

**Before the
OFFICE OF MANAGEMENT AND BUDGET
Washington, DC 20503**

Notice of Public Information Collection)
Requirement Submitted to OMB for) OMB Control No. **3060-0390**
Review and Approval)

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**COMMENTS OF THE NAMED STATE BROADCASTERS ASSOCIATIONS ON
THE PUBLIC INFORMATION COLLECTION SUBMISSION OF THE
FEDERAL COMMUNICATIONS COMMISSION REGARDING "THE
BROADCAST ANNUAL EMPLOYMENT REPORT" ON FCC FORM 395-B**

The State Broadcasters Associations identified in Exhibit 1 attached hereto (collectively, the "State Associations") respectfully request that the Office of Management and Budget ("OMB") (i) refuse to renew or extend OMB's previous clearance of Federal Communications Commission ("FCC") Form 395-B entitled the "The Broadcast Annual Employment Report" which is scheduled to expire on October 31, 2008,¹ and (ii) disapprove FCC Form 395-B as recently modified by the FCC (OMB Control No. **3060-0390**) and return it to the FCC as improperly submitted.²

The State Associations are trade associations whose chartered missions are to advance the best interests of their members which are chiefly free, over-the-air, local, full-service, commercial radio and television broadcast stations licensed to local communities throughout the United States. One aspect of that mission is to protect

¹ See ICR Ref. No. 200802-3060-011 (March 27, 2008).

² These Comments are timely filed in view of the fact that are being tendered to OMB and the FCC before September 29, 2008, which is the deadline for comments. See Public Information Collection Requirement Submitted to OMB for Review and Approval, Comments Requested, 73 Fed. Reg. 50967 (August 29, 2008).

broadcast stations against pertinent governmental regulations that are unnecessary, unduly burdensome, or otherwise unlawful. These Comments are grounded upon very serious legal, indeed constitutional, concerns that arise from the FCC's past and possibly future public use of FCC Form 395-B. These Comments have nothing to do with the long-standing commitment of the State Associations and the broadcasters that they represent to the principles of nondiscrimination and equal employment opportunity. In that regard, the State Associations continue to work hard to assist their radio and television station members to insure that they fully comply with the FCC's broadcast equal employment opportunity rule.³ Indeed, the record in various FCC proceedings involving the EEO Rule are replete with examples of the State Associations' outstanding track record of helping their members to meet the letter and spirit of the FCC's EEO Rule.

As demonstrated below, any action by OMB to renew or extend its previous clearance for FCC Form 395-B, or to approve the newly revised FCC Form 395-B would be premature and in violation of the Paperwork Reduction Act of 1995, 44 U.S.C. § 3501 *et seq.*, ("PRA") and OMB's implementing regulations at 5 C.F.R. Part 1320.

Background

The FCC long ago suspended its use of FCC Form 395-B because the United States Court of Appeals for the District of Columbia Circuit twice held unconstitutional earlier versions of the FCC's broadcast EEO regulations which were based, in material part, on data contained in FCC Form 395-B.⁴ *See Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir.), *reh'g denied*, 154 F.3d 487 (D.C. Cir.), *reh'g en banc*

³ 47 C.F.R. Section 73.2080 (the "EEO Rule").

⁴ *See* the EEO Rule and its former iterations.

denied, 154 F.3d 494 (D.C. Cir. 1998) (“*Lutheran Church*”); *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13 (D.C. Cir.), *reh’g and reh’g en banc denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002) (“*Broadcasters*”). In fact, the FCC has not required the filing of FCC Form 395-B since 2001.

Those two decisions, when considered together, send a clear signal to the FCC: placing pressure on broadcast stations to hire based on race is unlawful, and the FCC may not do indirectly what it may not do directly. The threat of petitions to deny, objections, complaints, and “governmental audits,” empowered by the public availability of station-by-station attributed racial, ethnic, and gender employee data contained in FCC Form 395-B would constitute that unlawful pressure. In invalidating a subsequent FCC EEO Rule, the Court in *Broadcasters* stated the proposition well when it held that an investigation based on data submitted on an FCC form “is a powerful threat, almost guaranteed to induce the desired behavior.”⁵

The gravamen of the Courts’ decisions was that the public availability of station-by-station attributed, racial data contained in the reports filed on FCC Form 395-B, coupled with the FCC’s willingness to consider such data during the licensing process, imposes unconstitutional governmental pressure on stations to make recruitment and hiring decisions based on race. The Courts concluded that such pressure violated the Due Process Clause of the Fifth Amendment of the United States Constitution. The FCC’s action in submitting newly revised FCC Form 395-B to OMB for clearance, before it rules on whether the form will be confidential, signals that the FCC is prepared to disregard the clear directives of the Courts.

⁵ *Broadcasters* at 19.

Discussion

The PRA requires the FCC to certify to OMB that the proposed collection of information, *inter alia*, is “necessary for the *proper* performance of the functions of the agency, including whether the information will have practical utility,”⁶ is “not unnecessarily duplicative of information otherwise reasonably accessible to the agency,”⁷ “reduces to the extent practicable and appropriate burden on persons who shall provide information to or for the agency,”⁸ and will be “implemented in ways consistent and compatible, to the maximum extent practicable, with the existing reporting and recordkeeping practices of those who are to respond.”⁹ The FCC’s collection submission, which is the subject of this proceeding, falls far short of meeting these criteria. Moreover, by delaying a ruling on the confidentiality of FCC Form 395-B until after OMB reaches its decision here, the FCC’s bifurcated approach in effect denies OMB material information without which OMB is unable to make an informed judgment on the collection submission’s compliance with the PRA.

I. THE FCC IS WITHHOLDING MATERIAL INFORMATION WITHOUT WHICH OMB MAY NOT MAKE AN INFORMED DECISION ON APPROVAL OF THE CURRENT OR MODIFIED FCC FORM 395-B

The FCC’s collection submission denies OMB material information without which OMB may not lawfully make an informed judgment on whether to extend the current clearance for FCC Form 395-B or to approve the revised FCC Form 395-B in the first instance. Consequently, OMB should allow the current clearance for FCC Form

⁶ 5 C.F.R. § 1320.9(a) (emphasis added)

⁷ 5 C.F.R. § 1320.9(b).

⁸ 5 C.F.R. § 1320.9(c).

⁹ 5 C.F.R. § 1320.9(e).

395-B to expire, and return the revised FCC Form 395-B to the FCC as improperly submitted.

In seeking approval of FCC Form 395-B, the FCC has chosen a bifurcated procedure: ask for approval of the data collection now and decide later whether the form will be kept confidential. The FCC has taken the bifurcated approach a step farther in this case. The FCC wants OMB to uncouple FCC Form 395-B from the FCC's EEO Rule and enforcement thereof without mentioning that since 2003 there have been pending before the FCC a number of petitions for reconsideration of the EEO Rule some of which, if granted, would result in FCC Form 395-B being used to assess compliance with the FCC's EEO Rule. OMB needs to be shown the entire set of inextricably intertwined EEO-related requirements before it is asked to approve any single subset of them.

OMB is not unfamiliar with the FCC's bifurcation strategy, a strategy which OMB has previously rejected. Recently, the FCC asked OMB to approve modified Section 73.1201(b)(3) of its Rules and Regulations.¹⁰ That modification was one of a number of massive, unprecedented re-regulatory, inter-related modifications to the FCC's disclosure regulations.¹¹ At the urging of the National Association of Broadcasters (the "NAB"), OMB disapproved the collection submission stating that "this collection cannot be reviewed until [all related] revisions are also submitted to OMB for review."¹² In the same vein, neither the extension of the earlier clearance for FCC Form 395-B nor approval of revised FCC Form 395-B are ripe for consideration by OMB because the

¹⁰ See ICR Reference No. 200807-3060-002 (August 21, 2008).

¹¹ See *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 23 FCC Rcd 1274 (2008).

¹² See ICR Reference No. 200807-3060-002 (August 21, 2008).

question of whether FCC Form 395-B will be public or confidential is material to OMB's review process. Specifically, the issue of confidentiality is inextricably tied to the threshold review question before OMB: is the collection submission necessary for the *proper* performance of the functions of the FCC?

The FCC has stated that it needs to collect the data in order to assess "industry trends."¹³ The State Associations submit that while it is not necessary for the FCC to employ FCC Form 395-B for its stated narrow purpose (as shown below), it is certainly not necessary that FCC Form 395-B be filed publicly, or that the data be publicly available on a station-by-station attributed basis, to accomplish the FCC's stated narrow purpose. If, however, as would appear to be the case here, the FCC has an additional purpose, albeit unstated, for making the data collection process public, such as placing pressure on stations to hire based on race, ethnicity, and gender, the issue of whether FCC Form 395-B will be public or confidential is inextricably tied to whether the data required to be filed publicly is "necessary for the *proper* performance of the functions of the" FCC.¹⁴ Given the fact that the Courts have concluded that making the data contained in FCC Form 395-B public on a station-by-station attributed basis creates unlawful governmental pressure on stations to hire based on race, "this collection cannot be reviewed until [the FCC's decision on the confidentiality issue is] also submitted to OMB for review."¹⁵ In short, if it would be improper for the FCC to use FCC Form 395-B to pressure stations to hire based on race, OMB must first know whether FCC Form 395-B will be public or confidential in order to determine whether FCC Form 395-B is

¹³ *In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 15 FCC Rcd 22548, ¶ 40 (2000).

¹⁴ 5 C.F.R. § 1320.9(a) (emphasis added).

¹⁵ See ICR Reference No. 200807-3060-002 (August 21, 2008).

“necessary for the *proper* performance of the functions of the” FCC.¹⁶ It is worth noting that the Equal Employment Opportunity Commission (the “EEOC”) does not make public the racial, ethnicity, and gender data that it collects from employers. “All reports and information from individual reports will be kept confidential.... Only data aggregating information by industry or area, in such a way as not to reveal any particular employer’s statistics, will be made public.”¹⁷

The State Associations acknowledge that the FCC has tried to address the Court’s “unlawful pressure” holding by stating it does not intend to use the data to “screen renewal applications or to assess compliance with [its] EEO regulations.”¹⁸ However, for at least four reasons, that declaration of then-present intention does not eliminate the unlawful pressure on stations to hire based on race, ethnicity, and gender that will be proximately caused by a governmental (FCC) process that collects and makes publicly available racial, ethnicity, and gender employee data on a station-by-station attributed basis.

First, unlawful pressure will exist if FCC Form 395-B data is available publicly on a station-by-station basis because it is not at all clear that the Commission intends to prohibit members of the public from using such data in, or in support of, petitions or complaints alleging that a particular station does not, in the opinion of the filer, employ enough minorities and/or women in certain job categories, and therefore the station is violating the nondiscrimination prong of the FCC’s EEO regulations. In its June 6, 2008 “Reply Comments,” Minority Media and Telecommunications Council (“MMTC”)

¹⁶ 5 C.F.R. § 1320.9(a) (emphasis added).

¹⁷ See Equal Employment Opportunity Commission, Equal Employment Opportunity Standard Form 100, Rev. January 2006, Employer Information Report EEO-1, Instruction Booklet, Item No. 7.

¹⁸ See *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules*, Fourth Notice of Proposed Rulemaking, 19 FCC Rcd 9973, ¶ 9 (2004).

sought to remind the Commission that its pledge not to use such data for assessing compliance with its EEO Rule only related to the *recruitment outreach prong* of the FCC's EEO Rule and does not extend to the *nondiscrimination prong* of that rule.¹⁹ The FCC has not refuted MMTC's position.

Second, unlawful pressure will exist because there are many opportunities, other than at station license renewal time, for the FCC and members of the public to use the FCC's processes to scrutinize, and thus place pressure on, a station's hiring decisions, *e.g.*, at the mid-point of a station's license period when it files its Midterm EEO Report on FCC Form 397.

Third, regardless of the FCC's then-present intent, stations will still be pressured to skew their hiring decisions in favor of minority and female employees in order to reduce the risk of litigation in the form of petitions, complaints, and the like. There should be no doubt of such risk: in its June 6, 2008 "Reply Comments," MMTC signaled its intent to charge stations, whose FCC Form 395-B data shows "insufficient" minority employee representation, as racial discriminators.²⁰ Indeed, the record before the FCC shows that many other groups have the same intent.²¹

Finally, even if the FCC's declaration were unambiguous, the FCC is not precluded from committing a regulatory about-face down the road by actually deciding to use FCC Form 395-B data to screen renewal applications or to assess EEO compliance based on data that it already possesses.

¹⁹ See MMTC Reply Comments, at n.12.

²⁰ *Id.*

²¹ See, *e.g.*, Intervenor's Brief of The National Organization for Women, *et al.* in *Broadcasters* at 26-27.

Aware of the ambiguities in the FCC's past declaration of intent, of the ease with which the FCC can modify that intention from time to time, and of the plan of MMTC and many others²² to use FCC Form 395-B data in proceedings before the FCC, every station that will have publicly filed FCC Form 395-B will feel pressure to hire based on race, ethnicity, and gender. Twice the Courts have recognized that regulatory dynamic.²³ Twice the Courts have held that the FCC may not lawfully maintain a regulatory scheme that pressures station to hire based on race.²⁴ Twice the Courts have, in essence, told the FCC that such a scheme is not the "proper performance of the functions of the" FCC.²⁵ Therefore, the FCC cannot reasonably deny either the existence of the adverse regulatory dynamic that will come into being if FCC Form 395-B is filed publicly or the reasonably foreseeable pressuring effect caused by making the FCC Form 395-B public. For that reason, it can be concluded that by taking action to make the data from FCC Form 395-B public on a station-by-station basis, the FCC intends such a pressuring effect. At bottom, it would appear that the FCC is seeking to do indirectly what the Courts have ordered that the FCC not do directly.

The unlawful regulatory dynamic that the public filing of FCC Form 395-B would create is avoidable by requiring that FCC Form 395-B be confidential and denying the FCC access to the data on a station-by-station basis. The State Associations have repeatedly urged the FCC to consider having Form 395-B sent by each respondent directly to an independent third-party on a confidential basis so that neither the Commission nor members of the public would be able to attribute station employment

²² *Id.*

²³ *See Broadcasters; Lutheran Church.*

²⁴ *Id.*

²⁵ *Id.*

profiles to any particular licensee, permittee, or station. A very responsible organization has informed the FCC, on the written record, of its interest in serving that role.

Specifically, BIA Financial Network ("BIA") has told the FCC that it is willing to receive and collate such information on a confidential basis and provide the FCC with non-station-by-station attributed, aggregated data (as the FCC might request from time to time). That service would allow the FCC to achieve its stated "industry trends" purpose. BIA would accept the data under a pledge of confidentiality extended to respondents by the Commission under the Confidential Information Protection and Statistical Act of 2002,²⁶ which would also ensure compliance with the confidentiality provisions of the PRA. To the best of the State Associations' knowledge, the FCC has not contacted BIA nor responded to this proposal.

This third-party, data collection system would be no less reliable or robust than if operated by the FCC itself. In order to assure the FCC that every station required to provide such data has timely provided the required information, the FCC would make clear that the failure to timely file complete and correct data would constitute a serious rule violation. In addition, BIA would be provided with an updated master list of stations against which it would determine which stations have filed by an FCC-established deadline and which stations have not filed. BIA would be expected to identify the non-filers to the FCC for appropriate follow-up action. BIA would also be expected to determine whether there were any internal inconsistencies (mathematical or otherwise) in the data provided by each station in which case it would be BIA would be obligated to contact the station in an effort to seek clarification. If BIA were not able to satisfy itself

²⁶ Pub. L. 107-347, 116 Stat 2962, Dec. 17, 2002, codified in a note to 44 U.S.C. § 3501.

that the information was complete and correct, BIA would be obligated to report this fact to the FCC for appropriate follow-up action. The Commission has yet to act on those requests. Thus, OMB's renewal, extension, or approval of FCC Form 395-B prior to the FCC's ruling on the confidentiality issue would place OMB in the position of pre-judging that important issue.

II. THE FCC HAS FAILED TO SHOW THAT FCC FORM 395-B MEETS EACH OF THE CRITERIA FOR OMB APPROVAL

The FCC has stated that it needs the data contained in FCC Form 395-B in order to assess "industry trends."²⁷ However, it is important to note that FCC Form 395-B is not required by statute and the FCC has not adequately demonstrated what relevance "industry trends" will have to the "proper" functioning of its statutory mission. Nor has the FCC shown why the aggregated data contained in EEO-1, as compiled by the EEOC, is not adequate for the FCC's stated limited purpose.

In addition, while the FCC estimates that it will take each respondent only one hour to complete FCC Form 395-B, this estimate does not take into consideration the time each respondent and its employees must expend in exchanging information with each other to make sure that each person feels completely comfortable with his or her racial or ethnic identification, as will be reported to the FCC, and that such identification is accurate for federal reporting purposes. In short, the FCC has not met its burden of establishing the amount of time truly necessary or appropriate for insuring the filing of a complete and accurate FCC Form 395-B. Nor has the FCC demonstrated why it needs its own data that is, as shown above, largely duplicative of data that is already available from the EEOC on an aggregated basis.

²⁷ *In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 15 FCC Rcd 22548, ¶ 40 (2000).

A recent decision of OMB adverse to the FCC also warrants the return of the FCC Form 395-B collection submitted to the FCC on the grounds of completeness. In a collection submission dealing with the FCC's new rules regarding Leased Access to cable channels, OMB held that the new rule violated the PRA and returned the collection submission to the FCC for further consideration.²⁸ In its decision, the OMB repeatedly faulted the FCC for failing to take into full account the costs and burdens on cable operators and the risks to their proprietary information. Those same concerns as relates to broadcasters should apply to the OMB's review of the revised FCC Form 395-B and OMB should similarly return the FCC's collection submission in this case.

²⁸ See Notice of OMB Action, OMB Control No: 3060-0568, ICR Reference No: 200804-3060-012 (July 9, 2008).

Conclusion

Based on the foregoing, OMB should decline to extend the previous clearance for FCC Form 395-B as well as disapprove FCC Form 395-B as recently revised by the FCC and return the collection submission to the FCC as improperly submitted.

Respectfully submitted,

THE NAMED STATE BROADCASTERS ASSOCIATIONS

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Dated: September 15, 2008

Exhibit 1

Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, Wyoming Association of Broadcasters