

**Before the
Office of Management and Budget
Washington, D.C. 20503**

Notice of Public Information Collection)	
Requirement Submitted to OMB for)	OMB Control Number: 3060-0390
Review and Approval)	

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**JOINT COMMENTS OF THE
OHIO, VIRGINIA, AND NORTH CAROLINA
ASSOCIATIONS OF BROADCASTERS
REGARDING FCC FORM 395-B**

The Ohio Association of Broadcasters, Virginia Association of Broadcasters, and North Carolina Association of Broadcasters (collectively, the “Associations”), through their attorneys, hereby jointly file these comments in response to the Federal Communications Commission’s (“FCC”) Notice of Public Information Collection Requirement Submitted to OMB for Review and Approval (the “*Notice*”),¹ in the above-captioned matter.

The Associations are non-profit organizations representing the interests of broadcasters in their respective states. As of September 23, 2008, the Ohio Association of Broadcasters has 55 television and 282 radio station members; the Virginia Association of Broadcasters has 40 television and 193 radio station members; and the North Carolina Association of Broadcasters has 31 television and 217 radio station members. Collectively, the Associations represent 126 television stations and nearly 700 radio stations.

¹ Notice of Public Information Collection Requirement Submitted to OMB for Review and Approval, 73 Fed. Reg. 50967-69 (Aug. 29, 2008) (“*Notice*”).

For the reasons stated below, the Associations respectfully request that the Office of Management and Budget (“OMB”) decline to approve the FCC’s revised Broadcast Station Annual Employment Report, FCC Form 395-B (“Form 395-B”), until such time as the FCC has resolved that Form 395-B may be filed on a confidential basis.

Background

The *Notice* refers the FCC’s recently revised Form 395-B for review and approval by OMB pursuant to the Paperwork Reduction Act.² Form 395-B is an annual report of a broadcast employment unit’s employees that identifies the employees’ gender and race/ethnicity.³ According to the FCC, Form 395-B is used to “monitor industry trends, assess the effectiveness of [the FCC’s Equal Employment Opportunity] Rule, and report to Congress.”⁴ Wholly apart from Form 395-B is the Commission’s Equal Employment Opportunity (“EEO”) regulatory regime, which, among other things, generally requires broadcasters to establish, maintain, and carry out a continuing program of specific practices designed to ensure equal opportunity and nondiscrimination in every aspect of station employment policy and practice; widely recruit for all full-time job vacancies; engage in a specified number of community outreach activities selected from a menu of options; and undertake certain recordkeeping and self-assessment efforts.⁵

² Paperwork Reduction Act of 1995, Pub. L. No. 104-13; *see also Notice*, at 50967.

³ *See* 47 C.F.R. § 73.3612; *In the Matter of Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, Memorandum Opinion & Order, 15 FCC Rcd 22548, ¶ 35 (2000) (“2000 EEO Memorandum Opinion & Order”).

⁴ *See id.*

⁵ *See* 47 C.F.R. § 73.2080(c)(1)-(2); *see generally In the Matter of Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 17 FCC Rcd 24018 (2002). *See also* 47 C.F.R. §§ 73.2080(b) & 73.2080(c)(3)-(5).

Form 395-B as presented to OMB in this proceeding incorporates racial classifications used by the Equal Employment Opportunity Commission (“EEOC”) on its EEO-1 form.⁶ However, the current iteration of Form 395-B is not the first effort by the FCC to collect data regarding race and gender of broadcast station employees. The FCC suspended the Form 395-B filing requirement in 2001 following a decision by the D.C. Circuit in which the court held that certain of the FCC’s EEO requirements were unconstitutional. In *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13 (D.C. Cir. 2001), the D.C. Circuit determined that the FCC’s requirement that licensees report the race and sex of each job applicant and the source by which the applicant was referred to the station violated the equal protection component of the Due Process Clause of the Fifth Amendment.⁷ Those requirements, according to the court, placed unlawful pressure on stations to focus recruitment efforts on women and minorities.⁸ According to the court:

[T]he Commission’s focus upon the race and sex of applicants belies its statement—or so a licensee reasonably might (and prudently would) conclude—that its only goal is that the licensee recruit with a “broad outreach.” . . . Measuring outputs to determine whether readily measurable inputs were used . . . is evidence that the agency with life and death power over the licensee is interested in results, not process, and is determined to get them.⁹

⁶ See F.C.C. Public Notice, Commission Proposes Revisions to FCC Forms 395-A and 395-B, FCC 08-194 (Aug. 26, 2008); see also U.S. Equal Employment Opportunity Commission, 2008 EEO-1 Survey, available at <http://www.eeoc.gov/eeo1survey/> (last visited Sept. 18, 2008).

⁷ See *MD/DC/DE Broadcasters Ass’n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001), *reh’g denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied sub nom.*, *MMTC v. MD/DC/DE Broadcasters Ass’n*, 534 U.S. 1113 (2002).

⁸ See *MD/DC/DE Broadcasters*, 236 F.3d at 19.

⁹ *MD/DC/DE Broadcasters*, 236 F.3d at 19.

The court found the pressure to recruit women and minorities was so significant as to fail constitutional scrutiny.

The danger of inappropriate and unlawful agency pressure placed on broadcast licensees to hire minorities was also the basis of the D.C. Circuit's determination in *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), that the FCC's EEO rules in effect at that time violated broadcasters' constitutional rights. At that time, the FCC used quantitative license renewal processing guidelines by which the agency selected licensees for in-depth EEO review if their workforce did not meet certain thresholds of minority and female employees.¹⁰ These guidelines were not the only data that the FCC considered in making EEO program review decisions—the agency also considered the station's EEO program and policies, EEO complaints, if any, filed against the licensee, and other relevant information.¹¹ Of the racial and gender data required to be reported, the court wrote the following:

[T]he fact that the FCC looks at more than “numbers” does not mean that numbers are insignificant. A station would be flatly imprudent to ignore any one of the factors it knows may trigger intense review—especially if that factor, like racial breakdown, is particularly influential. As a matter of common sense, a station can assume that a hard-edged factor like statistics is bound to be one of the more noticed screening criteria. The risk lies not only in attracting the Commission's attention, but also that of third parties. “Underrepresentation” is often the impetus (as it was in this case) for the filing of a petition to deny¹²

Thus, the court recognized that when an agency requires a regulated entity to report data regarding the racial and gender composition of its workforce, those reported numbers have significance not just to the agency, but also to the public. The D.C. Circuit found that the

¹⁰ *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998), *reh'g denied*, 154 F.3d 487, *reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998).

¹¹ *See Lutheran Church*, 141 F.3d at 353.

¹² *Lutheran Church*, 141 F.3d at 353.

combination of statistical processing guidelines and detailed reporting requirements unconstitutionally pressured licensees to make hiring decisions based on race.¹³

Together, *Lutheran Church* and *MD/DC/DE Broadcasters* clearly illustrate that requiring a broadcaster to publicly report statistical data regarding the gender and race or ethnicity of employees can create governmental pressure on the broadcaster to make race- and/or gender-based hiring decisions. The pressure comes both from the agency, which makes licensing and other critical decisions concerning broadcast applications and enforcement matters, and from the public, which may use “underrepresentation” as the basis to challenge station applications. *Lutheran Church* and *MD/DC/DE Broadcasters* establish that the FCC may not, consistent with the Constitution, adopt rules that have the effect of compelling broadcasters to make recruitment and hiring decisions based on race and/or gender.

Now, ten years after *Lutheran Church* and seven years after *MD/DC/DE Broadcasters*, the FCC has determined, again, to require broadcasters to report statistical data on the race and gender of their employees, but without first resolving the predicate constitutional question of whether such information will be made available to the public. In the absence of this determination, the FCC cannot establish that Form 395-B is necessary for a governmental purpose or that it is not unduly burdensome on broadcasters. As a threshold matter, the agency must make the decision on confidentiality of the data before OMB may approve Form 395-B.

Discussion

The *Notice* refers Form 395-B to OMB for review in accordance with the Paperwork Reduction Act.¹⁴ In reviewing Form 395-B, OMB must determine “whether the collection of

¹³ See *Lutheran Church*, 141 F.3d at 352. Whether the EEO rules were an unconstitutional sex-based classification was not an issue before the court. See *MD/DC/DE Broadcasters*, 236 F.3d at 16.

information by the agency is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility.”¹⁵ If OMB determines that Form 395-B is unnecessary for any reason, then the FCC may not require broadcasters to file the form.¹⁶ The Associations, of course, support the laudable goal of diversity in the workplace, and they have engaged in substantial efforts to support programs and policies to ensure, among other things, wide dissemination of notices of job openings and broad outreach throughout a broadcaster’s community. Respectfully, however, the Associations submit that, unless confidential filing is permitted, Form 395-B is not necessary for the proper performance of the functions of the Commission and is unduly burdensome.

I. UNTIL THE ISSUE OF CONFIDENTIALITY IS RESOLVED BY THE COMMISSION, OMB CANNOT DETERMINE WHETHER FORM 395-B IS NECESSARY TO THE PROPER PERFORMANCE OF COMMISSION FUNCTIONS

The FCC has proposed to collect detailed race- and gender-based information from broadcasters through the filing of Form 395-B without having made clear whether the form may be filed on a confidential basis.¹⁷ Form 395-B has been suspended since 2001 following the D.C. Circuit’s ruling in *MD/DC/DE Broadcasters* that requiring broadcasters to report the race and gender makeup of applicants for employment was unconstitutional. Since then, broadcasters have repeatedly argued that if Form 395-B is to be reinstated, then filers must be allowed to confidentially file their forms.¹⁸ Although the FCC indicated in an earlier proceeding in 2000

¹⁴ See Notice, at 50967.

¹⁵ See 44 U.S.C. § 3508.

¹⁶ See *id.*

¹⁷ See F.C.C. Public Notice, Commission Proposes Revisions to FCC Forms 395-A and 395-B, FCC 08-194, n.6 (Aug. 26, 2008).

¹⁸ See, e.g., Joint Petition for Reconsideration and Clarification of the Named State Broadcasters Associations, MM Docket No. 98-204, at 20 (2003) (seeking reconsideration and

(continued)

that it would not adopt a confidential filing rule,¹⁹ the Commission has not revisited that determination since *MD/DC/DE Broadcasters* or in the most recent phases of the EEO proceeding, even though broadcasters again raised the issue of confidential filing when the FCC sought comment on reinstatement of Form 395-B in April 2008.²⁰ Yet, *Lutheran Church* and *MD/DC/DE Broadcasters* make clear that requiring broadcasters to report data concerning the race and gender of their employees exposes broadcasters to improper and unlawful pressure to make race- and gender-based hiring decisions. The only way to avoid that unlawful pressure is to allow confidential filing.

It is undisputed that the Commission generally has statutory authority to adopt and enforce appropriate rules concerning equal employment opportunities in the broadcast industry.²¹ The Commission's authority to promulgate appropriate regulations regarding the establishment and maintenance of a broadcast EEO program is not raised in this docket or in these Comments. As stated above, the FCC currently has in place a rigorous EEO program designed to ensure that broadcasters engage in non-discriminatory employment practices, broadly recruit for all full-time

clarification based, in part, on reinstatement of Form 395-B); *In the Matter of the Commission's Broadcast and Cable Equal Opportunity Rules and Policies*, Third Report & Order & Fourth Notice of Proposed Rulemaking, 19 FCC Rcd 9973, ¶¶ 9, 14-17 (2004) (seeking comment on confidentiality issues); Comments of the National Association of Broadcasters, MM Docket No. 98-204 (July 29, 2004); Reply Comments of the National Association of Broadcasters, MM Docket No. 98-204 (Aug. 9, 2004); Comments of the Named State Broadcasters Associations, MM Docket No. 98-204 (July 29, 2004); Reply Comments of the Named State Broadcasters Associations, MM Docket No. 98-204 (Aug. 9, 2004). The Commission has not ruled on the issue of filing Form 395-B on a confidential basis although the matter has been directly raised by interested parties and the subject of a notice of proposed rulemaking issued by the Commission.

¹⁹ See 2000 EEO Memorandum Opinion & Order, ¶ 39.

²⁰ See, e.g., Comments of the National Association of Broadcasters, MM Docket No. 98-204 (May 22, 2008); Comments of the Named State Broadcasters Associations, MM Docket No. 98-204 (May 22, 2008); see also F.C.C. Public Notice, Media Bureau Seeks Comment on Possible Changes to FCC Forms 395-A and 395-B, DA 08-752 (Apr. 11, 2008).

²¹ See 47 U.S.C. § 334.

job vacancies, and reach out to their communities through outreach initiatives.²² Rather, the Associations challenge the necessity, indeed the constitutionality, of requiring Form 395-B to be filed on a non-confidential basis; without such a determination the FCC cannot establish that the form is necessary to performance of Commission functions.

Nothing that would be reported on Form 395-B on a non-confidential basis is required for the Commission to properly function. For example, the data reported on Form 395-B are not specifically required to be reported to Congress in a manner that associates the filer with the report.²³ Nor are the data required for the Commission to administer its EEO regulations. Indeed, the Commission has functioned as normal and has successfully enforced the EEO rules for nearly seven years while the Form 395-B filing requirement has been suspended. To the extent the data are helpful to the Commission in determining the effectiveness of the EEO rules, confidential filing of the data would serve that purpose just as well as non-confidential filing would.²⁴ The Commission does have authority to collect information and prepare reports.²⁵ But, that data must be collected in a way that conforms to the Constitution.²⁶

²² See, e.g., 47 C.F.R. § 73.2080.

²³ See, e.g., 47 U.S.C. §§ 154(i), (k).

²⁴ The Commission has stated that it requires non-confidential filing in order to associate the filer with the filing in the event questions arise. See *2000 EEO Memorandum Opinion & Order*, ¶ 39. However, the Commission has not addressed proposals to collect the data on an anonymous basis using a third-party pursuant to the Confidential Information Protection and Statistical Efficiency Act of 2003, Pub. L. No. 107-347, codified in 44 U.S.C. § 3501 note. See, e.g., Comments of the National Association of Broadcasters, In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, DA 08-752, MM Docket No. 98-204, at 2 (submitted May 22, 2008).

²⁵ See *In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules*, Third Report & Order and Fourth Notice of Proposed Rulemaking, 19 FCC Rcd 9973, ¶ 3 (2004) (citing 47 U.S.C. §§ 154(i) and (k), 303(r), and 403).

²⁶ See *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998).

Additionally, there is an important distinction to draw between the EEOC's EEO-1 survey, upon which Form 395-B's racial and ethnic categories are based, and the FCC's proposed Form 395-B. Certain employers, including broadcast employers, are required to report to the EEOC statistical data concerning the gender and race/ethnicity of their employees using the EEO-1 survey.²⁷ Significantly, however, the EEOC allows filers to submit EEO-1 on a confidential basis.²⁸

Twice the D.C. Circuit has found that the Commission's employment data collection procedures are unconstitutional. The lesson of *MD/DC/DE Broadcasters* and *Lutheran Church* is that the only way to both require the data to be reported and to avoid unconstitutional pressure is to allow the data to be submitted on a confidential basis. Without a determination by the FCC that the report may be submitted confidentially, OMB's review is premature.

II. UNTIL THE ISSUE OF CONFIDENTIALITY IS RESOLVED BY THE COMMISSION, OMB CANNOT DETERMINE WHETHER FORM 395-B WOULD BE UNDULY BURDENSOME ON BROADCASTERS

The Commission has promised to use the data reported in Form 395-B only for analyzing industry trends, assessing the effectiveness of the Commission's rules, and reporting to Congress—not to exert any pressure on licensees.²⁹ However, as the D.C. Circuit has recognized, there is inherent pressure in a data collection made available to the public regardless

²⁷ See 29 C.F.R. § 1602.7.

²⁸ See 29 C.F.R. § 1610.18; 42 U.S.C. § 2000e-8; U.S. Equal Employment Opportunity Commission, EEO Surveys, *available at* <http://www.eeoc.gov/employers/surveys.html> (last visited Sept. 23, 2008) (“Although the data is confidential, aggregated data is available to the public.”).

²⁹ See 47 C.F.R. § 73.3612 note; 2000 EEO Memorandum Opinion & Order, ¶¶ 35, 40 (2000).

of the Commission's stated intent.³⁰ This pressure would be unlawful, unconstitutional, and, therefore, a significant regulatory burden.

Processing guidelines or an agency-defined quota of the kind rejected in *MD/DC/DE Broadcasters* are not necessary in order to create unlawful pressure on a broadcaster to make race- and gender-based hiring decisions. Rather, pressure may be brought to bear on the licensee's knowledge that the agency can and does enforce its EEO rules through in-depth compliance audits³¹ and significant fines for EEO violations.³² The licensee would predictably and reasonably be inclined to make hiring decisions based on race and/or gender in order to avoid the threat of Form 395-B data being used against it in an EEO enforcement proceeding.³³

Additionally, pressure to make race- and gender-based hiring decisions may come from the public, which would have access to a station's Form 395-B filing on the FCC's website, where EEO filings are generally made available.³⁴ As recognized by the courts, if the detailed information about the racial and general make-up of a broadcasters' employment unit is publicly available, advocates and others will use this information improperly, for example, as the basis for an unfounded petition to deny or informal objection to a station's license renewal or other

³⁰ See *Lutheran Church*, 141 F.3d at 353.

³¹ See 47 C.F.R. § 73.2080(f)(4) (providing that the FCC will each year randomly select for audit approximately five percent of all licensees in the television and radio service).

³² See, e.g., *In the Matter of DIRECTV, Inc.*, Order, 23 FCC Rcd 12680, DA 08-1938 (2008) (settling allegations of EEO violations by direct broadcast satellite service provider and requiring \$150,000 payment to U.S. Treasury); *In the Matter of Liberman Television of Dallas License Corp., Licensee of Station KMPX(TV), Decatur, Texas*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 2032 (2007) (imposing \$20,000 fine for various EEO violations by television broadcaster).

³³ See *Lutheran Church*, 141 F.3d at 353.

³⁴ See FCC EEO Filing Search—Broadcast, available at http://fjallfoss.fcc.gov/prod/cdb/pubacc/prod/eo_search.htm (last visited Sept. 26, 2008).

application.³⁵ The D.C. Circuit expressly recognized this threat in *Lutheran Church*.³⁶ Of course, the station would be given an opportunity to respond to any petition to deny or informal objection;³⁷ however, petitions to deny and informal objections are costly, in terms of the legal and administrative expense required to respond, as well as injurious to a station's reputation. These unlawful pressures constitute an undue burden on broadcasters—an undue burden that could easily be avoided by an FCC determination that Form 395-B may be filed on a confidential basis.

III. FORM 395-B SHOULD BE RETURNED TO THE COMMISSION FOR RESUBMISSION WITH ITS DETERMINATION THAT CONFIDENTIAL FILING WILL BE ALLOWED

The Commission proposes (without directly stating) to first obtain OMB approval of Form 395-B and then make a determination on the long-pending confidential filing issue, but the Associations urge OMB to reject the “gamesmanship” inherent in such a course. The more appropriate and efficient regulatory path would be to consider both the information collection and the terms of filing at one time. Indeed, OMB recently rejected the Commission's two-phased approach in a different proceeding involving its revision to the station identification rules. When the FCC submitted for OMB approval certain revisions to the station identification rules,³⁸ which were adopted in a significant and controversial order addressing numerous FCC

³⁵ See 47 C.F.R. §§ 73.3584, 73.3587.

³⁶ See *Lutheran Church*, 141 F.3d at 353. Indeed, the proceeding underlying *Lutheran Church* was based on a petition to deny license renewal applications filed by an advocacy group. *Id.* at 346.

³⁷ See 47 C.F.R. § 73.3588.

³⁸ See 47 C.F.R. §§ 73.1201, 74.783, and 74.1283. The amendments to the station identification rules generally concern announcements regarding the existence, location, and accessibility of the station's public inspection file. See 73 Fed. Reg. 38211, 38212 (July 3, 2008).

regulations,³⁹ it did so without contemporaneously submitting a different but closely related information collection.⁴⁰ OMB rejected the station identification submission as “improperly submitted”: “Due to close linkages with potential revisions to [the related information collection], this collection can not be reviewed until those revisions are also submitted to OMB for review.”⁴¹ OMB directed the FCC to submit both matters at the same time for OMB consideration.⁴² Similarly, OMB also recently rejected the FCC’s information collection related to its revision of the cable leased access rules⁴³ because the proposed information collections violated the Paperwork Reduction Act; one of the violations involved the FCC’s failure to demonstrate there were reasonable mechanisms in place to protect proprietary and confidential information reported on the form, in accordance with an associated FCC rule.⁴⁴

The OMB station identification and cable leased access rulings illustrate that OMB has ample authority to reject Form 395-B until the confidentiality issue has been resolved. The two determinations are closely linked and have been unjustifiably separated by the FCC. These precedents should control the outcome here. Indeed, the actual regulatory burden imposed by Form 395-B cannot be assessed until the matter of confidentiality has been decided. As

³⁹ See *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Report & Order 23 FCC Rcd 1274 (2008).

⁴⁰ See I.C.R. No. 200807-3060-002, Notice of Office of Management and Budget Action (Aug. 21, 2008), available at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200807-3060-002# (“OMB Notice”) (last visited Sept. 22, 2008).

⁴¹ OMB Notice.

⁴² See OMB Notice.

⁴³ See 47 C.F.R. §§ 76.970, 76.971, 76.975, and 76.978.

⁴⁴ See I.C. R. No. 200804-3060-012, Notice of Office of Management and Budget Action (July 9, 2008), available at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200804-3060-012# (last visited Sept. 23, 2008); see also *In the Matter of Leased Commercial Access*, Report & Order & Further Notice of Proposed Rulemaking, 23 FCC Rcd 2909 (2008).

submitted to OMB, without a resolution of that issue, Form 395-B imposes significant—and unlawful—regulatory burdens on broadcasters.

Conclusion

The Associations respectfully submit the foregoing for OMB consideration in this proceeding. The Associations request that OMB reject Form 395-B as submitted and direct the Commission to resubmit the form when it has made a determination that Form 395-B may be filed on a confidential basis.

September 26, 2008

Respectfully submitted,

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