

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2))	MB Docket No. 18-23
)	
Modernization of Media Regulation Initiative)	MB Docket No. 17-105

REPORT AND ORDER

Adopted: February 14, 2019

Released: February 15, 2019

By the Commission: Chairman Pai and Commissioners O’Rielly and Carr issuing separate statements; Commissioners Rosenworcel and Starks concurring and issuing separate statements.

I. INTRODUCTION

1. In this Report and Order (*Order*), we eliminate the requirement in Section 73.2080(f)(2) of the Commission’s rules that certain broadcast television and radio stations file the FCC Broadcast Mid-Term Report (Form 397). Earlier this year, we issued a Notice of Proposed Rulemaking (*NPRM*) proposing to eliminate Form 397, which requires stations to provide equal employment opportunity (EEO) information that is generally also available through other sources, including stations’ online public inspection files.¹ No commenter opposes elimination of this requirement. As set forth below, we conclude that eliminating this largely redundant reporting requirement will further our efforts to modernize our media rules and reduce unnecessary requirements without hindering the Commission’s ability to conduct mid-term reviews of broadcasters’ EEO practices.²

II. BACKGROUND

2. Section 334(b) of the Communications Act of 1934, as amended (the Act), directs the Commission to conduct a mid-term review of broadcast stations’ employment practices.³ Pursuant to this directive, and as specified in Section 73.2080(f)(2), Commission staff reviews the EEO practices of broadcast television stations in station employment units with five or more full-time employees,⁴ and

¹ *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2); Modernization of Media Regulation Initiative*, MB Docket Nos. 18-23 and 17-105, Notice of Proposed Rulemaking, 33 FCC Rcd 2570 (2018) (*NPRM*).

² *See Commission Launches Modernization of Media Regulation Initiative*, MB Docket No. 17-105, Public Notice, 32 FCC Rcd 4406 (MB 2017) (initiating a review of rules applicable to media entities to eliminate or modify regulations that are outdated, unnecessary or unduly burdensome).

³ 47 U.S.C. § 334(b) (“The Commission shall revise the regulations described in subsection (a) of this section to require a mid-term review of television broadcast station licensees’ employment practices and to require the Commission to inform such licensees of necessary improvements in recruitment practices identified as a consequence of such review.”). Although Section 334(b) only applies to TV stations, the Commission currently conducts mid-term reviews for both broadcast TV and radio station licensees. *See* 47 CFR 73.2080(f)(2).

⁴ A station employment unit is a station or a group of commonly owned stations in the same market that share at least one employee. 47 CFR § 73.2080(e)(2). To alleviate the burden on small entities, the Commission limited obligations to establish an EEO program to station employment units with five or more full-time employees. *See Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, (continued....)

radio stations in employment units with eleven or more full-time employees, around the midpoint of broadcasters' eight-year license terms.⁵ After completing a mid-term review, staff informs licensees of any necessary improvements in recruitment practices to ensure that they are in compliance with the Commission's EEO rules.⁶

3. To facilitate mid-term reviews, the Commission adopted the current Form 397 in 2002.⁷ Licensees subject to mid-term review must file Form 397 at least four months prior to the four-year anniversary of the station's most recent license expiration date.⁸ Form 397 consists of three sections and requires stations to provide information that, with one exception, also is available in their public inspection files.⁹ First, stations must certify whether they have the requisite number of full-time employees to be subject to a mid-term review.¹⁰ As discussed below, because this piece of information is not otherwise available, we will implement a simple mechanism for stations to provide it to the Commission via the Online Public Inspection File (OPIF). Second, stations must identify, by name and title, "a particular official with overall responsibility for equal employment opportunity at the station."¹¹ This official also must be identified in Form 396, Broadcast Equal Employment Opportunity Program Report, which must be included in a station's public file.¹² Third, all stations subject to mid-term review must attach copies of their two most recent annual EEO public file reports to Form 397.¹³ Each station must also place these reports both in its public file and on its website, if it has one, on an annual basis.¹⁴ Each of the reports must be retained in the station's public file until its next license renewal is granted.¹⁵ Given the availability of this information to both the public and Commission staff even in the absence of Form 397, the record overwhelmingly supports elimination of the obligation to file the form.¹⁶

III. DISCUSSION

4. We adopt the *NPRM's* proposal to eliminate the requirement for broadcast television and radio stations to file Form 397. We agree with commenters that "eliminating this outdated filing requirement will reduce the burden on licensees and the unnecessary waste of administrative and material

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Report and Order, 23 FCC 2d 430, 436, para 1, App. B, A.3. (1970) (an EEO "program need not be filed if the station has less than five fulltime employees"); *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, Report and Order, 18 FCC 2d 240, 244, para. 8, n. 13 (1969) ("We believe it reasonable to exclude stations with less than five full-time employees."); 47 U.S.C. § 334(a)(1) ("[T]he Commission shall not revise—(1) the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply to television broadcast station licensees and permittees").

⁵ 47 CFR § 73.2080(f) ("The following provisions apply to employment activity concerning full-time positions at each broadcast station employment unit (defined in this part) employing five or more persons in full-time positions, except where noted."); *see also* 47 CFR § 73.2080(d) (exempting stations with fewer than five full-time employees from the obligation to file the EEO public file report); 47 CFR § 73.2080(f)(2) (explaining that the Commission will conduct a mid-term review of the employment practices of broadcast television stations and radio stations four years following the station's most recent license expiration date as specified in § 73.1020); *see also* 47 CFR §§ 73.2080(a) and 74.780 (specifying that the Commission's EEO rules apply to AM, FM, TV, Class A TV, LPTV, and international broadcast stations). Although covered by the EEO rules generally, LPTV stations and international broadcast stations are not subject to the mid-term review requirement or the requirement to file Form 397. *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, MM Docket No. 98-204, Second Report and Order and Third Notice of Proposed Rulemaking, 17 FCC Rcd 24018 at 24060 and 24066 (2002) (citing approvingly to *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, MM Docket Nos. 98-204 and 96-16, 15 FCC Rcd 22548 at 22562 (2000)); *see also* *Television Station Filing Procedures for Broadcast EEO Mid-Term Report (FCC Form 397)*, DA 08-1167, Public Notice (MB 2008).

⁶ 47 U.S.C. § 334(b).

⁷ Form 397 is available at <https://transition.fcc.gov/Forms/Form397/397.pdf>. In 2000, eight years after Congress enacted Section 334, the Commission adopted Form 397 to assist with the mid-term review process, among other changes to the EEO rules. *See* *Review of the Commission's Broadcast and Cable Equal Employment Opportunity*

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resources” without undermining our ability to conduct the statutorily-required mid-term reviews of broadcaster compliance with the EEO rules.¹⁷ Because the transition to the OPIF is now complete,¹⁸ nearly all the information in Form 397 is easily accessible online. As noted above, the number of full-time employees working at a station, which is the trigger for determining whether a station is subject to a mid-term review, is the only piece of information included in the Form 397 that is not currently available in a station’s online public file. To address this issue, we will modify the OPIF, as described below, to enable broadcasters to provide this information to the Commission in a simple way and allow Commission staff to quickly identify stations subject to a mid-term review.

5. As an initial matter, we adopt our tentative conclusion that eliminating Form 397 is consistent with Section 334 of the Act.¹⁹ NAB and Nexstar, the only two commenters to weigh in on our statutory interpretation, agree with our tentative conclusion.²⁰ Specifically, Section 334(a) prohibits revisions to EEO rules “in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply to television broadcast station licensees and permittees” and to the forms “used by such licensees and permittees to report pertinent employment data to the Commission.”²¹ Section 334’s legislative history identifies those forms as FCC Forms 395-B and 396²² and, as noted above, the Commission did not adopt Form 397 until after the date listed in Section 334.²³ Accordingly, based on the statutory language and legislative history, we conclude that Form 397 is not subject to the statutory limitation on revisions found in Section 334(a). In addition, although Section 334(b) directed the Commission to revise its regulations to require a mid-term review of television broadcast licensees’ employment practices,²⁴ it did not require the Commission to adopt Form 397. Thus, we adopt our tentative conclusion that Section 334(b) does not bar the Commission from eliminating Form 397, and we emphasize that the Commission will continue to conduct mid-term reviews even in the absence of Form 397.²⁵

6. We also adopt our tentative conclusion in the *NPRM* that eliminating the Form 397 filing requirement will reduce unnecessary regulatory burdens that no longer serve the public interest.²⁶ As

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Rules and Policies, Report and Order, 15 FCC Rcd 2329, 2385, para. 136 (2000) (*2000 Report and Order*) (adopting Form 397, referred to as a “Statement of Compliance,” as part of the mid-term review process and explaining that the form requires licensees to indicate whether they have complied with the Commission’s EEO rules during the relevant review period). In 2001, the D.C. Circuit vacated in its entirety the 2000 rulemaking order for reasons unrelated to Form 397. See *MD/DC/DE Broad. Assoc. v. FCC*, 236 F.3d 13 (D.C. Cir. 2001) (finding unconstitutional one of the options the Commission adopted as part of its broadcast EEO outreach requirements in the *2000 Report and Order*). In 2002, the Commission readopted Form 397, with modifications, including renaming the form, “Broadcast Mid-Term Report.” See *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Second Report and Order, 17 FCC Rcd 24018, 24064, paras. 153, 164 (2002) (2002 EEO Order) (adopting a new broadcast EEO Rule in response to the D.C. Circuit’s decision in *MD/DC/DE Broad. Assoc. v. FCC*, and readopting, with modifications, Form 397).

⁸ 47 CFR § 73.2080(f)(2); see also Form 397, Section III.

⁹ All broadcast stations subject to the mid-term review requirement are also separately required to maintain their public inspection files in the Online Public Inspection File, a central, Commission-hosted database, which can be accessed at <https://publicfiles.fcc.gov/>. See *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Second Report and Order, 27 FCC Rcd 4535 (2012) (adopting online public file requirements for commercial and non-commercial TV and Class A TV stations); *Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, Report and Order, 31 FCC Rcd 526, 558-59, para. 83 (2016) (determining, among other things, that online public file requirements would be implemented on a rolling basis for AM and FM broadcast radio licensees with a final deadline of March 1, 2018).

¹⁰ See Form 397, Section I. This information is not currently available in the OPIF. *But see infra* paras. 8-9. Stations that do not have the requisite number of full-time employees are not required to file Form 397, but may do so if they choose. Form 397, Section I (explaining that stations without the requisite number of full-time employees “do not have to file this form with the FCC. However, you have the option to complete the certification below, return the form to the FCC, and place a copy in your station(s) public file.”).

commenters recognize, prior to establishing the OPIF in 2012, “Form 397 was the only vehicle available to the [Commission] by which it could readily access the requisite documentation to complete its congressionally mandated task of review.”²⁷ However, now that all broadcast licensees subject to a mid-term review are also required to have an online public file,²⁸ the need for the physical submission of the Form 397 no longer exists. The information in Form 397 is duplicative of documentation and information already available in a station’s online public inspection file (*i.e.*, the requisite EEO contact information and copies of EEO public file reports) or that can easily be made available in the OPIF (*i.e.*, whether the station has the requisite number of full-time employees).²⁹ Thus, as commenters contend, the burdens associated with filing Form 397, including “the consumption of internal administrative efforts to prepare and file the form in the system or pay the fees associated with having outside FCC counsel prepare and/or submit the form online on behalf of the licensee,” far outweigh its benefits.³⁰

7. In the *NPRM*, we sought comment on whether, if we adopted our proposal to eliminate Form 397, we should separately and more frequently solicit from broadcast licensees EEO point of contact information, the second piece of information collected via Form 397.³¹ We find persuasive commenters’ arguments that “a separate and singular [new] requirement to provide a station specific EEO contact beyond the context of the Form 397 is unnecessary.”³² Indeed, such a requirement already exists. Given that the Commission already solicits EEO point of contact information once every eight years through Form 396 and station licensee contact information on various FCC forms,³³ we agree that soliciting this information elsewhere is unnecessary.³⁴

8. To ensure that Commission staff will still be able to identify which licensees are subject to a mid-term review in the absence of Form 397, we will require radio stations to answer a question about staffing size in order to upload an EEO public file report to the OPIF. In the *NPRM*, we identified two possible ways to make this information available, as proposed by NAB.³⁵ The first, NAB’s preferred approach,³⁶ would “require all subject stations to indicate whether they are subject to a mid-term review on their annual EEO public file report.”³⁷ As the *NPRM* explained, however, “this proposal would not provide information in a format that easily could be aggregated,”³⁸ and would potentially require

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¹¹ Form 397, Section II.

¹² See FCC Form 396, at 3, available at <https://transition.fcc.gov/Forms/Form396/396.pdf>. All broadcast station licensees must file Form 396 every eight years concurrently with their license renewal application. 47 CFR § 73.2080(f)(1). Stations with five or more full-time employees (a group which includes all stations required to file Form 397) must respond to the specific question in Form 396 requiring them to designate a point of contact who is responsible for EEO compliance.

¹³ Form 397, Section III. EEO public file reports must contain the following information:

- (i) A list of all full-time vacancies filled by the station’s employment unit during the preceding year, identified by job title;
- (ii) For each such vacancy, the recruitment source(s) utilized to fill the vacancy (including, if applicable, organizations entitled to notification pursuant to paragraph (c)(1)(ii) of this section, which should be separately identified), identified by name, address, contact person and telephone number;
- (iii) The recruitment source that referred the hiree for each full-time vacancy during the preceding year;
- (iv) Data reflecting the total number of persons interviewed for full-time vacancies during the preceding year and the total number of interviewees referred by each recruitment source utilized in connection with such vacancies; and
- (v) A list and brief description of initiatives undertaken pursuant to paragraph (c)(2) of this section during the preceding year.

47 CFR § 73.2080(c)(6).

¹⁴ 47 CFR § 73.2080(c)(6).

Commission staff to manually review thousands of EEO public file reports in order to determine which stations are subject to a mid-term review. Alternatively, NAB suggested modifying the OPIF itself to require stations to indicate whether they are subject to a mid-term review as a prerequisite to filing their annual EEO public file report. The *NPRM* proposed that this could be achieved by “adding questions regarding staff size to each station’s public file that must be answered before the station can upload its EEO public file report.”³⁹ NAB argues that this approach would require greater Commission staff resources than its first proposal, but does not explain why it believes this to be the case.⁴⁰ No other commenter put forth alternative proposals or addressed the concerns raised by the Commission about the first proposal suggested by NAB.

9. We adopt NAB’s second proposal and require radio stations uploading an EEO public file report to the OPIF, as they are required to do annually under our rules,⁴¹ to identify whether their staff size is sufficient to trigger a mid-term review.⁴² This information, entered into the OPIF itself rather than simply recorded on an uploaded document in a way that is not aggregable, will allow Commission staff to quickly and easily identify stations subject to mid-term review. As acknowledged in the *NPRM*, this approach will impose a one-time information technology resource cost on the Commission,⁴³ but will also minimize the annual administrative burden of conducting the statutorily-required mid-term review. It also has the attribute of imposing only a *de minimis* burden on subject stations to answer an additional question at the time they upload their annual EEO report. We note that we anticipate that the necessary information technology work to effectuate this change will be completed well before the next radio mid-term review cycle.⁴⁴

10. In addition to the proposed elimination of Form 397, the *NPRM* also sought comment on “the FCC’s track record on EEO enforcement and how the agency can make improvements to EEO compliance and enforcement.”⁴⁵ We received responsive comments from a group of 33 organizations

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¹⁵ 47 CFR § 73.2080(c)(6) (“Annually, on the anniversary of the date a station is due to file its renewal application, the station shall place in its public file, maintained pursuant to [47 CFR] § 73.3526 or § 73.3527, and on its web site, if it has one, an EEO public file report”). See also *2002 EEO Order*, 17 FCC Rcd at 24064, para 145 (stating “licensees will be required to retain the [EEO public file] reports in their public file until their next renewal is granted”).

¹⁶ No commenter who filed in response to the *NPRM* opposed elimination of the form. One letter filed prior to release of the *NPRM* expresses a concern that eliminating Form 397 “sends a bad message [that] the agency is abandoning its public interest responsibilities.” Letter from Yosef Getachew, Director of Media and Democracy Program, Common Cause, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 18-23 and 17-105, at 1 (filed Feb 16, 2018). We emphasize, however, that elimination of the requirement to file this form has no effect on the statutorily-required mid-term review itself. See *infra* para. 4.

¹⁷ Nexstar Comments at 1. See also NAB Comments at 3 (“The information needed for the EEO mid-term review is already available to the FCC and the public in stations’ online public files, and the stations that are subject to review can be identified without use of the Form. Eliminating the Form 397 filing requirement will have no impact whatsoever on the Commission’s performance of mid-term reviews or broadcasters’ compliance with the substantive EEO rules.”).

¹⁸ As of March 1, 2018, all broadcast stations that are currently required to file Form 397 must now maintain their public inspection files in the OPIF. See *supra* note 9.

¹⁹ *NPRM*, 33 FCC Rcd at 2573, paras 6-7.

²⁰ See NAB Comments at 2 (“[T]here is no statutory bar to deleting Form 397 or otherwise changing the process for collecting the information requested on the Form.”); Nexstar Comments at 1-2.

²¹ 47 U.S.C. § 334(a). Section 334 applies expressly to “television broadcast station licensees” and therefore does not mandate the Commission’s regulation of radio licensees. 47 U.S.C. § 334(b); *NPRM*, 33 FCC Rcd at 2573, para. 6. However, no commenter in the record has suggested modifying our rules to remove radio licensees from the broadcast mid-term review.

(collectively the “EEO Supporters”). While these commenters did not address the *NPRM*’s proposal to eliminate Form 397, in response to the *NPRM* the EEO Supporters expressed concern over the degree to which the Commission has addressed “the core issue” of word-of-mouth recruiting “conducted by a homogenous, non-diverse staff,” or “cronyism,” within the broadcast industry.⁴⁶ They also recommended that the Commission engage in audit reform and locate EEO staff in the Enforcement Bureau.⁴⁷ Within 90 days of adoption of this Order, the Commission will seek comment in a Further Notice on the FCC’s track record on EEO enforcement and how the agency can make improvements to EEO compliance and enforcement.⁴⁸

11. For the reasons discussed above, we find that Section 73.2080(f)(2)’s requirement that certain broadcast television and radio stations file Form 397 is unduly burdensome and no longer necessary. We amend our rules to eliminate Form 397 after the completion of the current mid-term review cycle which ends on April 1, 2019.⁴⁹

IV. PROCEDURAL MATTERS

12. *Final Regulatory Flexibility Act Analysis.*—As required by the Regulatory Flexibility Act of 1980, as amended (RFA),⁵⁰ the Commission has prepared a Final Regulatory Flexibility Analysis

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²² See H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 97 (1992), *reprinted at* 1992 U.S.C.C.A.N. 1231, 1279 (stating that Section 334 “incorporates in the Communications Act the FCC’s forms, FCC Form 395-B annual employment report and the FCC Form 396 Broadcast Equal Opportunity Program Report, for television broadcast stations”).

²³ See *supra* note 7; Nexstar Comments at 2.

²⁴ 47 U.S.C. § 334(b).

²⁵ *NPRM*, 33 FCC Red at 2573, para. 7. We similarly conclude that Section 334(c) does not preclude the Commission from eliminating Form 397. Although subsection (a) prohibits the Commission from revising the 1992 EEO rules, subsection (c) permits the Commission “to make nonsubstantive technical or clerical revisions” to those rules as are “necessary to reflect changes in technology, terminology, or Commission organization.” 47 U.S.C. § 334(c). As noted in the *NPRM*, subsection (c), when considered in context, is most reasonably read as an exception to subsection (a)’s limitation prohibiting the Commission from revising the 1992 EEO Rules, which do not include

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the rule requiring submission of Form 397. *See NPRM*, 33 FCC Rcd at 2573-74, para. 7. Because the limitation in (a) does not apply to Form 397, neither does the exception to (a) that Congress carved out with subsection (c).

²⁶ Nexstar Comments at 1; Meredith Comments at 1 (“Form 397 is an appropriate focus of the Modernization of Media Regulation initiative, as the substantive information included in the form is already in the online public file.”).

²⁷ Nexstar Comments at 2.

²⁸ As explained above, the EEO rules apply to TV, Class A TV, AM, and FM licensees, and online public file requirements apply to these same classes of licensees. *See supra* notes 5 and 9.

²⁹ Nexstar Comments at 3. *See also* State Broadcasters Association Reply at 2 (Form 397 now “serves little purpose (if any).”).

³⁰ Nexstar Comments at 3.

³¹ *NPRM*, 33 FCC Rcd at 2574-75, para. 10.

³² Nexstar Comments at 3; Meredith Comments at 1 (“Meredith does not oppose also listing an appropriate EEO contact in a similar manner via the public file profile..., but questions the necessity of such an addition.”).

³³ *See, e.g.*, FCC 302-FM, Application for FM Broadcast Station License, at Section I(2), available at <https://transition.fcc.gov/Forms/Form302-FM/302fmjune02.pdf>; FCC 315, Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit Or License, at Section I(2), available at <https://transition.fcc.gov/Forms/Form315/315.pdf>; FCC 303-S, Application for Renewal of Broadcast Station License, at Section I(2), available at <https://transition.fcc.gov/Forms/Form303-S/303s.pdf>.

³⁴ Meredith Comments at 1 (“In an era of scraping, spam, and phishing, it would seem that the Commission would be better served to send official correspondence to the licensee or its attorneys rather than operational individuals.”). Although we decline to solicit contact information for a designated EEO point person elsewhere, we note that as part of a station’s EEO compliance, Section 73.2080(b)(1) requires licensees to define the EEO responsibilities of each level of station management to ensure equal opportunity and nondiscrimination in every aspect of station employment policy and practice.

³⁵ *See* Letter from Erin L. Dozier, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-105, at 1 (Jan. 18, 2018); *see also* Letter from Lawrence A. Walke, Associate General Counsel, NAB to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-105 (Dec. 21, 2017).

³⁶ NAB Comments at 3-4 (“NAB believes that the best course is for the Commission to require all stations to indicate whether they are subject to the mid-term review on their annual EEO public file reports.”); *see also* SBA Reply at 2-3 (“[The State Associations] agree with NAB that, the best approach for broadcasters to convey whether their staff size triggers a Mid-Term EEO review requirement is via their Annual EEO Public Inspection File Report, which can now be found on both station websites and in stations’ online public inspection files.”).

³⁷ *NPRM*, 33 FCC Rcd at 2574, para. 8.

³⁸ *Id.*

³⁹ *Id.* at para. 9.

⁴⁰ NAB Comments at 4 (“[w]hile some additional staff resources will be required to implement [the first proposal], they will certainly be less than any meaningful attempt to modify the online public file database and manage the submission process going forward”). We disagree that a one-time modification to the online public file database will be more burdensome than annually reviewing thousands of annual EEO public file reports to determine eligibility.

⁴¹ 47 CFR § 73.2080(c)(6).

⁴² Specifically, radio licensees will be prompted to answer “Yes” or “No” regarding whether they have eleven or more full-time employees. All television stations required to upload an EEO public file report to the OPIF necessarily have sufficient staff sizes to trigger a mid-term review, as the requisite staff size for both obligations

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with respect to television employment units is five full-time employees. Thus, the very act of filing the report will be sufficient to identify these television stations. *See* 47 CFR § 73.2080(d); *infra* note 5.

⁴³ *NPRM*, 33 FCC Rcd 2570 at 2574, para. 9.

⁴⁴ The next radio renewal cycle begins later this year, and therefore the next mid-term cycle will begin in 2023. *See* <https://www.fcc.gov/media/radio/broadcast-radio-license-renewal>. We note that the deadline for filing Form 397 under the current renewal cycle has already passed for all television stations except those in Delaware and Pennsylvania, which have an April 1, 2019 deadline. These reports should continue to be filed. *See infra* note 50.

⁴⁵ *NPRM*, 33 FCC Rcd at 2575, para. 11.

⁴⁶ EEO Supporters Comments, MB Docket Nos. 18-23 and 17-105 at 2; Letter from David Honig, President Emeritus and Senior Advisor, Multicultural Media, Telecom and Internet Council, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-50, 09-182, 07-294, 04-256, 17-289, 98-204, 16-410, 18-23, and 17-105, at 2 (filed June 1, 2018) (EEO Supporters Ex Parte). The EEO Supporters assert that this practice perpetuates a “lack of diversity in the industry across generations,” and urge the Commission to use “certain racial and gender data” to identify stations who recruit primarily by word of mouth and require them to submit a Form 395. EEO Supporters Comments, MB Docket Nos. 18-23 and 17-105 at 3-4. The EEO Supporters also propose three additional EEO reforms, including reevaluating the Commission’s audit program, publication of an anonymized summary of EEO data, and relocating the EEO staff to the Commission’s Enforcement Bureau. *Id.* at 5-6.

⁴⁷ We note that the Commission recently has demonstrated its commitment to EEO enforcement by evaluating our audit program and consequently approving the relocation of Commission EEO enforcement staff and responsibilities to the Enforcement Bureau, as the EEO Supporters suggested. Press Release, FCC, Chairman Pai Statement on Proposal to Improve the FCC’s Enforcement of Equal Employment Opportunity Rules (Jul. 3, 2018), <https://www.fcc.gov/document/chairman-pai-statement-proposal-improve-enforcement-eeo-rules>; *FCC Equal Employment Opportunity Audit and Enforcement Team Deployment*, Order, 33 FCC Rcd 7504 (FCC July 24, 2018). The reassignment will become effective when the appropriate clearance has been obtained and the Commission publishes the Order in the Federal Register. *Id.* at para. 10. *See* EEO Supporters Comments, MB Docket Nos. 18-23 and 17-105 at 5-6 (suggesting that “the Commission should determine whether EEO enforcement would more effectively and efficiently be performed by the Enforcement Bureau”); *see also Diversity and Competition Supporters Supplemental NPRM Comments* at 80-81 (Proposal 40, Create a New Civil Rights Branch of the Enforcement Bureau), filed in MB Docket No. 09-182 (April 3, 2012) (proposing to create a Civil Rights Branch of the Enforcement Bureau that would contain EEO enforcement).

⁴⁸ We note that the EEO Supporters’ request for the Commission to collect and publish an annual anonymized summary of aggregate broadcast licensee employment data is an issue closely related to issues raised in a separate pending proceeding. Likewise, the EEO Supporters’ request for the Commission to impose particular requirements on stations that recruit primarily by word of mouth also relies on publishing this data, a matter that remains unresolved and pending in a separate proceeding. *See Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Third Report and Order and Fourth Notice of Proposed Rulemaking, 19 FCC Rcd 9973 (2004) (adopting revised FCC Form 395 (Annual Employment Report) for broadcast stations and MVPDs and seeking comment on the Commission’s policies regarding public access to obtain data contained in the forms); *see also* EEO Supporters Comments, at 3-4 (suggesting that stations that recruit primarily by word of mouth should be required to submit *in camera* a Form 395). We also note that we received comments from the Leadership Conference on Civil and Human Rights (Leadership Conference) that echoed the EEO Supporters’ concerns in this docket. The Leadership Conference further argues that, before eliminating Form 397, the Commission should collect aggregate industry employment data on Form 395-B and improve the usability of all EEO data in our online databases. Leadership Conference on Civil and Human Rights Comments, MB Docket No. 17-105, at 1-3 (June 2, 2018). Given our conclusion above that Form 397 has become unnecessary and no longer serves a useful purpose, we do not agree with this contention.

⁴⁹ This rule change will not become effective until after the completion of the current mid-term review periods for television stations in Delaware and Pennsylvania. *See* 47 CFR § 73.1020(a)(18)(ii) (setting license renewal periods for Delaware and Pennsylvania at August 1, 2015). Accordingly, all television licensees in Delaware and Pennsylvania must file Form 397 in connection with the April 1, 2019 mid-term review deadline (four months prior to the four year anniversary of the license). We also note that we are amending the first sentence of § 73.2080(f), as proposed in the *NPRM*, to alleviate any confusion or ambiguity that may have resulted from the construction of the

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(FRFA) relating to this Order. The FRFA is set forth in Appendix B.

13. *Paperwork Reduction Analysis.*— This document contains proposed new or revised information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. §§ 3501-3520). The requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the information collection requirements contained in this proceeding. The Commission will publish a separate document in the Federal Register at a later date seeking these comments. In addition, we note that, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. § 3506(c)(4), the Commission previously sought specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees. We have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the FRFA in Appendix B.

14. *Congressional Review Act.*—The Commission will send a copy of this Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

15. *Additional Information.*—For additional information on this proceeding, contact Jonathan Mark, Jonathan.Mark@fcc.gov, of the Media Bureau, Policy Division, (202) 418-3634.

V. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in sections 1, 4(i), 4(j) and 334 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 334 this Report and Order **IS HEREBY ADOPTED**.

17. **IT IS FURTHER ORDERED** that this Report and Order **SHALL BECOME EFFECTIVE** on May 1, 2019, except for those provisions which contain non-substantive modifications to existing information collection requirements that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. The non-substantive modifications **WILL BECOME EFFECTIVE** upon the effective date announced when the Commission publishes a notice in the Federal Register announcing such OMB approval and the effective date.

18. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

19. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

(Continued from previous page) _____

prior rule. Our amendments serve to clarify that the Commission will conduct mid-term reviews of each broadcast television station *that is part of an employment unit of five or more full-time employees* and each radio station that is part of an employment unit of *11 or more* full-time employees. See *infra* Appendix A (emphasis added). We note that these clarifying amendments are consistent with those proposed in Appendix A of the *NPRM* and that no commenter has opposed them. *NPRM*, 33 FCC Rcd at 2578. These modifications serve only to direct readers to requirements already present in the rule. See 47 CFR § 73.2080(f) (“The following provisions apply to employment activity concerning full-time positions at each broadcast station employment unit ... employing five or more persons in full-time positions, *except where noted*”) (emphasis added); see also FCC Form 397, Filing Instructions, at 2; Section I.

⁵⁰ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

20. **IT IS FURTHER ORDERED** that, should no petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 18-23 shall be **TERMINATED** and its docket closed.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

The Federal Communications Commission proposes to amend Part 73 of Title 47 of the Code of Federal Regulations (CFR) as set forth below:

PART 73 –RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, and 339.

2. Amend § 73.2080 to read as follows:

§ 73.2080 Equal Employment Opportunities (EEO).

* * * * *

(f)***

(2) The Commission will conduct a mid-term review of the employment practices of each broadcast television station that is part of an employment unit of five or more full-time employees and each radio station that is part of an employment unit of eleven or more full-time employees, four years following the station's most recent license expiration date as specified in § 73.1020. If a broadcast licensee acquires a station pursuant to FCC Form 314 or FCC Form 315 during the period that is to form the basis for the mid-term review, that review will cover the licensee's EEO recruitment activity during the period starting with the date it acquired the station.

* * * * *

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*NPRM*) in MB Docket 18-23.² The Commission sought written public comments on proposals in the *NPRM*, including comment on the IRFA. The Commission received no comments on the IRFA. The present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for, and Objectives of, the Report and Order

2. The Report and Order (Order) stems from a Public Notice issued by the Commission in May 2017, launching an initiative to modernize the Commission's media regulations.³ Numerous parties in that proceeding argued for elimination of the recordkeeping requirement at issue as redundant and unnecessary. The Order adopts the *NPRM*'s proposal to eliminate a provision of the Commission's rules that obligates certain broadcasters to file a Broadcast Mid-Term Report documenting their compliance with the Commission's EEO requirements, without eliminating the mid-term review of employment practices.

3. Specifically, the Order eliminates the requirement that broadcast television stations in station employment units (SEUs) with five or more full-time employees, and radio stations in SEUs with 11 or more full-time employees, file Form 397 four months prior to the date four years after their most recent license expiration date.⁴ This Order reduces outdated regulations and unnecessary regulatory burdens that can impede competition and innovation in media markets. It also announces changes to the Commission's Online Public Inspection File database (OPIF) in order for Commission staff to determine which stations are subject to the statutory mid-term review of employment practices.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

4. No comments were filed in response to the IRFA.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

5. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the SBA and to provide a detailed statement of any change made to the proposed rules as a result of those comments.⁵ The Chief Counsel did not file any comments in response to this proceeding.

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (CWAAA).

² *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2); Modernization of Media Regulation Initiative, MB Docket Nos. 18-23 and 17-105, Notice of Proposed Rulemaking, 33 FCC Rcd 2570, para. 1 (2018) (NPRM).*

³ *Commission Launches Modernization of Media Regulation Initiative*, MB Docket No. 17-105, Public Notice, FCC 17-58 (MB May 18, 2017) (initiating a review of rules applicable to media entities to eliminate or modify regulations that are outdated, unnecessary or unduly burdensome).

⁴ 47 CFR § 73.2080(f)(2).

⁵ 5 U.S.C. § 604(a)(3).

D. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

6. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted.⁶ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁷ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁸ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁹ The final rules adopted herein affect small television and radio broadcast stations. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

7. *Television Broadcasting.* This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”¹⁰ These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.¹¹ These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$38.5 million or less in annual receipts.¹² The 2012 Economic Census reports that 751 firms in this category operated in that year. Of that number, 656 had annual receipts of less than \$25,000,000, and 95 had annual receipts of \$25,000,000 or more.¹³ Based on this data, we estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

8. In addition, the Commission has estimated the number of licensed commercial television stations to be 1,349.¹⁴ Of this total, 1,277 stations had revenues of \$38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on October 1, 2018. Such entities, therefore, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 412.¹⁵ The Commission, however, does not compile and does not have access to information on the

⁶ *Id.*

⁷ 5 U.S.C. § 601(6).

⁸ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁹ 15 U.S.C. § 632.

¹⁰ U.S. Census Bureau, 2012 North American Industry Classification System (NAICS) Definitions, “515120 Television Broadcasting,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

¹¹ *Id.*

¹² 13 CFR § 121.201; 2012 NAICS Code 515120.

¹³ U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515120 Television Broadcasting), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

¹⁴ FCC News Release, *Broadcast Station Totals as of September 30, 2018* (rel. Oct. 3, 2018) (*Broadcast Station Totals*), <https://www.fcc.gov/document/broadcast-station-totals-september-30-2018>.

¹⁵ *Id.*

revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

9. We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations¹⁶ must be included. Our estimate, therefore likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of “small business” requires that an entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which the proposed rules would apply does not exclude any television station from the definition of a small business on this basis and therefore could be over-inclusive.

10. There are also 1,911 LPTV stations and 389 Class A stations.¹⁷ Given the nature of these services, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

11. *Radio Stations.* This economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public.”¹⁸ The SBA has created the following small business size standard for this category: those having \$38.5 million or less in annual receipts.¹⁹ Census data for 2012 shows that 2,849 firms in this category operated in that year.²⁰ Of this number, 2,806 firms had annual receipts of less than \$25,000,000, and 43 firms had annual receipts of \$25,000,000 or more.²¹ Therefore, based on the SBA’s size standard, the majority of such entities are small entities.

12. Apart from the U.S. Census, the Commission has estimated the number of licensed commercial AM radio stations to be 4,626 stations²² and the number of commercial FM radio stations to be 6,737, for a total number of 11,363.²³ Of this total, 11,362 stations had revenues of \$38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on October 1, 2018. In addition, the Commission has estimated the number of noncommercial educational FM radio stations to be 4,130.²⁴ NCE stations are non-profit, and therefore considered to be small entities.²⁵ Therefore, we estimate that the majority of radio broadcast stations are small entities.

¹⁶ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both.” 13 CFR § 21.103(a)(1).

¹⁷ *Broadcast Station Totals supra* note 14.

¹⁸ U.S. Census Bureau, 2012 NAICS Definitions, “515112 Radio Stations,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. This category description continues, “Programming may originate in their own studio, from an affiliated network, or from external sources.”

¹⁹ 13 CFR § 121.201; NAICS code 515112.

²⁰ U.S. Census Bureau, Table No. EC0751SSSZ4, *Information: Subject Series – Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515112), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table.

²¹ *Id.*

²² *Broadcast Station Totals supra* note 14.

²³ *Id.*

²⁴ *Id.*

²⁵ 5 U.S.C. §§ 601(4), (6).

E. Description of Reporting, Record Keeping, and Other Compliance Requirements for Small Entities

13. In this section, we identify the reporting, recordkeeping, and other compliance requirements in the *Order* and consider whether small entities are affected disproportionately by any such requirements.

14. *Reporting Requirements.* The *Order* does adopt new reporting requirements. It requires radio stations to indicate whether or not they have the requisite number of full time employees to be subject to a mid-term review.

15. *Recordkeeping Requirements.* The *Order* does not adopt new recordkeeping requirements.

16. *Other Compliance Requirements.* The *Order* does not adopt new compliance requirements.

F. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

17. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.²⁶

18. The *Order* eliminates the obligation imposed on certain broadcasters to file a Broadcast Mid-Term Report on employment practices. Eliminating this requirement is intended to modernize the Commission's regulations and reduce costs and recordkeeping burdens for affected entities, including small entities. Under the prior rule, affected entities were required to expend time and resources gathering and filing consolidated information that is largely already otherwise supplied to the Commission. The *Order* will require radio stations uploading an EEO public file report to answer one "either/or" question about staffing in order to determine their eligibility for the statutorily mandated mid-term review of broadcast equal employment practices. In the aggregate, replacing Form 397 with this requirement to provide additional information in the OPIF constitutes a reduction in burdens, and is as minimal a burden as possible for all entities, including small entities. Thus, we anticipate that affected small entities only stand to benefit from these revisions.

G. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule

19. None.

²⁶ 5 U.S.C. § 603(c)(1)-(4).

**STATEMENT OF
CHAIRMAN AJIT PAI**

Re: *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2)* (MB Docket No. 18-23); *Modernization of Media Regulation Initiative*, (MB Docket No. 17-105)

The British cartoonist Fran Orford published a cartoon with a drawing of a man and a woman with a big stack of papers between them. The caption read: “The idea that bureaucracy is on the increase is RIDICULOUS . . . and I have the reports to prove it!”

For the last two years, one of our goals at the FCC has been to get rid of unnecessary bureaucratic red tape. That’s why today, we are eliminating the Broadcast Mid-Term Report, otherwise known as Form 397. At one time, this form served a useful purpose: It required certain broadcast television and radio stations to provide equal employment opportunity (EEO) information around the midpoint of their eight-year license terms to assist the FCC in determining which stations would be subject to a mid-term review. But today, the FCC can easily access nearly all of this information online in each station’s public inspection file. And following adoption of this *Order*, we will be modifying our online public inspection file so that all of this information will be easily accessible. Ending this redundant reporting requirement is such a common-sense step that literally nobody in our record—not a single commenter—has opposed it.

Importantly, this decision will have no impact on the Commission’s ability to enforce our EEO rules. Indeed, we recently made clear our commitment on this score by voting to move staff handling EEO enforcement from the Media Bureau to the Enforcement Bureau, where they will be better equipped to take action when our rules are violated.

This *Order* would not have been possible without the work of Steve Broecker, Michelle Carey, Lyle Elder, Martha Heller, Tom Horan, Jonathan Mark, and Holly Saurer from the Media Bureau, and Susan Aaron, Dave Konczal, and Royce Sherlock from the Office of General Counsel. I thank them for all their efforts to update our media rules for the digital age.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2)* (MB Docket No. 18-23); *Modernization of Media Regulation Initiative*, (MB Docket No. 17-105)

The form we send to the trash heap today, which requires our nation's broadcasters to file equal employment opportunity (EEO) information for a mid-term review, was one of the first that I targeted for elimination when the Commission started its media modernization proceeding. Currently, broadcasters provide an EEO contact person and their two most recent annual EEO reports, all of which is already available online. Information on whether a station meets the criteria to trigger a mid-term review is not submitted elsewhere, however, so today's item sets up a requisite process as part of the online public inspection file. Therefore, all the information needed for the Commission to conduct a mid-term review of broadcasters' employment practices, which will continue, will be conveniently located in the online public file, making the Form 397 filing completely redundant. I did notice that we have committed to a future NPRM to examine, audit, and consider ways to improve our EEO enforcement. I am hopeful, but I do not necessarily expect that any ideas will not violate the U.S. Constitution, Supreme Court precedent, or the law.

I thank the Chairman and staff for bringing this review to an expeditious conclusion, continuing to modernize our media rules, and putting an end to this unnecessary and burdensome reporting requirement. I approve.

**STATEMENT OF
COMMISSIONER BRENDAN CARR**

Re: *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2)* (MB Docket No. 18-23); *Modernization of Media Regulation Initiative*, (MB Docket No. 17-105)

Today, we take another step towards modernizing our media regulations. We do so by eliminating an unnecessary paperwork requirement that only pulls resources away from broadcasters' efforts to serve their communities. And we do so in a way that promotes compliance with our EEO rules—an effort that builds on our decision last year to move EEO matters to the Enforcement Bureau, where agents can draw on a broader pool of staff and resources to ensure EEO compliance.

When the FCC first adopted the Form 397 filing requirement at issue today, the Commission and the public had no other way to verify broadcaster compliance with EEO obligations. But last March, the FCC completed the process of requiring broadcasters to include this data in their online public files. As a result, Form 397 is now duplicative, and thus commenters filed no opposition to our proposal to eliminate it. At the same time, we include an important technical fix in our decision today—which allows the FCC to continue to identify those broadcasters that are subject to our EEO rules.

With these decisions, the Commission can continue to carry out its important obligations under the EEO laws without the unnecessary cost of the Form 397 filing requirement. So I want to thank the staff of the Media Bureau for their continued work on the modernization initiative. The item has my support.

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2)* (MB Docket No. 18-23); *Modernization of Media Regulation Initiative*, (MB Docket No. 17-105)

For decades, at the direction of Congress, the Federal Communications Commission has been responsible for policies that prohibit discrimination in hiring at broadcast stations. On the surface, today's decision is just about Form 397, known as the Broadcast Mid-Term Report. This report has been used for the review of station compliance with equal employment opportunity policies at the mid-point of a station's license cycle. However, the bulk of the information gathered on this form is already available in the public file. As a result, today the agency determines that with these facts available elsewhere, it will modernize our process and eliminate Form 397.

However, context matters. During the past two years the FCC has issued more than a dozen rulemakings to modernize its media policies. It has issued ten orders doing the same. As for efforts to modernize diversity policies—well, we're told to wait. Now I think good things come to those who wait. And I think patience is a virtue. But I think we've waited long enough.

Under the Communications Act, this agency has a duty to develop policies to support the diversity of broadcast ownership. To this end, it has a responsibility to develop rules to support the review of the equal employment opportunity practices of broadcast licensees. A proceeding to address data related to this effort has been kicking around these halls for a decade and a half. Recognizing this fact, in the rulemaking that led up to today's decision regarding Form 397, my former colleague and I asked for it to seek comment on compliance and enforcement of the agency's equal employment opportunity obligations. Simple enough.

But today's decision takes a pass. We are told this is not the right time to address these matters. Only at my request—along with that of my current colleague Commissioner Starks—do we have a promise to do this another day. Down the road. In yet another rulemaking, three months hence.

I'm an optimist. But I'm also impatient. So while I appreciate the practical decision to eliminate Form 397, I am disappointed that we put the broader effort to address discriminatory practices related to media ownership off for the future. Because media ownership matters. What we see and hear says so much about who we are as individuals, as a community, and as a nation. And I want this agency's policies to reflect our diversity—and our obligations under the law.

For these reasons, I choose to concur.

**STATEMENT OF
COMMISSIONER GEOFFREY STARKS**

Re: *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2)* (MB Docket No. 18-23); *Modernization of Media Regulation Initiative*, (MB Docket No. 17-105)

This is the first item that I have considered under the Chairman’s “Modernization of Media Regulation” initiative. The media regulations at issue here today—the Commission’s equal employment opportunity (EEO) rules—are among our most long-standing and important as they prohibit discrimination in hiring at broadcast stations. While I concur in the matter before me, namely whether the Commission can rightfully eliminate Form 397, today’s action does not adequately face our statutory obligation to ensure that broadcasters are seeking and attracting diverse employees. Representation matters, and workforce diversity in the media is critical to ensure that all stories are told and all communities are served.

These critical rules do require an update—the Commission last substantively considered these EEO rules in 2004. Fifteen years ago, the Commission committed to collect EEO data from our broadcast licensees as part of the agency’s statutory duty. But data collection has been stalled since then because the Commission has left unresolved a single, narrow question about whether that collection should be confidential or not. Because we failed to follow through on that commitment to collect workforce diversity data, our ability to better understand the landscape of our media workforce remains stunted. We do not correct that error here today, and if not now, when?

As the Commission noted just a few months ago, our EEO rules are “essential to the public interest.”¹ Given that importance, some historical context is helpful. Our EEO rules originated in the late 1960s, in the aftermath of key civil rights gains, the Kerner Commission Report,² and the assassination of the Reverend Dr. Martin Luther King, Jr. These rules require that “[e]qual opportunity in employment shall be afforded by all licensees [of] . . . broadcast stations . . . to all qualified persons, and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin, or sex.”³

When promulgating these rules, the Commission also imposed on each licensee of a certain size a requirement to annually report to the Commission statistics concerning the racial, ethnic, and gender makeup of its workforce. In the early 1990s, Congress codified the Commission’s EEO rules, including the form used to collect workforce data—Form 395-B.

After two court decisions at the turn of the 21st century caused the Commission to reconsider some of its EEO rules and policies, the FCC suspended the use of Form 395-B.⁴ But the suspension was intended only to be temporary. The Commission moved quickly to reinstate Form 395-B and support its

¹ *Equal Employment Opportunity Audit and Enforcement Team Deployment*, Order, 2018 WL 3585130 (2018).

² The Kerner Report: The Report of the National Advisory Commission on Civil Disorders (March 1968).

³ 47 CFR § 73.2080(a).

⁴ *Suspension of the Broadcast and Cable Equal Employment Opportunity Outreach Program Requirements*, 16 FCC Rcd 2872 (2001).

statutory duties under EEO.⁵ As the Commission noted in the order reinstating Form 395-B, “collection of television broadcast . . . industry employment data is required by the Communications Act.”⁶ Moreover, Congress not only directed the Commission to collect broadcast workforce data but required it to use Form 395-B.⁷

In 2004, the Commission adopted a slightly revised Form 395-B and sought Office of Management and Budget (OMB) approval to use the form.⁸ At the same time, the Commission issued a further notice of proposed rulemaking seeking comment on whether the Commission should break from its well-established precedent of making the data public, and instead begin to keep the data collected confidential.⁹ OMB approved Form 395-B for use on the condition that the Commission resolve the open confidentiality issue. At the time, then-Chairman Michael Powell commented on the reinstatement of the form: “I am proud to support this item, which revises and re-implements annual employment reports from broadcasters[.] . . . This data will allow the Commission to accurately identify and report industry trends and [has] been collected by the Commission for years.”¹⁰

Fast forward to today. Fifteen years and several administrations later, the use of Form 395-B to collect EEO data remains suspended and the further notice remains unresolved on the issue of confidentiality. Yet there is evidence that the form has not been forgotten. In 2008, the Commission revised the form to harmonize its categories with a similar form used by the Equal Employment Opportunity Commission.¹¹ On three occasions, the Commission resubmitted the form to OMB to extend its approval, most recently in May 2017.¹² As a result, the most recent Form 395-B was approved in August 2017, and will retain its OMB approval until August 2020.¹³ It is ready to go—just waiting for the Commission to tie up that one final loose end on confidentiality.

With that long and winding history in mind, one can understand why I find it so disappointing that the matter before us regards eliminating EEO Form 397 rather than finalizing the long overdue Form 395-B. So, why so much fuss over a single, simple form?

⁵ *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Third Report & Order and Fourth NPRM, 19 FCC Rcd 9973, 9976 (2004) (Form 395-B R&O and FNPRM).

⁶ Form 395-B R&O and FNPRM, 19 FCC Rcd at 9974.

⁷ Section 334(a) of the Communications Act requires the Commission to maintain EEO rules for television broadcast station licensees and codified the FCC’s earlier EEO rules, including its data collection form, noting that “except as specifically provided in this section, the Commission shall not revise—(1) the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply to television broadcast station licensees and permittees; or (2) the forms used by such licensees and permittees to report pertinent employment data to the Commission.” 47 U.S.C. § 334(a). In fact, the Commission recognizes this in the current item, citing to legislative history stating that Section 334 “incorporates in the Communications Act the FCC’s forms, FCC Form 395-B annual employment report and the FCC Form 396 Broadcast Equal Opportunity Program Report, for television broadcast stations.” *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2)*, Report and Order at 5 n.22 (citing H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 97 (1992), reprinted at 1992 U.S.C.C.A.N. 1231, 1279) (Form 397 Report and Order).

⁸ Form 395-B R&O and FNPRM.

⁹ *Id.*

¹⁰ Statement of Chairman Powell, 19 FCC Rcd 9973, 9990 (2004).

¹¹ *Commission Proposes Revisions to FCC Forms 395-A and 395-B*, Public Notice, 23 FCC Rcd 13142 (2008).

¹² OMB Control Number History, OMB Control Number: 3060-0390, <https://reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=3060-0390>.

¹³ *Id.*

Over the past 15 years, according to the best data currently available—data painstakingly compiled by a third-party in the absence of Commission engagement—the proportion of people of color employed at television and radio broadcast stations has remained unacceptably low, particularly when considering the increasing diversity within our country.¹⁴ The stakes are high, and we can do better.

On its face, the elimination of Form 397—the “Broadcast Mid-Term Report”—is narrow and not problematic. Today’s order reasons that the information collected through this form is already collected elsewhere and is easily accessible to relevant Commission staff. In a few cases where the information is not otherwise collected, the item proposes minor tweaks to our website and databases. Although it is somewhat hard to understand how the form constitutes an undue burden,¹⁵ on balance and based on the record, eliminating Form 397 seems reasonable.

I agree, in part, with the Chairman’s “Modernization of Media Regulation” initiative in the sense that the Commission should eliminate clearly obsolete or unnecessary rules. To me, however, true regulatory “modernization” means more. While the work previously done so far is mostly appropriate, some basic and foundational statutory obligations have gone unmet, and rules and policies that are truly in need of “modernization” remain unchanged or forgotten. In my view, the Commission needs to execute the will of Congress by seeking out areas to “modernize” where we are falling short of our obligations. This is particularly true with respect to our responsibility for collecting broadcast workforce data, where the Commission has ignored its statutory duty for more than 15 years.

In some instances, “modernization” may mean removing outdated regulations from the books. But that cannot be the whole story. If I told you I was going to “modernize” my car, you wouldn’t expect me to remove its engine, wheels, and seats, and leave it immobile in my driveway. You’d expect me to replace each of those parts so in the end I have something better. And even if, in the midst of that process, I decide not to replace older parts that are outdated, obsolete, or broken, you would still expect me to make sure that the car can drive, hopefully better than before.

For that reason, moving forward, I will endeavor to approach each of these “Modernization of Media Regulation” items with a consistent framework. No matter how narrow the proceeding or how minor the form or rule being eliminated, I will look into each item to make sure that the Commission is meeting its broader statutory obligations and key mission. In the future, when the Commission proposes to eliminate a rule or regulation, we must ensure that the Commission’s underlying statutory obligations are otherwise addressed, or make a commitment to address any unmet requirements under the law. In the instance of an unmet statutory obligation, we should always seek concrete steps to make progress towards compliance with the law, or make a firm plan to engage in such steps in a limited period of time in order to demonstrate our commitment to addressing our obligations.

In this instance, the Commission titles this item, “Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2).” It is clearly more than that—this item amends EEO rules while leaving unaddressed key statutory directives in that area. There is evidence in this item¹⁶ and the underlying record¹⁷ that key EEO obligations remain unmet. Recognizing this, I

¹⁴ Radio Television Digital News Association, RTDNA Research: Women and minorities in newsrooms (July 3, 2017).

¹⁵ The form asks one “yes or no” question, requests the identity of the employee responsible for EEO compliance, and asks the licensee to attach two forms already maintained in its records. The form is completed only once every eight years and the Commission estimates that it takes 30 minutes to complete. FCC Form 397, Broadcast Mid-Term Report.

¹⁶ Form 397 Report and Order at 5 n.22 (citing H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 97 (1992), *reprinted at* 1992 U.S.C.C.A.N. 1231, 1279).

engaged in good faith with the Chairman's office and with the Media Bureau to determine with specificity the status of efforts to resolve the Form 395-B confidentiality rulemaking. I was told of unsuccessful Commission efforts to solve this problem many years ago. So I proposed a clear path forward on the 2004 further notice of proposed rulemaking¹⁸ that has remained outstanding for 15 years: issue a notice specifically asking parties to refresh the record on the Form 395-B confidentiality issue, and bring the matter to a resolution. Unfortunately, that request was denied. However, working closely and with the support of Commissioner Rosenworcel, we obtained the commitment in this item to issue a further notice on our EEO rules more generally. I am hopeful that interested parties can utilize that forthcoming docket to raise their voices regarding any EEO shortcomings, including data collection, that need to be addressed.

Standing alone, this item is not objectionable, and so I concur. But this item does not stand alone—it is part of the Commission's broader EEO framework, and since today's item pulls on the thread of that regime, we must understand what we're unraveling. I will discuss with the Chairman how we may proceed with fully reinstating Form 395-B and ensuring that the Commission fully complies with the law.

I would like to extend my thanks to the Media Bureau staff that prepared this item.

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¹⁷ Letter from The Leadership Conference on Civil and Human Rights, to Ajit Pai, Chairman, FCC, MB Docket Nos. 18-23 and 17-105, at 1 (filed June 21, 2018). *See also* Letter from Yosef Getachew, Director of Media and Democracy Program, Common Cause, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 18-23 and 17-105, at 1 (filed Feb 16, 2018) (noting the Commission's "poor track record of improving broadcasters' performance in hiring a diverse workforce" and stating that "eliminating EEO reporting requirements sends a bad message the agency is abandoning its public interest responsibilities"); EEO Supporters Comments at 2-3.

¹⁸ Form 395-B R&O and FNPRM.