

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

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

**REPLY COMMENTS OF THE MINORITY  
MEDIA AND TELECOMMUNICATIONS COUNCIL**

The Minority Media and Telecommunications Council (“MMTC”) respectfully submits these reply comments on proposed changes to FCC Form 395.<sup>1</sup>

Neither the National Association of Broadcasters (“NAB”) nor the Named State Broadcasters Associations (“State Associations”) has set forth rational reasons for the Commission to refrain from requiring broadcasters and MVPDs to file Form 395 data, or for keeping this data secret.

**The Commission Is Statutorily Bound To Collect Employment Data**

As the Commission noted in the Fourth NPRM, Sections 334 and 634 of the Act direct the agency to collect data regarding equal employment.<sup>2</sup> Although the court limited the

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<sup>1</sup> Media Bureau Seeks Comment on Possible Changes to FCC Forms 395-A and 395-B, MM Docket No. 98-204, Public Notice, DA-08-752, 23 FCC Rcd 544, 73 Fed. Reg. 21346 (April 21, 2008). Comments on the status of Form 395 were also sought in Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Third Report and Order and Fourth Notice of Proposed Rulemaking, 19 FCC Rcd 9973, 9977-78 ¶¶12-13 (2004) (“Fourth NPRM”).

<sup>2</sup> Fourth NPRM, 19 FCC Rcd at 9974 ¶3 (citing 47 U.S.C. §334(a)-(b)); Id. (citing 47 U.S.C. §554(d)(3)(A)). The State Associations assert that there is no such mandate. See Joint Comments of the State Associations, MM 98-204, May 22, 2008 (“State Associations Comments”) at 8. The Commission rejected that flawed contention four years ago. See Fourth NPRM, 19 FCC Rcd at 9974 ¶3 n. 12 (citing Comments of the National Alliance of State Broadcasters Associations (“NASBA”), April 22, 2003 (“NASBA, however, does not address the requirements imposed by Section 334.”))

Commission's previous use of this data, it did so on grounds not applicable here.<sup>3</sup> Nothing bars the Commission from interpreting Sections 334 and 634 to include data collection, since an "agency remains the authoritative interpreter (within the limits of reason) of [its] statutes."<sup>4</sup>

The State Associations assert that there is no need for employment data detailing the race and gender of broadcast employees.<sup>5</sup> However, the Commission simply cannot fulfill its statutory EEO enforcement mandate without this data. As explained in our Comments, EEO data collection is permissible as long as it assists the agency in performing its the statutory duties.<sup>6</sup> The need for the Commission to resume performance of those duties is desperate because discriminatory practices have already caused minorities to be almost entirely purged from radio journalism.<sup>7</sup> The Commission should use every tool at its disposal to prevent further discrimination by its licensees.

The State Associations suggest that the FCC should contract with an outside party to process broadcasters' Form 395 data – with no transparency whatsoever. Even the Commission's own staff would be denied access to these OMB-approved forms!<sup>8</sup> One has to marvel at the State Associations' chutzpah in suggesting that these statistical spreadsheets – which cannot possibly be read to imply a preference for any racial group – are somehow so radioactive that the Commission's civil service staff cannot be trusted to handle them, and even

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<sup>3</sup> Compare Lutheran Church/Missouri Synod v. FCC, 141 F.3d 344, 353 (D.C. Cir. 1998), petition for rehearing denied, 154 F.3d 487, petition for rehearing en banc denied, 154 F.3d 494 (D.C. Cir. 1998) ("Lutheran Church") (holding that Commission cannot use Form 395 data as a screening device to determine which stations' EEO compliance programs should be subject to heightened staff scrutiny).

<sup>4</sup> National Cable & Telecomm. Ass'n v. Brand X Internet Services, 545 U.S. 967, 983 (2005) ("Brand X").

<sup>5</sup> Comments of State Associations, MM Docket 98-204, May 22, 2008 ("State Associations Comments") at 2.

<sup>6</sup> Comments of the Minority Media and Telecommunications Council, MM 98-204, May 22, 2008 ("MMTC Comments") at 4.

<sup>7</sup> See MMTC Comments at 6-10.

<sup>8</sup> State Associations Comments at 8-9.

an outside party has to use tongs. Suffice it to say that, as noted in the Fourth NPRM, such outsourcing would hinder the Commission's efforts to collect accurate data because there would be no way to follow up with a broadcaster that provided incomplete information.<sup>9</sup>

The Commission has proposed to use the data to compile "trend data based on markets, size of stations, services, or other criteria that could not be reconstructed from totally anonymous forms."<sup>10</sup> As shown in our Comments, the Commission's use of data in this matter is constitutionally permissible.<sup>11</sup> The Commission also pledged not to use the data to "screen renewal applications or to assess compliance with our EEO regulations."<sup>12</sup> The State Associations do not set forth any legitimate reason why the Commission's staff lacks the integrity to honor this pledge.

**Filing Annual Employment Reports Does Not Create Unconstitutional Pressure For Broadcasters to Hire Minorities Or Women**

The State Associations and the NAB argue that requiring a station to file employment data creates unconstitutional pressure on the station to engage in race-based hiring.<sup>13</sup> The State Associations further contend that the mere collection of this data signals a return to results-based review of employment data.<sup>14</sup>

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<sup>9</sup> Fourth NPRM, 19 FCC Rcd at 9976 ¶9.

<sup>10</sup> Id.

<sup>11</sup> See MMTC Comments at 4-6.

<sup>12</sup> Fourth NPRM, 19 FCC Rcd at 9976 ¶9. We trust the Commission's reference to "our EEO regulations" refers to its outreach requirements in 47 C.F.R. §73.2080(b) through (e), rather than the nondiscrimination section of the rules, 47 C.F.R. §73.2080(a). Consistent with two generations of practice in every tribunal that considers employment discrimination allegations, the FCC should be able to use any relevant evidence to assess whether one of its licensees discriminated in employment.

<sup>13</sup> State Associations Comments at 2, 7-8; Comments of the National Association of Broadcasters, May 22, 2008 ("NAB Comments") at 2-4.

<sup>14</sup> State Associations Comments at 2-3.

These assertions are without merit and are based on pure speculation. As noted above, the Commission has stated it will not use the information it collects for any improper purpose.<sup>15</sup> Irrational fear of potential agency misconduct is no justification to prevent an agency from collecting data for a legitimate purpose.<sup>16</sup> An agency compiling data with a promise not to use it improperly is a far cry from the “raised eyebrow” regulation the State Associations claim will result from broadcasters filing employment reports.<sup>17</sup>

Since the Commission will not misuse Form 395 data, the NAB and the State Associations are also incorrect in suggesting that making Form 395 data publicly available would create unconstitutional pressure on broadcasters to engage in race-based hiring.<sup>18</sup> No such “pressure” can be exerted if the Commission provides no forum for it. Thus, while local civic groups could discuss Form 395 data with broadcasters, that kind of voluntary dialogue – which the Commission seeks to foster<sup>19</sup> – is free of “pressure” because recourse to state action is unavailable. Even if civic organizations somehow could exert “pressure” without state action to back them up,<sup>20</sup> Form 395 data would not cause any such “pressure” to favor one race over

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<sup>15</sup> See supra n. 12 and accompanying discussion.

<sup>16</sup> See MMTTC Comments at 5 (citing United States v. New Hampshire, 539 F.2d 277, 279-80 (1st Cir. 1976) cert. denied, 429 U.S. 1023 (1976)).

<sup>17</sup> See State Associations Comments at 7 (quoting MD/DC/DE Broadcasters Association v. FCC, 236 F.3d 13, 19 (D.C. Cir. 2001), petition for rehearing and rehearing en banc denied, 253 F.3d 732 (D.C. Cir. 2001), cert. denied sub nom. MMTTC v. FCC, 534 U.S. 1113 (2002) (“MD/DC/DE Broadcasters”). MD/DC/DE Broadcasters refers to past Commission enforcement practices as “raised eyebrow regulation” or “raised eyebrow harassment.” Id.

<sup>18</sup> See NAB Comments at 4 and State Associations Comments at 6.

<sup>19</sup> See Broadcast Localism, Report and Notice of Proposed Rulemaking, MB Docket No. 04-233, 23 FCC Rcd 1324, 1326 ¶2 (2007) (“Broadcast Localism NPRM”) (“the centerpiece of localism is the communication between broadcasters and the members of the public that they are licensed to serve...dialogue between broadcasters and their audiences concerning stations’ localism efforts is not ideal.”)

<sup>20</sup> NAB Comments at 4 (citing Lutheran Church, 141 F.3d at 353. The NAB misreads Lutheran Church as a broad admonition against the availability of employment statistics to members of the public.

another, since Form 395 reports equally and non-preferentially on the employment of all races and both genders.<sup>21</sup>

The State Associations also assert that the Commission has not considered alternative, “narrowly tailored” means of compiling EEO information.<sup>22</sup> However, narrow tailoring is a prong of strict scrutiny, a standard that does not apply in this instance because the Commission would be collecting data for purposes that will not lead to race-conscious treatment.<sup>23</sup> Instead, the applicable standard of review is rational basis. Plainly, requiring broadcasters to produce Form 395 data is rationally related to the Commission’s statutory mandate to collect such data<sup>24</sup> and to prevent discrimination.<sup>25</sup>

The State Associations also point out that the Commission adopted race and gender-neutral program in its recent Diversity Order.<sup>26</sup> However, the Commission came to those conclusions *after assessing industry data*<sup>27</sup> on minority and women broadcasters.<sup>28</sup> Further,

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<sup>21</sup> Thus Form 395 data could as easily be used incorrectly by those suggesting that a broadcaster should be sanctioned because it hired too few white men as it could be used incorrectly to suggest that a broadcaster should be sanctioned because it hired too few minorities or women. Both misuses of the data are precluded by the Commission’s Shermanesque statement that it will not use such complaints to assess EEO performance.

<sup>22</sup> State Associations Comments at 8-9.

<sup>23</sup> See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738, 2792 (2007) (Kennedy, J., concurring) (“Schools may pursue the goal of brining students of diverse backgrounds and races through other means, including ... tracking enrollments, performance, and other statistics by race”). Raw, statistical data on race and ethnicity may be collected, regardless of a party’s fear of misuse. See United States v. New Hampshire, 539 F.2d 277, 279-280 (1st Cir. 1976), cert. denied 429 U.S. 1023 (1976). See also MMTC Comments at 5.

<sup>24</sup> See supra at 1-2.

<sup>25</sup> 47 U.S.C. §§151 and 554(b); see also 47 C.F.R. §257 (Commission must report on its efforts to eliminate market entry barriers).

<sup>26</sup> State Associations Comments at 4 (citing Promoting Diversification of Ownership In the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294, 23 FCC Rcd 5922, 5925-27 ¶¶6-9 (released March 5, 2008) (“Diversity Order”).

<sup>27</sup> Albeit incorrectly.

<sup>28</sup> See Diversity Order, 23 FCC Rcd at 5926 ¶8.

unlike Form 395 race and gender EEO data, Form 323 race and gender ownership data is irrelevant to the enforcement of rules governing the behavior of an individual licensee.

### **CIPSEA Does Not Apply To The Collection Of Annual Employment Data**

The Confidential Information Protection and Statistical Efficiency Act of 2002 (“CIPSEA”)<sup>29</sup> was enacted to safeguard information supplied to the government under a pledge of confidentiality.<sup>30</sup> The NAB suggests that collecting broadcaster employment data pursuant to CIPSEA “appears extremely promising.”<sup>31</sup> However, the Commission’s collection of employment data does not fall within the statutory purpose of CIPSEA.<sup>32</sup> The legislative history of CIPSEA shows that CIPSEA’s purpose was to protect pledges of confidentiality made by the government *prior* to its 2002 enactment.<sup>33</sup> The Commission required broadcasters to submit EEO data for almost 30 years without any pledge of confidentiality<sup>34</sup> or expectation of privacy.<sup>35</sup> Therefore, although the Commission’s policy of making the information publicly available was suspended, there is no basis for the Commission to change that policy.

The NAB asserts that CIPSEA covers broadcast employment data because the data is used for a statistical purpose.<sup>36</sup> However, the NAB overlooks legitimate non-statistical uses of the data by nongovernmental organizations or federal advisory committees, or as relevant (albeit not dispositive) evidence of whether a broadcaster engaged in a specific practice – excessive

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<sup>29</sup> Pub. L. 107-347, §501, 116 Stat. 2899 (2002).

<sup>30</sup> Id. at §511(b)(1)-(3)

<sup>31</sup> NAB Comments at 4.

<sup>32</sup> Id. at 5-7.

<sup>33</sup> For example, the House Report states that the “bill provides one uniform set of confidentiality protections to supplant the ad hoc statutory protections *that now exist.*” H. Rep. No. 107-778 at 8 (emphasis added).

<sup>34</sup> Fourth NPRM, 19 FCC Rcd at 9978 ¶14 (stating “Broadcasters have filed FCC Form 395-B, the Broadcast station Annual Employment Report, with the Commission for more than thirty years. Throughout the form’s long history, the Commission has made it available to the public for inspection. Indeed, there was no exemption from the disclosure requirements of the Freedom of Information Act that would have permitted the Commission to keep the data confidential.”)

<sup>35</sup> Id.

<sup>36</sup> See NAB Comments at 5.

word of mouth recruitment from a homogeneous workforce – that the Commission has recognized as inherently discriminatory.<sup>37</sup>

**The Commission Is Authorized to Collect And Publish Employment Data Due To Dramatically Changed Circumstances In Broadcast Employment**

Dramatically changed circumstances compel a finding that the Commission should resume collection and publication of EEO data immediately, and that it should resume aggressive enforcement of its EEO rules to the full extent permitted by law.

An agency may “adapt [its] rules and policies to the demands of changing circumstances.”<sup>38</sup> So long as the agency justifies its changed course with reasoned analysis, its policy adaptations will withstand judicial review.<sup>39</sup>

What are the “changed circumstances?” Since 2001, when the Commission suspended EEO reporting and almost shut down EEO enforcement, *and* while the State Associations were promising that voluntary employee recruitment would expand the “depth and breadth” of outreach methods,<sup>40</sup> broadcasters quietly and steadily completed a purge of minorities from radio journalism.<sup>41</sup> Just look at what the State Associations told the Commission in 2002:

Through extensive efforts by the Associations and their members, even in the absence of FCC equal employment opportunity rules over the past two-and-a-half years, the broadcasting industry has continued to move forward increasing the breadth and depth of its outreach so that everyone seriously seeking employment in the industry can get timely information to pursue their goals, without regard to race, sex, or cultural heritage... Given this record, the Commission has no factual or logical basis

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<sup>37</sup> See, e.g., Jacor Broadcasting Corporation, 12 FCC Rcd 7934 (1997) (“Jacor”); Walton Broadcasting, Inc. (KIKX, Tucson, AZ) (Decision), 78 FCC2d 857, recon. denied, 83 FCC2d 440 (1980) (“Walton”).

<sup>38</sup> Motor Vehicle Manufacturing Assn. v. State Farm Mutual Auto Insurance Co., 463 U.S. 29, 42 (1983) (“State Farm”); see also Brand X, 545 U.S. at 981.

<sup>39</sup> State Farm, 463 U.S. at 42; see also United States Air Tour Ass’n v. FAA, 298 F.3d 997, 1006 (D.C. Cir. 2002).

<sup>40</sup> Joint Comments of the Named State Broadcasters Associations, MM 98-204, April 15, 2002 at 6-7 (“State Associations 2002 Comments”).

<sup>41</sup> See MMTC Comments at 6-10.

to re-regulate. As no evidence indicates that the broadcasting industry is a discriminator, it would be inappropriate for the Commission to regulate.<sup>42</sup>

The Commission was hoodwinked – and that has cost untold hundreds of minorities their broadcast careers. Until the Commission resumes strong civil rights enforcement, minorities and women will continue to be expunged from broadcast employment.

### **CONCLUSION**

The Commission should take these steps yesterday, and that wouldn't be soon enough:

- provide for transparency of EEO data
- reiterate that it will not use this data for any improper purpose
- affirm that it will use the data for proper purposes, including review of whether a broadcaster has discriminated by excessively using word of mouth recruitment from a homogeneous workforce
- set a date by which broadcasters and MVPDs must file their annual employment reports, and
- restore robust EEO enforcement, including far more numerous and thorough audits, no more rubber-stamp audit closures, far more forfeitures, and evidentiary hearings in instances of discrimination.<sup>43</sup>

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<sup>42</sup> State Associations 2002 Comments at i (Executive Summary).

<sup>43</sup> It is not necessary to increase the levels of individual EEO forfeitures. The average forfeiture for EEO cases decided from 2004-2007 is almost four times higher than the average forfeiture imposed in cases decided from 1994-1997. See MMTC Comments at 8. However, only 5% of stations are audited in a given year, and most audits result in a rubber stamp even where the licensee engaged in suspiciously noncompliant behavior. Id. The Media Bureau is bringing far too few cases, and, consequently, it has imposed far too few forfeitures and has recommended not a single case for evidentiary hearing. Further, some recent forfeitures were imposed on basically innocent parties – those who recruited primarily by word of mouth from heterogeneous workforces. Id. at 9 and ¶40. Word of mouth recruitment from a heterogeneous workforce is not inherently discriminatory, and in some circumstances it may be perfectly reasonable. What is inherently discriminatory, as the Commission has repeatedly acknowledged, is excessive use of word of mouth recruitment from a homogeneous workforce. Id. at 7 n. 35 (citing Jacor and Walton). Only with the carefully controlled use of Form 395 data can the Commission distinguish between technical recruitment noncompliance and the kind of discriminatory practices that have resulted in a near-complete purge of minorities from radio journalism.

Respectfully submitted,

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June 6, 2008