

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

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

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS
ON THE FOURTH NOTICE OF PROPOSED RULEMAKING**

The National Association of Broadcasters (“NAB”)¹ submits its reply comments in the above-captioned proceeding concerning whether the Commission should collect the Broadcast Station Annual Employment Report, FCC Form 395-B, pursuant to the recently enacted Confidential Information Protection and Statistical Efficiency Act of 2003 (“CIPSEA”),² and whether doing so would serve the public interest, among other matters.³

Discussion

Commenting parties who oppose confidential treatment of Form 395-B first argue that CIPSEA does not apply to the annual employment reports because the statute requires that the relevant data must be obtained by a federal agency “under a pledge of confidentiality,” but that the Commission has never pledged confidential treatment of the reports in the thirty years they

¹ NAB is a nonprofit, incorporated association of television and radio stations that serves and represents the American broadcasting industry.

² Pub. L. 107-347, 116 Stat 2962, Dec. 17, 2002, codified in 44 U.S.C. § 3501 note.

³ *Third Report and Order and Fourth Notice of Proposed Rulemaking* in MM Docket No. 98-204, FCC 04-103 (*rel.* June 4, 2004) (“*Third Report and Order*” or “*Fourth Notice*”).

have been required.⁴ NAB believes that NOW's assertions are flawed. As a preliminary matter, NOW fails to point out that the reports historically were not collected on a confidential basis because, until 1998, the Commission examined every station's report to determine whether its workforce was sufficiently diverse as compared to the workforce in the station's local community. Those stations that employed women and minorities below certain minimum percentages of their local workforce were subject to additional, in-depth scrutiny of their equal employment ("EEO") programs. However, the Commission suspended the obligation to file Form 395-B following the D.C. Circuit's rejection of the Commission's EEO rules in *Lutheran Church-Missouri Synod v. FCC* because the EEO rules unlawfully "pressure[d] license holders to engage in race-conscious hiring."⁵ As a result, the Commission has given repeated assurances that the Form 395-B data no longer will be used to assess the EEO compliance of individual licensees. Therefore, it is now perfectly legitimate for the Commission to change its policies to collect the reports on a confidential basis, and to take advantage of the recently enacted CIPSEA to guarantee the confidentiality of licensees' employment data.

Moreover, CIPSEA is not limited in any way to data that agencies previously collected on a confidential basis. Nor is there anything in the statute that would preclude a federal agency from updating its policies to invoke the statute and grant confidentiality to information that it previously disclosed to the public. In fact, the history and entire purpose of the Act is to encourage and enhance protection of government-obtained data. The Act states, for example, that protecting the confidentiality interests of individuals and organizations who provide data for

⁴ Comments of the National Organization for Women, Office of Communication of the United Church of Christ, Inc., Minority Media and Telecommunications Council *et al.* in MM Docket No. 98-204, filed July 29, 2004 ("NOW Comments"), at 3-4.

⁵ 141 F.3d 344 (D.C. Cir. 1998).

government statistical programs “serves both the interests of the public and the needs of society.”⁶

Confidential treatment of the annual employment reports also would be entirely consistent with the Commission’s own findings. On several occasions the Commission has indicated an interest in permitting licensees to file the annual employment reports anonymously, but concluded that the Freedom of Information Act (“FOIA”) mandated disclosure of the entire filing once the Commission received the report.⁷ However, the legislative history of CIPSEA specifically “prohibits data that are acquired for exclusively statistical purposes under a pledge of confidentiality from being disclosed under the Freedom of Information Act.”⁸ CIPSEA therefore trumps FOIA with respect to information like that collected on Form 395-B, and NAB would not be surprised to learn of other federal agencies choosing to take advantage of CIPSEA to afford confidentiality to certain data they now collect but feel compelled to disclose under FOIA.

NOW also argues that CIPSEA does not apply to the annual employment reports because the data reported on the forms is useful for certain nonstatistical purposes, and thus may not be treated confidentially. Under CIPSEA, federal agencies may treat information on a confidential basis only if the information is collected “for statistical purposes.”⁹ For example, NOW states that public disclosure of employment statistics could help deter discrimination by “enlisting

⁶ CIPSEA, § 501(3).

⁷ *See, e.g., Memorandum Opinion and Order* in MM Docket No. 98-204, 15 FCC Rcd 22548, 22559 (2000).

⁸ H.R. Rep. 107-778, 107th Cong., 2nd Sess. 2002, at 8.

⁹ CIPSEA, § 502.

various social pressures in the direction of improved performance.”¹⁰ NOW also asserts that public disclosure of the Form 395-B data would further the goal of the Commission’s broadcast localism proceeding to establish a “system of local broadcasting that is responsive to the unique interests and needs of individual communities.”¹¹ NOW states 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 and to resolve any problems with the companies in their communities.”¹² Similarly, NOW declares that disclosure of the annual employment reports would help the Commission assess the effectiveness of its equal employment opportunity (“EEO”) rules by enabling the public to “analyze and compare” the EEO performance of stations across geographic regions and programming formats.¹³

NAB believes that all of these supposed “nonstatistical” purposes offered by NOW are merely different recipes for the dish; that is, third parties’ misuse of the Form 395-B data to influence the hiring practices of particular stations. All of these suggested purposes would directly violate the D.C. Circuit’s holding in *MD/DC/DE Broadcasters Associations v. FCC* where the court rejected the Commission’s EEO rules specifically because they imposed unlawful, unconstitutional pressure on broadcasters to “focus their recruitment efforts on minorities and women.”¹⁴ Similarly, the *Lutheran Church* court rejected the EEO rules in effect

¹⁰ NOW Comments at 6 citing Cass R. Sunstein, *Television and the Public Interest*, 88 Cal. L. Rev. 499, 531 (2000).

¹¹ *Notice of Inquiry* in MB Docket No. 04-233 (*rel.* July 1, 2003), at ¶ 4.

¹² NOW Comments at 6-7.

¹³ *Id.* at 7.

¹⁴ 236 F.3d 13 (D.C. Cir. 2000); see also *Lutheran Church*, 141 F.3d 344 (D.C. Cir. 1998).

at that time because they placed undue pressure on broadcasters to meet certain numerical employment metrics as a way of ensuring diversity.¹⁵ Even the Commission’s own rules restrict use of the annual employment reports:

Data concerning the gender, race and ethnicity of a broadcast station’s workforce collected in the annual employment report will be used only for purposes of analyzing industry trends and making reports to Congress. Such data will not be used for the purpose of assessing any aspect of an individual broadcast licensee’s compliance with the equal employment opportunity requirements of § 73.2080.¹⁶

Use of the Form 395-B data thus is carefully proscribed to prevent abuse or manipulation.¹⁷

Nevertheless, NOW and other third parties continue to push for just such an approach. For example, NOW’s alleged need for disclosure of the Form 395-B data so that citizens can more easily “work with their local broadcast station . . . to resolve any problems with the companies in their communities” seems like thinly veiled code for allowing third parties to unlawfully leverage a station’s annual employment reports to pressure a particular station to hire or promote particular minorities. NOW’s intentions are even less disguised when it states that disclosure of the Form 395-B data could help the public to “analyze and compare” the EEO performance of broadcasters across different programming formats or in different geographic regions. NAB believes that use of the reports in such a manner would be wholly inappropriate. For example, it is easy to

¹⁵ 141 F.3d 344 (D.C. Cir. 1998).

¹⁶ 47 C.F.R. § 73.3612 Note.

¹⁷ See, e.g., NOW Comments at 8 citing *Third Report and Order* at ¶ 4. Ironically, NOW itself has repeatedly referred to this provision and other Commission assurances to argue that broadcaster concerns over potential misuse of the annual employment reports are unfounded, or worse, insincere. NAB would submit that NOW and other opponents to the Commission’s proposal should make up their minds as to whether the reported data may, or may not be used for illegitimate nonstatistical purposes.

imagine NOW or MMTC relying on the annual employment reports to create specious “studies” that allegedly prove that country stations in the Dakotas must practice intentional discrimination because they employ fewer minorities than urban hip-hop stations in Los Angeles or New York City.

Accordingly, the Commission must remain diligent in ensuring that Form 395-B data not be misused to pressure the hiring practices of individual broadcasters, and while the Commission’s assurances are a worthwhile effort, NAB believes that the confidentiality protection provided in CIPSEA can, and should be, employed to further guard against such unlawful situations.

NOW also contends that keeping the Form 395-B data confidential would not serve the expressed purposes of CIPSEA,¹⁸ including: (1) reversing the decline of public trust in the protection of confidential statistical information collected by government;¹⁹ (2) alleviating concerns that information collected by agencies would not be used against any particular individuals or organizations;²⁰ and (3) enhancing the accuracy of information provided to federal agencies.²¹

Broadcasters believe that, contrary to NOW’s assertions, collecting the annual employment reports pursuant to CIPSEA would serve all of these purposes. With respect to the first two points, it is clear that invoking CIPSEA in the collection of Form 395-B data would provide licensees with increased, if not maximum comfort that their employment information will remain confidential and fully protected from third party

¹⁸ *Id.* at 7-9.

¹⁹ NOW Comments at 7 citing CIPSEA, § 511(a)(4).

²⁰ *Id.* citing CIPSEA, § 511(a)(2).

²¹ *Id.* at 8 citing H. Rep. No. 107-778, at 8.

misuse. Reliance on CIPSEA, as opposed to the Commission's assurances regarding the use of Form 395-B data, or a naked pledge of confidentiality by the Commission, most certainly would increase the trust of broadcasters, as well as their employees, investors, vendors, advertisers and all other relevant members of the public, that the Commission or private third parties will not misuse the Form 395-B data in way that inaccurately impacts the standing of a licensee in a negative manner. If nothing else, the penalties for unlawful disclosure of protected information under CIPSEA will be a strong deterrence to both disclosure and third party attempts to discern the identity of filers.

Regarding the third point, NOW asserts that confidential treatment of the information would undermine the accuracy of the employment reports because anonymous filing would afford the Commission no way to enforce the reporting requirement or to follow-up on incomplete filings.²² However, this view fails to take account of various simple procedures the Commission could adopt that would enable it to confirm that all licensees submit complete filings, while also maintaining the confidentiality of the reports. For example, the Commission could devise a simple dual database system that should address the concerns of all interested parties. Specifically, the Commission could collect the reports in one database as it does today, with all the station identification information attached to the underlying employment data. However, pursuant to CIPSEA, this database of complete versions of the forms would be sealed and confidential, and accessible only to Commission personnel. At the same time, the employment data -- but not the filer identification information -- from the electronically filed reports also would be extracted into a separate blind database that would be publicly

²² *Id.* at 8.

available. The station identification information would be discarded. Such an approach thus would enable the Commission to verify that all licensees complied with the filing requirement by checking its records of licensees against the first database, while also allowing the public to review the relevant employment data on the other database. NAB has used a similar system in certain blind surveys of our members, and we see no reason why the Commission could not easily do the same.

NOW also contends that Section 334 of the Communications Act prohibits the Commission from applying CIPSEA to the annual employment reports because the relevant Conference Report implies that the Form 395-B must be filed in the “same manner, with the same format and content and same terms and conditions as in effect [in 1992].”²³ NAB disagrees. As noted in our initial comments, the plain language of Section 334 permits the Commission only to make “nonsubstantive technical or clerical revisions . . . [to the annual employment reports] . . . as necessary to reflect changes in technology, terminology, or Commission organization.”²⁴

NAB believes that invoking CIPSEA would have no impact on the manner, format, content, or terms and conditions under which Form 395-B is collected. Neither would such a change qualify as a substantive revision of the form. First, it is evident that applying CIPSEA to the annual employment reports would not require any change to the reports whatsoever. Licensees would continue to file the forms in the same manner as they have in the past, and there would be no need to alter the format or content of the reports. As for the terms and conditions of filing the reports, CIPSEA would have no

²³ NOW Comments at 9 citing H.R. Conf. Rep. No. 102-862 (1992), at 97.

²⁴ NAB Comments at 7-8 citing 47 U.S.C. § 334(c).

effect on a licensee's obligation to file, or potential penalties for failure to file, for that matter. No other terms or conditions of a station's filing of the reports would be altered or influenced. The only impact from applying CIPSEA to Form 395-B will be on the ability of third parties to review the entire forms, in particular the station identification information included on a station's original submission. However, this is an entirely different matter from the terms and conditions under which the reports must be filed. Again, invoking CIPSEA will have no impact on a station's duty to file. Thus, Section 334 presents no obstacles to invoking CIPSEA with respect to the annual employment reports.

Finally, NAB reiterates that maintaining confidentiality of Form 395-B is good public policy because of the risk that third parties will misuse the employment information to challenge individual stations' compliance with the EEO rules or otherwise pressure the hiring practices of particular stations. Third parties continue to reveal their intentions to do so, including MMTC's recent statement that it will "liberally draw inferences from [the] statistics" on Form 395-B in determining whether individual stations discriminate in hiring.²⁵ In the same vein, MMTC has repeatedly relied on a skewed manipulation of 1999 EEO-1 data as supposed evidence of intentional discrimination in the broadcasting industry,²⁶ even though its study ignores the D.C. Circuit's holdings in *Associations* and *Lutheran Church* by relying on a statistical comparison between the numbers of women and minority employees at stations and those in the local labor

²⁵ MMTC Comments in MM Docket Nos. 98-204 and 96-16 (filed April 15, 2002) at 315 n. 459.

²⁶ Letter from David Honig to Marlene H. Dortch in MM Docket No. 98-204 (October 1, 2002) ("10/1/02 Honig Letter") citing *The Reality of Intentional Job Discrimination in Metropolitan America – 1999*, Alfred W. Blumrosen and Ruth G. Blumrosen (Rutgers University, 2002) ("Blumrosen Study").

pool. NAB therefore strongly urges the Commission to diligently guard against potential misuse of the Form 395-B data to unlawfully pressure the hiring practices of particular licensees.

Conclusion

For the foregoing reasons, NAB respectfully urges the Commission to reject the arguments of NOW *et al.*, and instead revise its policies to collect the annual employment reports pursuant to CIPSEA in order to ensure the confidentiality of broadcast licensees' submitted data.

Respectfully submitted,

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Handwritten signatures of Jack N. Goodman and Larry Walke.

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