

**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

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION

The National Association of Broadcasters (NAB)¹ submits reply comments on the above-captioned Notice of Proposed Rulemaking,² in which the Commission proposes to eliminate the equal employment opportunity (EEO) Broadcast Mid-Term Report (Form 397).³ As discussed in NAB's initial comments,⁴ we agree that eliminating Form 397 will reduce unnecessary administrative burdens on broadcasters, without impacting the Commission's ability to conduct a mid-term review of broadcasters' compliance with the EEO rules.⁵

¹ NAB is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2), Modernization of Media Regulation Initiative*, Notice of Proposed Rulemaking, MB Docket Nos. 18-23, 17-105 (Feb. 22, 2018) (Notice).

³ 47 C.F.R. § 73.2080(f)(2); FCC Form 397, available at <https://transition.fcc.gov/Forms/Form397/397.pdf>.

⁴ Comments of the National Association of Broadcasters, MB Docket Nos. 18-23, 17-105 (Apr. 30, 2018) (NAB Comments).

⁵ Notice at ¶ 5.

The proposal to eliminate Form 397 is unopposed in the record.⁶ Commenters note that all the relevant information about a station's EEO-related efforts needed for the mid-term EEO review is already available in the Commission's online public inspection file, on stations' Annual EEO Public File Reports.⁷ The only item on Form 397 that is not available in the online public file is whether a station has the requisite number of employees to be subject to a mid-term review, and this can easily be provided through other means.⁸ Thus, Form 397 is duplicative and deleting it would further the Commission's goal in the Media Regulation Modernization Initiative to reduce unnecessary administrative obligations.⁹

An informal group, self-styled the "EEO Supporters," filed comments on a wholly different issue, urging the Commission to revive the Annual Employment Report (Form 395-B) as part of an entirely new approach to determining whether a station's recruitment practices are discriminatory.¹⁰ Form 395-B records data on the racial and gender composition of a broadcasters' staff.¹¹ However, the Commission has not collected this Form for nearly two decades due to litigation over the EEO rules and concerns about the

⁶ Comments of Nexstar Broadcasting, Inc., MB Docket Nos. 18-23, 17-105 (Apr. 30, 2018) (Nexstar Comments); Letter from Joshua Pila, General Counsel, Local Media Group, Meredith Corporation, to Marlene Dortch, Secretary, FCC, MB Docket Nos. 18-23, 17-105 (Apr. 30, 2018) (Pila Letter).

⁷ Pila Letter at 1; Nexstar Comments at 2; NAB Comments at 1-2.

⁸ NAB Comments at 4 (suggesting that broadcasters could indicate staff size on their Annual EEO Public File Reports).

⁹ Nexstar Comments at 3; *Commission Launches Modernization of Media Regulation Initiative*, Public Notice, 32 FCC Rcd 4406 (MB 2017).

¹⁰ Comments of EEO Supporters, MB Docket Nos. 18-23, 17-105, 98-204, 16-410 (Apr. 30, 2018), at 2-4 (EEO Supporters Comments).

¹¹ Broadcast Station Annual Employment Report (FCC Form 395-B), available at <https://transition.fcc.gov/Forms/Form395B/395b.pdf>.

confidentiality of the data included on the report. Again, this issue has nothing to do with eliminating Form 397.

In 1998, the U.S. Court of Appeals for the D.C. Circuit rejected the EEO rules because the Commission's approach would impermissibly pressure broadcasters to recruit women and minorities in violation of the equal protection clause of the Fifth Amendment.¹² The Commission modified the rules, but in 2001 the court also remanded this version on similar constitutional grounds.¹³ A significant factor in both cases was the requirement that broadcasters collect and publicly identify the ethnicity, race and gender of station employees. In 2002, the Commission again reshaped the EEO rules, this time focusing on stations' broad outreach and wide dissemination of vacancy information, instead of workforce composition, to avoid the earlier constitutional problems.¹⁴ Since the current rules became effective in 2003, the Commission has taken steps to reinstate Form 395-B, but has not collected the Form while it considers how to maintain confidentiality of the data, to avoid the earlier constitutional concerns.¹⁵

Rather than answer the noticed question about the EEO Mid-Term Report, the EEO Supporters ask the FCC to completely upend the substantive EEO rules.¹⁶ The EEO

¹² *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355-56 (D.C. Cir. 1998), *rehearing denied*, 154 F.3d 487 (D.C. Cir. 1998), *rehearing en banc denied*, 154 F.3d 494 (D.C. Cir. 1998).

¹³ *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001), *rehearing denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied sub nom*, *MMTC v. FCC*, 534 U.S. 1113 (2002).

¹⁴ *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Second Report and Order, 17 FCC Rcd 24018 (2002).

¹⁵ *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, 9978 (2004).

¹⁶ EEO Supporters Comments at 2-4.

Supporters suggested approach, however, would invoke the exact same constitutional problems that felled the previous EEO rules by placing unlawful pressure on station hiring decisions.

The EEO Supporters' comments also should be disregarded as unrelated to the Notice. The EEO Supporters attribute their comments to one sentence in the Notice where the Commission seeks comment on "the FCC's track record on EEO enforcement and how the agency can make improvements to EEO compliance and enforcement."¹⁷ However, read in context, the Commission's clear purpose is to solicit input on methods and procedures for improving its oversight of broadcaster's EEO efforts, not proposals to overhaul the substantive EEO rules or create an entirely new approach to assessing whether a station's recruitment practices are discriminatory. Indeed, the following two sentences in the Notice ask whether eliminating Form 397 will impact the Commission's ability to ensure EEO compliance, and if the Form is eliminated, what other mechanisms will it have to monitor and enforce the EEO rules.¹⁸

Accordingly, NAB supports the Commission's proposal to eliminate the EEO Mid-Term Report as an efficient step to reducing unnecessary administrative burdens on broadcasters without impacting the Commission's ability to monitor stations' EEO efforts or broadcasters' compliance with the substantive EEO rules. NAB looks forward to working with the

¹⁷ *Id.* at 1 citing Notice at ¶ 11.

¹⁸ Notice at ¶ 11.

Commission on additional efforts to modernize and streamline the Commission's media regulations.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal line extending to the right.

Rick Kaplan
Erin L. Dozier
Larry Walke

May 15, 2018