

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

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Modernization of Media Regulation Initiative

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MB Docket No. 17-105

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**JOINT REPLY COMMENTS OF THE
NAMED STATE BROADCASTERS ASSOCIATIONS**

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SUMMARY

The Named State Broadcasters Associations (the “State Associations”) both appreciate and applaud the Commission’s effort in undertaking this Modernization proceeding. By seeking input from regulatees—the group that has the deepest experience with which regulations are efficiently implemented and which impose unnecessary burdens—the Commission has opened a window for proposals aimed at implementing not just less burdensome regulations, but more effective regulations as well. Eliminating unnecessary paperwork and regulatory burdens is of course good for regulated entities, but allowing these licensees to divert resources from generating paperwork to serving the public will be the true benefit of this proceeding.

That this proceeding has been long in coming is demonstrated by the volume of suggestions that have poured into the record. The Commission has been given much to think about. Having said that, a review of the record reveals some common themes among the comments, and a consensus on a number of changes that would make broadcast regulation in particular more efficient and effective.

Among these proposals are those that would take advantage of the growing reach of the Internet, as well as the Commission’s increased willingness to incorporate use of the Internet into its rules. In particular, allowing stations to utilize the Internet to accomplish both public notices (such as those required for transfer and assignment applications) and private notices (such as must-carry elections) would allow stations to convey information between licensees, cable and satellite TV operators, the Commission, and the public more quickly, more efficiently, and at lower cost.

Similarly, as discussed in these Joint Reply Comments, a number of Commission forms and filing requirements have become redundant, unnecessary, or unnecessarily burdensome in their current form. These include the Form 397 (Mid-Term EEO Report), Form 317 (Ancillary

and Supplementary Services Report), Form 398 (Children’s Television Programming Report), and the requirement found in Section 73.3613 mandating the filing of contracts with the Commission that are already available from stations directly upon request.

Finally, numerous commenters focused on various approaches to making the Commission’s EEO Rule more efficient, particularly with regard to reducing the rule’s obsessive focus on paperwork rather than on ensuring equal employment opportunity—the true purpose of the rule. The FCC’s new online public file requirements have done much to make such data collection unnecessary to achieve the Commission’s EEO objectives. Commenters in this proceeding broadly voiced their support for equal employment opportunity while suggesting numerous reforms that would allow the rule to accomplish that goal far more efficiently.

The State Associations urge the Commission to investigate and pursue all of the above reforms, each as discussed in more detail in these Joint Reply Comments. The State Associations also note that many other proposals in the record merit further consideration, but simply could not be addressed herein without turning these Joint Reply Comments into a tome. To have more good suggestions than there is time to talk about them is a happy circumstance, and the Commission is to be congratulated for creating that opportunity.

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The Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Carolina Association of Broadcasters, North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of

Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Radio Broadcasters Association of Puerto Rico, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (collectively, the “State Associations”) by their attorneys in the matter, hereby file these Joint Reply Comments in response to the Commission’s Public Notice released May 18, 2017, in the above captioned proceeding.¹

INTRODUCTION

The State Associations join the many commenters in this proceeding that have applauded the Commission for its effort here to modernize and streamline its media regulations. As the comments demonstrate, broadcasters and others are eager for the Commission to eliminate duplicative regulations and burdensome paperwork that lack adequate (or any) public interest benefits to justify them. Because of the sheer breadth and volume of proposals submitted in the comment stage of this proceeding, the State Associations do not attempt herein to address the merits of them all. Instead, these Joint Reply Comments seek to focus on certain proposals that garnered wide consensus among commenters in this proceeding and which the State Associations feel deserve particular attention. We therefore urge the Commission to promptly launch proceedings to effectuate the reforms discussed below, and hope that these Joint Reply Comments assist the Commission in framing those proposals.

¹ See *Modernization of Media Regulation Initiative*, Public Notice, MB Docket No. 17-105, FCC 17-58 (“*Public Notice*”) (rel. May 18, 2017).

I. THE COMMENTS SUPPORT MODERNIZING THE COMMISSION'S RULES BY MOVING NOTICE REQUIREMENTS ONLINE.

A common theme among commenters is the benefit to the public and broadcasters that would accompany broader flexibility to use the Internet to satisfy notice requirements. As the State Associations have previously noted, the Commission has vigorously sought to move more broadcast-related information online.² These efforts include the Annual EEO Public File Report,³ the public inspection file,⁴ station-conducted contest rules,⁵ and station EEO recruitment efforts.⁶ Consistent with those modernization efforts, the State Associations agree with other commenters that the following types of notices are particularly well suited to make the online transition.

A. Local Public Notice

The State Associations join the National Association of Broadcasters (“NAB”), Nexstar Broadcasting, Inc. (“Nexstar”), the Joint Radio Commenters,⁷ and others in urging the

² See *Amendment of Section 73.1216 of the Commission's Rules Related to Broadcast Licensee-Conducted Contests*, Joint Comments of the Named State Broadcasters Associations in Response to Notice of Proposed Rulemaking, MB Docket No. 14-226, RM-11684 (filed Feb. 18, 2015).

³ *Review of the Commission's Broadcast & Cable Equal Employment Opportunity Rules & Policies*, 17 FCC Rcd 24018, 24062 (2002) (“2002 EEO Order”).

⁴ *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, Second Report and Order*, 27 FCC Rcd 4535 (2012); see also *Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, Report and Order, 31 FCC Rcd 526 (2016).

⁵ *Amendment of Section 73.1216 of the Commission's Rules Related to Broadcast Licensee-Conducted Contests*, Report and Order, 30 FCC Rcd 10468 (2015) (“Contest Rule Report and Order”).

⁶ *Petition for Rulemaking Seeking to Allow the Sole Use of Internet Sources for FCC EEO Recruitment Requirements*, Declaratory Ruling, MB Docket No. 16-410, FCC 17-47 (rel. Apr. 21, 2017).

⁷ Alpha Media LLC, Emmis Communications Corporation, iHeartMedia, Inc., Liberman Broadcasting, Inc., New York Public Radio, and Urban One, Inc. filed together in this proceeding as “Joint Radio Commenters.”

Commission to update Section 73.3580 of its Rules.⁸ Section 73.3580 generally subjects applications for broadcast licenses, major amendments thereto, and assignments and transfers to local public notice requirements, obligating broadcasters to publish the details of such applications in a local newspaper and/or broadcast the notice on the station. The State Associations agree that the Commission should allow broadcasters to (1) satisfy the notice requirement by posting on their website any notices that the rules currently require to be published in a local newspaper and (2) direct viewers and listeners to a website in lieu of broadcasting the entire notice over the air.⁹

The needless complexity inherent in the rule, combined with the fact that it has existed in substantially the same form since the 1960s, make the local notice requirement a prime candidate for review and modernization. In addition to being unwieldy and antiquated, the current rule is simply inefficient. Joint Radio Commenters noted that “[i]t would be far more helpful to listeners to have this information available online rather than in newspapers or in quickly read on-air announcements.”¹⁰ And, as Nexstar aptly observed, “in the case of a license assignment or transfer of control, announcing the names of all officers and directors of the applicant can take several minutes and turn off viewers and listeners rather than educating them.”¹¹

Posting notices to a website would be less costly and burdensome for stations than placing orders with a local newspaper, and the notices would be equally (if not more widely) accessible to the public than those published in one of what could be several local newspapers.

⁸ 47 C.F.R. § 73.3580 (“Local public notice of filing of broadcast applications”).

⁹ *See, e.g.*, Comments of the National Association of Broadcasters (“NAB Comments”) at 20-21; Comments of Nexstar Broadcasting, Inc. (“Nexstar Comments”) at 15-16; Comments of Joint Radio Commenters (“Joint Radio Comments”) at 2-3.

¹⁰ Joint Radio Commenters at 2-3.

¹¹ Nexstar Comments at 16.

The notices could also be published sooner after the relevant application is filed, particularly in the growing number of places where there are only weekly newspapers with long lead times to run an ad. Finally, the public's receipt of the notices would not be as time-dependent (*i.e.*, having to pick up the right edition of the newspaper to see the notice, or listening to the station at the precise right time to hear an on-air notice).

With respect to lengthy notices that are broadcast over the air, audience members would be better able to comprehend information that is posted online that can be consumed on their own schedule rather than copy read on-air (that may also cause listeners to tune out, harming the station and undercutting the very purpose of the public notice). Broadcasters should thus be afforded the discretion to choose online notice in lieu of newspaper notice and to determine when directing consumers to a website notice is more practical than reading the entire notice on-air.

As NAB noted in its comments, these practical proposals are consistent with the Commission's decision to update the station-conducted contest disclosure rules in 2015.¹² There, the Commission found that permitting online disclosures "advance[d] the public interest by affording broadcasters more flexibility in the manner of compliance with [the disclosure requirement] while giving consumers improved access to important contest information."¹³

¹² See, e.g., NAB Comments at 21 ("Because the 'Internet has become a fundamental part of consumers' daily lives and now represents the medium used most by the public to obtain information instantaneously,' the FCC similarly should bring its public notice rules into 'alignment with current consumer expectations' and permit online posting of notices consistent with its prior decision on licensee-conducted contests.") (citing *Contest Rule Report and Order*, 30 FCC Rcd at 10472).

¹³ *Contest Rule Report and Order*, 30 FCC Rcd at 10468.

Because this rationale is equally applicable to the local public notice requirements, the Commission should undertake to update Section 73.3580 of its Rules as well.

B. Retransmission Consent Elections

The must-carry and retransmission consent election process is another item that contains arcane and antiquated requirements in need of modernization. TV stations are currently required to send every three years, via certified mail, a copy of their carriage election to each cable system and satellite carrier, and then place those election letters in the public file. This obligation can be tedious and burdensome, and these problems could be largely eliminated with a few modest updates to the rules.

First, the State Associations agree with commenters proposing that the Commission change the current default election for cable and satellite systems to the station's prior election if no new election is made. Automatically defaulting to must-carry for cable systems may have made sense when the rules were adopted, but the majority of stations today rely upon retransmission consent rather than must-carry rights.¹⁴ Accordingly, defaulting to the station's prior election would be more consistent with actual station preferences. And, as Nexstar explained, this would benefit both broadcasters and MVPDs by “substantially reduc[ing] the number of election letters that broadcasters would need [to] send and cable operators would need to process.”¹⁵

¹⁴ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Fourth Further Notice of Proposed Rulemaking and Declaratory Order, 27 FCC Rcd 1713 ¶ 10 (2012) (noting that “almost 40 percent of all broadcast stations elected or defaulted to must carry rather than electing retransmission consent.”).

¹⁵ Nexstar Comments at 18.

For the minority of stations that would need to notify MVPDs of their new carriage election, the Commission should remove the certified mail requirement and permit stations to send their election to MVPDs via e-mail. This update would be consistent with the Commission's recent decision to permit cable operators to provide notices to subscribers via electronic distribution.¹⁶ The State Associations anticipate that such a change would be welcomed by the MVPDs, in light of NCTA's and ACA's acknowledgement that "businesses and customers increasingly prefer the efficiency, effectiveness, and ease of electronic communications."¹⁷

Should the Commission opt not to switch the default election, the Commission should at least update its rules to remove the certified mail requirement and allow stations to rely on the posting of their election notices in the online public inspection file.¹⁸ The dual notice requirement may have served a purpose when public inspection files were maintained in hard copy at the station, but as TV stations are required to upload their elections to an online public file that is readily accessible to all MVPDs, the certified mail delivery requirement is simply duplicative.

¹⁶ See *National Cable & Telecommunications Association and American Cable Association*, Declaratory Ruling, MB Docket No. 16-126, FCC 17-73 (rel. June 21, 2017); see also *id.*, Statement of Commissioner Michael O'Rielly ("It is my hope that the Commission will be able to keep things moving in this direction. For example . . . notices for retransmission consent elections could move to email.").

¹⁷ *National Cable & Telecommunications Association and American Cable Association*, Petition for Declaratory Ruling at 2 (filed March 7, 2016) (noting the support of Cox, Charter, Comcast, Suddenlink, US Telecom, and 83 small and mid-sized cable providers for electronic notifications).

¹⁸ NAB Comments at 22; see also Nexstar Comments at 16-18 (proposing that the FCC modify its rules to "allow broadcasters to make their triennial elections by e-mail or other electronic means.").

Notice via the online public file has the added benefits of being instant and more reliable than depending on every broadcaster to have the most up-to-date address for every cable and satellite system serving their market, and online postings are not susceptible to getting lost in transit or delivery refusals. Moreover, as new cable operators come (and some fade away), a TV station might not actually be aware of every MVPD serving its market. Making this update, particularly if a station were permitted to make a single universal election in its public file for MVPDs serving that market, would eliminate the time consuming and labor intensive tasks of finding the most up-to-date list of MVPDs covering the counties in a station's market, locating the current addresses for those MVPDs, separately printing and mailing the notices to each MVPD with enough lead time to ensure timely receipt, and to resend those that come back marked "not at this address." The time and resources stations expend on satisfying this notice requirement would be better spent serving the public through broadcasting.

II. THE COMMENTS SUPPORT ELIMINATING OR STREAMLINING CERTAIN FILING REQUIREMENTS.

Another common refrain in the comments is that it is time for the Commission to reevaluate the value of certain filing obligations given modern broadcast and viewing practices, as well as the breadth of information already publicly available online. Without attempting to present an exhaustive list of filings whose costs outweigh any purported benefit, the State Associations agree that the following filing requirements are particularly worthy of Commission review.

A. Form 317 DTV Ancillary and Supplementary Services Report

Section 73.624(g)(2) requires all commercial and noncommercial DTV licensees and permittees to file annually a Form 317 to report "*whether* they provided ancillary or

supplementary services in the 12-month period ending on the preceding September 30.”¹⁹ Given that hardly any TV licensees provide such services, the rule imposes on television licensees a make-work requirement that serves no purpose for the Commission or the public. In the twenty years since the requirement was created by Section 336(e) of the Telecommunications Act of 1996, tens of thousands of Form 317’s have been filed with the Commission that served utterly no purpose beyond telling the Commission “Not Applicable.” Not only do these filings yield no benefit where a station has not provided such services, but the Commission has to expend resources processing them, and their filing has the noticeable adverse effect of straining the Commission’s electronic filing system on December 1 each year, an already busy filing day.

The State Associations accordingly agree with commenters who propose modifying the rule to require a Form 317 from only those broadcasters that actually provided ancillary or supplementary services during the relevant reporting period.²⁰ The update could be accomplished with the following modest revisions to the current rule:

Each December 1, all commercial and noncommercial DTV licensees and permittees ~~will electronically report whether they~~ **that** provided ancillary or supplementary services in the 12-month period ending on the preceding September 30. ~~Licensees and permittees will~~ **electronically** ~~further~~ report, for the applicable period:

¹⁹ 47 C.F.R. § 73.624(g)(2) (emphasis added).

²⁰ See NAB Comments at 19 (“Because very few stations provide ancillary/supplementary services, the rule needlessly requires thousands of licensees to file Form 317 every year merely to state that fact. This requirement is an obvious waste of virtually all TV licensees’ time and resources. The Commission should eliminate this filing requirement, *except* for those stations required to pay the five percent fee.”); see also Nexstar Comments at 18 (“[G]iven that the majority of broadcasters do not use their spectrum for non-broadcast services, the Commission should amend the Form 317 filing requirement so that only those broadcasters required to pay a fee need to go through the effort of filing a report.”); Comments of Jack Goodman at Attachment 1; Comments of CBS Corporation, The Walt Disney Company, 21st Century Fox, Inc., and Univision Communications Inc. at 12-13.

This common sense change would benefit nearly every TV licensee (and the FCC) without increasing or altering the reporting obligations for those few broadcasters that do use their excess digital capacity for non-broadcast purposes. Additionally, eliminating thousands of “Not Applicable” reports would make it easier for the Commission and any interested members of the public to discern which licensees actually provided such services. Given the broad support for this proposal and the apparent lack of any downside, the State Associations urge the Commission to act promptly to amend this requirement.

B. Form 397 EEO Mid-Term Report

The State Associations further urge the Commission to eliminate the Form 397 EEO Mid-term Report filing requirement. The Form 397 must be filed at stations’ license term midpoints, and consists of two entirely unilluminating sections. The first section sets forth licensee and station information, and queries whether the size of the station employment unit subjects it to EEO recordkeeping requirements. The second section is comprised of the name of the person at the station responsible for implementing the EEO program and copies of the two most recent Annual EEO Public File Reports.

As many parties pointed out in their comments, the Form 397 serves little purpose (if any) now that broadcasters subject to the rule are required to upload their Annual EEO Public Inspection File Reports to the online public inspection file.²¹ NAB correctly observes that “[t]he

²¹ See, e.g., NAB Comments at 18 (“Given the move to online public files, the required information is already available on the FCC’s website, as licensees’ annual EEO Public File Reports are included in their online public files and are thus easily available to the public.”); Joint Radio Comments at 3 (“While these requirements may have been appropriate to aid in the Commission’s evaluation of station EEO practices prior to the implementation of electronic public files, they are, as Commissioner O’Rielly has observed, ‘duplicative’ ‘now that EEO reports are filed with the Commission in the parties’ online public files’ or otherwise available on station websites.”).

remainder of Form 397 contains only identification and contact information, which is already available in stations' online public files.” Because this filing aids neither the FCC’s nor the public’s review of broadcasters’ EEO practices, the Commission should move to promptly eliminate the Form 397 filing requirement.

C. Section 73.3613 Contract Filing

Section 73.3613 of the Commission’s Rules requires stations to file paper copies of certain contracts with the Commission within 30 days of execution. The State Associations respectfully submit that this requirement is another example of make-work that serves no corresponding public interest benefit. We agree with NAB that the contract filing requirement is duplicative of other regulatory requirements. For example, Section 73.3526(e)(5) already directs commercial licensees²² to retain in their public inspection files a copy of or an up-to-date list of such contracts (with those employing the latter option obligated to provide copies of the contracts to any party—including the Commission—upon request and within seven days).²³ This on-demand access to station contract information via the online public inspection file eliminates any need for stations to separately file copies with the Commission. In the absence of a legitimate reason to require stations to file paper copies of such contracts with the Commission, the State Associations recommend modifying the rule in light of the existing requirement that stations provide copies of such contracts on request.

²² Noncommercial stations face an identical obligation under 47 C.F.R. §73.3527(e)(4).

²³ NAB Comments at 17-18; *see also* Nexstar comments at 6-7.

E. Form 398 Children’s Television Programming Reports

The State Associations agree with the NAB that the Commission should review, clarify, and modernize the children’s programming rules.²⁴ As detailed in NAB’s comments, the rules are in desperate need of an update to align them with modern media technology and concomitant viewing habits.

For example, the paperwork burdens associated with filing quarterly Form 398 Children’s Television Programming Reports have come to vastly outweigh any observable benefit. Broadcasters are all too familiar with the picture painted in NAB’s comments of “Reports of the 15 TV stations owned by one group total[ing] 473 PDF pages, with the average being 31.5 pages per station” for the first quarter of 2017, and that “[t]he Reports of a station with three programming streams generally range from 30-40 pages every quarter.”²⁵ Nexstar correctly noted that “[t]hese reports do not affect a broadcaster’s substantive compliance with the commercial limits or core programming requirements, but rather impose unnecessary burdens on station personnel whose efforts would be better spent engaging with the community, developing local public interest programming, or otherwise serving the station’s viewers.”²⁶

In contrast to these quantifiable costs, the benefit gained from quarterly Form 398 filings is hard to discern. NAB hit the nail on the head when it noted that “in this day of electronic

²⁴ NAB Comments at 26-37.

²⁵ NAB Comments at 11; *see also* Comments of Meredith Corporation (“Meredith Comments”) at 2 (“the Commission’s ‘KidVid’ form for children’s programming often exceeds dozens of pages per station, yet provides little value to a parent in an on-demand world. Parents are simply not checking an obscure form on FCC.gov at the end of a quarter to see if a program was preempted or to get a description of a program. The FCC could instead rely upon basic certifications from television stations as evidence of compliance with the children’s television programming rules, which would save countless hours of FCC staff time and television station personnel time.”).

²⁶ Nexstar Comments at 11.

program guides, no rational person would consult these Reports to plan their children's viewing." Moreover, the paperwork associated with the Form 398 is unquestionably excessive, particularly in light of that fact that it seeks to assess station compliance with a programming *guideline* rather than a rule.²⁷

Accordingly, the State Associations urge the Commission to undertake a prompt review of its children's programming regulations. Should the Commission find it necessary to retain a reporting requirement, it should drastically streamline the form by, for example, requiring only a general certification of compliance with the Commission's programming guidelines instead of requiring granular detail about what a station aired in the preceding quarter and what it plans to air in the upcoming quarter. By itself, such a change would go far to ease the paperwork burden while not diminishing in any way the programming aired to meet the needs of children.

III. THE COMMENTS SUPPORT REVISITING THE NECESSITY OF VARIOUS BURDENS IMPOSED BY THE EEO RULE

To assist the Commission in determining which rules merit the launch of further proceedings to consider changes, the remainder of these Reply Comments identifies reasons why this proceeding represents a timely opportunity for the FCC to examine various aspects of the EEO Rule. Though it should go without saying, the State Associations have no intention of minimizing the important policy goal of equal employment opportunity or undermining federal,

²⁷ See 47 C.F.R. § 73.671(e)(1) ("A digital television licensee providing only one stream of free digital video programming will be subject to the 3 hour/week Core Programming processing *guideline* discussed in paragraph (d) of this section on that channel . . .") (emphasis added); see also 47 C.F.R. § 73.671(d) ("Licensees that do not meet these processing guidelines will be referred to the Commission, where they will have full opportunity to demonstrate compliance with the CTA (e.g., by relying in part on sponsorship of Core educational/informational programs on other stations in the market that increases the amount of Core educational and informational programming on the station airing the sponsored program and/or on special nonbroadcast efforts which enhance the value of children's educational and informational television programming).").

state, and local laws relating to nondiscrimination and equal opportunity. But in light of both the EEO Rule's complex legal history and the comments filed by numerous broadcasters with first-hand knowledge of how the EEO Rule actually operates and the burdens it imposes, the State Associations respectfully submit that the Commission's current EEO regime is ripe for review.

A. The Comments Indicate That the Current EEO Rule's Methods of Ensuring a Broadcaster Is an Equal Opportunity Employer Are Unnecessarily Burdensome

As evidenced by the numerous comments filed relating to the Commission's EEO Rule,²⁸ few rules are more closely associated with the phrase "excessive paperwork." While you would be hard-pressed to find a broadcaster who is not supportive of the overall intent of the EEO Rule,²⁹ you would be equally hard-pressed to find a broadcaster who believes the quantity of paperwork required by the Rule is reasonable, or that it is the most productive approach for ensuring equal employment opportunity at broadcast stations.

In point of fact, the EEO Rule is so paperwork-centric that it is the only broadcast rule for which the Commission conducts random annual audits to assess whether stations have maintained all of the necessary paperwork. The continuation of these audits is particularly noteworthy given that non-exempt stations already create Annual EEO Public File Reports on their actual hiring efforts, post them to their station website, and place them in their public file. Given that the reports are already online via station websites, and are becoming even more

²⁸ 47 C.F.R. § 73.2080 (these Reply Comments refer to the current iteration of the rule as the "EEO Rule").

²⁹ See, e.g., Comments of America's Public Television Stations, Corporation for Public Broadcasting, National Public Radio, Inc., and Public Broadcasting Service ("Public Broadcaster Comments") at 11; Nexstar Comments at 13; Comments of Gleiser Communications, LLC ("Gleiser Comments") at 2; Joint Radio Comments at 12.

prevalent online as radio stations complete the move to online public files, substantial station hiring information is readily available to anyone wishing to review it, including FCC staff. It is unclear why the EEO Rule uniquely requires detailed compliance audits, other than it being a rule that is focused far more on recordkeeping skills than on determining whether a station has in fact failed to be an equal opportunity employer. For that reason, the Commission should at a minimum consider modifying its random audit program to instead examine the online records of the randomly selected stations and direct requests for further explanation and backup paperwork only to those stations whose online filings do not show prima facie compliance with the Commission's EEO Rule.

The Commission's bias towards paperwork review in EEO audits is not surprising, as findings that a broadcaster has actually refused to conduct itself as an equal opportunity employer are largely non-existent in modern times. Instead, most EEO-related fines are connected with a failure by a broadcaster to be able to produce paperwork demonstrating that the station followed prescribed steps in the hiring process. Sometimes this is because those formalistic steps were not taken, and sometimes it is because the station has not preserved paperwork proving those steps were taken. In either case, the focus of EEO audits has drifted away from ensuring a broadcaster is in fact an equal opportunity employer, to instead ensuring the broadcaster has followed an FCC-prescribed employment regimen and can produce adequate paperwork to demonstrate it.

As noted in the Gleiser Comments, "it appears the EEO Rule has never been subjected to a cost-benefit analysis; not so much in the pure economic sense, but one which assesses whether reliance on the EEO Rule has merely diverted attention from more productive, less burdensome

approaches.”³⁰ Even without taking that deeper, and much needed, examination, there is ample low hanging fruit available in any effort to reduce the burdens imposed by the EEO Rule. These include, for example: (1) eliminating the filing of Form 397 (the Mid-Term EEO Report), as discussed above and suggested by Commissioner O’Rielly and numerous commenters, since that information can readily be found in a station’s online public file;³¹ (2) eliminating the requirement that stations post their most recent Annual EEO Public File Report on their website, since once again, the report can be found in a station’s online public file;³² and (3) ceasing to require stations to also post their responses to an EEO audit in their public file, which seems to have little purpose since the FCC is already thoroughly reviewing that paperwork, and the uploading can be so labor-intensive that the Public Broadcasters note in their comments that it can require the hiring of additional employees and the writing of custom software.³³

Beyond this extremely low-hanging fruit are a number of other revisions that commenters suggest merit a close look. These include aspects of the existing rule that appear to be

³⁰ Gleiser Comments at 2.

³¹ See *Public Notice*, Statement of Commissioner Michael O’Rielly; NAB Comments at 18-19; Meredith Comments at 1; Nexstar Comments at 13-14; Joint Radio Comments at 3.

³² Cf. Comments of the American Cable Association at 12-14 (seeking elimination of separate website link for cable EEO reports in light of their inclusion in the online public file). The State Associations acknowledge that not all stations will have an online file until March 2018, but presume that date will have come and gone by the time the FCC could launch a rulemaking, complete it, and have any resulting rule changes go into effect, particularly since OMB approval would be required for some of the changes.

³³ Public Broadcaster Comments at 11 n.18 (“Public broadcasting stations selected for random EEO audits have been required to hire additional staff solely to upload the audit response report to each individual public file for every television and radio license, which can require many hundreds of uploads. The online public file system limits the number and size of documents such that stations have also been forced to develop custom API software to upload the required documents.”).

unproductive, at least compared to the burdens involved, and those that actually appear to be counterproductive to maintaining a diverse broadcast work force.³⁴

Of course, some commenters go farther, arguing that the time has come to eliminate the micromanagement of broadcasters' hiring practices in the absence of any evidence that a particular broadcaster has failed to provide equal employment opportunity. The Public Broadcasters, a coalition of America's Public Television Stations, the Corporation for Public Broadcasting, National Public Radio, Inc., and the Public Broadcasting Service state:

While Public Broadcasting fully endorses the concept and reality of equal employment opportunity, it points out that employment practices are subject to oversight and enforcement elsewhere at the Federal level, by all 50 states and the District of Columbia, and at the local level in many cases. In addition, any history of adverse discrimination findings against a broadcast licensee (whether resulting from private litigation in court or by agency enforcement action) needs to be reported to the Commission and can be held against an entity's suitability to continue as an FCC licensee at renewal time....

While an argument could reasonably be made that the Commission simply does not need to regulate employment practices, and therefore the rule should be eliminated altogether, Public Broadcasting recommends that the rule could be retained, but its burdens at least minimized by reducing it to a non-discrimination prohibition and a general obligation to recruit for full-time job vacancies, and by reducing required EEO filings to only those that would accompany license renewal applications.³⁵

As this proceeding is not intended to directly implement changes to any Commission rule, but merely to determine which rules merit the launch of further proceedings to consider changes, the principal intent of these reply comments is not to focus on any particular change to the EEO Rule. The nature and extent of modifications needed to modernize the EEO Rule would presumably be the focus of a rulemaking proceeding launched as a result of this proceeding.

³⁴ See, e.g., Nexstar Comments at 14-15 and Joint Radio Comments at 13-14 (eliminating mandatory transmittal of job opening information to entitled sources); Nexstar Comments at 15, Gleiser Comments at 4, and Comments of M. Kent Frandsen at 4-5 (eliminating requirement for a specific number of non-vacancy specific recruitment initiatives).

³⁵ Public Broadcaster Comments at 11-12.

However, the long and complex history of the various iterations of the EEO Rule makes reform of this rule more complicated than most. In the discussion below, the State Associations seek to provide the Commission with the legal context necessary to efficiently frame such a proceeding.

B. Efforts to Reform the EEO Rule Must Be Informed by the Complex History of the Rule

1. The Judicial Component

To state it plainly, no Commission EEO rule has survived judicial scrutiny. Earlier iterations of the FCC's EEO Rule have twice been found unconstitutional by the U.S. Court of Appeals for the District of Columbia Circuit, with the court questioning, but never needing to decide, if the FCC has authority to promulgate such a rule. Importantly, the current version of the rule is in place not because it survived judicial review, but because it has not yet been subjected to judicial review. As a result, the questions the court raised about the Commission's authority remain unresolved.

The first of those rulings, *Lutheran Church v. FCC*,³⁶ held that the EEO rule in effect in 1992 was a race-based regulation and therefore subject to strict scrutiny. The court further held that the Commission's rationale for enacting a race-based rule, diversity in programming, was not a compelling governmental interest that could withstand review under the strict scrutiny standard of review.³⁷ The court remanded the case to the Commission to determine whether the Commission could present a compelling governmental interest to adopt an EEO rule. In so doing, the court stated that its decision was based only on its review of the FCC's EEO program requirements and did not address the non-discrimination provision of the rule:

³⁶ *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 ("*Lutheran Church*"), *rehearing denied* 154 F.3d 487, *rehearing en banc denied* 154 F.3d 494 (D.C. Cir. 1998).

³⁷ *Id.* at 354.

To be sure, we have held only that the Commission’s EEO program requirements are unconstitutional; therefore, our decision does not reach the Commission’s non-discrimination rule which *King’s Garden* interprets. See 47 C.F.R. § 73.2080(a). But our opinion has undermined the proposition that there is any link between broad employment regulation and the Commission’s avowed interest in broadcast diversity. We think, therefore, that the appropriate course is to remand to the FCC so it can determine whether it has authority to promulgate an employment non-discrimination rule.³⁸

The court proceeded to suggest that the Commission had relied solely on the programming diversity rationale because the Commission itself knew that, under *NAACP v. FPC*,³⁹ it did not have authority to implement an EEO rule solely for the purposes of avoiding employment discrimination. Specifically, the court said:

The only possible statutory justification for the Commission to regulate workplace discrimination would be its obligation to safeguard the “public interest,” and the Supreme Court has held that an agency may pass antidiscrimination measures under its public interest authority only insofar as discrimination relates to the agency’s specific statutory charge. *NAACP v. FPC*, 425 U.S. 662, 96 S.Ct. 1806, 48 L.Ed.2d 284 (1976). Thus the FCC can probably only regulate discrimination that affects “communication service”—here, that means programming.⁴⁰

In response to a request for rehearing by the Commission, the court specifically noted it had left open the question of whether the Commission could justify even an outreach-only rule (as opposed to the results-oriented rule the court had just found to be an unconstitutional racial quota), stating: “Whether the government can encourage—or even require—an outreach program specifically targeted on minorities is, of course, a question we need not decide.”⁴¹

³⁸ *Id.* at 356.

³⁹ *National Association for the Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662 (1976).

⁴⁰ *Lutheran Church*, 141 F.3d at 354 (citing 47 U.S.C. § 151 and *NAACP v. FPC*, 425 U.S. at 670 n.7).

⁴¹ *Lutheran Church v. FCC*, 154 F.3d 487, 492 (D.C. Cir. 1998) (denying rehearing).

In response to the ruling, the Commission adopted a different rationale for its regulation of EEO, which is the rationale it continues to rely upon today. That new rationale was to eliminate word-of-mouth hiring as a barrier to equal employment in broadcasting.⁴² The Commission then promulgated a new EEO rule consisting of two compliance options (Option A and Option B) from which stations could choose.⁴³

That new rule came before the U.S. Court of Appeals for the DC Circuit in *MD/DC/DE Broadcasters Association v. FCC*⁴⁴ in 2000. The court, finding that one of the two compliance options still constituted a race-based rule, specifically did not reach the question of whether the FCC's new rationale was a compelling governmental interest sufficient to justify use of a race-based rule. Rather, the court found that the rule was not narrowly tailored to the Commission's stated purpose and would therefore fail strict scrutiny review regardless of the governmental interest cited.⁴⁵

⁴² See *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, 15 FCC Rcd 2329, 2331 (2000).

⁴³ Under Option A of the post-*Lutheran* rule, broadcast stations had to demonstrate that they gave notice of job openings to qualifying organizations requesting them and engaged in a specified number of recruitment activities delineated by the Commission. For a station electing Option A, the Commission would evaluate compliance with the rule based on completion of the specified outreach activities, without regard to the racial make-up of the resulting applicant pool or station work force. Under Option B, broadcast stations had flexibility to design their own recruitment outreach programs, but the Commission would rely on racial metrics to determine whether the broadcaster's outreach was adequately inclusive. *Id.* at 2364-65.

⁴⁴ *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13 ("MD/DC/DE Broadcasters Association"), rehearing denied 253 F.3d 732 (D.C. Cir 2001), cert denied sub nom. *Minority Media and Telecommunications Council v. MD/DC/DE Broadcasters Assoc.*, 534 U.S. 1113 (2002).

⁴⁵ *Id.* at 21 ("We need not resolve the issue of a compelling governmental interest in preventing discrimination, however, because the Broadcasters argue convincingly that the new EEO rule is not narrowly tailored to further that interest.").

The court therefore invalidated the rule and remanded the matter back to the FCC. The FCC requested rehearing of the court’s decision to vacate the entire rule rather than merely vacate Option B. The court denied that request, noting the FCC had set out two goals when it adopted the rule—to ensure broad outreach in station recruitment and to afford stations flexibility in complying with the rule.⁴⁶ The court said that merely eliminating Option B would leave one of the FCC’s stated goals unmet. It went on to say that on remand the Commission could adopt other measures to accommodate the flexibility goal or the Commission could change its goals.⁴⁷ The FCC sought review of the court’s decision by the U.S. Supreme Court, which rejected that request.⁴⁸

The FCC then adopted the current EEO Rule, which has not been reviewed by the U.S. Court of Appeals. As a result, the questions raised by the court as to whether the Commission “has authority to promulgate an employment non-discrimination rule”⁴⁹ or “can encourage—or even require—an outreach program specifically targeted on minorities”⁵⁰ remain unresolved.

The practical impact of this history for the present proceeding is that the more burdensome and intrusive the EEO Rule is, the harder it will be for the FCC to defend it in a court that has already questioned the FCC’s authority to have such a rule in the first place.

⁴⁶ *MD/DC/DE Broadcasters Association v. FCC*, 253 F.3d 732, 736 (2001) (denying rehearing).

⁴⁷ *Id.* The Commission later cited this language as indicating the court’s acceptance of Commission authority to adopt EEO rules, but as discussed above, the court had already called the Commission’s authority into question in *Lutheran Church* and did not reach the question in *MD/DC/DE Broadcasters*. See *2002 EEO Order*, 17 FCC Rcd at 24022.

⁴⁸ *Minority Media and Telecommunications Council v. MD/DC/DE Broadcasters Assoc.*, 534 U.S. 1113 (2002).

⁴⁹ *Lutheran Church*, 141 F.3d at 356.

⁵⁰ *Lutheran Church v. FCC*, 154 F.3d 487, 492 (D.C. Cir. 1998) (denying rehearing).

Beyond the pragmatic benefits of reducing the paperwork and regulatory burdens on station staff, reforming the rule is essential if it is to survive judicial scrutiny.

Moreover, with the Commission now basing its EEO Rule on the need to eliminate word-of-mouth hiring as a barrier to equal employment, the judicial viability of the rule rests entirely upon word-of-mouth recruiting in fact being a barrier to equal employment. But as the Multicultural Media, Telecom and Internet Council (“MMTC”) itself noted in its comments:

MMTC requests that the Commission stop prosecuting those whose “offense” is recruiting primarily by WOM from a heterogenous staff—a practice that is not discriminatory; and instead (b) [sic] prosecute the “bad apples” who recruit primarily by WOM from a homogenous staff....⁵¹

As the MMTC Comments indicate, relying upon word-of-mouth is not *per se* harmful to equal employment, nor inherently a *barrier* to equal employment, weakening the stated rationale for the EEO Rule’s existence. Moreover, as the broadcast work force becomes more diverse, the rationale weakens further.

In that regard, it is useful to examine the broadcast employment data released just last month by the Radio Television Digital News Association (“RTDNA”). RTDNA regularly gathers data on the composition of broadcast news departments, which are generally the station employees most directly involved in a station’s local programming and community involvement.

⁵¹ Comments of the Multicultural Media, Telecom and Internet Council (“MMTC Comments”) at 19. Unfortunately, the MMTC’s solution for determining whether a licensee is a “bad apple” is for the Commission to review the work force demographics of licensees relying on word-of-mouth recruiting and punish only those whose staffs are not heterogeneous. However, such disparate treatment would not only be a race-based rule subject to strict scrutiny in court, but would represent merely another variation of the “quota-based” approach to EEO that was struck down in both *Lutheran Church* and *MD/DC/DE Broadcasters Association*. See, e.g., *MD/DC/DE Broadcasters Association*, 236 F.3d at 21 (“Option B places pressure upon each broadcaster to recruit minorities without a predicate finding that the particular broadcaster discriminated in the past or reasonably could be expected to do so in the future.”).

The 2017 RTDNA/Hofstra University study found that minority employees represented 24.4% of TV newsroom employees and 11.7% of radio newsroom employees, with women representing 44.0% of TV newsroom employees and 36.1% of radio newsroom employees.⁵² More importantly, at least with regard to determining whether word-of-mouth recruiting can serve as a “barrier” to equal opportunity, 95.5% of TV newsrooms have minority employees, and 99.2% have women employees.⁵³ While smaller minority populations in many rural areas can have a practical impact on the number of minority newsroom employees in a small market radio station, 50% of major market radio newsrooms have minority employees, and 67.9% have women employees.⁵⁴

In light of the substantial presence of minority and women employees in broadcast newsrooms, the factual basis for the Commission’s legal rationale supporting the EEO Rule is eroding. That is a happy circumstance for all, but it also means that if the Commission nonetheless wishes to retain its EEO Rule, the rule needs to be streamlined, reducing unnecessary burdens on stations, and minimizing the associated paperwork. This proceeding marks an important first step in that process; one which is critical if the EEO Rule is to survive the judicial scrutiny it could not overcome in *Lutheran Church* and *MD/DC/DE Broadcasters Association*.

2. The Congressional Component

But with regard to reforming the rule, the next question is what flexibility does the Commission have in doing so? Potentially playing a role in any modernization of the EEO Rule

⁵² https://www.rtdna.org/article/rtdna_research_women_and_minorities_in_newsrooms_2017 (last visited July 28, 2017).

⁵³ *Id.*

⁵⁴ *Id.*

is 47 U.S.C § 334, which was enacted in 1992, long before the *Lutheran Church* and *MD/DC/DE Broadcasters Association* decisions. It provides as follows:

Limitation on revision of equal employment opportunity regulations

(a) Limitation

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.

(b) Midterm review

The Commission shall revise the regulations described in subsection (a) to require a midterm review of television broadcast station licensees' employment practices and to require the Commission to inform such licensees of necessary improvements in recruitment practices identified as a consequence of such review.⁵⁵

(c) Authority to make technical revisions

The Commission may revise the regulations described in subsection (a) to make nonsubstantive technical or clerical revisions in such regulations as necessary to reflect changes in technology, terminology, or Commission organization.⁵⁶

Before discussing the implications of Section 334, the State Associations first note that by its terms, it applies only to television station licensees and permittees. It is irrelevant to EEO regulation of radio station operators.

With regard to television station operators, however, Section 334 is more of an enigma.

The court in *Lutheran Church* found the 1992 iteration of the EEO Rule to be invalid as a

⁵⁵ Note that while Section 334 requires the Commission to conduct Midterm EEO Reviews, it does not limit the Commission's discretion in determining how to conduct those reviews. As a result, this provision does not interfere with the suggestion made in a number of comments (and discussed above) that the Commission no longer require the filing of Form 397, the Mid-Term EEO Report form. Instead, it merely requires that the FCC conduct a Midterm EEO Review. With regard to Section 334's restriction on altering certain then-existing EEO forms, that does not apply to Form 397, which was not created until after Section 334 was enacted.

⁵⁶ 47 U.S.C. § 334 (emphasis added).

violation of the U.S. Constitution, and Section 334's current relevance, if any, has not been addressed by the courts. In interpreting the current relevance of the provision, there are two possible options:

1. The plain language of Section 334 prohibits the Commission from enacting any EEO regulation affecting TV stations other than what was contained in the 1992 rule. Given that the 1992 EEO rule was invalidated in *Lutheran Church v. FCC*, the Commission is prohibited from applying any EEO regulation adopted after 1992 to TV stations, making the current EEO Rule unenforceable with regard to TV stations. As noted above, Section 334 by its terms does not apply to radio, so it would not restrict any Commission effort to reform its rule with regard to radio stations; or
2. As Section 334 orders the FCC to maintain in place a rule that the courts have determined is unconstitutional, Section 334 is itself unconstitutional on the theory that a statute seeking to impose an unconstitutional regulation is itself unconstitutional. If that is the case, the FCC's authority to reform the EEO Rule with regard to both TV and radio stations is unaffected by Section 334. As noted above, however, the courts have not ruled on the status of Section 334, leaving the viability of this option uncertain.

Unhappy with either of those options, the FCC proposed a third option following *Lutheran Church*: construing Section 334 as a general grant of authority from Congress to regulate EEO.⁵⁷ Relying on this assertion, and proceeding from the premise that the nondiscrimination portion of its rule remained intact following *Lutheran Church*,⁵⁸ the Commission asserted that *NAACP v. FPC*, the case which the *Lutheran Church* court had

⁵⁷ *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, 15 FCC Rcd 2329, 2337 (2000).

⁵⁸ *Id.* at 2336. See also *2002 EEO Order*, 17 FCC Rcd at 24036 ("In order to avoid any confusion arising from the language in the court's decision, we recodify the nondiscrimination requirement.").

specifically rejected as a basis for FCC authority to adopt an employment rule under its broad public interest mandate, actually *validated* the FCC's authority to adopt an EEO rule.⁵⁹

Having convinced itself of its authority, the FCC adopted its post-*Lutheran Church* EEO rule. That rule, however, was found unconstitutional in *MD/DC/DE Broadcasters Association* because it was not narrowly tailored. As a result, that court had no reason to proceed to other fundamental questions, such as the Commission's authority to promulgate an EEO rule at all, or whether Section 334 prevented the Commission from adopting an EEO rule that would apply to TV stations.⁶⁰

The good news for the Commission is that its ability to reform the EEO Rule is not hindered by Section 334 under any of these legal theories. With regard to Option 1, it is true that any reformed EEO regulation adopted by the Commission might be found unenforceable with regard to TV stations because of Section 334, but that is equally true of the existing rule. With regard to Option 2, reform would not be restricted if Section 334's prohibition on new EEO regulations is itself unconstitutional. Finally, with regard to the assertion of prior commissions that the FCC effectively had authority to override the plain language of Section 334 and adopt new rules (twice) because of its inherent authority to promulgate EEO regulations, a court may or may not agree with that assertion, but the Commission would be in no worse (and likely a

⁵⁹ See *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, 15 FCC Rcd 2329, 2338 (2000).

⁶⁰ In adopting what is the current EEO Rule, the Commission continued its reliance on Section 334 as a general grant of authority to adopt its regulations. See *2002 EEO Order*, 17 FCC Rcd at 24026-27. Similarly, the FCC cited the court's statements in the *Lutheran Church* rehearing decision (that the court would be willing to review any new or changed goals the Commission might present to support its authority to promulgate a new EEO rule) as a factual finding by the court that the FCC had authority to create a new EEO rule. *Id.* at 24022.

better) position to defend a reformed EEO Rule in the courts than it would be to defend the current rule's compliance with Section 334.

As noted above, these various considerations make reforming the EEO Rule a bit more complicated than the typical broadcast rule. The above discussion is intended to highlight those legal complexities and assist the FCC should it wish to proceed to a more in-depth review of the EEO Rule. Indeed, these considerations are important not only for those wishing to alter the FCC EEO regime, but for those seeking to provide legal justification to support it.

As a practical matter, however, these fundamental policy and statutory issues are not presently before the FCC. Of more immediate import here is the goal of minimizing unnecessary paperwork and regulatory burdens—the Commission's objective in launching the Modernization proceeding.

In that regard, we believe the FCC can achieve its current EEO objectives through a more efficient and less burdensome process. The history of broadcasters' compliance with the EEO Rule demonstrates that stations are meeting the FCC's EEO objectives. There is no need to continue a regulatory process that places heavy emphasis on duplicative reporting and paperwork. The movement of public files online has fundamentally changed the process, rendering much of the EEO paperwork duplicative and unnecessary. Accordingly, the State Associations request that the FCC move promptly to:

- Eliminate the filing of the Mid-Term EEO Report (Form 397);
- Eliminate the requirement that stations post their most recent Annual EEO Public file Report on their website; and
- Eliminate the random EEO Audit, or at least minimize the burden of such audits by streamlining the process as discussed above, including elimination of the requirement that stations post their responses in their public file.

As reflected in the various comments cited herein, the EEO Rule is clearly a candidate for modernization, with ample room for reducing paperwork and regulatory burdens on station staff without affecting in any way the FCC's underlying EEO policies.

CONCLUSION

For the reasons discussed above, the State Associations respectfully request that the Commission promptly initiate proceedings to review and amend its regulations consistent with these Joint Reply Comments.

Respectfully submitted,

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August 4, 2017

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