

**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

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.

this item¹⁶ and the underlying record¹⁷ that key EEO obligations remain unmet. Recognizing this, I 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.

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).

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.