

*Before the*  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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

**COMMENTS OF  
THE NATIONAL ORGANIZATION FOR WOMEN, OFFICE OF COMMUNICATION  
OF THE UNITED CHURCH OF CHRIST, INC., MINORITY MEDIA AND  
TELECOMMUNICATIONS COUNCIL *ET AL.***

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## SUMMARY

The National Organization for Women, Office of Communication of the United Church of Christ, Inc., Minority Media and Telecommunications Council, and many other civil rights, labor, trade and religious organizations strongly urge the FCC to continue to make the annual employment forms filed by broadcast stations and MVPD operators available to the public.

NOW *et al.* strongly oppose any suggestion that the FCC should only collect employment data on a confidential basis. The Confidential Information Protection and Statistical Act of 2002 (CIPSEA) neither compels nor permits the FCC to keep employment data confidential. By its plain language, CIPSEA only applies where an agency has promised confidential treatment and uses the data exclusively for statistical purposes. The FCC has never pledged to keep the data confidential. Indeed, for thirty years, the FCC has made this data public and the Form 395-B explicitly so states. Moreover, the Commission collects that data for a variety of legitimate, nonstatistical purposes.

Even if CIPSEA would allow the Commission to keep employment data confidential, Section 334 of the Communications Act prohibits the FCC from giving confidential treatment to employment reports filed by television stations, and it would not make sense to treat radio and television differently in this regard.

Allowing radio stations to file confidentially would undermine important public policy goals. Public disclosure is a strong deterrent against race and gender discrimination. Moreover, public access to employment information is important in assuring that broadcasters are responsive to local community needs. This information is also crucial to the Advisory Committee on Diversity for Communications in the Digital Age in developing proposals for increasing opportunities for minorities and women. Public disclosure also helps to insure the accuracy of the data, one of the purposes underlying CIPSEA. Finally, the Communications Act

explicitly requires the FCC to make employment reports filed by MVPDs available to the public. It would contravene Congressional intent and serve no rational purpose for the FCC to treat broadcasters differently than MVPDs.

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**COMMENTS OF NOW *et al.***

The National Organization For Women, Office of Communication of the United Church of Christ, Inc., Minority Media and Telecommunications Council, and many other civil rights, labor, trade and religious organizations (*NOW et al.*)<sup>1</sup> respectfully submit comments in response to the *Fourth Notice of Proposed Rulemaking (4th FNPRM)*, which was issued in conjunction with the *Third Report and Order (3rd R&O)* in the above captioned proceeding.<sup>2</sup>

*NOW et al.* commend the Commission for its decision in the *3rd R&O* to reinstate the requirement that broadcast stations and MVPDs with five or more employees file an annual

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<sup>1</sup> The full list of parties to these comments is: The National Organization For Women, Minority Media and Telecommunications Council, Office of Communication of the United Church of Christ, Inc., Philadelphia Lesbian and Gay Task Force, Alliance for Community Media, Alliance for Public Technology, American Association of People with Disabilities, American Federation of Television and Radio Artists, Black Citizens for a Fair Media, Communications Commission of the National Council of Churches, USA, Communications Workers of America, Hispanic Americans for Fairness in Media, Independent Spanish Broadcasters Association, Leadership Conference on Civil Rights, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, National Asian American Telecommunications Association, National Asian Pacific American Legal Consortium, National Association for the Advancement of Colored People, National Association of Black Owned Broadcasters, National Association of Black Telecommunications Professionals, National Association of Latino Independent Producers, National Council of Hispanic Organizations, National Council of La Raza, National Hispanic Foundation for the Arts, National Hispanic Media Coalition, National Urban League, People for the American Way Foundation, Puerto Rican Legal Defense & Education Fund, Rainbow/PUSH Coalition, Telecommunications Research and Action Center, UNITY: Journalists of Color, Inc., Women's Institute for Freedom of the Press

<sup>2</sup> Released June 4, 2004, published at 69 Fed. Reg. 34,986.

employment report (Form 395-A for MVPDs and Form 395-B for broadcasters) with the Commission. We agree with the Commission's conclusion that it has broad statutory authority to require the filing of this information, and indeed, the Communications Act requires it to collect such information. *3rd R&O* ¶3. We also agree that with the Commission that collection of Form 395-B is not prohibited by either *Lutheran Church* or *MD/DC/DE Broadcasters Association*. *Id.* ¶7-9. The Commission properly rejected the arguments of some commenting parties that the Form 395 data was unnecessarily duplicative of the EEOC's filing requirements. *Id.* ¶10.

In the *4th FNPRM*, the Commission asks whether the Confidential Information Protection and Statistical Act of 2002 (CIPSEA),<sup>3</sup> which allows agencies to collect statistical information on a confidential basis in certain circumstances, applies to the broadcast Forms 395-B. ¶15. The Commission further inquires whether, even if the law allows it to collect the annual employment data on a confidential basis, the Commission's public policy goals might be better advanced by making the information public. *Id.* While recognizing that Section 554(d)(3)(B) of the Communications Act directs the FCC to make the Forms 395-A filed by MVPDs publicly available, it also seeks comment on whether CIPSEA would allow the FCC to keep that data confidential. *Id.* ¶16. As detailed below, *NOW et al.* strongly oppose any attempt to allow annual employment reports to be filed on a confidential basis.

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<sup>3</sup> CIPSEA was enacted in December 2002, as part of the E-Government Act, Pub. L. 107-347, 116 Stat. 2899 (2002).

**I. CIPSEA DOES NOT APPLY TO THE ANNUAL EMPLOYMENT REPORTS**

**A. By Its Plain Language, CIPSEA Does Not Apply To The Collection Of Annual Employment Forms**

The CIPSEA provides that “[d]ata or information acquired by an agency under a pledge of confidentiality for exclusively statistical purposes shall not be disclosed by an agency in identifiable form, for any use other than an exclusively statistical purpose, except with the informed consent of the respondent.”<sup>4</sup> On its face, CIPSEA does not apply to the Form 395-B because the Commission offers neither a pledge of confidentiality regarding the annual employment forms, nor is the purpose of the information purely statistical.

**1. The FCC Has Consistently Required That Employment Data Be Made Available To The Public And Has Never Pledged To Keep It Confidential**

Section 73.3612 of the Commission’s rules, which requires broadcast licensee to file annual employment reports, does not pledge confidential treatment.<sup>5</sup> In fact, Form 395-B explicitly advises broadcasters that “all information provided in this form will be available for public inspection.”<sup>6</sup>

In 1970, when the Commission first adopted the requirement that broadcast stations file annual employment reports, it required stations to both file these reports with the FCC and to

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<sup>4</sup> *Id.* § 512(a). Other sections of CIPSEA use the similar language. *E.g.*, § 512(b)(1) (“data or information acquired by an agency under a pledge of confidentiality for exclusively statistical purposes”).

<sup>5</sup> 47 CFR §73.3612.

<sup>6</sup> This language is included as part of the “FCC Notice to Individuals Required by the Privacy Act and the Paperwork Reduction Act.” The name and address of the licensee, as well as the call signs and locations of the stations are information included on the form.

maintain copies of these reports in their public inspection files.<sup>7</sup> For the next thirty years, the FCC consistently required that the annual employment reports be publicly available both at the station and at the FCC.<sup>8</sup> Indeed, employment reports are only one of many kinds of records that broadcasters have routinely been required to make available to the public. *See McConnell v. Federal Election Comm’n*, 124 S.Ct. 619, 713 (noting that “[b]roadcasters must keep and make publicly available numerous records” and citing many examples).

## **2. The Annual Employment Data Is Used For Both Statistical And Nonstatistical Purposes**

While the FCC clearly requires the filing of annual employment reports for statistical purposes, that is not the sole purpose for these reports. CIPSEA defines a “statistical purpose” as “the description, estimation, or analysis of the characteristics of groups, without identifying the individuals or organizations that comprise such groups.”<sup>9</sup> A “nonstatistical purpose” is defined as “the use of data in identifiable form for any purpose that is not a statistical purpose, including any administrative, regulatory, law enforcement, adjudicatory, or other purpose that affects the rights, privileges, or benefits of a particular identifiable respondent.”<sup>10</sup>

Originally, the Commission used annual employment reports for both statistical and non-statistical purposes. As the Commission explained 1979 Report & Order:

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<sup>7</sup> *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, Report & Order*, 28 FCC 2d 430, 436 (adding §1.612 (requiring filing of annual employment report Form 395 with FCC) and adding §1.526(a)(5) (requiring copies of annual employment report to be maintained locally for public inspection)).

<sup>8</sup> The filing requirement was suspended in 1998 after the decision in *Lutheran Church*, reinstated in 2000, and suspended again in 2001 after the decision in *State Broadcasters. Suspension of the Requirement for Filing of Broadcast Station Annual Employment Reports and Program Reports*, 13 FCC Rcd 21,998 (1998); *Review of the Commission’s Broadcast and Cable Equal Opportunity Rules and Policies*, Report and Order, 15 FCC Rcd 2329, 2332 (2000); *Suspension of the Broadcast and Cable Equal Employment Opportunity Outreach Program Requirements*, 16 FCC Rcd 2872, 2873 n.1 (2001).

<sup>9</sup> CIPSEA § 502(9)(A).

<sup>10</sup> CIPSEA § 502(5)(A).



We use the data from the 395 forms to issue statistics on employment in the broadcast industry periodically and in reviewing the EEO programs of individual stations, mostly in connection with their triennial renewal applications. Members of the public seeking information on a station's employment practices also consult the forms, which are placed in a station's public file. Thus, they may be used in connection with negotiations between community groups and licensees over employment issues and in petitions to deny or informal objections filed against renewal and other licensing applications.<sup>11</sup>

As a result of the decision in *Lutheran Church-Missouri Synod v. FCC*,<sup>12</sup> the Commission will no longer use the employment data to assess compliance with EEO outreach rules at license renewal time, nor can members of the public use this data as grounds for a petition to deny a license renewal that accuses the licensee of violating outreach rules. As the Commission makes clear, the employment data “will be used to compile industry employment trend reports and reports to congress and *will not be used to determine compliance with our EEO rules.*” *3rd R&O* at ¶4 (emphasis added).

This does not mean, however, that the data is not useful for many other non-statistical purposes. Such information is clearly useful to the Advisory Committee for Diversity for Communication in the Digital Age (Diversity Committee) which has been charged with recommending “[p]olicies and practices that will further enhance the ability of minorities and women to participate in telecommunications and related industries.”<sup>13</sup> For example, the Advisory Committee may want to know which licensees have particularly strong records on

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<sup>11</sup> *Amendment of Broadcast Equal Employment Opportunity Rules and FCC Form 395*, 70 FCC 2d 1466, 1467 (1979).

<sup>12</sup> 141 F3d 344 (D.C. Cir. 1998), *pet. for reh'g denied*, 154 F3d 487, *pet. for rehearing en banc denied*, 154 F3d 494 (D.C. Cir. 1998).

<sup>13</sup> Advisory Committee on Diversity for Communications in the Digital Age Mission Statement, available at <http://www.fcc.gov/DiversityFAC>.

hiring and retaining minorities and women, so that its members could find out what they have done to achieve such success.<sup>14</sup>

Public disclosure of employment statistics may deter employment discrimination and assist licensees in self-assessing their efforts to prevent discrimination. As Professor Cass Sunstein has argued in connection with a proposal that broadcasters publicly disclose their public service and public interest activities, “a disclosure requirement will by itself trigger improved performance, by creating a kind of competition to do better, and by enlisting various social pressures in the direction of improved performance.”<sup>15</sup> He discusses how information disclosure has been an effective regulatory tool in the environmental and other contexts.<sup>16</sup> Similarly, the Supreme Court recognized the importance of public disclosure in upholding §501 of the Bipartisan Campaign Reform Act of 2002, which requires broadcasters to keep publicly available records of politically related broadcasting requests.<sup>17</sup>

Moreover, as the Commission notes in its recently issued *Notice of Inquiry on Broadcast Localism*, “the Commission’s overarching goal” is to establish and maintain “a system of local broadcasting that is responsive to the unique interests and needs of individual communities.”<sup>18</sup> When citizens have available factual information about all aspects of a station’s operations, including employment practices and programming practices, they are in a better position to work

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<sup>14</sup> Members of the Advisory Committee would not have access to information collected under a pledge of confidentiality as prescribed by CIPSEA. CIPSEA instructs that only employees and agents of the agency will have access to the information. CIPSEA at § 512(d). Advisory Committee members are neither employees nor agents of the Commission. Federal Advisory Committee Act, § 2(b)(6), 5 U.S.C.A. App. 2 (1972) (stating that federal advisory committee members have only “advisory” functions).

<sup>15</sup> Cass R. Sunstein, *Television and the Public Interest*, 88 Cal. L. Rev. 499, 531 (2000).

<sup>16</sup> *Id.*

<sup>17</sup> *McConnell*, 124 S.Ct at 712-13.

<sup>18</sup> MB Docket No. 04-233, ¶4 (rel. July 1, 2003).

closely with their local broadcaster to ensure that stations are meeting their needs and to resolve any problems with the companies in their communities.

The public can also help the FCC in assessing the effectiveness of the newly revised EEO rules and whether they remain necessary. Having access to anonymously filed information would not meet this need because the public would have not means to analyze and compare the progress of minorities and women in different parts of the country, on stations with different formats and programming types, and in different companies.

NOW, MMTC and other civil rights organizations need the type of information provided by Form 395 to research employment practices in the broadcast industry and develop proposals and programs to serve their constituents. The Form 395 data also has great potential value to historians and other academics. Finally, information about the employment practices of particular stations is also of interest to persons seeking employment at a broadcast station.

Thus, the Form 395-B is not collected “for exclusively statistical purposes.” Nor has the data ever been acquired under a pledge of confidentiality. For these reasons, the plain language of CIPSEA plainly does permit that the FCC treat the information confidentially.

**B. Keeping Annual Employment Data Confidential Would Not Serve The Purpose Of CIPSEA**

Even if CIPSEA could arguably be read as applying to the annual employment forms, it would not be consistent with Congressional intent to read it this way. The CIPSEA’s Findings indicate that Congress enacted this provision because it found that declining public trust in the protection of confidential information was adversely affecting the accuracy and completeness of statistical analyses,<sup>19</sup> and that protecting pledges of confidentiality was essential in obtaining

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<sup>19</sup> §511(a)(4). *See also* H. Rep. No. 107-787 (finding that “[a]ccurate statistical data are essential to making informed public and private decisions in a host of important areas.”)

continued public cooperation in statistical programs.<sup>20</sup> Congress also wanted to make sure that when agencies made pledges of confidentiality, they would not use the information against individuals or organizations in any agency action.<sup>21</sup>

None of these purposes would be served here by affording confidential treatment. Indeed, the accuracy of the information would be undermined by keeping the identity of the filing party confidential. As the Commission has previously determined, “[anonymous filing] would afford [the Commission] no way of enforcing the reporting requirement, and thus would completely undermine the integrity of the data collection program.”<sup>22</sup>

Furthermore, for 30 years the FCC has had no problem ensuring that broadcasters would file this information publicly. Compliance with this and the many other FCC filing requirements is essential to license renewal. Moreover, broadcasters cannot claim that they fear disclosure, since this information has traditionally been made public.

Finally, broadcasters have no reason to fear that the agency would use confidential data against them in an agency action. Not only is the employment data not confidential, but the FCC has explicitly stated it would not use it to assess any aspect of an individual broadcast licensee’s compliance with the EEO requirements of §73.2080. *3rd R&O* at ¶ 4 & App. B (note to §73.3612).

The legislative history of CIPSEA provides further support for the conclusion that the law is exclusively concerned with how statistical information collected pursuant to a pledge of

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<sup>20</sup> §511(a)(4).

<sup>21</sup> §511(a)(2).

<sup>22</sup> Review of the Commission’s Broadcast and Cable Equal Opportunity Rules and Policies, MO&O, 15 FCC Rcd 22,548, 22559-60 (2000). *See also* Brief for Respondents at 50, *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13 (D.C. Cir. 2001) (Nos. 00-1094, 00-1198) (stating that anonymous submissions “would make the data collection process essentially unenforceable and would make the data collected highly suspect if not completely worthless”).

confidentiality is handled by agencies. 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*.”<sup>23</sup> Moreover, CIPSEA passed as part of a larger act, the E-Government Act, whose overall purpose was to enhance public access to information.<sup>24</sup>

Thus, neither the plain language nor the purpose of CIPSEA requires the FCC to afford confidential treatment of annual employment reports.

## **II. THE COMMUNICATIONS ACT LIMITS THE FCC’S AUTHORITY TO AMEND FORM 395-B TO ELIMINATE THE IDENTITY OF THE FILING PARTY**

Some parties might argue that even though CIPSEA does not apply to the FCC’s collection of annual employment data, the FCC should nonetheless change its longstanding practice and promise confidential treatment. In the absence of specific Congressional direction to afford confidential treatment to annual employment reports, however, the Commission’s authority to make such a pledge is limited by Section 334 of the Communications Act.

Section 334, which was enacted as part of the 1992 Cable Act, prohibits revision of “the forms used by [television] licensees and permittees to report pertinent employment data to the Commission.”<sup>25</sup> The accompanying Conference Report states that Section 334 “incorporates into the Communications Act . . . FCC Form 395-B annual employment report,” and details the conferees’ intent that the form be filed “in the same manner, with the same format and content and same terms and conditions as in effect [in 1992].”<sup>26</sup> Thus, Section 334 prohibits

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<sup>23</sup> H. Rep. No. 107-778 (emphasis added).

<sup>24</sup> The purposes of the E-Government Act are, among other things, “to promote the use of the Internet and emerging technologies within and across the Government agencies to provide citizen-centric Government information and services” and “to promote access to high quality Government information and services across multiple channels.” H. Rep. No. 107-787 §IV.

<sup>25</sup> 47 U.S.C. §334(a)(2) (2001).

<sup>26</sup> H.R. Conf. Rep. No. 102-862, at 97 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1279.

modification of the Annual Employment Report (Form 395-B) it to keep the identity of the entity filing information secret from the public. Although Section 334 applies to television licensees, not radio licensees, there is no basis for treating radio stations differently than television stations.<sup>27</sup>

### **III. EVEN IF THE COMMISSION HAS AUTHORITY TO COLLECT EMPLOYMENT INFORMATION ON A CONFIDENTIAL BASIS, CONFIDENTIAL FILING WOULD CONTRAVENE IMPORTANT POLICY OBJECTIVES**

Even if the Commission has the authority to allow radio stations to file confidential employment reports, such filings would undermine the Commission's policy goals as well as the Congressional intent in passing CIPSEA.

Making the annual employment reports publicly available serves a number of important, non-statistical purposes. As discussed *supra* at 5-7, the mere requirement of public disclosure may cause broadcasters to be more aware of their obligation not to discriminate and to make greater efforts to diversify their workforces. Moreover, employment data is used by job seekers, nonprofit organizations, academics, and the general public. But even were the data only used for statistical purposes, requiring filers to disclose their identity will help insure the accuracy of the data. *See supra* at 8.

Another reason for continuing to require broadcasters to make their employment data public is to afford fair, comparable treatment of broadcasters (both radio and television) and MVPDs. Section 554(d)(3)(A) of the Communications Act explicitly requires the FCC to require cable operators to file annual employment reports with the Commission. Further,

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<sup>27</sup> *See, e.g., Review of the Commission's Broadcast and Cable EEO Rules and Policies*, 13 FCC Rcd 23,004, 23,015 (1998) (recognizing that while §334 did not explicitly codify the Commission's EEO requirements for radio licensees, the Commission's statutory authority to regulate radio is coterminous with its authority over television under Title III of the Communications Act).

§554(d)(3)(B) mandates that these reports “shall be made available for public inspection” at any the cable operator’s central location and any other location where five or more employees work. Thus, this section clearly prohibits the FCC from allowing cable operators to file employment reports on a confidential basis.<sup>28</sup> It would serve no rational purpose and would be unfair and for the FCC to treat television broadcasters differently than MVPDs in this regard.

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<sup>28</sup> Section 554 was enacted as Section 634 of the Cable Communications Policy Act of 1984. It was intended to codify and strengthen the Commission’s existing EEO regulations of cable. *See Review of the Commission Broadcast and Cable EEO Rules and Policies*, 15 FCC Rcd 2329, 2340-41 (2000). The FCC’s cable EEO regulations for cable, including the annual employment reports, were explicitly modeled on its broadcast regulations. *See Amendment of the Commission’s Rules to Require Operators of Community Antenna Television Systems and Community Antenna Relay Stations Licensees to Show Nondiscrimination in their Employment Practices*, 34 FCC 2d 186, 186 (1972).

## CONCLUSION

For the foregoing reasons, NOW *et al.* respectfully requests that the Commission promptly set a date by which broadcasters and MVPDS must file their annual employment report, which would have been due September 2004 but for the grace period established in the *3rd R&O*. The Commission should direct that annual employment reports of all broadcasters and MVPDs (including the identity of the filing party) be available to the public at the FCC, in the public inspection files and on the station's or MVPD's website.

Respectfully Submitted,

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