Retention of Annual Employment Report Form 395-B
April 21, 2003 Commission Meeting

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

National Organization for Women
NOW Legal Defense and Education Fund
Feminist Majority Foundation
Philadelphia Lesbian and Gay Task Force
Women's Institute for Freedom of the Press

NOW *ET AL.* URGE THE COMMISSION TO CONTINUE TO REQUIRE BROADCASTERS TO FILE ANNUAL EMPLOYMENT REPORTS (FCC FORM 395-B)

The Commission should promptly reinstate its requirement that broadcast licensees file annual employment reports (FCC Form 395-B) providing workforce data, including race and gender information. In its recent Report and Order adopting new EEO rules, the Commission deferred action on the annual employment report to address new Office of Management and Budget ("OMB") requirements and a request for anonymous filing of the data. *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, *Second Report and Order and Third Notice of Proposed Rule Making*, MM Dkt. No. 98-204, 17 FCC Rcd 24018, 24025 ¶ 17 (rel. Nov. 20, 2002) ("*Second R&O*") (citing Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58782 (Oct. 30, 1997) ("OMB Decision")). Failure to collect the workforce data will further compromise the Commission's ability to compile meaningful trend analysis, which requires consistent collection at regular intervals. *See* Comments and Reply Comments of NOW *et al.* in the *Second Notice of Proposed Rule Making,* MM Dkt. No. 98-204, dated April 15, 2002 and May 29, 2002, respectively.

1. Congress requires the Commission to collect race, gender, and ethnicity data on Form 395-B, and the Commission can do so in a constitutional manner.

Section 334 of the Communications Act requires the Commission to retain the annual employment report by prohibiting revisions to "forms used by such licensees and permittees to report pertinent employment data to the Commission." 47 U.S.C. § 334(a). According to the accompanying Conference Report, Section 334 incorporated the annual employment report into the Communications Act and provided that the form was to be filed "in the same manner with the same format and content and same terms and conditions as in effect [in 1992]." H.R. Conf. Rep. No. 102-862, at 97 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1279. Because the codified section and relevant forms of the Commission's 1992 rules included Form 395-B, Congress not only prohibits any modification or elimination of the annual employment report, but instructs the Commission to collect 395-B data from broadcasters annually. *See* Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, § 22(f) (1992).

Moreover, subsequent court decisions have not undermined the Commission's authority or obligation to maintain the annual employment report. *See MD/DC/DE Broad. Ass'n v. FCC,* 236 F.3d 13, *pet. for reh'g* denied, 253 F.3d 732 (D.C.Cir. 2001), *cert. denied,* 534 U.S. 113 (2002); *see also Lutheran Church-Mo. 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. Cir. 1998). As the Commission has pointed out, "the Court in *Association* did not directly address the propriety of collecting Form 395-B data for the limited purpose for which it is intended. The court did uphold all of the reporting requirements adopted by the Commission in the *Report and Order*, including the requirement for filing Commission Form 395-B." *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, S*econd Notice of Proposed Rulemaking*, 16 FCC Rcd 22843, 22858 ¶ 51 (rel. Dec. 21, 2001).

The Commission also noted that nothing in the Court's opinion suggested that the collection of Form 395 data would be subject to strict scrutiny or is unconstitutional. *Id.* The Commission further concluded that its collection of Form 395-B data would not pressure broadcasters to recruit women and minorities because "the impact of an individual hiring decision on . . . [overall employment] statistics would be negligible and Commission action modifying the EEO Rule as a result of long-term industry trends would be highly speculative." *Id.* ¶ 37. In fact, to alleviate the concerns of the court, the Commission has specifically stated that the annual employment report data will only be used for monitoring trends and the overall effectiveness of its EEO program, but not for assessing individual broadcaster compliance, even if forming the basis of a petition by a third party. *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, *Memorandum Opinion and Order,* MM Dkt. No. 98-204, 96-16, 15 FCC Rcd 22548, 22559 ¶ 35 (2000) (*"Recon"*).

2. Form 395-B data provides useful information to Congress, the Commission, and broadcasters.

a. Form 395-B provides current employment data on the broadcast industry.

As the Commission has noted previously, the consistent annual filing of the employment reports ensures that the Commission has reasonably current data, especially in light of the number of station sales and consolidations that has occurred in recent years. *Recon*, 15 FCC Rcd 22548, 22561 ¶ 42. The data will also aid the Commission in compiling the requisite trend reports to Congress and assessing any need to revise rules accordingly. *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, *Report and Order,* MM Dkt. Nos. 98-204, 96-16, 15 FCC Rcd 2329, 2395 ¶ 164 (rel. Feb. 2, 2000) ("*R&O*").

b. Form 395-B provides more complete information than Form EEO-1, particularly for compiling trend reports for Congress.

The Equal Employment Opportunity Commission (EEOC) generally requires employers with over 100 employees to annually submit race, gender, and ethnicity data in Form EEO-1. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, as amended by the Equal Employment Opportunity Act of 1972 (1972). However, reliance on submission of EEO-1 forms would

deprive the Commission of information on the majority of the industry as most broadcasters have less than 100 employees and would not have to submit Form EEO-1 data. *See* U.S. Census Bureau, U.S. Department of Commerce, *United States County Business Patterns for the United States* (2000), *available at* http://factfinder.census.gov/servlet/IBQTable?_ts=68983447070 (last visited April 21, 2003) (approximately 95% have less than 100 employees). In contrast, broadcasters with five or more full-time employees would have to submit Form 395-B data, thus providing a more complete industry snapshot. The Commission would also not be able to use EEO-1 data to compare past or future full-time employment and subgroup specific trends because EEO-1 data does not distinguish between part-time and full-time employees and does not monitor trends in various subgroups as does Form 395-B. *R&O,* 15 FCC Rcd at 2395-2396 ¶ 166. Form 395-B, therefore, not only better serves the Commission's objectives, but is more responsive to OMB's mandate that "tabulation procedures used by the agencies . . . result in the production of as much detailed information on race and ethnicity as possible." OMB Decision, 62 Fed. Reg. at 58788.

3. Anonymous filing of annual employment reports is not only unnecessary, but would thwart the Commission's purposes and the public interest.

The Commission should continue to reject requests for anonymous or even "clearinghouse" filing procedures to ensure the integrity of data collection. *See Second R&O*, 17 FCC Rcd at 24025 ¶ 17 (citing *State Broadcasters Associations' Letter to the FCC*, MM Dkt. No. 98-204, dated October 28, 2002). The Commission previously denied NAB's proposal to protect a station's anonymity through the use of a tear-off sheet, and any clearinghouse proposal fails for the same reasons. *See Recon*, 15 FCC Rcd at 22558 ¶ 39 (rel. Nov. 22, 2000) (*"Recon"*). First, anonymity is not necessary as the Commission has made clear that it will not use the data for assessing individual station EEO compliance and that it will summarily dismiss any third party pleadings alleging EEO violations based on the data. *Id.* With those assurances, broadcasters have no legitimate basis to fear that the workforce data will be used against them. *Id.* Second, an anonymous or clearinghouse approach would prohibit the Commission from enforcing its reporting requirements and undermine the congressionally mandated data collection. *Id.*

4. The annual employment report filing requirement does not pose an undue burden.

The Commission has already determined that filing Form 395-B does not impose an undue burden on broadcasters or cable entities. *Recon*, 15 FCC Rcd at 22561 ¶ 42. In fact, broadcasters have been successfully complying with the filing requirement for decades. Moreover, the previous rule actually provided relief to broadcasters by enabling them to share resources and file only one Form 395-B for "all commonly owned stations in the same market sharing at least one employee." *R &O,* 15 FCC Rcd at 2398 ¶ 170. In addition, only broadcasters with at least five full-time employees had to comply with the Commission's requirement to file Form 395-B. *Id.* ¶ 169.

For the foregoing reasons, NOW *et al.* urge the Commission to continue to require broadcasters to file annual employment reports (FCC Form 395-B). The Commission must remain committed to its goals of preventing discrimination and promoting equal employment opportunity in the industry.