

**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

**NOTICE OF PROPOSED RULEMAKING**

**Adopted: February 22, 2018**

**Released: February 22, 2018**

**Comment Date: (30 days after date of publication in the Federal Register)  
Reply Comment Date: (45 days after date of publication in the Federal Register)**

By the Commission: Chairman Pai and Commissioners Clyburn, O’Rielly, Carr and Rosenworcel issuing separate statements.

**I. INTRODUCTION**

1. In this Notice of Proposed Rulemaking (NPRM), we propose to eliminate the requirement in Section 73.2080(f)(2) of the Commission’s rules that certain broadcast television and radio stations<sup>1</sup> file the Broadcast Mid-Term Report (Form 397).<sup>2</sup> In response to a Public Notice launching the Commission’s Modernization of Media Regulation Initiative,<sup>3</sup> a number of parties have asked the Commission to consider eliminating this reporting obligation because it is unnecessary and unduly burdensome.<sup>4</sup> By proposing to eliminate Form 397, we continue our efforts to modernize our regulations and reduce unnecessary requirements that no longer serve the public interest.

**II. BACKGROUND**

2. Section 334(b) of the Communications Act of 1934, as amended (the Act), directed the Commission to revise its regulations to require a mid-term review of broadcast stations’ employment practices.<sup>5</sup> Pursuant to this direction, and as specified in Section 73.2080(f)(2), Commission staff reviews

<sup>1</sup> See 47 CFR 73.2080(f)(2) (stating that “The Commission will conduct a mid-term review of the employment practices of each broadcast television station [employing five or more persons in full-time positions] and each radio station that is part of an employment unit of more than ten full-time employees four years following the station’s most recent license expiration date as specified in § 73.1020.”).

<sup>2</sup> FCC Form 397, available at <https://transition.fcc.gov/Forms/Form397/397.pdf>.

<sup>3</sup> *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4406 (MB 2017) (initiating a review of rules applicable to media entities to eliminate or modify regulations that are outdated, unnecessary or unduly burdensome).

<sup>4</sup> See, e.g., Nexstar Broadcasting Comments at 13-14; Affiliates Associations Comments at 9; Joint Radio Commenters at 3; NAB Comments at 18; *but see* Letter from Yosef Getachew, Dir. of Media and Democracy Program, Common Cause, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 18-23, 17-105, at 1 (filed Feb. 16, 2018) (*Common Cause Ex Parte*).

<sup>5</sup> 47 U.S.C. § 334(b) (stating that “The Commission shall revise the regulations described in subsection (a) of this section to require a midterm 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

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the equal employment opportunity (EEO) practices of all broadcast television stations in station employment units<sup>6</sup> with five or more full-time employees, and all radio stations in employment units with eleven or more full-time employees, around the midpoint of broadcasters' eight-year license terms.<sup>7</sup> 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.<sup>8</sup>

3. To facilitate mid-term reviews, the Commission adopted the current Form 397 in 2002.<sup>9</sup> Stations subject to mid-term reviews must file Form 397 at least four months prior to the four-year anniversary of the station's most recent license expiration date.<sup>10</sup> Form 397 consists of three sections and requires stations to provide information that, with one exception,<sup>11</sup> also is available in stations' public inspection files.<sup>12</sup> First, stations must certify whether they have the requisite number of full-time employees to be subject to a mid-term review. 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.<sup>13</sup> Second, stations must identify, by name and title, "a particular official with overall responsibility for equal employment opportunity at the station."<sup>14</sup> This question is also asked in Form 396, Broadcast Equal Employment Opportunity Program Report, which must be included in a station's public file.<sup>15</sup>

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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 stations. *See* 47 CFR 73.2080(f)(2).

<sup>6</sup> 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).

<sup>7</sup> 47 CFR § 73.2080(f)(2).

<sup>8</sup> 47 U.S.C. § 334(b).

<sup>9</sup> In 2000, eight years after Congress enacted Section 334, the Commission adopted Form 397 to assist with the mid-term review process. *See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Report and Order, 15 FCC Rcd 2329, 2385, para. 136 (2000) (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 rule 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 FCC 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).

<sup>10</sup> 47 CFR §§ 73.2080(f)(2), FCC Form 397, Section III.

<sup>11</sup> *See infra* para. 5.

<sup>12</sup> *See infra* note 15.

<sup>13</sup> *See* Form 397, Section I (querying "Does your station employment unit employ fewer than five full-time employees, if television, or fewer than eleven full-time employees, if radio?" and requiring licensees to check "Yes" or "No." Section I then states "If yes, you 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. You do not have to complete the rest of this form.").

<sup>14</sup> FCC Form 397, Section II.

<sup>15</sup> *See* FCC Form 396, at 3, available at <https://transition.fcc.gov/Forms/Form396/396.pdf>. All broadcast stations must file Form 396 every eight years on the same date that they apply for license renewal. 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

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4. Third, all stations subject to mid-term reviews must attach to Form 397 copies of their two most recent annual EEO public file reports.<sup>16</sup> Separately, pursuant to Section 73.2080(c)(6) of the Commission's rules, each broadcast station must place its EEO public file report both in its public inspection file<sup>17</sup> and on its website, if it has one, on an annual basis.<sup>18</sup> The report must be retained in the public file until the station's next license renewal is granted.<sup>19</sup>

### III. DISCUSSION

5. We tentatively conclude that eliminating Form 397 will advance the Commission's goal of reducing unnecessary regulatory burdens without undermining our statutorily-required mid-term reviews of broadcaster compliance with the EEO rules. As mentioned above, nearly all the information in Form 397, such as the name of a station official with responsibility for compliance with the Commission's EEO rules and copies of a station's annual public file reports, is also available in stations' public inspection files.<sup>20</sup> The only piece of information required by Form 397 that is not, to date, available in the public inspection file is whether the station has enough full-time employees to trigger a mid-term review. As discussed below, however, we do not believe that the filing of the Form 397 is the only means available by which to obtain this information. We therefore agree with NAB and other

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responsible for EEO compliance, and stations with fewer than five employees are only required to fill out a truncated version of Form 396.

<sup>16</sup> FCC 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).

<sup>17</sup> All television broadcast stations maintain their public files online in a central, Commission-hosted database, which can be accessed at <https://publicfiles.fcc.gov/>. *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Second Report and Order, 27 FCC Rcd 4535 (2012). Beginning on March 1, 2018, all radio broadcast stations will be required to do so as well. *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) (expanding the list of entities required to transition their public inspection file to the Commission's online database to cable operators, satellite TV providers, and broadcast and satellite radio licensees, and announcing the March 1, 2018 transition deadline for broadcast radio stations other than commercial stations in top 50 markets with five or more full-time employees).

<sup>18</sup> We note that under 47 CFR § 73.2080(d), stations in small employment units with fewer than five employees are exempt from this requirement.

<sup>19</sup> 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") and (d) (exempting small stations with fewer than five full-time employees). See *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").

<sup>20</sup> See *supra* note 15.

commenters that, in light of the nearly-complete transition to online public inspection files, Form 397 is no longer needed to facilitate implementation of the Commission's mid-term review obligations.<sup>21</sup> We therefore tentatively agree with commenters who assert that requiring broadcasters to file Form 397 has become "redundant and unnecessarily burdensome."<sup>22</sup>

6. We also tentatively conclude that eliminating Form 397 is consistent with Section 334 of the Act. As an initial matter, because Section 334 applies expressly to "television broadcast station licensees," it does not implicate Commission regulation of radio licensees.<sup>23</sup> Specifically, Section 334(a) only limits changes to certain Commission EEO regulations governing television; it 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."<sup>24</sup> The legislative history identifies those forms as FCC Forms 395-B and 396.<sup>25</sup> Indeed, as noted above, the Commission originally adopted Form 397 in 2000, eight years after Congress enacted Section 334 of the Act.<sup>26</sup> Accordingly, based on the statutory language and legislative history, we tentatively conclude that Form 397 is not subject to the statutory limitation on revisions found in Section 334(a) of the Act.

7. As discussed above, Section 334(b) directed the Commission to revise its regulations to "require a midterm review of television broadcast station licensees' employment practices" and to "inform such licensees of necessary improvements in recruitment practices identified as a consequence of such review."<sup>27</sup> However, this provision does not require the Commission to adopt Form 397 and does not prohibit the Commission from revising or eliminating it. Because, among other reasons, the Commission will continue to conduct mid-term reviews of broadcast licensees' employment practices even if we eliminate Form 397,<sup>28</sup> we tentatively conclude that Section 334(b) does not bar the Commission from modifying or eliminating the Form. We also tentatively conclude that Section 334(c) does not preclude the Commission from eliminating Form 397. Considered in context, subsection (c) is most reasonably read as an exception to subsection (a)'s limitation prohibiting the Commission from

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<sup>21</sup> For example, NAB maintains that "elimination of the mid-term reporting requirement will have no effect on broadcasters' obligations to comply with the substantive EEO requirements, or reduce licensees' other EEO recordkeeping and reporting requirements." NAB Comments at 18-19. *See* MMTTC Reply at 1 (quoting NAB's Comments).

<sup>22</sup> Nexstar Broadcasting Comments at 13-14. *See, e.g.,* Affiliates Associations Comments at 9 ("The content of these reports entirely duplicates information contained in stations' annual public file reports—which are required to be posted both in station online public files and on station websites...."); Joint Radio Commenters at 3 ("While these requirements may have been appropriate to aid in the Commission's evaluation of station EEO practices prior to the implementation of electronic public files, they are ... duplicative now that EEO reports are filed with the Commission in the parties' online public files") (internal quotations omitted); NAB Comments at 18 ("Given the move to online public files, the required information is already available on the FCC's website, as licensees' annual EEO Public File Reports are included in their online public files and are thus easily available to the public.").

<sup>23</sup> *See supra* note 4; 47 U.S.C. § 334(b).

<sup>24</sup> 47 U.S.C. § 334(a).

<sup>25</sup> *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").

<sup>26</sup> *See supra* note 8.

<sup>27</sup> 47 U.S.C. § 334(b).

<sup>28</sup> One commenter in the media modernization docket has expressed concern that this proceeding could result in the elimination of the review itself. *See Common Cause Ex Parte*. As stated above, however, the Commission is committed to its statutory duty to conduct midterm reviews of licensees' employment practices.

revising the 1992 EEO rules.<sup>29</sup> While 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.”<sup>30</sup> Because the limitation in (a), by its terms, does not apply to Form 397, neither does the exception to (a) that Congress carved out, as reflected in subsection (c). We seek comment on the tentative conclusions related to these statutory interpretations.

8. We also seek comment on how the Commission should identify which stations are subject to a mid-term review, absent Form 397. Commission staff currently conducts mid-term reviews of stations that self-identify as subject to the mid-term review rule by filing Form 397. NAB proposes two possible solutions to identify stations subject to mid-term review, and we seek comment on these suggestions as well as any other approach that would allow such stations to be identified with the least necessary expenditure of resources by both regulatees and the Commission. NAB’s first proposal is to require all subject stations to indicate whether they are subject to a mid-term review on their annual EEO public file report.<sup>31</sup> We note that this proposal would not provide information in a format that easily could be aggregated by Commission staff and potentially would require staff to manually review each station’s EEO public file reports prior to the mid-term review period to determine which stations are subject to mid-term review. These reports do not follow a prescribed uniform structure, so this information could appear in different locations and in different formats in each report. Although it appears that the costs of including this information on the annual EEO report would likely be *de minimis*, we seek comment on the scope of any potential costs to licensees. Would this approach constitute an overall reduction in the costs incurred by licensees with respect to mid-term reviews?

9. Alternatively, NAB suggests modifying the online public file database itself to require all stations to indicate whether they are subject to a mid-term review as a prerequisite to filing their annual EEO public file report.<sup>32</sup> If we modify the online public file database to include this information, should we adopt NAB’s proposed prerequisite approach, such as 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, or should we make some other change? Any such modification to the online file would impose information technology resource costs on the Commission and new burdens on broadcast licensees. What would be the scope of these costs for licensees? Would this approach constitute an overall reduction in the costs incurred by licensees with respect to mid-term reviews? In proposing alternatives to Form 397, commenters should keep in mind that our goal is to reduce the regulatory burden on regulatees while at the same time minimizing the administrative burden and costs on the Commission in its effort to satisfy the statutory objectives of Section 334 of the Act.

10. Additionally, we seek comment on whether we should require stations to designate a point of contact responsible for a station’s EEO compliance on a more routine basis, if we eliminate Form 397. As noted above, point-of-contact information will continue to be provided through a station’s Form 396. Given that Form 396 is filed only once every eight years, however, should we specify a means for stations to update their EEO points of contact more frequently? For example, should we require this information to be included in a station’s annual EEO public file report? Are there other options we should consider, such as requiring this information to be included in a station’s online public file?

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<sup>29</sup> See 47 U.S.C. § 334(c) (“[t]he Commission may revise the regulations described in subsection (a)”).

<sup>30</sup> 47 U.S.C. § 334(c).

<sup>31</sup> Letter from Larry Walke, Assoc. General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-105, at 1 (filed Dec. 21, 2017) (NAB Dec. 21 *Ex Parte*). NAB indicates that it prefers this approach. Letter from Erin Dozier, Senior Vice President and Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary FCC, MB Docket No. 17-105, at 1 (filed Jan. 18, 2018).

<sup>32</sup> NAB Dec. 21 *Ex Parte* at 1-2.

Alternatively, should we conclude that the requirement to include a specific EEO point of contact in Form 396 is sufficient?

11. We also seek input on the relative costs and benefits of Form 397 as a means to facilitate mid-term reviews. We ask that parties explain how any benefits derived from the Form compare with the costs. Finally, we seek comment on the FCC's track record on EEO enforcement and how the agency can make improvements to EEO compliance and enforcement. Beyond the mid-term review, would elimination of Form 397 impact the FCC's ability to ensure compliance and enforcement of EEO rules, and if so, how? Similarly, if Form 397 were eliminated, what other mechanisms will the FCC have to monitor and enforce its EEO rules?

#### IV. PROCEDURAL MATTERS

##### A. Initial Regulatory Flexibility Act Analysis

12. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>33</sup> the Commission has prepared an Initial Regulatory Flexibility Act Analysis (IRFA) relating to this NPRM. The IRFA is set forth in Appendix B.

##### B. Initial Paperwork Reduction Act Analysis

13. This document contains new information collection requirements. It seeks comment on whether and how Commission rules would need to be revised if Form 397 is eliminated, so that Commission staff would be able to determine which broadcast stations are subject to the mid-term review of employment practices, and the name and title of station employees responsible for EEO compliance. The Commission, as part of its continuing efforts to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

##### C. Ex Parte Rules

14. Permit-But-Disclose. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.<sup>34</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment

<sup>33</sup> 5 U.S.C. § 603. The RFA, 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).

<sup>34</sup> 47 CFR §§ 1.1200 *et seq.*

filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

#### D. Filing Requirements

15. Comments and Replies. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12<sup>th</sup> St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

16. Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., CY-A257, Washington, D.C. 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

17. People with Disabilities. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

#### E. Additional Information

18. For additional information on this proceeding, contact Jonathan Mark of the Policy Division, Media Bureau, at [Jonathan.Mark@fcc.gov](mailto:Jonathan.Mark@fcc.gov) or (202) 418-2120.

### V. ORDERING CLAUSES

19. 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 Notice of Proposed Rulemaking **IS ADOPTED**.

20. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed

Rulemaking, including the Initial Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## Proposed Rule Changes

Note: For ease of review, the proposed rule changes are noted below with additions in bold underlined text.

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, 303, 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 ~~more than ten~~ **11 or more** full-time employees four years following the station's most recent license expiration date as specified in §73.1020. ~~Each such licensee is required to file with the Commission the Broadcast Mid Term Report (FCC Form 397) four months prior to that date.~~ 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** ~~Form 397, its Report should~~ cover the licensee's EEO recruitment activity during the period starting with the date it acquired the station.

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## APPENDIX B

## Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA)<sup>1</sup> the Commission has prepared this Initial Regulatory Flexibility Act Analysis (IRFA) concerning the possible significant economic impact on small entities by the rules proposed in this Notice of Proposed Rulemaking (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rule Changes**

2. The proposed rule changes stem from a Public Notice issued by the Commission in May 2017 launching an initiative to modernize the Commission's media regulations.<sup>4</sup> Numerous parties in that proceeding argued for elimination of the recordkeeping requirement at issue as redundant and unnecessary. The NPRM proposes to eliminate a provision of the Commission's rules that obligate 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 NPRM proposes to eliminate 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.<sup>5</sup> This proposal is intended to reduce outdated regulations and unnecessary regulatory burdens that can impede competition and innovation in media markets. The NPRM also seeks comment on whether it will be necessary to make other changes to Section 73.2080 or the rules governing the online public file in order for Commission staff to determine which stations are subject to the statutory mid-term review of employment practices and the name and title of station employees responsible for EEO compliance.

**B. Legal Basis**

4. The proposed action is authorized pursuant to 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.

**C. Description and Estimates of the Number of Small Entities to Which the Proposed Rules Will Apply**

5. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>6</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small

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<sup>1</sup> 5 U.S.C. § 603. The RFA, 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).

<sup>2</sup> 5 U.S.C. § 603(a).

<sup>3</sup> *Id.*

<sup>4</sup> *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).

<sup>5</sup> 47 CFR § 73.2080(f)(2).

<sup>6</sup> 5 U.S.C. § 603(b)(3).

organization,” and “small governmental jurisdiction.”<sup>7</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>8</sup> 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.<sup>9</sup> The rules proposed herein will directly affect certain small television and radio broadcast stations, and cable entities. Below is a description of these small entities, as well as an estimate of the number of such small entities, where feasible.

6. *Television Broadcasting.* This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”<sup>10</sup> These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.<sup>11</sup> 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.<sup>12</sup> The 2012 Economic Census reports that 751 firms in this category operated in that year. Of that number, 656 had annual receipts of \$25,000,000 or less.<sup>13</sup> Based on this data, we estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

7. In addition, the Commission has estimated the number of licensed commercial television stations to be 1,384.<sup>14</sup> Of this total, 1,264 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 February 24, 2017. 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 394.<sup>15</sup> The Commission, however, does not compile and does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

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<sup>7</sup> 5 U.S.C. § 601(6).

<sup>8</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 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.” 5 U.S.C. § 601(3).

<sup>9</sup> 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission’s statistical account of television stations may be over-inclusive.

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

<sup>11</sup> *Id.*

<sup>12</sup> 13 CFR § 121.201; 2012 NAICS Code 515120.

<sup>13</sup> 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](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table).

<sup>14</sup> FCC News Release, *Broadcast Station Totals as of December 31, 2016* (rel. Jan. 5, 2017), <https://www.fcc.gov/document/broadcast-station-totals-december-31-2016>.

<sup>15</sup> *Id.*

8. We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations<sup>16</sup> 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.

9. There are also 417 Class A stations.<sup>17</sup> Given the nature of this service, we will presume that all 417 of these stations qualify as small entities under the above SBA small business size standard.

10. *Radio Stations.* This economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public.”<sup>18</sup> The SBA has created the following small business size standard for this category: those having \$38.5 million or less in annual receipts.<sup>19</sup> Census data for 2012 shows that 2,849 firms in this category operated in that year.<sup>20</sup> Of this number, 2,806 firms had annual receipts of less than \$25,000,000.<sup>21</sup> Because the Census has no additional classifications that could serve as a basis for determining the number of stations whose receipts exceeded \$38.5 million in that year, we conclude that the majority of television broadcast stations were small under the applicable SBA size standard.

11. Apart from the U.S. Census, the Commission has estimated the number of licensed commercial AM radio stations to be 4,486 stations<sup>22</sup> and the number of commercial FM radio stations to be 6,755, for a total number of 11,241.<sup>23</sup> Of this total, 9,898 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) in October 2014. In addition, the Commission has estimated the number of noncommercial

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<sup>16</sup> “[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).

<sup>17</sup> See FCC News Release, *Broadcast Station Totals as of June 30, 2017* (rel. July 11, 2017).

<sup>18</sup> 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.”

<sup>19</sup> 13 CFR § 121.201; NAICS code 515112.

<sup>20</sup> 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](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table).

<sup>21</sup> *Id.*

<sup>22</sup> This number is derived from subtracting the total number of noncommercial educational stations (204) from the total number of licensed AM stations (4690). See <https://transition.fcc.gov/fcc-bin/amq?freq=530&fre2=1700&type=2&edu=1&list=1&ThisTab=Results+to+This+Page%2FTab&size=9>; <https://transition.fcc.gov/fcc-bin/amq?freq=530&fre2=1700&type=2&edu=0&list=1&country=US&ThisTab=Results+to+This+Page%2FTab&size=9> (visited on Aug. 30, 2017).

<sup>23</sup> *Broadcast Station Totals as of June 30, 2017*, Press Release (MB rel. July 11, 2017) (*Broadcast Station Totals*) at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-328096A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-328096A1.pdf).

educational FM radio stations to be 4,111.<sup>24</sup> NCE stations are non-profit, and therefore considered to be small entities.<sup>25</sup> Therefore, we estimate that the majority of radio broadcast stations are small entities.

12. We note again, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations<sup>26</sup> must be included. Because we do not include or aggregate revenues from affiliated companies in determining whether an entity meets the applicable revenue threshold, our estimate of the number of small radio broadcast stations affected is likely overstated. In addition, as noted above, one element of the definition of “small business” is 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 radio broadcast station is dominant in its field of operation. Accordingly, our estimate of small radio stations potentially affected by the proposed rules includes those that could be dominant in their field of operation. For this reason, such estimate likely is over-inclusive.

#### **D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

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

14. *Reporting Requirements.* The NPRM does not propose to adopt reporting requirements.

15. *Recordkeeping Requirements.* The NPRM does not propose to adopt recordkeeping requirements.

16. *Other Compliance Requirements.* The NPRM does not propose to adopt other compliance requirements. It does seek comment on whether and how Commission rules would need to be revised if Form 397 is eliminated, so that Commission staff would be able to determine which broadcast stations are subject to the mid-term review of employment practices and the name and title of station employees responsible for EEO compliance.

17. The proposed rule revisions, if adopted, will reduce the compliance burden on all affected Commission regulatees, including small entities, by eliminating the requirement to file Form 397. No party in the proceeding has opposed the proposals set forth in the NPRM. We thus find it reasonable to conclude that the benefits of eliminating the rules at issue will outweigh any costs.

#### **E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

18. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed 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 and reporting requirements under the rule for such 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.<sup>27</sup>

19. The NPRM proposes to eliminate the obligation, imposed on certain broadcasters, to file a Broadcast Mid-Term Report on employment practices. Eliminating this requirement is intended to

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<sup>24</sup> *Broadcast Station Totals, supra.*

<sup>25</sup> 5 U.S.C. §§ 601(4), (6).

<sup>26</sup> “[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).

<sup>27</sup> 5 U.S.C. § 603(c)(1)-(c)(4).

modernize the Commission's regulations and reduce costs and recordkeeping burdens for affected entities, including small entities. Under the current rules, affected entities must expend time and resources gathering and filing consolidated information that is largely already otherwise supplied to the Commission. As noted, the proposed rule revisions are unopposed in the media modernization docket. Thus, we anticipate that affected small entities only stand to benefit from such revisions, if adopted.

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule**

20. None.

**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

In 2002, members of the United States Winter Olympic Team won 34 medals for their exemplary performances at the Salt Lake City Games. That same year, the FCC adopted the current Form 397, which certain broadcast television stations are required to file around the mid-point of their license term, providing information about their employment practices. At the time, some athletes competing now in PyeongChang, South Korea, like gold medalist American snowboarder Red Gerard, were barely old enough to walk.

Much has changed in the 16 years since Salt Lake City—and not just in the world of sports. For one thing, the FCC now requires broadcasters to maintain online public inspection files. And by March 1 of this year, broadcasters' transition to this online Commission-hosted database will be complete.

Why is this relevant? Because nearly all of the information broadcasters are required to provide on Form 397 is now readily available in their online public files. This appears to render the filing obligation redundant and unnecessarily burdensome. So today's *Notice* proposes to get rid of it. Even absent this filing obligation, the FCC will still be statutorily required to conduct mid-term reviews of television stations' compliance with our equal employment opportunity (EEO) rules.

I'd like to thank the staff who worked on this *Notice*: from the Media Bureau, Steven Broeckaert, Michelle Carey, Lyle Elder, Martha Heller, Jonathan Mark, Mary Beth Murphy, Holly Saurer, and Sarah Whitesell, and from the Office of General Counsel, Susan Aaron and Dave Konczal. When it comes to modernizing the Commission's media rules, you are continuing to go for the gold each and every month.

**STATEMENT OF  
COMMISSIONER MIGNON L. CLYBURN**

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

On the surface, elimination of the obligation to file the Broadcast Mid-Term Report, otherwise known as Form 397, seems innocuous, because it contains information about a broadcasters' equal employment opportunity (EEO) practices that can be found in other places, including a stations' public inspection files. But if you were to slow down for a moment and look at what these reports show, you will discover a stunning lack of diversity across the broadcast industry. And no matter by what platform this information is reported, the question that deserves an answer is this: Is the FCC complying with its statutory obligation to ensure that broadcasters are seeking and attracting diverse employees, including by maintaining an EEO recruitment program?

In an ex parte filed by Common Cause last week, I was struck by this statement: “[E]liminating EEO reporting requirements sends a bad message the agency is abandoning its public interest responsibilities.” This prompted me to ask whether the FCC’s newly established Advisory Committee on Diversity and Digital Empowerment was formally consulted before teeing up today’s Notice of Proposed Rulemaking (NPRM)?

To this I say: If we are going to take a weedwhacker to EEO reporting obligations that the majority deems to be “unnecessary” or “unduly burdensome,” then we ought to simultaneously discuss compliance practices, in order to ensure that the rules we have on the books are effectively enforced.

So, I asked that we seek comment on the FCC’s track record on EEO enforcement and how the agency can make improvements to EEO compliance and enforcement. I also asked that we determine whether elimination of Form 397 will impact the FCC’s ability to ensure compliance and enforcement of EEO rules, and if so, how? Similarly, if Form 397 is eliminated, what other mechanisms will the FCC have to monitor and enforce its EEO rules? I am grateful that my colleagues have agreed to include these questions in the NPRM.

For these reasons, I will vote to approve and look forward to reviewing the record that develops from today’s NPRM.

**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*

Kudos are due to Chairman Pai and his staff for initiating this proceeding. I originally targeted Form 397 when the Commission teed up its media modernization review, as a reform that was long overdue. Form 397 requires simply a name and a copy of the annual EEO reports for the last two years. But, now that EEO reports are filed with the Commission in parties' online public files, this form has been made irrelevant. I am pleased to see that in today's item the Commission tentatively concludes that Form 397 is no longer necessary. This is the right outcome. I look forward to reviewing the record for comments on whether and, if necessary, how best to address the covered station issue.

**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

On March 1st, the Commission will complete the transition to online public files for all broadcasters subject to public file requirements. So by next week, every one of these public files will be available in a central database hosted by the FCC. Given the ease with which the Commission can access these files, there is no longer any reason to continue requiring broadcasters to file redundant paperwork. In fact, I heard from one broadcaster earlier this week when I visited their station in Mississippi about the still significant paperwork burdens the FCC imposes on local broadcasters, and how it diverts limited resources away from other efforts.

The FCC's Form 397 is a case in point. In the past, this form was used to facilitate a mid-term review of a station's employment practices to ensure compliance with federal Equal Employment Opportunity rules. But now, all of the compliance information will be available in broadcasters' online public files, so Form 397 is largely duplicative.

The one piece of information in Form 397 that is not duplicated in the public file is the number of full-time employees a station maintains, which determines whether it is subject to EEO rules. So we rightly seek comment on ways that the Commission can continue to identify stations subject to those EEO rules. The record that has been developed so far indicates that we can continue to carry out our important obligations under the EEO laws while reducing the costs of filing requirements. So I look forward to reviewing the comments that all stakeholders provide in response to this Notice of Proposed Rulemaking.

I thank the Media Bureau for its work on this item. It 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

In this rulemaking we seek comment on the Broadcast Mid-Term Report, known as Form 397. It's fair to ask if this format is still necessary when so much of the information it gathers is already available in the public file.

But there is no question about what remains necessary—and that's compliance with the law. Under the Communications Act, this agency has a duty to develop rules to support a mid-term review of the employment practices of broadcast licensees. This is a responsibility we must take seriously and on that point I think the text of this rulemaking misses the mark. It focuses on the need to reduce the burdens of filers but neglects to emphasize what is most essential—the need to honor our Equal Employment Opportunity policies.

Nonetheless, I am hopeful that we can use this rulemaking to modernize reporting duties and reaffirm our commitment to increasing diversity in media. Because on that last score, we have work to do.