

August 13, 2002

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: MM Docket No. 98-204

Dear Ms. Dortch:

In connection with the above-captioned docket concerning equal employment opportunity (“EEO”), the National Association of Broadcasters (“NAB”) writes to address the question of the Commission’s obligation to revive collection of the Annual Employment Report (FCC Form 395-B) from radio and television broadcasters, as well as other EEO-related requirements.

Based on *ex parte* communications with Commission staff,¹ NAB is under the impression that the Commission may interpret federal law to, not only permit the Commission to re-institute certain EEO rules, but also mandate that it do so. NAB respectfully disagrees with this view.

The Annual Employment Report consists of data on the ethnicity and gender of a reporting entity’s workforce. In the *Second Notice*, the Commission gleaned authority for restoring this report from the D.C. Circuit’s decision in *Association*.² The Commission noted that the *Association* court rejected the requirement that licensees who chose the former Option B must report the race and gender of applicants, because this rule unconstitutionally pressured those licensees to focus their recruitment efforts on women and minorities.³ However, the Commission also asserted that since the court “did not directly address the propriety of collecting the FCC Form 395-B data” for the intended

¹ See *Notice of Ex Parte Communication* in MM Docket No. 98-204, Letter from Lawrence A. Walke to Marlene H. Dortch, (July 24, 2002).

² *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13 (D.C.Cir. 2001) (“*Association*”).

³ *Second Notice of Proposed Rulemaking in MM Docket No. 98-204*, 16 FCC Rcd 22843, 22858 (2001) (“*Second Notice*”).

purposes under former Option A, revival of the form as part of the Commission's current EEO proposal therefore must be permissible.⁴

The Commission ventured even farther, stating that it has "authority to collect the data and, indeed, [is] required to do so for broadcast television by Section 334 of the Communications Act."⁵ The Commission relied on its previous conclusion in the *EEO Report and Order* that it is obligated under Section 334 to "collect employment data for the broadcast television and cable industries."⁶

NAB believes that the Commission's claim that federal law requires the Annual Employment Report is flawed because it ignores the impact on Section 334 of the D.C. Circuit's earlier decision in *Lutheran Church*.⁷ Section 334 specifically prohibits the Commission from revising the EEO rules that were "in effect on September 1, 1992 as such regulations apply to television broadcast station licensees," as well as "the forms used by such licensees and permittees to report pertinent employment data to the Commission."⁸ The statute only permits the Commission to make "nonsubstantive technical or clerical revisions in such regulations as necessary to reflect changes in technology, terminology, or Commission organization."⁹

As of September 1, 1992, the Commission's EEO rules (47 C.F.R. § 73.2080) consisted of three subsections: (a) General EEO policy; (b) EEO program; and (c) EEO program requirements. The Commission required the filing of the Annual Employment Report in part to enable a comparison of a broadcast station's workforce composition to that of the station's relevant labor recruitment area.¹⁰ The court in *Lutheran Church*, however, deemed the EEO obligations under subsections (b) and (c) unconstitutional because they pressured broadcasters to make race-based hiring decisions.¹¹

The Commission has expressly relied on its view that Congress' enactment of Section 334 codified "the Commission's EEO rules for broadcast licensees,"¹² in effect on September 1, 1992. However, the Commission's ability to restore the Annual Employment Report and other EEO-related obligations following *Lutheran Church* is questionable. Certainly, the Commission is not required to restore the report. The Commission is not free to pick and choose which parts of a statute it will obey. Nor may

⁴ *Id.*

⁵ *Id.*

⁶ *Report and Order in MM Docket Nos. 98-204 and 96-16*, 15 FCC Rcd 2329, 2358 (2000) ("*EEO Report and Order*") citing 47 U.S.C. §§ 334(a)(2) and 554(d)(3).

⁷ *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998) ("*Lutheran Church*").

⁸ 47 U.S.C. § 334(a).

⁹ *Id.* § 334(c).

¹⁰ Former 47 C.F.R. § 73.2080(c)(3).

¹¹ *Lutheran Church*, 141 F.3d at 352.

¹² *Notice of Proposed Rulemaking in MM Docket Nos. 98-204 and 96-16*, 13 FCC Rcd 23004, 23014 (1998) ("*1998 EEO Notice*").

the Commission select particular provisions to sever and salvage from the ruins of a statute later held unconstitutional.

The Supreme Court has identified two tests for whether a provision may be severed from the rest of a statute. First, the Court has focused on legislative intent: Would Congress still have passed the provision in question had it known that the remaining provisions were invalid?¹³ Thus, for example, in *Denver Area Educational Telecommunications Consortium*, the Court found that, despite the absence of an expressed severability clause in the 1992 Cable Act, “it seems fairly obvious Congress would have intended” the provisions governing indecency on leased access channels to stand regardless of the legal fate of the provisions governing indecency on public, educational, and governmental channels.¹⁴ The Court stated that the latter’s presence “had little, if any effect upon ‘leased access’ channels . . .”¹⁵

Unlike in *Denver Area Educational Telecommunications Consortium*, no such legislative intent exists or is implied with respect to the EEO rules. Congress did not express a sentiment that the Commission should collect employment data from broadcasters even in the absence of the EEO outreach requirements. Nor did Congress suggest the possible severability of the Annual Employment Report from the remainder of the statute. Clearly, the situation at hand differs from that concerning leased access and PEG access channels described above, as the presence of the Commission’s EEO program requirements undeniably had a substantial effect upon the Annual Employment Report. In fact, the forms and data that Congress identified in Section 334 had no purpose whatsoever other to support the EEO rules that Lutheran Church now prevent the Commission from enforcing.

The Court’s second test focuses on the practical effects of severing. The Court has described the “elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.”¹⁶ In other words, as the Court stated in *INS v. Chadha*, a provision may be severed if “what remains after severance ‘is fully operative as a law.’”¹⁷ *Chadha* concerned a provision in the Immigration and Nationality Act that enabled only one House of Congress to invalidate a decision of the Executive Branch to allow a deportable alien to remain in the United States. The Court rejected this one-House veto provision, but found that the remainder of the Act was severable and salvageable because it could survive as a fully operative and workable mechanism.¹⁸

¹³ *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 767 (1996), citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985).

¹⁴ 518 U.S. at 767.

¹⁵ *Id.*

¹⁶ *Brockett*, 472 U.S. at 502 quoting *Allen v. Louisiana*, 103 U.S. 80, 83-84 (1881).

¹⁷ *INS v. Chadha*, 462 U.S. 919, 935 (1983) quoting *Champlin Refining Co. v. Corporation Comm’n*, 286 U.S. 210, 234 (1932).

¹⁸ *Id.*

In the present case, severing the Annual Employment Report or other particular EEO obligations from the unconstitutional aspects of Section 334 and the Commission's EEO rules is not viable. First, Congress had no reason to enact the Section 334 provision barring revision of the employment forms without the existence of the EEO outreach provisions. The Commission has stated repeatedly that it intends to use the employment data to review industry hiring trends, for which the only conceivable purpose is to review the effectiveness of its EEO outreach requirements. However, following *Lutheran Church*, the EEO program requirements no longer existed, so there was nothing for the Commission to review. Certainly, given the Supreme Court's consistent attention to laws involving racial preferences in hiring, Congress would not have mandated the collection of race and gender data of broadcasters' workforces without a good reason worthy of withstanding strict scrutiny.

Compare this to 47 C.F.R. § 73.2080(a) setting forth a general anti-discrimination policy for broadcasters. Unlike the Annual Employment Report, the Commission easily and logically may continue this provision in the absence of the former EEO program requirements. Moreover, legislative history exists to support such a general policy.

The Commission thus has no statutory grounds for rescuing the Annual Employment Report. Only the Congress possesses this discretion, and it is not the Commission's place to surmise what Congress would have done if it knew that the EEO rules in effect on September 1, 1992 were unconstitutional. Simply put, the Annual Employment Report, without the remainder of the statutory provision, cannot survive as a fully operative and workable mechanism.

The Commission admitted as much when it suspended the collection of Form 395-B from broadcasters after the D.C. Circuit denied the Commission's request for rehearing of *Lutheran Church*.¹⁹ Similarly, the Commission again suspended the form following the D.C. Circuit's rejection of the EEO rules in *Association*. Presumably, without any EEO outreach rules to enforce or review, the Commission could not justify collecting data on the race and gender of broadcasters' workforces. Of course, if the statute *required* the continued collection of the Annual Employment Report, as the Commission may believe, then the Commission's suspension of the form would have been unlawful.

In the *Second Notice*, the Commission states that it does "not intend to modify the proposed rule in any respect that would make it vulnerable to attack on constitutional or statutory grounds. Accordingly, we urge parties to give careful consideration . . . how their proposals will comply with constitutional and statutory strictures, particularly those imposed by . . . Sections 334 and 634 of the Communication Act."²⁰

¹⁹ See *Commission Suspends Requirements for Filing of EEO Forms*, Report No. MM 98-13 (rel. Sep. 29, 1998).

²⁰ *Second Notice*, 16 FCC Rcd at 22850.

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NAB simply urges the Commission to do likewise, and closely review and support its authority, or alleged mandate, for restoring the Annual Employment Report and other EEO-related requirements in the wake of the D.C. Circuit's decision in *Lutheran Church*, and the impact of that decision on Section 334.

Please direct any questions concerning this matter to the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jack N. Goodman". The signature is written in a cursive style with a large initial "J".

Jack N. Goodman
Lawrence A. Walke

cc: Susan Eid
Jordan Goldstein
Stacy Robinson
Catherine Bohigian
Roy Stewart
Mary Beth Murphy
Deborah Klein
Jamilah Bess-Johnson
Lewis Pulley
Roy Boyce