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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 76

[MB Docket No. 19-177; FCC 19-54]

Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming

Industries

AGENCY: Federal Communications Commission.

ACTION: Proposed Rule

SUMMARY: This Proposed Rule seeks comment on how the Commission can make improvements to equal employment opportunity (EEO) compliance and enforcement and responds to issues raised in comments filed in a recent proceeding to eliminate the obligation to file the Broadcast Mid-term Report (FCC Form 397). In that proceeding, the Commission committed to seek comment on these issues.

DATES: Comments Due: **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**. Replies Due: **[INSERT DATE 45 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Interested parties may submit comments and replies, identified by MB Docket No. 19-177, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Federal Communications Commission's Web site:* <http://www.fcc.gov/cgb/ecfs/>. Follow the instructions for submitting comments.
- *Mail:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

For more detailed filing instructions, see the Procedural Matters section below.

FOR FURTHER INFORMATION CONTACT: Radhika Karmarkar, Industry Analysis Division, Media Bureau, Radhika.Karmarkar@fcc.gov, (202) 418-1523.

SUPPLEMENTARY INFORMATION: This Proposed Rule in MB Docket No. 19-177 was adopted June 12, 2018, and released June 21, 2018. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, 445 12th Street, SW., Room CY-A257, Washington, DC 20554, or online at <https://docs.fcc.gov/public/attachments/FCC-18-179A1.pdf>. To request this document in accessible formats for people with disabilities (e.g. Braille, large print, electronic files, audio format, etc.) or to request reasonable accommodations (e.g. accessible format documents, sign language interpreters, CART, etc.), send an email to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

SYNOPSIS:

1. Background. The Commission has administered regulations governing the EEO responsibilities of broadcast licensees since 1969, and of cable television operators since 1972. 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. 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 positive continuing program to ensure equal opportunity and nondiscrimination in employment policies and practice.

2. 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. 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. In 2017, in response to a broadcaster petition that received wide support from the industry and other stakeholders, 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.

3. 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. To enforce its EEO rules, the Commission may conduct inquiries of broadcasters and MVPDs at random or if it has evidence of a violation. 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. The Commission can issue appropriate sanctions and remedies for violations of its EEO rules. 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. The Commission’s EEO enforcement and associated auditing responsibilities are key priorities.

4. EEO Enforcement and Compliance. The Commission seeks comment on the agency’s track record on EEO enforcement and whether it should make improvements to EEO compliance and enforcement. While the relevant comments in the Form 397 proceeding focused primarily on EEO enforcement and compliance in the broadcast industry, today’s Proposed Rule 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.

5. With respect to its current EEO enforcement efforts, the Commission invites 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?

6. In the Form 397 proceeding, a group of 34 organizations (EEO Supporters) offered several suggestions for improving the Commission's EEO enforcement. 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.

7. With respect to enforcement, the EEO Supporters 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." We invite comment 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.

8. 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 in other Commission proceedings? 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.

PROCEDURAL MATTERS

9. Ex Parte Rules—Permit-But-Disclose. The proceeding that this Proposed Rule initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules. 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 section 1.1206(b) of the Commission’s rules. In proceedings governed by section 1.49(f) of the Commission’s rules, 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 Commission’s Electronic Comment Filing System (ECFS) 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.

10. Filing Requirements—Comments and Replies. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 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 ECFS.

- Commenting parties may file comments in response to this Proposed Rule in MB Docket No. 19-177.
- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.
- 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, D.C. 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, D.C. 20554.

11. Initial Regulatory Flexibility Act Analysis. The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice and comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a

significant economic impact on a substantial number of small entities.” The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. 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 Small Business Administration (SBA).

12. Written public comments are requested on the IFRA and must be filed in accordance with the same filing deadlines as comments on this Proposed Rule, with a distinct heading designating them as responses to the IRFA. In addition, a copy of this Proposed Rule and the IRFA will be sent to the Chief Counsel for Advocacy of the SBA.

13. Paperwork Reduction Act. This Proposed Rule seeks comment on whether the Commission should adopt new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens and pursuant to the Paperwork Reduction Act of 1995, invites the public and the Office of Management and Budget (OMB) to comment on these information collection requirements. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, the Commission seeks specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

14. 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 Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

15. Additional Information. For additional information on this proceeding, please contact Radhika Karmarkar of the Media Bureau, Industry Analysis Division, Radhika.Karmarkar@fcc.gov, (202) 418-1523.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

16. Need for, and Objective of, the Proposed Rules. This Notice seeks comment on how the Commission can make improvements to equal employment opportunity (EEO) compliance and enforcement.

17. Legal Basis. 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.

18. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply. 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. Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

19. *Television Broadcasting.* This U.S. Economic Census category comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public. 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 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. 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. Based on these data, we estimate that the majority of commercial television broadcast stations are small entities under the applicable size standard.

20. Additionally, the Commission has estimated the number of licensed commercial television stations as of March 31, 2019, to be 1383. 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 non-commercial educational (NCE) stations to be 378. 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. Given the nature of this service, the Commission presumes that all of these stations qualify as small entities under the applicable SBA size standard.

21. *Radio Broadcasting.* This U.S. Economic Census category comprises establishments primarily engaged in broadcasting aural programs by radio to the public. 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. Economic Census data for 2012 show that 2,849 firms in this category operated in that year. 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. Based on these data, we estimate that the majority of commercial radio broadcast stations qualify as small entities under the applicable SBA size standard.

22. As of March 31, 2019, 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 stations. 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 NCE 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.

23. In assessing whether a business concern qualifies as small under the above definition,

business (control) affiliations 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.

24. *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. In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers. Industry data indicate that there are currently 4,300 active cable systems in the United States. Of this total, 3,550 cable systems have fewer than 15,000 subscribers, and 750 systems have 15,000 or more subscribers. Thus, we estimate that most cable systems are small entities.

25. *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 revenues in the aggregate exceed \$250 million. There are approximately 50,504,642 cable video subscribers in the United States today. 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. Based on available data, we find that all but six incumbent cable operators are small entities under this size standard. 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.

26. We also note that there currently are 182 cable antenna relay service (CARS) licensees. 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.

27. *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 not 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," which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. 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.

28. *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 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. The same SBA and Economic census data criteria apply to DBS Service as apply to SMATV/PCO companies described in the preceding paragraph. Currently only two entities provide DBS service, which requires a great deal of capital for operation: DIRECTV (owned by AT&T) and DISH Network. 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.

29. Description of Projected Reporting, Recordkeeping, and other Compliance Requirements. The Notice seeks comment on the Commission’s track record on EEO enforcement and whether the agency should make improvements to EEO compliance and enforcement.

30. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered. 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. The Proposed Rule 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.

Federal Rules that May Duplicate, Overlap or Conflict with the Proposed Rule. None

31. Ordering Clauses. Accordingly, it is ordered that, pursuant to the authority contained 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.

32. 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 Dortch,
Secretary

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