.¹⁹ For

¹⁶ Pub. L. 107-347, 116 Stat. 2962 (2002), *codified as* 44 U.S.C. §§ 3561-64.

¹⁷ 2019 NAB EEO Comments at 7 (listing obligations to submit documentation of all candidates interviewed or hired for job vacancies, retain copies of vacancy announcements and send copies to requesting organizations, as well as conduct non-vacancy outreach activities); 47 C.F.R. §§ 73.2080(c).

¹⁸ *Id.* at 3.

¹⁹ *Id.*, *citing* Letter from Maurita Coley, President and CEO, MMTC, to Rosemary Harold, Chief, Enforcement Bureau, FCC, MB Docket No. 19-177 (Sep. 3, 2019).

example, the Commission routinely holds symposiums and other events featuring opportunities for broadcasters to learn strategies for obtaining financing and develop relationships with lenders and advisors.²⁰ The Commission should consider creating similar opportunities focused on improving employment diversity, instead of simply adding more rules and paperwork obligations that have never had a meaningful impact on employment diversity.

Many broadcasters already go above and beyond mere compliance with the Commission's EEO rules to improve and ensure diversity, equity and inclusion. Doing so not only strengthens their mission to build a welcoming, productive work environment, but also allows stations to leverage the various experiences and strengths of their staff to produce content that reflects the needs and interests of their local communities. Graham Media Group's DE&I Commitment Statement describes it well:

Graham Media Group is committed to a diverse employee workforce that celebrates unique perspectives, experiences and viewpoints. We foster a respectful environment where all employees feel valued, included and empowered which in turn drives innovation, solutions, and engagement. We know our diversity makes a difference in what we do, how we do it and the impact we make in the communities we serve. We demonstrate our commitment through strategic objectives that support workplace learning, engagement, community and business outreach.²¹

Programming that is produced by a diverse broadcast workforce can also cement the loyalty of viewers and listeners and translate into ratings and revenues, which have never been more critical given the ongoing economic impact of the COVID-19 pandemic and the

²⁰ See, e.g., [*Path to Media Ownership and Sustainability - Symposium on Access to Capital for Small and Diverse Broadcasters*](#), co-hosted by the FCC's Advisory Committee on Diversity and Digital Empowerment (ACDDE) and the Media Bureau (Nov. 6, 2020).

²¹ See <https://www.grahammedia.com/careers>.

increasingly competitive media marketplace. Below are a few examples of such voluntary, successful initiatives:

- ViacomCBS:
 - ✓ CBS Television Stations (CTS) and CBS News have created a Diversity Council focused on recruitment, development and education across their recently combined division. CTS has been taking steps that reflect the goals of the Council. For example, seven of the last eight senior leadership hires at CTS have been women and/or people of color, including new General Managers at its New York, Los Angeles, Chicago and Dallas stations.
 - ✓ CTS recently announced that it will hire Executive Producers of Community Impact in each of its station newsrooms to ensure accurate representation and reflection of the communities the stations serve, including under-represented communities.
 - ✓ CBS News formed a Race and Culture Team last year, which works closely with executive producers of all ViacomCBS news platforms to help shape coverage and ensure reporting reflects diverse perspectives. CTS is partnering with the Race and Culture Team to create powerful storytelling at its stations focused on issues of racial equity and social justice.
 - ✓ Beginning with the 2021-2022 development season, the CBS network is allocating a minimum of 25% of its script development budgets to projects created or co-created by Black, Indigenous and People of Color (BIPOC), and its writers' rooms are aiming to have a minimum of 40% BIPOC representation, with a goal to increase that percentage to 50% in the 2022-2023 season. All unscripted programs will aim to have casts with at least 50% BIPOC contestants, and the network is allocating at least a quarter of its annual unscripted development budget to projects created or co-created by BIPOC producers, effective as of the 2021-2022 season.
 - ✓ During the summer of 2020, CBS Studios and the NAACP agreed on a multi-year partnership to develop and produce scripted, unscripted and documentary content for linear television networks and streaming platforms.²²

- iHeart:
 - ✓ Invests resources to further its commitment to inclusion, and credible, sustainable efforts to foster a diverse workforce culture.²³
 - ✓ Recently launched a DE&I Plan that includes measures committing to more diversity on our company's Board of Directors to requiring that diversity be a part of recruiting, hiring and promotion decisions. Improving its interviewing process to include a wider representation of interviewers, instituting a DE&I

²² See <https://www.viacomcbs.com/inclusion> for more information. In addition, ViacomCBS discloses data about the race and gender composition of its workforce on its Diversity and Inclusion webpage. See *id.*

²³ See <https://cdn.iheartmedia.com/documents/ESG/iHeartMedia.pdf>.

- Advisory Committee that will bring important and timely issues around diversity and inclusion to senior management for consideration, serve as a sounding board for company policies about diversity and inclusion and help guide efforts regarding accountability, education, mentorship and recruitment.
 - ✓ Embedded diversity objectives in senior leaders' long-term performance goals.
 - ✓ Pledged that 50% of all new podcasts on the iHeartPodcast Network will be from female and diverse creators.
- Graham Media Group:
 - ✓ Conducts Employee and Management Assessments to ensure understanding of DEI principles and obtain employee feedback on DEI programs.
 - ✓ Graham's Executive DEI Council, which consists of senior company leaders, meets monthly to develop and refine DEI practices to support goals to drive DEI throughout our workplace culture and operating practices.
 - ✓ Employee Resource Groups, launched in June 2021, develop programs to support education and awareness, professional development, networking, mentoring, business and community outreach. Current teams are focused on the interests of Black, Latinx, LGBTQ+, Working Parents/Adult Caregivers, Social and Emotional Wellness, with additional teams to form around Veterans, Asian, Middle Eastern and Generations in the Workplace.
 - ✓ Juneteenth and PRIDE special education efforts and community outreach.
 - ✓ Annually hosts Emma Bowen Foundation Interns and encourages participants to seek permanent employment.
- TEGNA:
 - ✓ Partnered the Poynter Institute to launch a first-of-its-kind multi-year Inclusive Journalism Program, which drives inclusivity in storytelling and community coverage. All content teams (news, digital, and marketing) at each station will participate. The program involves a self-audit, training on unconscious bias in news reporting and content development, increasing diversity of on-air issue experts, leadership coaching and a robust audit of content by a third party firm specializing in multicultural research.
 - ✓ Established aggressive goals to drive greater workforce diversity by the end of 2025, including increasing diversity of station-level content leadership roles by 50% and all management within the company by 50%.
 - ✓ Launched a program to link a meaningful portion of key leaders' bonus potential to the successful achievement of goals and implementation of diversity and inclusion activities.
 - ✓ Established a company-wide Diversity and Inclusion Working Group of employees designed to identify and elevate both opportunities and areas of improvement to drive a more inclusive environment within the company, and partner with senior leadership in creating solutions in identified areas. The team has identified and helped the company create several solutions that have led to new practices, greater cultural learning and education, and better planning and accountability to reach our inclusion and diversity goals.
- Hearst Television:

- ✓ For over 20 years, Hearst has partnered with the Emma Bowen Foundation to cultivate opportunities for diverse talent by offering multi-year paid internships at our local TV stations. Nearly all stations participated in the program in 2021, hosting 34 Fellows from 31 universities, and eight alums are currently employed with Hearst.
 - ✓ The Fred Young Hearst Television Producing Fellowship is a 12-week, paid fellowship program at a Hearst TV station. To date, 27 Fellows have completed the program, received job offers in newscast production at one of Hearst's stations, and over half remain employed with Hearst.
 - ✓ Veterans, reservists and military spouses are a vital part of Hearst Television. The Military Might Employee Resource Group (ERG) is a productive avenue to bring employees together from across the country and aids in recruiting veterans to the company. Since the HTV Military Might" ERG launched in November of 2020, 14 military members have joined the HTV family.
 - ✓ In 2020, Hearst hired a Diversity and Inclusion Director and formed a D&I Advisory Council, and will shortly launch six additional Employee Resource Groups designed to attract, engage and retain a diverse talent pipeline of employees.
 - ✓ Hearst launched Project CommUNITY in 2019 to focus storytelling on divisive issues in the communities it serves. Hearst also produces weekly public affairs programs and launched a Listening Tour to facilitate national conversations about race, equality and justice.
- Audacy:
 - ✓ In partnership with Clark Atlanta University, Audacy personnel share experiences to prepare students to become the next generation of audio leaders. Students gain practical insights, and Audacy gains perspectives and connections through internships, fellowships, and job opportunities. The partnership provides a pipeline of talent for job positions and will be the catalyst to strong partnerships with other HBCUs.
 - ✓ Provides yearlong fellowships that provide diverse candidates early in their career access to resources, support and professional networks they might not otherwise experience in a typical internship or entry level position. Currently, ten Fellows started work on September 13, 2021, in News, Sports Content, Digital, and Ad Sales departments.
 - ✓ Channel Q provides an innovative media destination built by and for our LGBTQ+ community. Channel Q provides entertaining, informative, and empowering content to raise awareness and create constructive conversations around LGBTQ+ issues.
 - NAB:
 - ✓ Supports a range of initiatives that improve diversity in broadcasting and create new opportunities for women, people of color and other underrepresented communities.²⁴

²⁴ See <https://www.nab.org/about/diversity.asp>.

- ✓ Created a DE&I Board Advisory Committee to the NAB Board of Directors to provide guidance on DE&I matters relating to the industry and NAB itself.
- ✓ The NAB Leadership Foundation (NABLF) has a long history of fostering diversity through such programs as the Broadcast Leadership Training program, which offers MBA-style executive training station personnel who want to advance to senior management or own their own stations, the Media Sales Academy, which provides college students with the tools and resources needed to start their career in broadcasting, and the Technology Apprentice Program, which provides diverse talent with opportunities for hands-on training to be a broadcast engineer and networking opportunities with potential employers.²⁵
- ✓ Numerous graduates of these programs have secured their first jobs in broadcasting, advanced to senior leadership at stations and even graduated to station ownership.

The success of such efforts is clear and underscored by the FCC's own reviews of broadcasters' EEO programs, in which the Commission annually selects at random approximately five percent of radio and television stations for a thorough EEO audit.²⁶ NAB estimates that the FCC has conducted EEO audits of at least 15,000 broadcast stations since this process was launched in 2003. To our knowledge, all of these investigations have resulted in fewer than 20 Notices of Apparent Liability or Admonishments to broadcasters for EEO rules violations (0.1%), none of which involved a charge of discrimination.²⁷ Of these, the most common problems were related to recordkeeping mistakes like failing to track recruitment sources or recruiting only through the Internet, which is now permitted pursuant to a Commission decision in 2017.²⁸ Given this lack of evidence of discrimination and the successful voluntary efforts of broadcasters to increase employment diversity, it is

²⁵ See <https://www.nabfoundation.org>.

²⁶ 47 C.F.R. § 73.2080(f)(4).

²⁷ 2019 NAB EEO Comments at 8-9.

²⁸ *Petition for Rulemaking Seeking to Allow the Sole Use of Internet Sources for FCC EEO Recruitment Requirements*, Declaratory Ruling, 32 FCC Rcd 3865 (2017).

difficult to discern why the Commission's efforts at increasing diversity would be focused on collecting and publicly reporting the data required on Form 395-B.

III. REINSTATING FORM 395-B AND PUBLICLY REPORTING THE REQUIRED DATA WOULD VIOLATE COURT PRECEDENT STRIKING DOWN EARLIER VERSIONS OF THE FCC'S EEO RULES

The Further Notice seeks to refresh the FCC's record regarding collection of Form 395-B, given the passage of time since the form was suspended in 2001.²⁹ NAB submits that there have been no changes to the Commission's legal authority to use the form or the surrounding facts that would permit or justify reinstatement of the form and making the required data publicly available. In fact, the FCC should be more wary than ever, given the request of some third parties that the FCC use the form data to pursue broadcasters whose workforce is not diverse enough in their view.³⁰

The existing EEO rule already "resides at the margins of constitutionality."³¹ NAB submits that restoring Form 395-B would narrow this margin even more, and publicly reporting the data would push the FCC beyond its constitutional authority. The current rules represent the Commission's third attempt at creating legally sustainable EEO policies,³² as the D.C. Circuit Court of Appeals rejected the first two versions as unconstitutional measures that unlawfully pressured broadcasters to make race- and gender-based hiring decisions in violation of the equal protection clause of the Fifth Amendment.

²⁹ Further Notice at ¶ 1.

³⁰ 2019 ES EEO Comments at 13-17.

³¹ Joint Reply Comments of the State Broadcasters Associations, MB Docket No. 19-177, at 5 (Nov. 4, 2019) (2019 State Associations Comments).

³² Second Report and Order and Third Notice of Proposed Rulemaking, MM Docket No. 98-204, 17 FCC Rcd 24018 (2002) (Second Order).

In *Lutheran Church*, the court vacated the FCC’s original EEO policy, which required stations to compare the racial composition of their workforce with that of the local population and take steps to address any underrepresentation if their workforce did not meet certain thresholds of minority and female employment. The court held this requirement to be a race-based obligation that was subject to strict scrutiny and impermissibly “pressure[d] license holders to engage in race-conscious hiring.”³³ Regarding the racial and gender data that was required under the rule, the court stated:

A station would be flatly imprudent to ignore any one of the factors it knows may trigger intense review — especially if that factor, like racial breakdown, is particularly influential. 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. “Underrepresentation” is often the impetus (as it was in this case) for the filing of a petition to deny³⁴

In response, the FCC crafted a new EEO policy consisting of two options, one of which required stations to report the gender and race of job applicants. The court in *MD/DC/DE Broadcasters* rejected this approach as a race-based policy that was subject to strict scrutiny³⁵ and not narrowly tailored to the FCC’s purpose of preventing discrimination.³⁶ Like the previous EEO policy, the court found that this attempt imposed unlawful pressure on stations to focus on the race of job applicants to avoid Commission enforcement.³⁷

Regarding the employment data required under this rule, the court stated:

Measuring outputs to determine whether readily measurable inputs were used . . . is evidence that the agency with life and death power over the license (of a broadcaster) is interested in results, not process, and is determined to get

³³ *Lutheran Church*, 141 F.3d at 352.

³⁴ *Id.* at 353.

³⁵ *MD/DC/DE Broadcasters*, 236 F.3d at 21-22.

³⁶ *Id.*

³⁷ *Id.* at 19-20.

them. As a consequence, the threat of being investigated creates an even more powerful incentive for licensees to focus their recruiting efforts upon women and minorities, at least until those groups generate a safe proportion of the licensee's job applications.³⁸

In light of the court's concerns about measuring the results of stations' EEO efforts, the FCC suspended Form 395-B and crafted the existing EEO rules, which focus on race-neutral outreach requirements.³⁹

FCC Form 395-B requires all television and radio stations with five or more full-time employees to annually report granular information on the ethnic, racial and gender composition of their full-time and part-time staff. The latest version of the form collects data on the number of and staff position of all male and female employees that are White, Black or African American, Native Hawaiian Other Pacific Islander, Asian, American Indian or Alaska Native, or Two or More Races.⁴⁰ The form states that: "Self-identification is the preferred method of identifying the race and ethnic information necessary for the report. Employers are required to attempt to allow employees to use self-identification to complete the report. If an employee declines to self-identify, employment records or observer identification may be used."⁴¹

Collecting and publishing the Form 395-B data on a station-attributable basis would be an unavoidable vehicle for the exact sort of unlawful pressure on broadcasters to make

³⁸ *Id.*

³⁹ Second Order, 17 FCC Rcd at 24019.

⁴⁰ See <https://omb.report/icr/202004-3060-047/doc/100723701> (Instruction #7). This form implemented a 2008 update of Form 395-B to track the racial classification standards used by the EEOC at the time. The Office of Management and Budget (OMB) has approved this FCC information collection through June 2023, subject to the FCC's resolution of issues related to the confidentiality of the required data.

⁴¹ *Id.*

race- and gender-based hiring decisions that was prohibited under *Lutheran Church and MD/DC/DE Broadcasters*. Moreover, this would hold true despite the Commission's promise to use the data to analyze industry trends and make reports to Congress, and not to assess an individual broadcaster's compliance with the EEO requirements.⁴²

First, regardless of the FCC's intent or actions, unlawful pressure may come from members of the public who try to use the data to lodge complaints with the FCC or otherwise pressure stations that do not employ enough minorities or women in their view.⁴³ The goals of certain third parties are obvious. For example, a group calling themselves "EEO Supporters" recently urged the FCC to create a new enforcement policy that relies on Form 395-B. Under their proposal, the FCC first would identify broadcasters that hire some employees through personal referrals based on their EEO Annual Public File Reports. Next, the FCC would collect Form 395-B from such broadcasters. Finally, if a station's workforce composition as shown on the form failed to meet some arbitrary diversity threshold, the station would be sanctioned as an "intentional discriminator" and subjected to fines and other penalties for violating the FCC's rules.⁴⁴ However, disciplining, or even threatening to discipline stations based on the racial composition of their workforce is the precise use of the form's data that was twice found unconstitutional by the D.C. Circuit.⁴⁵

⁴² Report and Order, MM Docket Nos. 98-204, 96-16, 15 FCC Rcd 2329, 2332 (2000) (*First Report and Order*); Third Report and Order and Fourth Notice of Proposed Rulemaking, MM Docket No. 98-204, 19 FCC Rcd 9973, 9975-9978 (2004) (*Third Report and Order or Fourth NPRM*), *pet. for recon. pending*; 47 C.F.R. § 73.3612 Note.

⁴³ Joint Comments of the Ohio, Virginia and North Carolina Associations of Broadcasters Regarding FCC Form 395-B, OMB Control No. 3060-0390 (Sep. 26, 2008) (2008 OH/VA/NC Comments).

⁴⁴ 2019 ES EEO Comments at 4-5.

⁴⁵ 2019 State Associations Comments at 16-18.

Making the data publicly available would also enable third parties to file singular complaints at the FCC claiming a need for enforcement actions against certain stations based on the employment data on the form. The risk of such investigations, even if there is nothing to find or prosecute, and even if the FCC promises to immediately dismiss such petitions, would still impose pressure on broadcasters to make race-conscious hiring decisions to avoid potentially expensive, time-consuming proceedings. Also of note, such proceedings, even if unjustified and unsupported, may have to be disclosed to broadcasters' lenders under their loan arrangements, jeopardizing a station's ability to secure additional needed funding.⁴⁶

Second, publishing the data would cause unlawful pressure to hire preferentially regardless of the FCC's intended use of the data.⁴⁷ Specific processing guidelines or quotas like those in the earlier versions of the EEO rules and rejected by the D.C. Circuit are not necessary to impose unlawful pressure on broadcasters to hire preferentially. The *MD/DC/DE* court noted that regulatory agencies can pressure licensees in several ways, and that the FCC in particular

has a long history of employing: "a variety of *sub silentio* pressures and 'raised eyebrow' regulation of program content. . . . The practice of forwarding viewer or listener complaints to the broadcaster with a request for a formal response to the FCC, the prominent speech or statement by a Commissioner or Executive official, the issuance of notices of inquiry . . . all serve as means for communicating official pressures to the licensee."⁴⁸

⁴⁶ *Id.* at 29.

⁴⁷ 2008 OH/VA/NC Comments at 10, citing *Lutheran Church*, 141 F.3d at 353.

⁴⁸ *MD/DC/DE*, 236 F.3d at 19, quoting *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978).

Thus, even if the FCC tries to assure stakeholders that the employment data on Form 395-B will not be used to assess a station's EEO compliance, licensees would still be incentivized to hire preferentially to avoid any perceived risk of enforcement or the form data being used against them in some other way.⁴⁹

The State Associations have made another important point. Third parties may support publishing the form data because such data was published for many years before the form was suspended in 2001. However, prior to *Lutheran Church*, the FCC routinely used statistical analysis of a broadcaster's workforce composition (as shown on Form 395-B) to investigate stations for potential rules violations, while it was also common for third parties to file petitions to deny a station's license renewal based on Form 395-B data. Thus, before the D.C. Circuit Court struck down this FCC practice, allowing third parties access to the form data to file petitions to deny was consistent with the FCC's own use of the form. Following *Lutheran Church*, however, the FCC is no longer permitted to use the data for enforcement purposes. Therefore, if the FCC reverts to its old practice of making the form data publicly available, it would do so knowing that it is effectively outsourcing to third parties the ability to impose pressure on broadcasters to make race- and gender-conscious hiring choices.⁵⁰

Thus, if the FCC still chooses to reinstate Form 395-B, the only constitutional way to avoid imposing such unlawful pressure on broadcasters is to collect the form confidentially, and analyze and report the required data on an anonymized, aggregated basis that is not attributable to any specific broadcast station or company.

⁴⁹ 2008 OH/VA/NC Comments at 10, *citing Lutheran Church*, 141 F.3d at 353.

⁵⁰ 2019 State Associations Comments at 29-30.

IV. IF REINSTATED, FORM 395-B MUST BE COLLECTED, ANALYZED AND REPORTED ON A CONFIDENTIAL BASIS AND CIPSEA WOULD SEEM TO PROVIDE A REASONABLE MECHANISM

Pursuant to the limits placed on the FCC's legal authority in *Lutheran Church and MD/DC/DE Broadcasters*, the FCC may not use Form 395-B data to screen license renewal applications or in any other enforcement action against a station. The FCC has therefore tried to assure stakeholders that the data would only be used to analyze industry hiring trends and to prepare reports for Congress.

As discussed above, the D.C. Circuit rejected the FCC's previous EEO rules pursuant to a strict scrutiny analysis because rules constituted a government action based on race.⁵¹ Resumption of Form 395-B and publishing the data would also fail such an analysis because it impose unlawful pressure on broadcasters to hire preferentially, unless doing so is narrowly tailored to achieve a compelling governmental interest.⁵² However, even assuming that "analyzing industry trends and making reports to Congress" comprise such compelling interests, collecting and publishing the data on a station-attributable basis would not be narrowly tailored or necessary to fulfill those purposes.

Only a confidential process would protect broadcasters' equal protection rights and potentially survive judicial scrutiny. Moreover, to the extent the FCC needs the Form 395-B

⁵¹ *Lutheran Church* invoked the *Adarand* principle that "[a]ll government action based on race – a group classification long recognized as 'in most circumstances irrelevant and therefore prohibited' – should be subject to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." *Lutheran Church*, 141 F.3d at 354, citing *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995), citing *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943).

⁵² *Id.*

data to analyze industry trends or prepare Congressional reports,⁵³ confidential filing and analysis of the data would work just as well as non-confidential data.⁵⁴ Nor is public disclosure of Form 395-B data needed for the FCC to properly execute its EEO policies,⁵⁵ given that the form has been suspended for approximately two decades, during which time the FCC has effectively fulfilled its statutory obligations regarding EEO and vigorously enforced its EEO rules.

Furthermore, there is no statutory requirement to collect or publish the data on a station-attributable basis.⁵⁶ Neither the Communications Act nor the FCC's EEO rules indicate any particular mechanism for collection of Form 395-B.⁵⁷ Section 334(a) of the Communications Act merely states that the Commission "shall not revise . . . the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. § 73.2080)" as they pertain to television stations or the "forms used by such licensees to report pertinent employment data."⁵⁸ The 1992 version of the EEO rules makes no mention of how Form 395-B must be collected or used.⁵⁹ In addition, although Section 334(a) may bar the Commission from making major changes to its EEO forms, merely switching to a

⁵³ Commission Starks also implies that the data is needed to help the FCC determine whether additional regulatory actions are necessary. Further Notice, Statement of Commissioner Geoffrey Starks.

⁵⁴ 2008 NAB Comments at 4.

⁵⁵ Further Notice at ¶ 19.

⁵⁶ 2008 OH/VA/NC Comments at 10; 47 U.S.C. § 334.

⁵⁷ Further Notice at ¶ 18.

⁵⁸ 47 U.S.C. § 334(a).

⁵⁹ See *Television, AM Radio, FM Radio; Amendment to the Commission's Rules and Procedures Concerning Broadcast Equal Opportunity Practices and Reporting Requirements*, Report and Order, MM Docket No. 85-30, 52 Fed. Reg. 26683 (July 16, 1987) (attaching the EEO rule that remained in place as of 1992).

confidential process would not require any substantive changes to the form.⁶⁰ Furthermore, Section 334(c) permits the FCC to make “nonsubstantive technical or clerical revisions” to the EEO rules as of September 1, 1992.⁶¹ Although those rules did not indicate a particular filing method for Form 395-B, this provision certainly implies FCC flexibility to make non-substantive changes to the EEO forms as well, such as switching to a confidential collection method. The data to be collected would remain unchanged, as would broadcasters’ EEO obligations. The only difference would involve the public’s access to the data.

Thus, if Form 395-B is reinstated, the only permissible approach requires confidential filing of the form and use of the data on an anonymized, aggregated basis. NAB submits that collecting the form under the confidentiality protections provided in the Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA) would appear to be a reasonable mechanism.⁶² Pursuant to CIPSEA, data collected 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 a statistical purpose, except with the consent of the filers.⁶³ CIPSEA defines “statistical purpose” as the “description, estimation, or analysis of the characteristics of groups, without identifying the individuals or organizations that comprise such groups.”⁶⁴ The term “nonstatistical purpose” is defined as “the use of data in identifiable form for any purpose that is not a statistical purpose,

⁶⁰ See, e.g., Joint Reply Comments of the Named State Broadcasters Associations, MB Docket No. 98-204, at 7 (Aug. 9, 2004).

⁶¹ 47 U.S.C. § 334(c).

⁶² Further Notice at ¶¶ 10 and 21.

⁶³ CIPSEA, § 512(b).

⁶⁴ CIPSEA, § 502(9).

including any administrative, regulatory, law, enforcement, adjudicatory, or other purpose that affects the rights, privileges, or benefits of a particular identifiable respondent.”⁶⁵

Form 395-B would seem to meet these parameters. The data is clearly statistical in nature as filers must only complete a grid indicating the number of employees in various job categories by race, ethnicity and gender. The form requires no descriptive text or other narrative. The Commission has clarified that the form data will only be used for statistical as opposed to nonstatistical purposes:

The Commission will no longer use the employment profile data in the annual employment reports in screening renewal applications or assessing compliance with EEO program requirements. The Commission will use this information only to monitor industry employment trends and report to Congress.⁶⁶

The information on Form 395-B is merely a compilation of data from broadcasters that, as required under CIPSEA’s definition of “statistical purpose,” will be used only to “estimate” and “analyze” the workforce of the broadcasting industry.

If the FCC elects to reinstate Form 395-B, using CIPSEA should help to assuage confidentiality concerns without impeding the FCC’s use of the data. For example, unlike completely anonymous filings, this process would allow the FCC to connect filers with their forms and follow-up with broadcasters who do not file or submit incomplete reports.⁶⁷

CIPSEA may also help to increase broadcasters’ trust in the process.⁶⁸

⁶⁵ *Id.* at § 502(5).

⁶⁶ Further Notice at ¶ 6, *citing Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, MM Docket Nos. 98-204, 96-16, Report and Order, 15 FCC Rcd 2329, 2332 (2000). The FCC added a special note to the EEO rules to this effect to help alleviate the concerns of wary broadcasters. 47 C.F.R. § 73.3612 Note.

⁶⁷ Further Notice at ¶ 16-17.

⁶⁸ See *Office of Mgmt. & Budget, Implementation Guidance for Title V of the E-Government Act, Confidential Information Protection and Statistical Efficiency Act of 2002*, Notice of Decision, 72 Fed. Reg. 33362 (June 15, 2007) (2007 CIPSEA Guidance).

There appears to be no substantial logistical bars to the FCC's use of CIPSEA, which provides several options for confidential information collections. For example, the Commission could possibly designate the Office of Economics and Analytics or perhaps a subset of either as a "statistical agency or unit" that is allowed to collect and analyze the data pursuant to CIPSEA.⁶⁹ Under this approach, the specified unit's activities would be "predominantly the collection, compilation, processing, or analysis of [Form 395-B] information for statistical purposes," consistent with CIPSEA's requirements.⁷⁰ This approach would also favorably resolve the FCC's concern about using contractors to assist in the collection and analysis of the data.⁷¹

Alternatively, the FCC could collect Form 395-B pursuant to CIPSEA's requirements for the handling of data by "nonstatistical agencies or units."⁷² In this case, however, CIPSEA does not authorize the agency or unit to designate contractors or other agents to assist in the collection and examination of confidential data, although the FCC could still fulfill its goals by designating in-house employees to perform exclusively statistical activities on the Form 395-B data.

CIPSEA provides yet another alternative that allows nonstatistical agencies or units, instead of collecting data directly, to enter into an agreement with a Federal statistical agency or unit that would be responsible for protecting confidential information acquired under CIPSEA.⁷³ In this scenario, the statistical agency or unit could designate certain FCC

⁶⁹ 44 U.S.C. § 3561(8).

⁷⁰ CIPSEA, § 502(8).

⁷¹ Further Notice at ¶ 21; CIPSEA at § 512(d); see also 2007 CIPSEA Guidance.

⁷² CIPSEA at §512(c).

⁷³ 2007 CIPSEA Guidance, at note 79.

staff as agents of the statistical agency or unit to help “perform exclusively statistical activities” on the confidential information on Form 395-B.⁷⁴ Accordingly, NAB submits that CIPSEA would seem to provide multiple workable approaches for the FCC to collect Form 395-B without compromising the confidentiality of the data and without impeding its ability to use the data as intended.⁷⁵

V. THE FORM 395-B FILING PROCESS AND INFORMATION SHOULD BE HARMONIZED WITH THE EEOC’S PROCESS FOR EEO-1 REPORTS AND BROADCASTERS REQUIRED TO FILE THE EEO-1 REPORT EXCUSED FROM FILING FORM 395-B

The FCC adopted changes to Form 395-B in 2008 designed to track the racial and employment categories on the EEO-1 Report.⁷⁶ Although Form 395-B was suspended, OMB approved this updated version of the form in August 2008 and has extended approval through June 2023,⁷⁷ subject to the FCC’s resolution of the confidentiality issues described above. NAB simply requests that the FCC continue to ensure that the categories on Form 395-B match those on the EEOC’s EEO-1 Report.⁷⁸

⁷⁴ *Id.*

⁷⁵ The recently enacted Foundations for Evidence Based Policymaking Act of 2018 (Evidence Act) would not seem to be an obstacle because it only applies to information collections that were created on or after January 14, 2019, and therefore would not cover Form 395-B. 44 U.S.C § 3506(b)(6); Notice at ¶ 22. The FCC itself characterizes Form 395-B as “suspended” (Further Notice at ¶ 1) and claims that neither of the D.C. Circuit Court decisions invalidated the FCC’s ability to collect the form. *Id.* at ¶ 12. The FCC also seeks comment on whether to “reinstate” Form 395-B. *Id.* at ¶ 22. None of these terms can sensibly be used to describe a requirement has been newly “created” as that term is used in the Evidence Act. 44 U.S.C. § 3506(b)(2)(B)(i)(I).

⁷⁶ *Commission Proposes Changes to FCC Forms 395-A and 395-B*, MM Docket No. 98-204, Public Notice, 23 FCC Rcd 13142-43 (MB 2008).

⁷⁷ See <https://omb.report/omb/3060-0390>.

⁷⁸ Further Notice at ¶ 20.

In fact, given the EEOC's role as the nation's primary expert agency on employment discrimination laws and policy,⁷⁹ NAB submits that the FCC should follow the EEOC's lead on all matters related to collecting annual employment data. Like the permitted use of Form 395-B, the EEOC uses the data on EEO-1 Reports to analyze employment trends.⁸⁰ However, EEO-1 Reports are submitted on a confidential basis, and the EEOC is only allowed to publish aggregated data in a manner that does not identify any specific filer.⁸¹ Information from EEO-1 Reports may not be made public unless an enforcement proceeding is started under Title VI of the Civil Rights Act of 1964.⁸² If confidential data is sufficient for the EEOC to analyze employment trends, it should clearly be so for the FCC. Moreover, unlike the EEOC, the FCC may not use the Form 395-B data for enforcement purposes, essentially zeroing out any justification for the FCC to publicly disclose the data.

In the same vein, given that the forms collect the same data, there is little need for the FCC to require broadcasters who must file the EEO-1 Report to also submit the Form 395-B. Requiring companies to duplicate these efforts would be a time-consuming waste of resources. The FCC should consider exempting such broadcasters from filing Form 395-B, since the FCC could retrieve the data from the EEOC (on a confidential basis), or at most, require such companies to forward a copy of their EEO-1 Report to the FCC in lieu of filing the Form 395-B. Either of these approaches would further the Commission's long-standing

⁷⁹ <https://www.eeoc.gov/overview>.

⁸⁰ *Id.*

⁸¹ See <https://eeocdata.org/EE01/support/faq>.

⁸² 42 U.S.C. § 2000e-8(e).

efforts to reduce administrative burdens on broadcasters and the unnecessary waste of Commission resources, without undermining the FCC's ability to implement its policies.⁸³

VI. CONCLUSION

For the reasons stated above, NAB does not object to the FCC reinstating Form 395-B, as long as the individual filers cannot be publicly identified. NAB, however, encourages the Commission to put its time and resources into actually helping broadcasters hire and retain a more diverse workforce. The current regulatory approach adds continued burdens on broadcasters with no corresponding benefits. NAB wholeheartedly supports the goal of increased diversity among our workforce and would like to have the Commission take steps that contribute to our reaching that important goal.

Respectfully submitted,



Rick Kaplan
Larry Walke

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

September 30, 2021

⁸³ See, e.g., *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2); Modernization of Media Regulation Initiative*, MB Docket Nos. 18-23 and 17-10, 34 FCC Rcd 668 (2019).