

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 )

**PETITION FOR PARTIAL RECONSIDERATION OF  
THE NATIONAL ASSOCIATION OF BROADCASTERS**

Rick Kaplan  
Jerianne Timmerman  
Larry Walke

June 3, 2024

## TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY.....	1
II. THE COMMISSION IS NOT STATUTORILY REQUIRED TO REINSTATE FORM 395-B FOR RADIO STATIONS .....	4
III. REQUIRING PUBLIC DISCLOSURE OF FORM 395-B DATA VIOLATES THE FIRST AMENDMENT.....	7
A. THE FORM 395-B DATA IS NOT PURELY FACTUAL OR NONCONTROVERSIAL .....	7
B. THE FCC’S JUSTIFICATIONS FOR MAKING THE FORM 395-B DATA PUBLICLY AVAILABLE ARE NOT REMOTELY COMPELLING.....	12
C. THE FCC FAILS TO NARROWLY TAILOR COLLECTION AND PUBLICATION OF FORM 395-B TO ITS CLEAR PURPOSE.....	16
IV. MANDATING THE PUBLIC AVAILABILITY OF THE FORM 395-B DATA VIOLATES THE FIFTH AMENDMENT.....	17
V. DISCLOSURE OF FORM 395-B DATA MAY HARM GENDER NON-BINARY EMPLOYEES	222
VI. CONCLUSION .....	233

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	)	

**PETITION FOR PARTIAL RECONSIDERATION OF  
THE NATIONAL ASSOCIATION OF BROADCASTERS**

**I. INTRODUCTION AND SUMMARY**

Pursuant to Section 1.429 of the Commission's rules,<sup>1</sup> the National Association of Broadcasters (NAB)<sup>2</sup> requests partial reconsideration of the Fourth Report and Order in the above-captioned proceeding,<sup>3</sup> in which the Commission reinstates the collection of radio and television stations' workforce composition data on FCC Form 395-B. NAB does not oppose reinstatement of the form. As discussed below, we respectfully seek reconsideration of the FCC's decision in the Fourth Report and Order to make the Form 395-B data publicly available on a station-specific basis because, among other things, doing so violates both the Free Speech Clause of the First Amendment and the equal protection component of the

---

<sup>1</sup> 47 C.F.R. § 1.429.

<sup>2</sup> 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 (Commission or FCC) and other federal agencies, and the courts. NAB has standing to submit this Petition as an active participant in the proceeding, having filed multiple comments and reply comments and meeting with various FCC staff to discuss the agency's proposals.

<sup>3</sup> *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Fourth Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, MB Docket No. 98-204 (rel. Feb. 22, 2024) (Fourth Report and Order).

Fifth Amendment.<sup>4</sup> Given the Commission's new categorization concerning non-binary employees, a number of broadcasters also have expressed concern on behalf of their employees who would be identified as such that they could be harassed due to the FCC's decision to force broadcasters to place this information in their online public files.

As a preliminary matter, NAB notes that recent statements by the Commission claim erroneously that it is statutorily required to regulate the equal employment opportunity (EEO) practices of both TV and radio broadcast stations, when in fact, Congress has, at most, merely authorized the FCC to adopt and administer such rules.<sup>5</sup> Moreover, even if Congress's command that the FCC leave the TV rules as is was not mooted by subsequent court decisions, Congress has *never* suggested that the FCC should regulate radio in the same manner. Thus, under any reading of the statute, there is no Congressional *mandate* directing the FCC to impose EEO rules on radio stations, including the collection of Form 395-B.<sup>6</sup> NAB respectfully urges the Commission to clarify any misconceptions that may result from these repeated mischaracterizations, and to fully reconsider the order with respect to radio should the Commission determine that it was only acting as a result of its previous (erroneous) view that it was required to implement such rules.

The Commission's choice to publicly disclose the Form 395-B data for individual broadcast stations also contravenes the First Amendment. The requirement to make the data public is subject to strict scrutiny as it compels speech about a controversial topic and cannot stand because the FCC fails to show that disclosing the data will further a compelling interest. The FCC's justifications for publicly disclosing the form data are empty on their

---

<sup>4</sup> U.S. Const. Amends. I and V.

<sup>5</sup> 47 U.S.C. § 334.

<sup>6</sup> See *infra* Section II.

face, and nothing more than pretextual administrative conveniences that do not justify public disclosure of the data even under lesser intermediate scrutiny. Moreover, the FCC makes no attempt to narrowly tailor its approach to its proffered purpose of the rule.<sup>7</sup>

NAB further explains that a similar analysis determines that public disclosure of the Form 395-B data on a station-specific basis also violates the Fifth Amendment. Notwithstanding the FCC's promises to use the data only to analyze industry trends and create reports to Congress, and not use the data to assess an individual station's compliance with the EEO rules, disclosing the form data will deliberately unleash pressure on stations to engage in preferential hiring practices, thereby violating the equal protection clause. The FCC appears poised to repeat the same mistakes that led the D.C. Circuit Court of Appeals to reject two earlier versions of the EEO rules, including the collection of Form 395-B data. The FCC effectively invites third party activist groups to use the data for such inappropriate purposes, and MMTC, NOW, and other advocacy groups have made clear their intentions to accept the Commission's invitation. However, as Commissioner Carr notes in his separate statement, the Commission may not induce, promote, or encourage private third parties to do what it is constitutionally prohibited from doing itself.<sup>8</sup>

Finally, NAB raises concerns that the Commission's plan to modify Form 395-B to include a mechanism to account for those employees who identify as gender non-binary could harm such employees.<sup>9</sup> We understand that some station employees who identify as gender non-binary may have concerns about being identifiable on Form 395-B as such due to potentially unwelcome attention from outside interests. NAB submits that it would be

---

<sup>7</sup> See *infra* Section III.

<sup>8</sup> See *infra* Section IV.

<sup>9</sup> See *infra* Section V.

relatively simple for an interested external group to identify such an employee when the individual is identified on Form 395-B as gender non-binary, by job category, and works at a small station, or even a larger station in a small town. Essentially, the FCC's choice to make the form publicly available could help facilitate the "doxing" of such employees. NAB also explains that the FCC's plan may require stations choosing to complete this part of the form to use "observer identification" to complete the form, which could lead to mistaken misidentifications of employees, or, if a station chooses not to complete this part of the form, unequal treatment of such employees among the rest of a station's employees whose gender is reflected on the form. NAB strongly encourages the Commission to consider these concerns as further evidence that publicly disclosing the Form 395-B data on a station-specific basis is an ill-advised approach.

## **II. THE COMMISSION IS NOT STATUTORILY REQUIRED TO REINSTATE FORM 395-B FOR RADIO STATIONS**

The Communications Act is plain on its face that Congress specifically authorized the Commission to regulate the EEO practices of only television stations (and cable operators), and not radio stations. Section 334(a) of the Act states that the Commission shall not revise the EEO rules in effect on September 1, 1992, "as such regulations apply to television broadcast station licensees and permittees," or the forms used by "such licensees and permittees" to report pertinent employment data to the Commission. There is no mention of radio broadcast stations.<sup>10</sup>

Given this lack of explicit instruction to regulate the EEO practices of radio stations, the Commission more than two decades ago went to great lengths to extrapolate such

---

<sup>10</sup> 47 U.S.C. 334(a).

authority.<sup>11</sup> Essentially, the FCC determined that Congress ratified its authority to promulgate EEO rules for radio stations because Congress was aware of the existing EEO rules for radio when it enacted Section 334 and nowhere indicated that the FCC lacked authority to adopt and administer such rules.<sup>12</sup> The FCC also found it implausible that Congress would have intended to leave only radio licensees free of EEO obligations when it explicitly recognized the broadcast and cable EEO rules in the Act and extended the rules to all MVPDs.<sup>13</sup>

Putting aside the validity of the FCC's interpretation of Congressional intent, although Congress may have *allowed* the Commission to administer EEO rules for radio stations, Congress clearly did not *require* the FCC to impose such rules. This was the Commission's position for many years. For example, in the 2004 Fourth Notice seeking comment on public access to Form 395-B, the Commission stated: "Thus, we are directed by statute to require the submission of such reports by broadcast television stations and MVPDs. Furthermore, we have authority to require employment reports for all broadcasters and MVPDs and would exercise that authority even if not required by statute to do so."<sup>14</sup> In the 2019 Report and Order eliminating Form 397 (Broadcast Mid-Term Report), the FCC stated: "Section 334 applies expressly to 'television broadcast station licensees' and therefore does not mandate the Commission's regulation of radio licensees."<sup>15</sup>

---

<sup>11</sup> *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Notice of Proposed Rulemaking, 13 FCC Rcd 23004, 23015 (1998).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, 13 FCC Rcd at 23014-15.

<sup>14</sup> *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, 9974-75 (2004).

<sup>15</sup> *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)*, Report and Order, 34 FCC Rcd 668 at note 21 (2019).

More recently, however, the current Commission has seemingly tried to morph the authority it has inferred from Section 334 and the 1992 Cable Television Consumer Protection and Competition Act to regulate the EEO practices of radio stations into a statutory requirement, including a mandate to collect Form 395-B. For instance, in the first paragraph of the Fourth Report and Order, the Commission states: “[W]e reinstate the collection of workforce composition by television *and radio* broadcasters on FCC Form 395-B *as statutorily required* by the Communications Act of 1934” (emphasis added).<sup>16</sup> In addition, the FCC repeatedly swept radio stations into various statements in the 2021 Further Notice that Congress mandates the collection of employment data from all broadcasters.<sup>17</sup> Commissioners also echoed this view in both the 2021 Further Notice and the Fourth Report and Order.<sup>18</sup>

NAB is concerned that efforts to reframe the FCC’s authority over radio stations’ EEO practices into a statutory requirement, whether intentional or not, could reset the basis for future EEO-related obligations imposed on radio stations. The statute’s specific application to only television stations (and cable) is clear, and it is inappropriate and misleading for the FCC to leverage the authority it gleans from Congress’s supposed acquiescence to the existing EEO rules for radio to characterize the collection of Form 395-B from radio stations as a statutory requirement. A federal agency may not read more into a statutory provision

---

<sup>16</sup> Fourth Report and Order at ¶ 1.

<sup>17</sup> *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Further Notice of Proposed Rulemaking, 36 FCC Rcd 12055, 12061 (2021) (2021 Further Notice).

<sup>18</sup> *Id.* at 12075, Statement of Acting Chairwoman Jessica Rosenworcel (“This data is vitally important to assess the [broadcast] industry’s workforce diversity. Moreover, its collection is required under the law.”). See also Fourth Report and Order, Statement of Commissioner Geoffrey Starks (“Quite simply, we reinstate a longstanding statutorily mandated requirement to collect workforce data from broadcasters.”).



that is plain on its face.<sup>19</sup> Congressional ratification of the FCC’s EEO rules may allow, but not require, the FCC to regulate the EEO practices of radio stations, and the FCC’s recent declarations to the contrary cannot will this distinction into extinction. Accordingly, NAB urges the Commission to clear up any misconceptions that could result from its recent erroneous suggestions that the Communications Act requires it to collect Form 395-B from radio stations, and if it is imposing these reporting requirements based on a faulty belief that it *must* do so, the order is unlawful. The Supreme Court has specifically “admonish[ed]” the Commission that “only Congress can rewrite” the Communications Act.<sup>20</sup>

### **III. REQUIRING PUBLIC DISCLOSURE OF FORM 395-B DATA VIOLATES THE FIRST AMENDMENT**

#### **A. The Form 395-B Data is Not Purely Factual or Noncontroversial**

The Commission attempts to dispel concerns that publicly reporting the Form 395-B information on a station-specific basis contravenes the First Amendment.<sup>21</sup> Under the FCC’s approach, a broadcast station would have to gather information on the race, gender, and ethnicity of its employees within certain job categories. Although employers must allow employees to use self-identification to complete the report, if an employee declines, the station may use employment records or “observer identification.”<sup>22</sup> Stations must then file the report with the FCC by September 30 of each year in a manner that makes the form data

---

<sup>19</sup> *Public Employees Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989) (“But, of course, no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.”).

<sup>20</sup> *Louisiana Public Service Comm’n v. FCC*, 476 U.S. 335, 376 (1986).

<sup>21</sup> Fourth Report and Order at ¶¶ 51-52.

<sup>22</sup> Instructions for Completion of FCC Form 395-B Broadcast Station Annual Employment Report, at #7, available here: <https://omb.report/icr/202004-3060-047/doc/100723701> (Form 395-B Instructions).

for each individual broadcast station available for public inspection.<sup>23</sup> This obligation violates the First Amendment by unconstitutionally compelling speech in contravention of the Supreme Court precedent.

Freedom of speech “includes both the right to speak freely and the right to refrain from speaking.”<sup>24</sup> Strict scrutiny generally applies when the government compels speech because “[m]andating speech that a speaker would not otherwise make” means the rule is “necessarily . . . content-based.”<sup>25</sup> Strict scrutiny further applies when a rule “burden[s] political speech” by forcing disclosures on controversial topics subject to public debate.<sup>26</sup> Both of these courses “subject [a] regulation to strict scrutiny regardless of the government’s” claim of a “benign motive . . . [or] . . . content-neutral justification.”<sup>27</sup> To satisfy strict scrutiny, a government requirement must “further a compelling interest” and be “narrowly tailored to achieve that interest.”<sup>28</sup> The Supreme Court has subjected certain disclosure requirements to intermediate scrutiny when a compelled disclosure involved (1) “commercial advertising” and (2) “purely factual and uncontroversial information,”<sup>29</sup> but even under this test set forth in *Zauderer*, a disclosure requirement must be “narrowly tailored” to a “sufficiently important” government interest.<sup>30</sup>

---

<sup>23</sup> The 2021 Further Notice indicated that stations would file the form in their public inspection file hosted online by the FCC. 2021 Further Notice, 36 FCC Rcd at 12060 note 46.

<sup>24</sup> *Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018).

<sup>25</sup> *Riley v. Nat’l Fed. of the Blind of N.C.*, 487 U.S. 781, 798 (1988).

<sup>26</sup> *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

<sup>27</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015).

<sup>28</sup> *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (internal quotations omitted).

<sup>29</sup> *Zauderer v. Off. Of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 U.S. 626 (1985).

<sup>30</sup> *Americans for Prosperity Foundation (AFP) v. Bonta*, 141 S. Ct. 2372, 2383 (2021).

Collecting and publishing information about an individual station’s workforce diversity is clearly compelled speech because nearly all broadcast stations have chosen not to disclose such information during the long suspension of the form.<sup>31</sup> The Commission claims that publishing Form 395-B is different than typical compelled speech cases because the form data is “purely factual, noncontroversial information in a commercial context,”<sup>32</sup> and therefore “no message is being forced by the government.”<sup>33</sup> However, as Commissioner Carr explains, intermediate scrutiny is inapplicable here because the *Zauderer* exception related to commercial speech is limited to disclosures that are reasonably related to the government’s interest in “preventing deception of consumers.”<sup>34</sup> The race and gender data on Form 395-B are also far outside the context of a commercial transaction that might qualify for intermediate review, and while some courts have extended intermediate scrutiny

---

<sup>31</sup> The FCC notes a handful of companies that voluntarily publish such data. Fourth Report and Order at note 128. However, the companies mentioned by the FCC are large, publicly traded corporations that publish this data to highlight their commitment to inclusion and celebrate the success of their voluntary efforts to “create a workforce that reflects the communities where they live and serve.” Hearst 2023 RISE Report at 4, available at <https://www.hearst.com/documents/33329/890300/2023+Hearst+RISE+DE%26I+Overview.pdf/14d1c825-8209-867d-f9dd-10d527d189a6?t=1679517544494>. If anything, the examples cited by the FCC illustrate how ineffective and unnecessary the FCC’s EEO rules are compared to industry’s efforts that actually enhance workplace diversity.

<sup>32</sup> Fourth Report and Order at ¶¶ 51-52 citing *Riley*, 487 U.S. at 800.

<sup>33</sup> *Id.* citing *Zauderer*, 471 U.S. at 651. The FCC also argues that making the data public is subject to intermediate scrutiny as commercial speech, but the test in the case cited by the FCC applies to speech restrictions, not compelled speech. *Central Hudson v. Public Service Commission of New York*, 447 U.S. 557 (1980); Comments of American Free Enterprise Chamber of Commerce at 9, MB Docket No. 98-204 (Apr. 29, 2024) (American Chamber), citing Fourth Report and Order at ¶ 52.

<sup>34</sup> Fourth Report and Order, Separate Statement of Commissioner Brendan Carr (Carr Statement) at 56 citing *Zauderer*, 471 U.S. at 651.

to disclosures of other kinds of commercial speech, application depends on the degree to which the information in question is “purely factual and uncontroversial.”<sup>35</sup>

Even then, the fact that “a disclosure is factual, standing alone, does not immunize it from scrutiny because the right against compelled speech is not . . . restricted to ideological messages. Rather, the general rule that the speaker has the right to tailor the speech applies equally to statements of fact the speaker would rather avoid.”<sup>36</sup> For example, objective factual information that carries no messages, such as labor conditions in a company’s factory, can raise heightened First Amendment concerns when discussing controversial topics.<sup>37</sup> Thus, neither the factual nature of the data on Form 395-B, nor the FCC’s claim that the form data does not force a government message, can save public disclosure of the data from strict scrutiny.

Moreover, making the Form 395-B data publicly available raises heightened constitutional concerns because the compelled speech here may be used to “stigmatize” companies and “shape their behavior”<sup>38</sup> regarding hiring practices, which are hardly noncontroversial issues. The history of this proceeding provides ample evidence. There has been a long intense debate about whether publishing the Form 395-B data would lead to undue pressure from the government or third parties on broadcast stations to engage in preferential hiring, with dozens of comments and letters filed by stakeholders on both sides

---

<sup>35</sup> *American Meat Inst. v. USDA*, 760 F.3d 18, 23 (D.C. Cir. 2014) (en banc) (approving USDA country of origin labeling requirement as information important to consumer welfare); *CTIA-The Wireless Ass’n v. City of Berkeley, Cal.*, 928 F.3d 832, 848 (9<sup>th</sup> Cir. 2019) (approving city ordinance requiring disclosure of RF level as a “short-hand description of the warning the FCC already requires cell phone manufacturers to include in their user manuals.”).

<sup>36</sup> American Chamber Comments at 9, citing *National Ass’n of Manufacturers (NAM) v. SEC*, 800 F.3d 518, 554 (D.C. Cir. 2015).

<sup>37</sup> *Id.* citing *NAM*, 800 F.3d at 555.

<sup>38</sup> *NAM*, 800 F.3d at 520, 530.

of the issue. These concerns caused the FCC to suspend Form 395-B in 2001 following two D.C. Circuit Court cases that struck down parts of the FCC's EEO rules,<sup>39</sup> and maintain the form's suspension for more than two decades until "issues were resolved regarding confidentiality of the employment data."<sup>40</sup> The debate continued through 2004, when the FCC sought to refresh its record on "developments in the law relating to public disclosure of employment data" and a system that could "afford varying degrees of station-level anonymity."<sup>41</sup> And the debate continues to this day, as numerous self-styled public interest groups have promised in recent years to use the published form data to hold "companies accountable" or push the FCC to designate certain stations' licenses for hearing if they don't conform to certain notions of workplace diversity.<sup>42</sup>

Simply put, if the Commission's assertions that data on Form 395-B were "purely factual and noncontroversial,"<sup>43</sup> it would have reinstated Form 395-B and made the data publicly available decades ago. Nothing significant has changed in the relevant facts or law since 2001, other than the priorities of the Commission.

---

<sup>39</sup> *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); *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).

<sup>40</sup> 2021 Further Notice, 35 FCC Rcd at 12055.

<sup>41</sup> Fourth Report and Order at ¶ 12 citing Fourth Notice, 19 FCC Rcd at 9975 and 78.

<sup>42</sup> American Chamber Comments at 8; Fourth Report and Order, Carr Statement at 54 citing Letter from The Leadership Conference on Civil and Human Rights to FCC Chairwoman Jessica Rosenworcel, MB Docket Nos. 19-177, 98-204 (Sept. 29, 2022). *See also* Comments of the EEO Supporters, MB Docket Nos. 19-177 and 98-204 (Sep. 20, 2019) (dubbing stations "intentional discriminators" if they hire "primarily through word of mouth" and have a "homogenous" workforce and urging the FCC to designate the licenses of such stations for hearing).

<sup>43</sup> Fourth Report and Order at ¶ 52.

## B. The FCC's Justifications for Making the Form 395-B Data Publicly Available are Not Remotely Compelling

In any event, the requirement to publish the Form 395-B data is tantamount to a compelled disclosure directly to the public and cannot withstand strict or intermediate scrutiny because the Commission fails to show that disclosing the data would further a compelling or even an important government interest, nor narrowly tailors the obligation to the purpose of the rule.

The FCC offers three reasons for making the form data public, each more absurd than the last. *First*, the FCC states that public disclosure will increase the likelihood that mistaken data will be discovered and corrected by “individuals or entities with a connection” to a station, and will incentivize stations to file accurate data to avoid third-party claims that the filed data is incorrect.<sup>44</sup> The FCC cites one 14-year old assertion by the National Organization of Women as support for this approach, but does provide any proof that public disclosure will help to ensure the accuracy of the data.<sup>45</sup> There is no record of this or any other FCC form being corrected by such “individuals or entities,” no description of who the FCC is referencing, or how such a person or group would go about this effort. Would a third-party representative walk around a station's offices and observe the (apparent) gender and race of every employee, or perhaps wait outside and see how many women and persons of color enter? Would they somehow gain access to a private company's employment rolls? Aside from the FCC essentially inviting third parties to review a station's form to illuminate negative data (i.e., pressure a station to alter its hiring practices), this purported justification seems like conjecture manufactured by the FCC to prop up its desired result.

---

<sup>44</sup> *Id.* at ¶¶ 15-16.

<sup>45</sup> Carr Statement at 55.

More importantly, the FCC's claimed benefits from third party review of Form 395-B are specious because licensees are already fully incentivized to file accurate data. Falsely certifying to the truthfulness of information filed on a Commission form could lead to significant enforcement actions, including the potential loss of a station's license or even criminal prosecution. Form 395-B requires a signed certification that "all statements contained in this report are true and correct," under the following bold-typed warning:

**WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE TITLE 47, SECTION 312 (a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).**

It is ludicrous to suggest that the potential penalties contained in this foreboding notice are not reason enough for broadcasters to file an accurate Form 395-B. The FCC relies on a licensee's certification to the truthfulness of filed information on every other form and in every other regulatory context,<sup>46</sup> and there is no reason for a different approach here. Stations will file correct information whether Form 395-B is made publicly available or not, and the FCC's nonsensical claim that enabling third parties with necessarily limited (at best) knowledge of a station's workforce to review individual stations' forms will motivate stations to file accurate reports is not a compelling (or even a rational) interest.

*Second*, the FCC asserts that making the data public is consistent with Congress's goal in the OPEN Government Data Act to maximize the usefulness of data.<sup>47</sup> However, this is merely generic pabulum that can be said about any reporting requirement imposed by any agency. The FCC does not provide a reason why disclosing the specific data on Form 395-B

---

<sup>46</sup> See, e.g., FCC Form 398, Children's Television Programming Report, available here: <https://transition.fcc.gov/Forms/Form398/398.pdf>,

<sup>47</sup> Fourth Report and Order at ¶ 15; Pub. L. No. 115-435 (2019) §§ 201-202, Title II of the Foundations for Evidence-Based Policymaking Act of 2018, 44 U.S.C. § 3501(2), (4).

on a station-specific basis serves the purpose of this statute, especially given the decades-old concerns that making the data public could lead to undue pressure on stations to engage in preferential hiring. The FCC's normal policy is not to make all the data it collects publicly available, and the FCC fails to sufficiently distinguish Form 395-B from its many other required reports.<sup>48</sup> In addition, this vague claim about maximizing the utility of the data is irrelevant to the decision to make the forms public since the FCC can ensure the usefulness of the data through other means, as it does in other contexts.<sup>49</sup> At most, this claim about consistency with the OPEN Government Data Act is just a byproduct of the FCC's specious argument that making the data public will enhance its reliability, but is not a separate reason. The FCC could equally maximize the utility of data through confidential treatment of station-specific Form 395-B data.

*Third*, the Commission posits that making the form data public will allow it to produce the most useful reports possible without being hindered by concerns about inadvertent disclosures of identifiable information.<sup>50</sup> The FCC claims that being able to “slice, dice, and display” the employment data into published reports without worrying about divulging the identity of individual stations will benefit Congress and the public. NAB submits that it is backwards logic to try to avoid the mistaken disclosure of information by preemptively publishing the information. If this made sense, every government agency – including the intelligence agencies? – would publish all the data they collect from private parties to allow for published analyses without concerns about mistakenly divulging the source of the data.<sup>51</sup>

---

<sup>48</sup> See Carr Statement at 55.

<sup>49</sup> Comments of the Center for Regulatory Freedom (CRF) at 3, MB Docket No. 98-204 (Apr. 13, 2024).

<sup>50</sup> Fourth Report Order at ¶ 15.

<sup>51</sup> *Id.*



Also, the FCC regularly collects and examines private data collected from regulated entities without inadvertently disclosing confidential information,<sup>52</sup> including companies' private financial data filed in application, transaction, spectrum auction, and enforcement proceedings, without inadvertently divulging private information to the public. Perhaps unsurprisingly, the Commission does not cite any examples of it previously mistakenly releasing confidential information to bolster its position here.

Overall, the Commission's stated reasons for making public the Form 395-B data of individual stations falls short under the constitutional analysis of compelled speech in other contexts. For example, CRF notes that the Supreme Court struck down a California law that required charities making solicitations in the state to disclose the names, addresses, and occupations of all major donors.<sup>53</sup> The Court found that such blanket disclosures were unconstitutionally broad and dramatically mismatched to the state's interest in "administrative convenience" and preventing wrongdoing by charities.

The FCC claims that its purpose in disclosing the Form 395-B data is for "preparing meaningful and accurate analyses of workforce trends in the broadcast industry."<sup>54</sup> At bottom, however, the FCC's rationales add up to the same kind of interests in administrative convenience that the Supreme Court previously deemed insufficient. Instead of the FCC relying on its normal certification and enforcement processes to confirm the accuracy of data on Form 395-B, disclosing an individual station's form allows third parties to assume this responsibility. Similarly, instead of formulating reports that protect the identifiable information of individual broadcast stations, it is easier for the FCC to simply disclose every

---

<sup>52</sup> See Carr Statement at 55.

<sup>53</sup> CRF Comments at 4 citing *AFP*, 141 S. Ct. at 2389.

<sup>54</sup> Fourth Report and Order at ¶ 15.

station's Form 395-B. As CRF explains, while administrative efficiency may be important to the Commission, it is not a "prime objective" of the First Amendment and cannot support public disclosure of Form 395-B data.<sup>55</sup> Accordingly, regardless of the appropriate review standard, the FCC's decision to publish the Form 395-B data on a station-specific basis has no legs because it lacks any legitimate justification, particularly when less burdensome, equally effective alternatives exist.

### **C. The FCC Fails to Narrowly Tailor Collection and Publication of Form 395-B to its Clearly Stated Purpose**

The FCC makes no attempt to narrowly tailor its approach to its repeatedly stated goals to use the data to analyze industry employment trends and create reports to Congress. The Fourth Report and Order stated repeatedly that collecting and accessing the Form 395-B data was important for understanding and analyzing the "broadcast industry workforce" and the "workforce composition in the broadcast industry," and repetitively used terms and phrases such as "broadcast sector," "industry trends," "industry-wide," "broadcast employment trends," and "trends in the broadcast sector."<sup>56</sup> Repeating this language only undercuts the Order's position, because it merely reemphasizes that the Commission does not need to publish the Form 395-B data on a station-by-station basis. For the Commission to examine the broadcast "sector" or "industry" and analyze and report on industry- or sector-wide trends does not require *any* underlying data to be made public, and certainly does not require data to be made public on a *station-specific* basis. Similarly, referring to use of the Form 395-B "to gather data purely for statistical purposes" does not support

---

<sup>55</sup> CRF Comments at 4 citing *McCullen v. Coakley*, 573 U.S. 464, 495 (2014).

<sup>56</sup> Fourth Report and Order at ¶¶ 2, 13, 14, 15, 22, 45, 47, 50, 52.

making data public on a station-level basis<sup>57</sup> or even making the FCC’s need to have the data at all sound compelling or important. Indeed, collecting data “purely for statistical purposes” seems akin to collecting data for the sake of data collection.

In any event, NAB submits that the Commission could easily collect, confirm the accuracy of the employment data, and analyze such data without disclosing the workforce composition of individual stations. For example, the FCC could simply collect the forms on a confidential basis pursuant to a filer’s certification to the truthfulness and accuracy of the information, and then create public reports that analyze the data in an aggregated, anonymous manner that guards the identity of individual filers.<sup>58</sup> Such an approach would better comport with both the First Amendment and the Administrative Procedure Act requirement for reasoned decision-making.<sup>59</sup>

As it stands, the Commission’s decision to make the workforce composition data collected on Form 395-B publicly available is unconstitutional under the First Amendment. NAB thus urges the FCC to modify the Fourth Report and Order to comply with the Constitution and federal law.

#### **IV. MANDATING THE PUBLIC AVAILABILITY OF THE FORM 395-B DATA VIOLATES THE FIFTH AMENDMENT**

A similar analysis to the above discussion shows that publishing the Form 395-B data on a station-attributable basis also runs afoul of the Fifth Amendment and contradicts existing applicable legal precedent. The Commission states that Congress added Section

---

<sup>57</sup> *Id.* at ¶ 47; see also ¶ 49.

<sup>58</sup> Reply Comments of the National Association of Broadcasters at 5-6, MB Docket No. 98-204 (Nov. 1, 2021).

<sup>59</sup> The FCC has failed to “articulate a satisfactory explanation for its action,” including a rational connection between its stated purpose and the choice made. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

334 to the Communications Act in 1992 to affirm the FCC’s authority and existing rules regarding EEO, including Form 395-B. Congress did so after finding that “increased numbers of females and minorities in positions of management authority . . .in broadcast television . . . advances the Nation’s policy favoring diversity in the expression of views in the electronic media.”<sup>60</sup> The FCC also states that “workforce diversity is critical to the ability of broadcast stations” to effectively serve local communities, and that employment data make it possible to assess progress in the industry.<sup>61</sup>

While the Commission repeatedly declares that the purpose of collecting Form 395-B merely is to allow the FCC to examine industry-wide trends and create reports, the statements above at least suggest that disclosure of Form 395-B data on a station-specific basis is intended to encourage certain hiring practices. This impression is bolstered by the flimsiness of the FCC’s defenses for publishing the data on a station-level basis, which, as discussed in Section III., appear “pretextual.”<sup>62</sup> Given the lack of any compelling or important basis for disclosing station-level Form 395-B data and the potential for public availability of that data to lead to unlawful pressure on broadcast stations to engage in preferential hiring practices, the FCC’s decision also is contrary to the equal protection clause of the Fifth Amendment.<sup>63</sup>

---

<sup>60</sup> Fourth Report and Order at ¶ 5 citing 1992 Cable Act, codified as 47 U.S.C. § 334(a).

<sup>61</sup> *Id.* at ¶ 2.

<sup>62</sup> Carr Statement at 56.

<sup>63</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). See also CRF Comments at 3-4 citing *Students for Fair Admissions, Inc. (SFFA) v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 202, 214-215 (2023) (arguing that the Supreme Court rejected increasing racial diversity as a compelling interest and that the “Constitution . . . should not permit any distinctions of law based on race or color” (cleaned up)).

That was the holdings of two D.C. Circuit Court decisions rejecting earlier versions of the FCC's EEO rules and remains true today. In the 1998 *Lutheran Church* case, the court found that the FCC's EEO rules "pressured[d] license holders to engage in race-conscious hiring" to hire a staff that reflects the diversity of their area.<sup>64</sup> In the 2001 *MD/DC/DE Broadcasters Ass'n* case, the court again struck down the FCC's EEO rules, which included the FCC's promise to use Form 395-B data only to monitor industry trends and not for compliance purposes.<sup>65</sup> Despite these assurances, the court found that the FCC's intention under one part of the rules to investigate stations that reported 'few or no' applications from women or minorities "compelled broadcasters to redirect their necessarily finite recruiting resources so as to generate a larger percentage of applications from minority candidates."<sup>66</sup> Even assuming the FCC had a compelling interest in preventing discrimination, the court also found that the rule was not narrowly tailored to the Commission's stated goal of preventing discrimination in the broadcast industry.<sup>67</sup>

Here, publishing the Form 395-B data will similarly unlawfully unleash pressure on stations to engage in preferential hiring, perhaps not directly from the FCC, but FCC-enabled pressure, nonetheless. The Commission practically invites third-party groups to pursue claims against broadcasters. For example, the FCC states that making the form data public will allow third parties to review and correct the data.<sup>68</sup> The FCC further states that

---

<sup>64</sup> *Lutheran Church*, 141 F.3d at 351-52.

<sup>65</sup> *MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 15.

<sup>66</sup> *Id.* at 20.

<sup>67</sup> *Id.* at 22.

<sup>68</sup> Fourth Report and Order at note 58, citing Comments of the National Organization for Women, et al. at 10, MB Docket No. 98-204 (July 29, 2004 (2004 NOW Comments)).

publishing the data will incentivize stations to file accurate forms to “avoid third-party claims” that submitted data was incorrect.<sup>69</sup>

It seems clear that various advocacy groups stand ready to accept the FCC’s invitation to examine stations’ hiring practices and pressure them to engage in preferential practices. For more than twenty years, NOW et al. has supported collection and public disclosure of Form 395-B because it could help deter discrimination by “enlisting various social pressures in the direction of improved performance.”<sup>70</sup> These groups have also stated that granting access to “all aspects of a station’s operations, including employment practices” would place citizens in a “better position to work closely with their local broadcast station to ensure that stations are meeting their needs.”<sup>71</sup> Even more troubling, NOW et al. has stated that disclosure of the form data would help the FCC assess the effectiveness of its EEO rules by allowing the public to “analyze and compare” the EEO performance of stations across geographic regions and programming formats.<sup>72</sup> They do not even try to disguise their intentions to use the data for inappropriate purposes, as there can be only one interpretation of their plans to enlist “social pressures” and “work closely with” stations to improve their performance. It is not hard to imagine advocacy groups using Form 395-B data, for example, to pressure country music radio stations in the Dakotas to change their hiring practices to bring the diversity of their workforce in line with urban hip-hop stations in New York City.<sup>73</sup>

---

<sup>69</sup> *Id.* at ¶ 15.

<sup>70</sup> 2004 NOW Comments at 3-4.

<sup>71</sup> *Id.* at 6-7.

<sup>72</sup> *Id.* at 7.

<sup>73</sup> Reply Comments of the National Association of Broadcasters at 5-6, MB Docket No. 98-204 (Aug. 9, 2004).

Other advocacy groups have echoed these intentions. For instance, MMTC has announced plans to “liberally draw inferences from [the] statistics” on Form 395-B to determine whether individual stations are discriminating in hiring,<sup>74</sup> and the Leadership Conference on Civil and Human Rights (LCCHR) has asserted that publishing the Form 395-B data will “allow the public to hold those companies accountable” for insufficient diversity and inclusion efforts.<sup>75</sup> Given these statements of intent, the Fourth Report and Order erred in casually dismissing concerns about use of public station-specific Form 395-B data to pressure local stations as “speculative” or “overstated.”<sup>76</sup>

The Commission also claims that strict scrutiny is inapplicable because of its codified promise not to use the data to assess an individual broadcaster’s compliance with the EEO rules,<sup>77</sup> and commitment to dismiss any petition or complaint filed by a third party against a broadcast station based on Form 395-B data.<sup>78</sup> However, these promises will not address third parties’ use of the data required to be reported to the FCC and disclosed by the FCC to pressure stations about their hiring practices in other ways, such as social media campaigns and costly shareholder proxy votes. The government cannot “induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.”<sup>79</sup>

---

<sup>74</sup> Comments of MMTC Comments, MB Docket Nos. 98-204 and 96-16 (April 15, 2002).

<sup>75</sup> Letter from LCCHR et al., to FCC Chairwoman Jessica Rosenworcel, MB Docket No. 98-204 (Sep. 29, 2022) at 2.

<sup>76</sup> Fourth Report and Order at ¶ 17 (finding concerns about the publication of workforce data to be “overstated”); *id.* at ¶ 36 (characterizing concerns about competitive harms as “projecting a speculative worst-case scenario”); *id.* at ¶¶ 35 and 37 (calling potential harms from publishing Form 395-B data “unspecified” and “slight,” respectively).

<sup>77</sup> *Id.* at note 32, citing 47 C.F.R. § 73.3612 (amended Note).

<sup>78</sup> *Id.* at ¶ 17.

<sup>79</sup> *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (cleaned up); *accord SFFA*, 600 U.S. at 230.

Finally, as required under strict scrutiny, the Commission fails to narrowly tailor collection and publication of Form 395-B data to its stated purposes of analyzing industry trends and creating reports. NAB explains above that the Commission could easily collect the form and its information on a confidential basis and publish reports that analyze the data in an aggregated manner that does not reveal any specific station sources.

#### **V. DISCLOSURE OF FORM 395-B DATA MAY HARM GENDER NON-BINARY EMPLOYEES**

The Commission announces plans to modify Form 395-B to include a mechanism to account for those employees who identify as gender non-binary.<sup>80</sup> NAB understands that some station employees who identify as gender non-binary may have concerns about being identifiable on Form 395-B as gender non-binary due to potentially unwelcome attention from outside interests. NAB submits that outside groups may relatively easily identify such an employee when the individual is identified on Form 395-B as gender non-binary, by job category, and works at a smaller station, or even a larger station in a small town. Essentially, the FCC's choice to make the form publicly available could help facilitate the "doxing" of such employees, which could lead to unwanted public focus on the employee, and even personal threats from outside interests. NAB also observes that publicly releasing information that specific stations have non-binary employees could inadvertently result in external pressure on those stations to alter their hiring practices. That would clearly be contrary to the public interest.

We also note the unnecessarily awkward position in which the FCC's plan will place both station managers and employees, as well as potential privacy concerns. Form 395-B instructs stations to complete it based on employees' self-identification. However, if an

---

<sup>80</sup> Fourth Report and Order at ¶¶ 39-40.



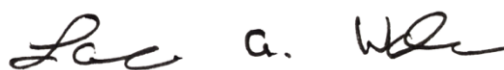
employee declines to self-identify, the station may use employment records or “observer identification” to fill in the blanks.<sup>81</sup> Thus, even if completing this part of the form is optional, a station choosing to complete this entry could be forced to identify such employees simply based on their appearance, without any context. Moreover, station management could be held accountable for mistakenly misidentifying an employee. Alternatively, if a station chooses not to complete this part of the form, the employee would still be singled out for unequal treatment among the rest of their peers whose gender is reflected on the form.

NAB strongly encourages the Commission to consider these concerns as further evidence that publicly disclosing the Form 395-B data on a station-specific basis is an ill-advised approach.

## VI. CONCLUSION

For the reasons discussed above, NAB respectfully requests partial reconsideration of the FCC’s decision in the Fourth Report and Order that requires making the workforce composition data on Form 395-B publicly available on a station-specific basis.

Respectfully submitted,



Rick Kaplan  
Jerianne Timmerman  
Larry Walke  
NATIONAL ASSOCIATION OF BROADCASTERS  
1 M St SE  
Washington, DC 20003  
(202) 429-5430

June 3, 2024

---

<sup>81</sup> Form 395-B Instructions, #7.