

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

In the Matter of)
)
Review of EEO Compliance and Enforcement in) MB Docket No. 19-177
Broadcast and Multichannel Video Programming)
Industries)

NOTICE OF PROPOSED RULEMAKING

Adopted: June 12, 2019

Released: June 21, 2019

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: Commissioners Rosenworcel and Starks concurring and issuing separate statements.

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (NPRM), we seek comment on how the Commission can make improvements to equal employment opportunity (EEO) compliance and enforcement. Specifically, this NPRM responds to issues raised in the comments filed in the recent proceeding to eliminate the obligation to file the Broadcast Mid-term Report (FCC Form 397), which was undertaken as part of the Commission’s *Modernization of Media Regulation Initiative*. In the *Form 397 Elimination Order*, the Commission committed to seek comment on these issues within 90 days of adoption of that order.¹ This NPRM addresses that commitment.

II. BACKGROUND

2. The Commission has administered regulations governing the EEO responsibilities of broadcast licensees since 1969,² and of cable television operators since 1972.³ The Commission’s EEO rules prohibit discrimination on the basis of race, color, religion, national origin or sex (and for Multichannel Video Programming Distributors, or MVPDs, also age), and require broadcasters and MVPDs to provide equal employment opportunities.⁴ In addition to these broad dictates applicable to all full-power radio and television broadcasters, Low Power TV, Class A TV and MVPDs, employment units of a specific size in each industry must also follow an EEO program. Specifically, the rules require that each broadcast station (or station employment unit) with five or more full-time employees, and each MVPD employment unit with six or more full-time employees establish, maintain, and carry out a

¹ See *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2) and Modernization of Media Regulation Initiative*, MB Docket Nos. 18-23 and 17-105, Report and Order, FCC 19-10, at para. 10 (Feb. 15, 2019) (*Form 397 Elimination Order*).

² See *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Employment Practices*, Docket No. 18244, RM 1144, Report and Order, 18 FCC 2d 240 (1969).

³ See *Amendment of the Commission’s Rules to Require Operators of Community Antenna Television Systems and Community Antenna Relay Systems to Show Nondiscrimination in Their Employment Practices*, Docket No. 19246, Report and Order, 34 FCC 2d 186 (1972).

⁴ 47 CFR §§ 73.2080(a); 76.73(a).

positive continuing program to ensure equal opportunity and nondiscrimination in employment policies and practice.⁵

3. Among other things, EEO recruitment rules require an employment unit to use recruitment sources for each full-time vacancy that, in its reasonable and good faith judgment, are sufficient to widely disseminate information about the job opening.⁶ Broadcasters and MVPDs must use a three pronged approach to recruit for full-time vacancies: 1) widely disseminate information concerning each full time (30 hours or more) job vacancy, except for a vacancy filled in exigent circumstances, 2) provide vacancy notices to recruiting organizations that request them, and 3) complete longer-term recruitment initiatives within a two-year period.⁷ In 2017, in response to a broadcaster petition that received wide support from the industry and other stakeholders, including the Multicultural Media, Telecom and Internet Council (MMTC),⁸ the Commission updated its EEO policy to allow online job postings to be used as a sole recruitment tool to meet the “widely disseminate” prong of its recruiting rules.⁹

4. In addition to general EEO efforts, the Commission requires broadcasters and MVPDs to undertake specific EEO recruiting initiatives and keep records sufficient to show compliance with these initiatives.¹⁰ To enforce its EEO rules, the Commission may conduct inquiries of broadcasters and MVPDs at random or if it has evidence of a violation.¹¹ In addition, the Commission conducts random audits each year of approximately five percent of broadcasters, and conducts more intensive reviews of MVPD compliance practices once every five years.¹² The Commission can issue appropriate sanctions and remedies for violations of its EEO rules.¹³ The public can also file EEO complaints with the Commission based on the contents of broadcaster and MVPD public files or allegations of rule violations.¹⁴ The Commission’s EEO enforcement¹⁵ and associated auditing responsibilities¹⁶ are key priorities.

⁵ *Id.* §§ 73.2080(b), (c); 76.73(b); 76.75.

⁶ *Id.* §§ 73.2080(c)(1)(i); 76.75(b)(1)(i).

⁷ *Id.* § 73.2080(c). The section provides a list of 16 longer-term initiatives from which broadcasters can choose, including hosting or participating in job fairs or establishing internship, scholarship, training or mentoring programs. *Id.* § 73.2080(c)(2)(i)-(xvi). MVPDs with more than ten full-time employees not located in smaller markets and MVPDs with six to ten full-time employees and/or located in smaller markets must complete two or one longer-term recruitment initiatives, respectively, in a one-year period. *Id.* § 76.75(b)(2).

⁸ See *Petition for Rulemaking Seeking to Allow the Sole Use of Internet Sources for FCC EEO Recruitment Requirement*, MB Docket No. 16-410, Declaratory Ruling, 32 FCC Rcd 3685, 3687, para. 5, n. 17 and 3689, para. 8., n.31 (2017) (*Internet Recruiting Declaratory Ruling*).

⁹ When adopting its EEO recruiting rules in 2002, the Commission was “unable to conclude that Internet usage has become sufficiently widespread to justify allowing it to be used as the sole recruitment source” but committed to monitoring the viability of the Internet as a recruiting source and considering petitions seeking to demonstrate changed circumstances sufficient to warrant a change in its policy. See *Internet Recruiting Declaratory Ruling*, 32 FCC Rcd 3685, para. 3, citing *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, 24051, para. 99 (2002) (*Second Report and Order and Third NPRM*). In 2017, the Commission concluded that “computer access has become sufficient ‘so that it could be reliably assumed that an Internet job posting will be readily available to all segments of a community’ if posted on a widely available site.” *Internet Recruiting Declaratory Ruling*, 32 FCC Rcd at 3688, para. 6, citing *Second Report and Order and Third NPRM*, 17 FCC Rcd at 24050, para. 95.

¹⁰ 47 CFR §§ 73.2080(c)(1)-(5); 76.75(b), (c). Broadcasters and MVPD units subject to the recruiting requirements also must post an annual EEO report describing their EEO outreach efforts in their online public files on their web sites and in the online public files hosted on the Commission’s web site. *Id.* §§ 73.2080(f)(4); 73.3526(c); 76.77(d); 76.1702(a). MVPDs must also report annually on their EEO outreach efforts on FCC Form 396-C and these reports (continued....)

III. EEO ENFORCEMENT AND COMPLIANCE

5. We seek comment on the Commission's track record on EEO enforcement and whether the agency should make improvements to EEO compliance and enforcement.¹⁷ While the relevant comments in the Form 397 proceeding focused primarily on EEO enforcement and compliance in the broadcast industry, today's NPRM seeks comment on improvements to EEO compliance and enforcement for both broadcasters and MVPDs as well as the Commission's track record on EEO enforcement with respect to both categories of regulated entities.

6. With respect to the Commission's current EEO enforcement efforts, we invite commenters to assess their effectiveness. What elements of the Commission's EEO enforcement program are effective? What elements of the program are not effective? What elements could be improved and how could they be improved? Are there elements that should be added to the EEO enforcement program to increase its effectiveness? Are there elements that should be removed from the program because they are not effective?

7. In the Form 397 proceeding, a group of 34 organizations (EEO Supporters)¹⁸ offered several suggestions for improving the Commission's EEO enforcement.¹⁹ The Commission already has implemented one of these suggestions, namely the relocation of the Commission's EEO staff from the Media Bureau to the Enforcement Bureau.²⁰ The Commission recently completed the logistics of the relocation.²¹

8. With respect to enforcement, the EEO Supporters have also suggested that the Commission evaluate its audit program "to ensure that auditors have sufficient information to verify that hiring decisions were made *after* the job postings were made, not before-hand, and that audits are allowed to uncover discrimination at the points of recruitment, interviewing, and selection."²² We invite comment

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are placed in the Commission-hosted online public files. *Id.* § 76.77(d).

¹¹ *Id.* §§ 73.2080(f)(4); 76.77(d).

¹² *Id.* §§ 73.2080(f)(4); 76.77(d). *See also* 47 U.S.C. § 334(a), (b).

¹³ 47 CFR §§ 73.2080(g); 76.77(f).

¹⁴ *Id.* §§ 73.2080(f)(5); 76.77(e).

¹⁵ *See e.g.* *Cumulus Licensing, LLC*, Notice of Apparent Liability for Forfeiture, 32 FCC Rcd 10285 (MB 2017) (\$16,000 forfeiture proposed where broadcaster failed to recruit for vacancies, provide notification of vacancies, provide data and records of interviewees, include EEO records in public inspection files and self-assess its recruitment program); *Maryland Public Broadcasting Commission*, Order, 32 FCC Rcd 6579 (MB 2017) (adopting consent decree that required broadcaster to pay \$5,000 forfeiture and implement EEO compliance procedures); *Full Channel TV, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 27 FCC Rcd 3970 (MB 2012), *aff'd* Forfeiture Order, 31 FCC Rcd 7782 (MB 2016), *recon dismissed*, Memorandum Opinion and Order, 31 FCC Rcd 13439 (MB 2016) (\$11,000 forfeiture proposed where MVPD failed to recruit widely for vacancies, analyze its recruitment program, compile and maintain an EEO public file report, make EEO public file reports available for public inspection and place its EEO program information on its website.); *Fidelity Cablevision, Inc.*, Notice of Apparent Liability for Forfeiture, 31 FCC Rcd 8845 (MB 2016) (\$11,000 forfeiture proposed for when broadcaster failed to recruit widely for vacancies and self-assess its recruitment program); *Davidson Media Station*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, *aff'd* Forfeiture Order, 30 FCC Rcd 14262 (MB 2015) (\$5,000 forfeiture and reporting conditions proposed where broadcaster failed to recruit properly for vacancies and self-assess its recruitment program).

on this proposal. Is it necessary for us to modify our audit program to verify that hiring decisions were made after job openings were posted? If so, what modifications would be necessary? Are our current auditing procedures sufficient to uncover discrimination at the points of recruitment, interviewing, and selection? If not, how could we modify those procedures so that they would be sufficient? Any commenters should describe proposed modifications to our audit program with specificity, supply any data or studies indicating that such proposals would further the Commission's goal of nondiscrimination in employment, provide suggestions for overcoming any implementation difficulties, and compare the relative costs and benefits of such proposals.

9. Aside from exploring modifications to our audit program, are there other types of enforcement and compliance initiatives the Commission should explore to ensure that its EEO rules are an effective deterrent to discrimination in the broadcast and MVPD industries, including other initiatives previously suggested by the EEO Supporters? Again, commenters should explain any initiatives with specificity, supply any data or studies indicating that such proposals would be consistent with the U.S. Constitution and further the Commission goal of nondiscrimination in broadcaster and MVPD employment, and provide suggestions for overcoming any implementation difficulties.

IV. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Act Analysis

10. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),²³ the

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¹⁶ See e.g., *Media Bureau Commences 2019 EEO Audits*, Public Notice, DA 19-78 (MB 2019); *Media Bureau Continues 2018 EEO Audits*, Public Notice, 33 FCC Rcd 9768 (MB 2018); *Media Bureau Announces Deadline for MVPDs to File EEO Program Annual Reports and Identifies Those That Must Respond to Supplementary Investigation Questions*, 33 FCC Rcd 6312 (MB 2018); *Media Bureau Continues 2018 EEO Audits*, Public Notice, 33 FCC Rcd 6070 (MB 2018); *Media Bureau Continues 2018 EEO Audits*, Public Notice, 33 FCC Rcd 1890 (MB 2018); *Media Bureau Continues 2017 EEO Audits*, Public Notice, 32 FCC Rcd 4818 (MB 2017); *Media Bureau Continues EEO Audits*, Public Notice, 32 FCC Rcd 7636 (MB 2017); *Media Bureau Commences 2017 EEO Audits*, Public Notice, 32 FCC Rcd 1131 (MB 2017); *FCC Continues EEO Audits*, Public Notice, 31 FCC Rcd 11029 (MB 2016); *Media Bureau Reminds MVPDs That They Must File EEO Program Annual Reports by Sept. 30, 2016, and Identifies Those That Must Respond to Supplementary Investigation Questions*, Public Notice, 31 FCC Rcd 8746 (MB 2016); *FCC Commences 2016 EEO Audits*, Public Notice, 31 FCC Rcd 1263 (MB 2016); *FCC Continues EEO Audits*, Public Notice, 30 FCC Rcd 11010 (MB 2015); *Media Bureau Reminds MVPDs That They Must File EEO Program Annual Reports by Sept. 30, 2015, and Identifies Those That Must Respond to Supplementary Investigation Questions*, Public Notice, 30 FCC Rcd 8427 (MB 2015).

¹⁷ *Form 397 Elimination Order* at para. 10.

¹⁸ The 34 organizations are: Asian American Journalists Association, Blacks in Government, Common Cause, Dialogue on Diversity, Hispanic Technology and Telecommunications Partnership, International Black Broadcasters Association, League of United Latin American Citizens; MANA, A National Latina Organization; Multicultural

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Commission has prepared an Initial Regulatory Flexibility Act Analysis (IRFA) relating to this NPRM. The IRFA is set forth in Appendix.

B. Initial Paperwork Reduction Act Analysis

11. This document may contain new or modified information collection requirements. It seeks comment on whether and how Commission rules would need to be revised to improve equal employment opportunity (EEO) compliance and enforcement. 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

12. Permit-But-Disclose. This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.²⁴ 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

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Media, Telecom and Internet Council, National Action Network, National Asian American Coalition, National Association for the Advancement of Colored People, National Association of Black Journalists, National Association of Black Owned Broadcasters, National Association of Multicultural Digital Entrepreneurs, National Coalition on Black Civic Participation, National Council of Negro Women, National Diversity Coalition, National Hispanic Foundation for the Arts, National Indian Telecommunications Institute, National Newspaper Publishers Association, National Organization of Black County Officials, National Organization of Black Elected Legislative Women, National Puerto Rican Chamber of Commerce, National Urban League, National Utilities Diversity Council, Native American Journalists Association, Public Knowledge, Rainbow PUSH Coalition, Transformative Justice Coalition, U.S. Black Chambers, Inc.; Vision Maker Media, Women in Cable Telecommunications and LGBT Technology Partnership and Institute. Comments of the EEO Supporters, MB Docket Nos. 18-23 and 17-105, at Annex (rec. Apr. 30, 2018) (EEO Supporters Comments). *See also* Letter from David Honig, President Emeritus and Senior Advisor, Multicultural Media, Telecom and Internet Council to Marlene H. Dortch, Secretary, FCC at n.1, MB Docket Nos. 14-50, 09-182, 07-294, 04-256, 17-289, 98-204, 16-410, 18-23, and 17-105 (filed May 29, 2018).

¹⁹ *See generally*, EEO Supporters Comments.

²⁰ *FCC Equal Employment Opportunity Audit and Enforcement Team Deployment*, Order, 33 FCC Rcd 7504 (2018). *See also* EEO Supporters Comments at 5-6; Letter from Leadership Conference on Civil and Human Rights to Chairman Pai, FCC at 3, MB Docket Nos. 18-23 and 17-105, (filed June 21, 2018). The Leadership Conference letter also includes the following organizations: American Civil Liberties Union, Asian Americans Advancing Justice-AAJC, Common Cause, Communications Workers of America, NAACP, National Consumer Law Center, National Hispanic Media Coalition, National Urban League, OCA-Asian Pacific American Advocates, and United Church of Christ, OC Inc.

²¹ FCC, Equal Employment Opportunity Audit and Employment Team Deployment, Final Rule, 84 Fed. Reg. 9463 (Mar. 15, 2019).

²² EEO Supporters Comments at 5.

²³ 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).

²⁴ 47 CFR §§ 1.1200 *et seq.*

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 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

13. 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 12th 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.

14. 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 12th 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.

15. 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 or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

E. Additional Information

16. For additional information on this proceeding, contact Radhika Karmarkar of the Industrial Analysis Division, Media Bureau, at Radhika.Karmarkar@FCC.gov or (202) 418-1523.

V. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in sections 1, 4(i), 4(j), 334, and 634 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 334, and 554, this Notice of Proposed Rulemaking **IS ADOPTED**.

18. **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

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in this NPRM. The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments specified in 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).² In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

2. This NPRM seeks comment on how the Commission can make improvements to equal employment opportunity (EEO) compliance and enforcement.

B. Legal Basis

3. The proposed action is authorized under Sections 1, 4(i), 4(j), 334, and 634 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 334, and 554.

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

4. 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 rule revisions, if adopted.⁴ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁵ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act (SBA).⁶ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field

¹ 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). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

² 5 U.S.C. § 603(a).

³ *Id.*

⁴ 5 U.S.C. § 603(b)(3).

⁵ 5 U.S.C. § 601(6); *see infra* note 6 (explaining the definition of “small business” under 5 U.S.C. § 601(3)); *see* 5 U.S.C. § 601(4) (defining “small organization” as “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, 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(5) (defining “small governmental jurisdiction” as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register”).

⁶ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632(a)(1)). 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.” *Id.*

of operation; and (3) satisfies any additional criteria established by the SBA.⁷ Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

5. *Television Broadcasting.* This U.S. Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”⁸ These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.⁹ 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.¹⁰ The 2012 Economic Census reports that 751 firms in this category operated in that year. Of that number, 656 had annual receipts of \$25 million or less, 25 had annual receipts between \$25 million and \$49,999,999 and 70 had annual receipts of \$50 million or more.¹¹ Based on this data, we estimate that the majority of commercial television broadcast stations are small entities under the applicable size standard.

6. Additionally, the Commission has estimated the number of licensed commercial television stations to be 1383.¹² Of this total, 1282 stations (or 94.2%) had revenues of \$38.5 million or less in 2018, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on April 15, 2019, and therefore these stations qualify as small entities under the SBA definition. In addition, the Commission estimates the number of noncommercial educational stations to be 378.¹³ The Commission 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. There are also 387 Class A stations.¹⁴ Given the nature of this service, the Commission presumes that all of these stations qualify as small entities under the applicable SBA size standard.

7. *Radio Broadcasting.* This U.S. Economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public.”¹⁵ Programming may originate in the establishment’s 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.¹⁶ Economic Census data for 2012 show that 2,849 firms in this category operated in

⁷ 15 U.S.C. § 632(a)(1)-(2)(A).

⁸ U.S. Census Bureau, 2017 NAICS Definitions, “515120 Television Broadcasting,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁹ *Id.*

¹⁰ 13 C.F.R. § 121.201; 2012 NAICS code 515120.

¹¹ 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.

¹² Broadcast Station Totals as of March 31, 2019, News Release (MB Apr. 2, 2019) (March 31, 2019, Broadcast Station Totals), available at <https://www.fcc.gov/document/broadcast-station-totals-march-31-2019>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ U.S. Census Bureau, 2017 NAICS Definitions, “515112 Radio Stations,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

¹⁶ 13 C.F.R. § 121.201; 2017 NAICS code 515112.

that year.¹⁷ Of that number, 2,806 operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999 million and 26 with annual receipts of \$50 million or more.¹⁸ Based on this data, we estimate that the majority of commercial radio broadcast stations were small under the applicable SBA size standard.

8. The Commission has estimated the number of licensed commercial AM radio stations to be 4,613 and the number of commercial FM radio stations to be 6762 for a total of 11,375 commercial stations¹⁹ Of this total, 11,366 stations (or 99.9%) had revenues of \$38.5 million or less in 2018, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on April 15, 2019, and therefore these stations qualify as small entities under the SBA definition. In addition, there were 4139 noncommercial educational FM stations. The Commission 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.

9. In assessing whether a business concern qualifies as small under the above definition, business (control) affiliations²⁰ 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, an element of the definition of “small business” is that the 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 or television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which the proposed rules may apply does not exclude any radio or television station from the definition of small business on this basis and is therefore possibly over-inclusive.

10. *Cable Companies and Systems (Rate Regulation Standard)*. The Commission has also developed its own small business size standards for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers nationwide.²¹ In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.²² Industry data indicate that there are currently 4,300 active cable systems in the United States.²³ Of this total, 3,550 cable systems have fewer than 15,000 subscribers, and 750 systems have 15,000 or more subscribers.²⁴ Thus, we estimate that most cable systems are small entities.

11. *Cable System Operators (Telecommunications Act Standard)*. The Communications Act of 1934, as amended, also contains a size standard for a small cable system operator, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual

¹⁷ U.S. Census Bureau, U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515112 Radio Stations) https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515112.

¹⁸ *Id.*

¹⁹ March 31, 2019, Broadcast Station Totals.

²⁰ “[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 to power to control both.” 13 CFR § 121.103(a)(1).

²¹ 47 CFR § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

²² 47 CFR § 76.901(c).

²³ August 24, 2017 Report from the Media Bureau based on data contained in the Commission’s Cable Operations and Licensing System (COALS). See www.fcc.gov/coals.

²⁴ *Id.*

revenues in the aggregate exceed \$250,000,000.²⁵ There are approximately 50,504,642 cable video subscribers in the United States today.²⁶ Accordingly, an operator serving fewer than 505,046 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.²⁷ Based on available data, we find that all but six incumbent cable operators are small entities under this size standard.²⁸ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

12. We also note that there currently are 182 cable antenna relay service (CARS) licensees.²⁹ The Commission, however, neither requests nor collects information on whether CARS licensees are affiliated with entities whose gross annual revenues exceed \$250 million. Although some CARS licensees may be affiliated with entities whose gross annual revenues exceed \$250 million, we are unable at this time to estimate with greater precision the number of CARS licensees that would qualify as small cable operators under the definition in the Communications Act.

13. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"³⁰ which was developed for small wireline firms.³¹ Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.³² U.S. Economic Census data for 2012 indicate that in that year there were 3,117 firms operating businesses as wired telecommunications carriers. Of that 3,117, 3,059 operated with 999 or fewer employees. Based on this data, we estimate that a majority of operators of SMATV/PCO companies were small under the applicable SBA size standard.³³

14. *Direct Broadcast Satellite (DBS) Service.* DBS Service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic dish

²⁵ 47 U.S.C. § 543(m)(2); *see also* 47 CFR § 76.901(f) & nn.1-3.

²⁶ *See* SNL Kagan, *Multichannel Industry Benchmarks*, <https://www.snk.com/interactivex/MultichannelIndustryBenchmarks.aspx> (last visited Apr. 29, 2019).

²⁷ *See* 47 CFR § 76.901(f), nn.1-3.

²⁸ *See* SNL Kagan, *Top Cable MSOs*, <https://platform.mi.spglobal.com/web/client?auth=inherit&ignoreIDMContext=1#industry/topCableMSOs> (last visited Apr. 29, 2019).

²⁹ August 24, 2017, report from Media Bureau staff based on data contained in the Commission's Cable Operations and Licensing System (COALS). *See* www.fcc.gov/coals.

³⁰ *See* 13 CFR § 121.201, NAICS code 517110 (2012).

³¹ Although SMATV systems often use DBS video programming as part of their service package to subscribers, they are not included in Section 340's definition of "satellite carrier." *See* 47 U.S.C. §§ 340(i)(1) and 338(k)(3); 17 U.S.C. § 119(d)(6).

³² 13 CFR § 121.201, NAICS code 517110 (2012).

³³ U.S. Census Bureau, Table EC1251SSSZ5, <https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=#none>.

antenna at the subscriber's location. DBS is now included in SBA's economic census category "Wired Telecommunications Carriers." The Wired Telecommunications Carriers industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.³⁴ The SBA determines that a wireline business is small if it has fewer than 1500 employees.³⁵ Economic census data for 2012 indicate that 3,117 wireline companies were operational during that year. Of that number, 3,083 operated with fewer than 1,000 employees.³⁶ Based on that data, we conclude that the majority of wireline firms are small under the applicable standard. Currently, however, only two entities provide DBS service, which requires a great deal of capital for operation: DIRECTV (owned by AT&T) and DISH Network.³⁷ DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Accordingly, we conclude that, in general, DBS service is provided only by large firms.

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

15. The NPRM seeks comment on the Commission's track record on EEO enforcement and whether the agency should make improvements to EEO compliance and enforcement.

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

16. The RFA requires an agency to describe any significant 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 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.³⁸ The NPRM seeks comment on the Commission's track record on EEO enforcement and whether the agency should make improvements to EEO compliance and enforcement. The Commission is open to consideration of alternatives that will minimize the burden on small entities.

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

17. None.

³⁴ See U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

³⁵ NAICS Code 517110; 13 CFR § 121.201.

³⁶ See U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012; 2012 Economic Census of the United States*, http://factfinder.census.gov/faces/tableservices.jasf/pages/productview.xhtml?pid+ECN_2012_US_51SSSZ4&prodType=table.

³⁷ See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10507, para. 27 (2013).

³⁸ See 5 U.S.C. § 603(c).

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL
CONCURRING**

Re: *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries*, MB Docket No. 19-177.

Over the past two years the Federal Communications Commission has issued more than a dozen rulemakings and orders to modernize its media policies. Even more are in the works. But for too long the effort to modernize our diversity policies has languished on the back burner, without the attention from this agency it rightfully deserves.

However, with this rulemaking we at long last start the process of reviewing the agency's equal employment opportunity efforts. This is good news. However, the range of questions posed in this rulemaking is unduly narrow. While it asks about equal employment opportunity compliance and enforcement, it neglects to inquire about data that will help inform our work to modernize these policies. This is regrettable. After all, a rulemaking on developing data to support equal employment opportunity has been kicking around these halls for a decade-and-a-half. Refreshing the record on data collection here is both prudent and overdue.

I've often said that we cannot manage what we do not measure. So when this agency asks for input on equal employment opportunity compliance and enforcement, I believe data should be a part of that dialogue. Because we do not properly address it here, I concur.

**STATEMENT OF
COMMISSIONER GEOFFREY STARKS
CONCURRING**

Re: *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries*, MB Docket No. 19-177.

I am pleased that we are proceeding with this Notice of Proposed Rulemaking to provide stakeholders with an opportunity to comment further on the state of the Commission's Equal Employment Opportunity (EEO) regime. Workforce diversity in the media is critical to ensuring that all stories are told and all communities are served, and I am always in favor of developing a better understanding of whether the efforts of this Commission and our staff are bearing fruit or in need of reform. However, I am forced to concur on this item because I continue to have serious concerns with whether the Commission is complying with our statute with respect to long-stalled EEO data collection efforts through FCC Form 395-B.¹

After receiving outreach from members of Congress² concerning this item, urging the Commission to use it as a vehicle to take up a 15-year-old further notice of proposed rulemaking, I once again requested that we take steps to come into compliance with our statute. I asked that we include language in this item to refresh the record on this languishing EEO data collection. Unfortunately, my request was denied. The Chairman has indicated that he believes there are "serious statutory and constitutional concerns" with the Form 395-B data collection.³

To that end, in requesting a Further Notice of Proposed Rulemaking on Form 395-B, I have specifically indicated that I would welcome comments on any statutory and constitutional concerns, and would like to solicit the expertise of stakeholders to develop a record for our review on those questions. First, I see no principled basis to refuse to seek further comment on this EEO data collection, including its constitutionality. Second, my colleagues approving today's item voted without reservation to seek comment on a number of constitutional questions in an item that the Commission adopted not two weeks ago concerning commercial leased access on cable.⁴ Why not do the same here? The inconsistency is glaring.

¹See *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, Report and Order, FCC 19-10, 2019 WL 696578, at *10 (Feb. 15, 2019) (Concurring Statement of Commissioner Geoffrey Starks).

² Letter from Senator Chris Van Hollen and Representative Yvette D. Clarke, to Ajit Pai, Chairman, FCC (May 10, 2019).

³ Letters from Ajit Pai, Chairman, FCC, to Senator Chris Van Hollen and Representative Yvette D. Clarke (May 28, 2019).

⁴ *Leased Commercial Access; Modernization of Media Regulation Initiative*, MB Docket Nos. 07-42 and 17-105, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 19-52, 2019 WL 2461906, at *15 (June 7, 2019) ("... [W]e seek comment on whether leased access requirements can withstand First Amendment scrutiny in light of video programming market changes. . . . Can the statutory leased access requirements or the Commission's other leased access rules continue to withstand First Amendment scrutiny in light of the market changes discussed in this order? If not, what discretion does the Commission have to reduce the burdens that those provisions impose on protected speech?"). The Commission also sought comment on constitutional issues in its *Children's Television Notice of Proposed Rulemaking. Children's Television Programming Rules; Modernization of Media Regulation Initiative*, MB Docket Nos. 18-202 and 17-105, Notice of Proposed Rulemaking, 33 FCC Rcd 7041, 7060 (2018) ("We also seek comment on how the increase in other sources of children's programming, changes in relevant viewing patterns, and other developments since the enactment of the CTA in 1990 may affect the First Amendment considerations applicable to the Commission's prescription of broadcast television programming requirements in this manner.").

As I've stated in the past, 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. I will review the record with interest.