

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

In the Matter of )  
 )  
Review of the Commission’s ) MM Docket No. 98-204  
Broadcast and Cable )  
Equal Employment Opportunity )  
Rules and Policies )  
and )  
Termination of the ) MM Docket No. 96-16  
EEO Streamlining Proceeding<sup>1</sup> )  
 )  
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 )

**REPORT AND ORDER**

**Adopted: January 20, 2000;**

**Released: February 2, 2000**

By the Commission: Chairman Kennard and Commissioners Ness and Powell issuing separate statements; Commissioner Tristani approving in part, dissenting in part and issuing a statement; Commissioner Furchtgott-Roth dissenting and issuing a statement.

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<sup>1</sup> Streamlining Broadcast EEO Rule and Policies, MM Docket No. 96-16, 11 FCC Rcd 5154 (1996) (Streamlining).

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## I. INTRODUCTION

1. In this *Report and Order*, we adopt a new broadcast equal employment opportunity (“EEO”) Rule and policies,<sup>2</sup> consistent with the D.C. Circuit’s decision in *Lutheran Church - Missouri Synod v. FCC*,<sup>3</sup> amend our EEO rules and policies applicable to cable entities,<sup>4</sup> including multichannel video programming distributors (“MVPDs”),<sup>5</sup> to conform them, as much as possible, to the broadcast EEO

<sup>2</sup> The broadcast EEO Rule, 47 C.F.R. § 73.2080, covers “all licensees or permittees of commercially or noncommercially operated AM, FM, TV, or international broadcast stations.” In addition, pursuant to *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5791 (1997), Digital Audio Radio Service by satellite is also covered by our EEO Rule. Prior to their suspension, discussed below, several different EEO forms were required to be filed by broadcasters, including a Broadcast Station Annual Employment Report (Form 395-B), a Broadcast EEO Program Report (Form 396) filed with a station’s renewal application, and a Broadcast EEO Model Program Report (Form 396-A) filed with an assignment, transfer, or construction permit application.

<sup>3</sup> 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh’g denied*, 154 F.3d 487, *pet. for reh’g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) (“*Lutheran Church*”).

<sup>4</sup> Our cable EEO rules, 47 C.F.R. § 76.71, *et. seq.* (“cable EEO rules”), were implemented pursuant to Section 634 of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), and the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). *See also* 47 C.F.R. §§ 21.920, 25.601, 74.996, 76.1702, 76.1802, and 100.51. Cable entities are required to file Annual Employment Reports (Form 395-A for cable operators and satellite master antenna television systems (“SMATV”) and Form 395-M for multichannel video programming distributors) and are also required to file a Supplemental Investigation Sheet (“SIS” or “SIS form”) every five years.

<sup>5</sup> “A multichannel video programming distributor is an entity such as, but not limited to, a cable operator, a multipoint distribution service, a multichannel multipoint distribution service [“MMDS”], a direct broadcast satellite service [“DBS”], a television receive-only satellite program distributor, and a video dialtone program

Rule; establish our authority to retain the anti-discrimination provisions of our broadcast EEO Rule; and terminate MM Docket Nos. 98-204 and 96-16, *Streamlining Broadcast EEO Rule and Policies*, 13 FCC Rcd 6322 (1998) (“*Order and Policy Statement*”). The new broadcast EEO Rule and modified EEO rules for cable entities, adopted herein, emphasize outreach in recruitment to all qualified job candidates and ban discrimination on the basis of race, color, national origin or gender.

2. Pursuant to the Communications Act of 1934, as amended (“Communications Act”), this Commission is charged with the responsibility of regulating “interstate and foreign communications services so that they are available, so far as possible, to all people of the United States, without discrimination on the basis of race, religion, national origin, or sex...”<sup>6</sup> The Commission is also mandated to license individuals and companies to use the radio spectrum as the “public interest, convenience, and necessity” require.<sup>7</sup> While we have grappled over the years with the task of giving form and content to that statutory mandate, we have no doubt that it requires us to deny licenses to those who would discriminate on the basis of race, ethnicity or gender. Such persons do not have the basic character qualifications to hold a valuable government license. And the licenses that we grant to broadcasters are not like any others granted by government. They afford licensees the privilege and the power to air programming -- entertainment, news, public affairs, educational -- that exerts a powerful influence on our culture and shared values and helps shape and inform public opinion on myriad issues of public importance. We do not believe that a licensee who discriminates against minorities or women would be able or inclined to fulfill its responsibility as a public trustee to provide a program service that airs diverse viewpoints, enriches public debate, and is responsive to the needs and interests of all sectors of its community. We can expect no less of broadcast licensees or cable entities under the Communications Act.<sup>8</sup>

3. We require more of broadcasters and cable entities in this *Report and Order*, however, than merely refraining from discrimination. We require them to reach out in recruiting new employees beyond the confines of their circle of business and social contacts to all sectors of their communities. We believe that repeated hiring without broad outreach may unfairly exclude minority and women job candidates when minorities and women are poorly represented in an employer’s staff -- particularly when they are poorly represented in the ranks of management employees who make hiring decisions. It is not enough to say that one will not discriminate against anyone who applies for a job when not all have been given a fair opportunity to apply. Outreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process.

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service provider...” 47 C.F.R. § 76.71(a). The term “cable” in this *Report and Order* includes multichannel video programming distributors that control the programming that they distribute. 47 U.S.C. § 554(h)(1); 47 C.F.R. § 76.71(a).

<sup>6</sup> 47 U.S.C. § 151, as amended (1997).

<sup>7</sup> 47 U.S.C. §§ 307, 309.

<sup>8</sup> See 47 U.S.C. §§ 151, 303(f), (g), (r); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795-800 (1978); *NAACP v. FPC*, 425 U.S. 662, 670 n. 7 (1976) (“*National Citizens*”); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 U.S. 621, 628, 633-35 (D.C. Cir. 1978) (*en banc*) (“*Bilingual*”).

4. These goals would be sufficient in themselves to warrant nondiscrimination and outreach requirements. We believe that such requirements also serve an important, constructive function in fostering greater diversity of viewpoints and programming that is responsive to the interests of a diverse community. As discussed below, we harbor no illusion that members of any group share the same outlook or views. But we do believe that the record in this proceeding and human experience suggest that, if the group of people who make programming decisions at a broadcast station or cable system come from a wider variety of backgrounds with a greater range of human experience and social interactions, their programming decisions will better reflect the diversity of viewpoints in our pluralistic society than would programming decisions made by a homogenous workforce. And we hope and believe that, given the power and pervasiveness of the electronic media in our nation, programming that reflects the diverse views and interests present in our society will increase our understanding of those from different backgrounds, decrease the sense of isolation of minority groups, and help us build bridges across racial, ethnic and socioeconomic divides. We have no doubt that regulations that advance these goals would “encourage the larger and more effective use of radio in the public interest.”<sup>9</sup>

## II. SUMMARY

5. The *Report and Order* addresses the concerns of the *Lutheran Church* court regarding the Commission's authority to promulgate an employment nondiscrimination rule. In the *Report and Order*, we confirm the existence of such authority and retain the anti-discrimination provisions of the broadcast and cable EEO rules. The *Report and Order* also discusses the statutory bases for the Commission's authority to promulgate EEO program requirements and describes the regulatory approach that we are adopting towards religious radio broadcasters.

6. The *Report and Order* reinstates the requirement that broadcasters file annual employment reports (Form 395-B), which was suspended by the Commission following *Lutheran Church*, and retains the requirement that cable entities file annual employment reports (Form 395-A or 395-M).<sup>10</sup> The Commission will no longer use the employment profile data in the annual employment reports in screening renewal applications or assessing compliance with EEO program requirements. The Commission will use this information only to monitor industry employment trends and report to Congress.

7. The EEO program requirements adopted in the *Report and Order* require that broadcasters and cable entities widely disseminate information about job openings to ensure that all qualified applicants, including minorities and women, are able to compete for jobs in the broadcast and cable industries. The requirements afford broadcasters and cable entities flexibility in designing their EEO programs while, at the same time, ensuring broad dissemination of information concerning every full-time vacancy, as well as effective enforcement of our EEO rules and policies. To enhance the success of their outreach, broadcasters and cable entities are also required to implement two supplemental recruitment measures: (i) notification of job vacancies to any recruitment organization that requests such notification; and (ii) a certain number of outreach efforts beyond the traditional recruitment that occurs in response to

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<sup>9</sup> 47 U.S.C. § 303(g).

<sup>10</sup> The annual employment reporting requirement for cable entities was not suspended following *Lutheran Church*.

individual vacancies, such as job fairs, internship programs, training programs, mentoring programs, and interaction with educational and community groups.

8. Although all broadcasters and cable entities will be required to widely disseminate information concerning job openings, they may choose not to use the supplemental recruitment measures if they believe that they can accomplish broad outreach without them. However, a broadcaster or cable entity who makes this election will be required to maintain records concerning the recruitment sources, race, ethnicity and gender of applicants so it can monitor whether its outreach efforts have been successful in achieving broad outreach to the community. If the data collected indicates that outreach has not been inclusive, a broadcaster or cable entity will be expected to adjust its outreach program accordingly. Thus, the rules we are adopting require a broadcaster or cable entity to analyze the effectiveness of its outreach program, and address any problems found.

9. As in the past, broadcast station employment units with fewer than five full-time employees and cable employment units with fewer than six full-time employees will not be required to demonstrate compliance with the EEO program requirements. However, all other broadcasters and cable entities must file annually an EEO report in their public file, detailing their outreach efforts during the preceding year and the results of those efforts. Broadcasters also will be required to file a Certificate of Compliance every second, fourth and sixth year of the license term certifying compliance with the EEO Rule. Television stations and every radio station that is part of an employment unit with more than ten full-time employees will be required to file a copy of their EEO public file report midway through the license term with the FCC. This information will be analyzed as part of the Commission's mid-term review of a station's EEO program. Stations will also be required to file their EEO public file report with their renewal application and cable entities will be required to file their EEO public file report as part of the supplemental information required by statute to be filed every five years.

### III. BACKGROUND

10. The Commission, in the *Notice of Proposed Rule Making*<sup>11</sup> in this proceeding, proposed EEO outreach requirements that would be consistent with the decision rendered in *Lutheran Church*.<sup>12</sup> The Court of Appeals held that the portions of the Commission's regulations requiring licensees to maintain an EEO program to recruit minorities were subject to the strict scrutiny applicable to racial classifications imposed by the federal government under *Adarand Constructors, Inc. v. Peña*.<sup>13</sup> The court further held those requirements unconstitutional as applied to minorities.<sup>14</sup> The court opined that this regulatory scheme "pressure[s] stations to maintain a work force that mirrors the racial breakdown of their 'metropolitan

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<sup>11</sup> 13 FCC Rcd 23004 (1998) (hereinafter *NPRM*). We note that several comments and reply comments were late-filed in this proceeding. However, because we believe that it is in the public interest to do so, we will consider these comments and reply comments as part of the record of this proceeding.

<sup>12</sup> See *NPRM*, 13 FCC Rcd at 23008-23011 (paras. 11-17) for further discussion of *Lutheran Church*.

<sup>13</sup> 515 U.S. 200, 115 S. Ct. 2097 (1995) ("*Adarand*").

<sup>14</sup> The court declined to evaluate the constitutionality of the EEO program requirements as applied to women, since the issue was not before it. *Lutheran Church*, 141 F.3d at 351, n.9.

statistical area,”<sup>15</sup> and thus injects racial considerations into hiring decisions. The court did not find that a station would be held in violation of the Commission’s rules based solely on a statistical disparity between its employment profile and the percentage of minorities in the local labor force. However, it concluded that the requirement that stations evaluate the success of their EEO programs based on those statistics, in conjunction with the Commission’s use of those statistics at renewal time, compelled licensees “to hire with an eye toward meeting the numerical target,” and thus resulted in individuals being granted a preference because of their race.<sup>16</sup> In addition, while the court did not question the constitutionality of the Commission’s anti-discrimination rule, it remanded to the Commission the question of its statutory authority to promulgate such a rule.<sup>17</sup> The *NPRM* tentatively concluded that we have ample statutory authority to retain our EEO anti-discrimination rule,<sup>18</sup> and we elaborate further on this view below.

11. On September 15, 1998, the court denied the Commission’s petition for rehearing *en banc*.<sup>19</sup> In doing so, the court issued a supplemental decision in which it indicated that its initial decision in the case should not be read to hold that any regulation encouraging broad outreach to, as opposed to the actual hiring of, a particular race would necessarily trigger strict scrutiny. The court also observed that not all race conscious measures adopted by the government are subject to strict scrutiny.<sup>20</sup>

12. Against that backdrop, the Commission sought comment on numerous proposals and issues regarding changes to its broadcast EEO Rule and conforming changes to its cable EEO rules. Although the *Lutheran Church* decision did not directly affect cable entities, the Commission’s cable EEO rules contain some of the same provisions that the court invalidated in *Lutheran Church*; therefore, to avoid possible constitutional problems, as well as to emphasize broad and inclusive recruitment outreach, we proposed new EEO provisions for both broadcasters and cable entities, including MVPDs.<sup>21</sup>

13. In the *NPRM*, the Commission tentatively proposed EEO rules which removed all requirements that broadcast licensees and cable entities compare their employment profile with the local labor force. In addition, the Commission indicated that it would no longer compare individual broadcast licensees’ or cable entities’ employment profiles with the local labor force, even as a screening device. We proposed to retain the cable and broadcasting rules’ general EEO policy/program requirements as outlined in 47 C.F.R. §§ 76.73(b) and 73.2080(b), respectively. Further, we proposed to retain most of the cable and broadcasting rules’ specific EEO program requirements.<sup>22</sup>

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<sup>15</sup> *Id.* at 352.

<sup>16</sup> *Id.* at 354.

<sup>17</sup> *Id.* at 356-357.

<sup>18</sup> *NPRM*, 13 *FCC Rcd* at 23014 (para. 25).

<sup>19</sup> *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487 (1998).

<sup>20</sup> *Id.* at 492.

<sup>21</sup> *See* 47 C.F.R. §76.71 *et seq.*

<sup>22</sup> These require broadcasters and cable entities to: disseminate their equal employment opportunity program to job applicants and employees; review seniority practices to ensure that such practices are not

14. The *NPRM* proposed several alternative recruitment approaches with the objective of ensuring the broadest dissemination of vacancy information. We asked generally for comments on ways the Commission could encourage entities to expand their pools of qualified applicants without creating any incentives to prefer minority and female applicants over other applicants.

15. Further, the *NPRM* proposed that entities be required to analyze their efforts to recruit, hire and promote in a nondiscriminatory fashion and address any difficulties in implementing their EEO programs. We solicited comments on how this analysis should be conducted.

16. The *NPRM* stimulated response from a broad range of commenters, who raised exceptional and thought-provoking ideas and proposals. Having reviewed the entire record in this proceeding, we have constructed a new EEO outreach program which we believe will accomplish our goal of ensuring broad outreach in recruitment while avoiding the constitutional infirmities identified by the court in *Lutheran Church* and reducing recordkeeping burdens to the extent consistent with maintaining an effective, enforceable program.

#### IV. DISCUSSION

##### A. Statutory Authority for EEO Program Requirements and Anti-Discrimination Rules

###### 1. Section 634: Explicit Authority to Regulate EEO Practices of Cable Entities, Including Multichannel Video Programming Distributors

17. We noted in the *NPRM* that the court's decision in *Lutheran Church* did not address the validity of our EEO rules for cable entities, which were not at issue in that case.<sup>23</sup> We tentatively concluded that we have ample statutory authority under Section 634 of the Communications Act for the continued enforcement of the cable EEO rules.<sup>24</sup> Indeed, we noted that Section 634 *requires* us to enforce EEO rules for cable entities. Nevertheless, because certain provisions in the cable EEO rules are similar to those provisions in the broadcast EEO Rule found to be unconstitutional in *Lutheran Church*, we sought comment on whether the Commission has statutory authority to modify those rules to avoid constitutional problems.

18. We conclude that the Commission is required by Section 634 to enforce EEO rules for the cable industry, but that we have considerable latitude under the statute to revise the cable EEO rules. Congress built into Section 634 flexibility for the Commission to implement the regulatory scheme by granting the Commission rulemaking authority rather than simply prescribing the cable EEO requirements

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discriminatory; examine rates of pay and fringe benefits for employees and eliminate any inequities based upon race or sex discrimination; offer promotions to qualified minorities and women in a nondiscriminatory fashion to positions of greater responsibility; cooperate with any labor union in the development of programs to assure qualified minority persons or women of equal opportunity for employment; include a nondiscrimination clause in union agreements; and avoid the use of selection techniques or tests that have the effect of discriminating against qualified women and minorities. *NPRM*, 13 FCC Rcd at 23039.

<sup>23</sup> *NPRM*, 13 FCC Rcd at 23022 (para. 46). See 47 C.F.R. §§ 76.71 *et seq.*

<sup>24</sup> 47 U.S.C. § 554.

by statute; by stating in Section 634(d)(2) that the “rules shall specify the terms under which” an entity shall take the actions specified in that section;<sup>25</sup> and by providing in Section 634(d)(4) that the Commission may amend the cable EEO rules “from time to time to the extent necessary to carry out the provisions of this section.” We believe that our broad rulemaking authority under Section 634(d)(2) and 634(d)(4) permits us to adopt new, race-neutral, inclusive outreach requirements and to revise the annual employment reports (Forms 395-A and 395-M) and Supplemental Investigation Sheets (“SIS” or “SIS forms”) filed by cable entities to make them consistent with our modified cable EEO rules. Commenters agree that Section 634 explicitly authorizes the Commission to modify its cable EEO regulations to advance the congressional goals identified in the statute.<sup>26</sup>

19. Additionally, by stating in Section 634(d)(2) that the Commission is to adopt rules implementing the requirements of that section “to the extent possible,” Congress recognized that it may not be possible for the Commission to fully implement all of the provisions in that section. Thus, it only obligated the Commission to implement the listed requirements “to the extent possible,” consistent with other conflicting requirements or limitations. The court’s decision in *Lutheran Church* delineates constitutional limitations with which we must reconcile the cable EEO rules. We believe that Section 634(d)(2) permits the Commission to eliminate those provisions of the cable EEO rules that are similar to those struck down by the court in *Lutheran Church* because it is not “possible” for the Commission to enforce a provision that a court has found unconstitutional. Accordingly, we modify the cable EEO rules in this *Report and Order* to remove provisions similar to those found unconstitutional in *Lutheran Church*. We also revise the annual employment reports and SIS forms filed by cable entities to conform them with our modified cable EEO rules.

## 2. Broadcasters

20. The court specifically directed us in *Lutheran Church* to consider our authority to promulgate an employment nondiscrimination rule. Further, while the court struck down the broadcast EEO program requirements on constitutional grounds and did not hold that we lack statutory authority to promulgate such rules, it questioned our reliance on our public interest mandate to foster diversity of programming as a basis for the broadcast EEO Rule. Accordingly, we discuss here our statutory authority to retain our anti-discrimination rule and to adopt new EEO outreach requirements for broadcasters.

21. Based on the record in this proceeding, we have concluded that we have ample statutory authority to retain our EEO anti-discrimination rule and, consistent with the constitutional standards established in *Lutheran Church*, to promulgate new EEO outreach requirements. First, Congress has explicitly authorized us to regulate the EEO practices of television broadcasters and ratified the Commission’s authority to adopt EEO rules for radio broadcasters. Second, we have authority to adopt rules fostering equal employment in the broadcast industry in order to further the statutory goal of fostering minority and female ownership in the provision of commercial spectrum-based services, reflected in Section 309(j) of the Communications Act. Finally, equal employment of minorities and women furthers the public

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<sup>25</sup> In contrast, Section 634(c) simply provides that cable entities “shall” comply with five listed requirements in implementing their EEO programs.

<sup>26</sup> Tele-Communications, Inc. (TCI) Comments at 3 (owner of cable systems); Cole, Raywid and Braverman (CRB) Comments at 2-3.

interest goal of diversity of programming, both directly and by enhancing the prospects for minority and female ownership.

a. Section 334: Explicit Authority to Regulate EEO Practices of Television Broadcasters

22. In 1992, Congress enacted Section 334 of the Communications Act as part of the Cable Television Consumer Protection and Competition Act of 1992<sup>27</sup> Section 634 provides that “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.<sup>28</sup>

The Conference Report accompanying this legislation indicates that Section 634 “codifies the Commission’s equal employment opportunity rules, 47 C.F.R. 73.2080” for television licensees and permittees.<sup>29</sup> Section 334 thus grants the Commission explicit authority to regulate the EEO practices of television broadcasters. Indeed, it *requires* the Commission regulate the EEO practices of television broadcasters. Thus, as is the case with respect to cable operators and other multichannel programming distributors, the Commission has express statutory authority to regulate the EEO practices of television broadcasters.

b. Congressional Ratification

23. We noted in the NPRM that the Commission has maintained nondiscrimination and EEO program requirements for broadcasters for over 30 years. In 1968, the Commission adopted a Memorandum Opinion and Order in which it concluded that the national policy against discrimination and the fact that broadcasters are licensed under the Communications Act to operate in the public interest required the Commission to consider allegations of employment discrimination in licensing broadcast stations.<sup>30</sup> The Commission expressed its view that deliberate discrimination in employment is inconsistent with a broadcaster’s responsibility to serve all elements of its community.<sup>31</sup> In 1969, the Commission adopted rules prohibiting broadcast stations from discriminating against any person in employment on the basis of race, color, religion, or national origin, and requiring stations to maintain a program designed to assure equal opportunity in every aspect of station employment.<sup>32</sup> It reiterated its view that discriminatory

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<sup>27</sup> Pub. L. No. 192-385, 106 Stat. 1460 (“1992 Cable Act”).

<sup>28</sup> 47 U.S.C. § 334(a).

<sup>29</sup> Conf. Rep. No. 862, 102d Cong., 2d Sess. 97 (1992).

<sup>30</sup> *See Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 FCC 2d 766 (1968).

<sup>31</sup> *Id.* at 770.

<sup>32</sup> *See Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 18 FCC 2d 240 (1969).

employment practices are incompatible with a station's obligation to operate in the public interest, and relied on Sections 4(i), 303, 307, 308, 309 and 310 in adopting the new rules. Relying on its authority to license and regulate broadcasters in the public interest, the Commission has revised and extended its rules on numerous occasions since 1969 to, *inter alia*, refine its EEO program requirements, require licensees to file these programs and other statistical employment information with the Commission, and prohibit discrimination against, and require outreach to, women.<sup>33</sup>

24. Over the last 30 years, the Commission has vigorously enforced its EEO requirements, sanctioning broadcast licensees in numerous cases for failing to comply fully with those requirements. Commission decisions enforcing the EEO requirements have been challenged both by licensees who have been sanctioned for noncompliance<sup>34</sup> and by petitioners who believed that Commission enforcement was not vigorous enough.<sup>35</sup> Indeed, the Court of Appeals for the D.C. Circuit held more than 20 years ago that the Commission *must* investigate broadcasters' employment practices and, in assessing the character qualifications of broadcast licensees, consider whether they have engaged in intentional employment discrimination.<sup>36</sup> And the Supreme Court observed in the seminal case addressing the scope of an agency's authority to serve the "public interest" that FCC regulation of the employment practices of its licensees "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 ... to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups."<sup>37</sup>

25. We observed in the *NPRM* that during the three decades that the Commission has administered EEO program requirements and antidiscrimination rules, Congress has repeatedly expressed awareness of the rules and has not only acquiesced in them, but has also referred to them approvingly,

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<sup>33</sup> See, e.g., *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 23 FCC 2d 430 (1970); *Amendment of Part VI of FCC Forms 301, 303, 309, 311, 314, 315, 340, and 342, and Adding the Equal Employment Program Filing Requirement to Commission Rules 73.125, 73.301, 73.599, 73.680, and 73.793*, 32 FCC 2d 708 (1971); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 FCC 2d 226 (1976) ("1976 Report and Order"). See also *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 70 FCC 2d 2320 (1978) [delineating the Commission's investigative jurisdiction and methods of cooperation with the Equal Employment Opportunity Commission ("EEOC")].

<sup>34</sup> See, e.g., *San Luis Obispo Broadcasting Ltd. Partnership*, 13 FCC Rcd 1020 (1998); *Valley Television, Inc.*, 12 FCC Rcd 22795 (1998); *Congaree Broadcasting, Inc.*, 5 FCC Rcd 7691 (1990); *South Plains Broadcasting Company, Inc.*, 101 FCC 2d 1364 (1985).

<sup>35</sup> See, e.g., *Davidson County Broadcasting Company, Inc.*, 12 FCC Rcd 12245 (1997); *Broadcast Associates, Inc.*, 11 FCC Rcd 15479 (1996); *Buckley Broadcasting Corp.*, 11 FCC Rcd 6628 (1996); *Lanser Broadcasting Corp.*, 10 FCC Rcd 12121 (1995); *Ogden Broadcasting of South Carolina, Inc.*, 7 FCC Rcd 1895 (1992).

<sup>36</sup> *Bilingual*, 595 F.2d at 628-29 ("[I]n implementing its anti-discrimination policy, the Commission of necessity must investigate broadcasters' past employment practices. A documented pattern of intentional discrimination would put seriously into question a licensee's character qualification to remain a licensee: intentional discrimination almost invariably would disqualify a broadcaster from a position of public trusteeship.").

<sup>37</sup> *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976).

confirming our view that the Commission has statutory authority to promulgate these rules. We continue to believe that Congress has ratified the Commission's authority to adopt and enforce EEO requirements against broadcasters under its statutory mandate to license and regulate broadcasters in the public interest.<sup>38</sup>

26. There is a substantial body of case law establishing the principle that congressional approval and ratification of administrative interpretations of statutory provisions, including those granting jurisdiction to regulate, can be inferred from congressional acquiescence in a long-standing agency policy or practice.<sup>39</sup> The inference of ratification from congressional acquiescence in the Commission's exercise of authority to adopt and enforce EEO regulations is particularly strong. As noted above, the Commission has consistently taken the position over a very long period of time -- 30 years -- that it has authority under its public interest mandate to adopt and enforce EEO rules, and the obligations arising under those rules have become a major component of broadcasters' obligation to serve the public interest.<sup>40</sup> Moreover, as noted above, the Commission has enforced its regulations vigorously. These are not obscure agency rules that could have gone unnoticed by Congress.

27. But congressional ratification of the Commission's authority to adopt EEO rules need not be inferred solely from congressional acquiescence in the Commission's exercise of that authority over a period of many years. Congress has, in two major pieces of legislation, *expressly* approved and ratified the Commission's authority to regulate the EEO practices of its broadcast licensees and other media entities as well.

28. In 1984, Congress enacted Section 634 of the Communications Act<sup>41</sup> as part of the Cable Communications Policy Act of 1984.<sup>42</sup> Although the Commission at that time already had rules in place

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<sup>38</sup> We note that while Congressional ratification applies equally to radio and television broadcasters – which have been subject to the same EEO rules for the last 30 years – it is relevant only to radio broadcasters since Congress enacted Section 334 of the Act, which, as discussed above, *expressly* authorizes the Commission to regulate the EEO practices of television broadcasters.

<sup>39</sup> See, e.g., *Haig v. Agee*, 453 U.S. 280, 300-06 (1981) (“*Haig*”) (long-standing interpretation by the Secretary of State of its power under Passport Act of 1926 as encompassing the power to revoke passports to prevent damage to national security or foreign policy was ratified by congressional acquiescence, even though Secretary exercised power infrequently); *Lorillard v. Pons*, 434 U.S. 575, 580-85 (1978) (“*Lorillard*”) (Congress is presumed to be aware of administrative and judicial interpretations of a statute and to adopt and ratify those interpretations when it re-enacts a statute without change or incorporates in a new law sections of a prior law that have a settled interpretation); *Zemel v. Rusk*, 381 U.S. 1, 9-13 (1965) (“*Zemel*”) (Secretary of State's interpretation of Passport Act of 1926 as authorizing him to impose area restrictions was ratified by Congress when it left untouched the Secretary's broad rulemaking authority when it later enacted legislation relating to passports); *Norwegian Nitrogen Products Co. v. U.S.*, 288 U.S. 294, 313-15 (1933) (“administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful”).

<sup>40</sup> See, e.g., *1969 Report and Order*, 18 FCC 2d at 241-42; *1976 Report and Order*, 60 FCC 2d at 229; *Report*, 9 FCC Rcd at 6285-87.

<sup>41</sup> 47 U.S.C. § 554.

<sup>42</sup> Pub. L. No. 98-549, 98 Stat. 2779 (“1984 Cable Act”).

regulating the EEO practices of cable operators as well as broadcasters, Section 634 was intended to “codif[y] and strengthen[] the Commission’s existing equal employment opportunity regulations.”<sup>43</sup> Section 634 granted the Commission broad authority to adopt rules banning employment discrimination by cable operators and requiring cable operators to “establish, maintain, and execute a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of its employment policies and practices ....”<sup>44</sup>

29. The legislative history of Section 634 makes it unmistakably clear that Congress believed that the Commission already possessed authority to regulate the EEO practices of mass media entities -- broadcast as well as cable. The House Commerce Committee Report on the bill proposing the provisions on which Section 634 was based explicitly confirmed the Commission’s authority to adopt EEO rules. The House Commerce Committee stated:

*It is well established that the Commission has the authority to regulate employment practices in the communications industry. Among the Commission’s efforts in the equal employment opportunity (EEO) area over the last several years has been the enforcement of employment standards in the cable industry. Section 634 endorses and extends those standards.*

Because of the potentially large impact cable programming and other services provided by the cable industry has on the public, the employment practices of the industry have an importance greater than that suggested by the number of its employees. The committee strongly believes that *equal employment requirements are particularly important in the mass media area* where employment is a critical means of assuring that program service will be responsive to a public consisting of a diverse array of population groups.<sup>45</sup>

30. In addition to the explicit recognition of the Commission’s broad and “well established” authority to regulate employment practices in the communications industry, the legislative history of Section 634 shows that Congress viewed the legislation as codifying, strengthening and building upon the Commission’s pre-existing regulatory scheme, which it viewed as well within the Commission’s statutory authority. For example, the House Report states that the legislation “codifies and strengthens the Commission’s existing equal employment opportunity regulations.”<sup>46</sup> Further, it states that the statutory definition of the entities that are subject to the EEO requirements “endorses the Commission’s current practice of reviewing compliance with EEO standards by cable systems and other employment units with more than 5 employees, and extends the applicability of EEO requirements to headquarters operations.”<sup>47</sup>

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<sup>43</sup> H.R. Rep. No. 934, 98th Cong., 2d Sess. 86 (1984), *reprinted in* [1984] U.S. Cong. News 4655. The Senate bill that was ultimately enacted, S. 66, did not contain EEO provisions. The EEO provisions that were eventually enacted as Section 634 originated in Section 635 of H.R. 4103, which is explained in H.R. Report No. 934, discussed below. The Senate adopted the explanation of H.R. 4103 contained in H.R. Report No. 934. *See* 130 C.R. S.14285 (Oct. 11, 1985), *reprinted in* [1984] U.S. Cong. News 4738.

<sup>44</sup> 47 U.S.C. § 554(b), (c), (d).

<sup>45</sup> H.R. Rep. No. 934, 98th Cong., 2d Sess. 84-85 (1984) (emphasis added).

<sup>46</sup> *Id.* at 86.

<sup>47</sup> *Id.*

Similarly, it states that the provisions specifying the requirements for Commission EEO rules “conform in large part to the Commission’s required EEO program under existing regulations.”<sup>48</sup> Clearly, Congress recognized and ratified the Commission’s broad authority to regulate the EEO practices of mass media entities.

31. Additional evidence of congressional ratification can be found in the Cable Television Consumer Protection and Competition Act of 1992,<sup>49</sup> which further strengthened the cable EEO requirements, extended those requirements to all MVPDs, and codified the Commission’s EEO program and nondiscrimination requirements as applied to broadcast television licensees. In so doing, Congress confirmed the importance of EEO rules for the electronic media generally. Moreover, Congress once again explicitly acknowledged the existence of the Commission’s broadcast and cable EEO requirements and proclaimed that vigorous enforcement of those rules was necessary. Section 22(a) of the 1992 Cable Act provides:

- (1) *despite the existence of regulations governing equal employment opportunity, females and minorities are not employed in significant numbers in positions of management authority in the cable and broadcast television industries;*
- (2) *increased numbers of females and minorities in positions of management authority in the cable and broadcast television industries advances the Nation’s policy favoring diversity in the expression of views in the electronic media; and*
- (3) *rigorous enforcement of equal employment opportunity rules and regulations is required in order to effectively deter racial and gender discrimination.*<sup>50</sup>

By extending the cable EEO requirements to every entity that provides multiple channels of video programming, such as MMDS operators and DBS licensees, Congress was building upon, and filling in the gaps in, the Commission’s regulatory scheme, ensuring that *every* electronic mass media provider would be subject to EEO regulations enforced by the Commission.

32. As noted above, the 1992 Cable Act not only strengthened and extended the cable EEO requirements, it also codified the Commission’s EEO requirements for broadcast television stations in Section 334 of the Act.<sup>51</sup> Section 334 thus explicitly recognizes the existence of the Commission’s broadcast EEO Rule and requires the Commission to keep its EEO requirements in effect for television broadcasters.

33. Furthermore, Section 22(g) of the 1992 Cable Act required the Commission to report to Congress on “the effectiveness of [the Commission’s] procedures, regulations, policies, standards, and guidelines in promoting the congressional policy favoring increased employment opportunity for women

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<sup>48</sup> *Id.* at 87.

<sup>49</sup> Pub. L. No. 192-385, 106 Stat. 1460.

<sup>50</sup> 1992 Cable Act, Section 22(a) (emphasis added). *See also* H.R. Rep. No. 628, 102d Cong., 2d Sess. 111-17 (1992).

<sup>51</sup> 47 U.S.C. § 334. *See also* Conf. Rep. No. 862, 102d, 2d Sess 97 (1992).

and minorities in positions of management authority.” The Commission was required to include in that report “such legislative recommendations to improve equal employment opportunity in the broadcasting and cable industries as it deems necessary.” We do not believe that Congress would have directed the Commission to review the effectiveness of its broadcast and cable EEO policies and regulations then in effect, and recommend whether further legislative action was necessary, had Congress not believed that those policies and regulations were within the Commission’s lawful authority.<sup>52</sup> Thus, Section 22(g) is further evidence of Congress’ affirmative approval of the Commission’s authority to adopt equal employment opportunity requirements for broadcasters.<sup>53</sup>

34. It is within this historical context that the Commission’s statutory authority to regulate the EEO practices of broadcast licensees must be viewed. As discussed above, the Supreme Court has inferred congressional ratification of administrative action from “nothing more than silence in the face of an administrative policy.”<sup>54</sup> Here, the inference of congressional ratification rests on far firmer ground, including explicit statements confirming the Commission’s authority to regulate the EEO practices of media companies and legislation that codified and expanded the reach of Commission EEO regulations.<sup>55</sup> Under these circumstances, the inference of congressional ratification is inescapable.<sup>56</sup>

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<sup>52</sup> We note that the Commission’s EEO rules for broadcasters apply to radio as well as television stations.

<sup>53</sup> See, e.g., *Bob Jones University v. United States*, 461 U.S. 574 (1983) (“*Bob Jones University*”).

<sup>54</sup> *Haig*, 453 U.S. at 300, citing *Zemel*, 381 U.S. at 11 and other Supreme Court cases.

<sup>55</sup> The facts here give rise to an even stronger inference of congressional ratification than was present in *City of New York v. FCC*, 486 U.S. 57 (1988), for example. In that case, cable television franchisors challenged the Commission’s authority, in adopting regulations establishing cable signal quality technical standards, to forbid state and local authorities to impose more stringent technical standards. In determining that the Commission acted within its statutory authority in preempting state and local standards, the Supreme Court found that Congress in the Cable Act of 1984 endorsed the Commission’s longstanding policy of federal preemption of cable technical standards, and that it was “quite significant” that there was no evidence of any intent by Congress to “overturn the Commission’s decade-old policy without any discussion or even any suggestion that it was doing so.” *Id.* at 67-68. In the case of the Commission’s jurisdiction to regulate in the EEO area, there is affirmative evidence of congressional approval of the Commission’s statutory authority.

<sup>56</sup> See, e.g., *City of New York v. FCC*, *supra*; *Bob Jones University*, 461 U.S. at 601 (finding that “Congress affirmatively manifested its acquiescence” in the IRS’ statutory interpretation that educational institutions that discriminate on the basis of race are not eligible for an income tax exemption when it enacted a new provision denying tax-exempt status to social clubs that discriminate on the basis of race); *U.S. v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) (“once an agency’s statutory construction has been fully brought to the attention of the public and the Congress and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned”), quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 487-89 (1940); *Lorillard*, 434 U.S. at 580 (where Congress adopted a new law incorporating sections of a prior law, it can be presumed to have had knowledge of and approved the interpretation given to the prior law); *Zemel*, 381 U.S. at 12 (Congress ratified Secretary of State’s authority to refuse to impose area restrictions on travel when “[d]espite 26 years of executive interpretation of the 1926 Act as authorizing the imposition of area restrictions, Congress in 1952, though it once again enacted legislation relating to passports, left completely untouched the broad rule-making authority granted in the earlier Act.”).

35. Notably, despite voluminous comments filed in this proceeding, only one commenter challenges the Commission's position that its statutory authority to regulate the EEO practices of broadcasters has been ratified by Congress. Evening Post Company and Great Empire Broadcasting, Inc. (Evening Post) argues that Congress has not ratified the Commission's authority to regulate EEO practices of broadcasters because: (i) Section 334 of the Communications Act is framed in negative terms and thus limits, rather than expands, the Commission's authority; and (ii) Section 334 of the Communications Act was enacted by the 1992 Cable Act, thus somehow diminishing the import of the findings in Section 22(a) of the Cable Act regarding the need for EEO regulation of cable and broadcast television. Evening Post also asserts that "it could be argued" that Congress' grant to the Commission of explicit authority to adopt rules for cable and multichannel video program distributors indicates that it did not intend that the Commission would have statutory authority to regulate EEO practices in the broadcast industry.<sup>57</sup>

36. Evening Post's argument is belied by both the facts and the law. As a general matter, we note first that Evening Post fails to acknowledge congressional acquiescence in the Commission's exercise of its jurisdiction to regulate EEO practices of broadcasters for the past 30 years. More specifically, though it is true that Section 334 is drafted in negative terms, that provision requires the Commission, in substance, to continue applying to television broadcasters the EEO rules that were in effect when Section 334 was enacted. Indeed, the Conference Report on the 1992 Cable Act makes it clear that this was Congress' intent.<sup>58</sup> However drafted, we cannot see how this provision can be viewed as anything other than an endorsement of the Commission's authority to regulate the EEO practices of broadcast television licensees and a directive that it continue to do so.<sup>59</sup> Further, we fail to see how the fact that Section 334 of

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<sup>57</sup> Evening Post Comments at 4-6.

<sup>58</sup> See H.R. Rep. No. 862, 102d Cong., 2d Sess 97 (1992) (section 334 "codifies the Commission's equal employment opportunity rules").

<sup>59</sup> Smithwick and Belendiuk (S&B) argues that Section 334 forbids the Commission from changing its EEO program requirements. See S&B Comments at 12-15 (law firm representing over 300 broadcast stations). We disagree. As discussed above, while Section 334 is drafted as a prohibition, it requires in essence that the Commission continue applying to television broadcasters the EEO Rule that was in effect on September 1, 1992. Thus, Congress clearly intended that the FCC enforce equal employment obligations against broadcasters. While the Commission cannot continue to enforce those portions of the 1992 EEO Rule that were invalidated on constitutional grounds, the Commission can most faithfully advance the congressional intent underlying Section 334 by adopting new outreach rules to replace those that were invalidated. Section 334 is unlike the statute at issue in *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) ("*MCI*"), cited by S&B. See S&B Comments at 13. In *MCI*, the D.C. Circuit found that the Commission lacked authority to prohibit non-dominant common carriers of interstate telephone service from filing tariffs. The court found that Section 203(a) of the Communications Act explicitly requires the filing of tariffs, and that the Commission's authority to "modify" this requirement pursuant to another statutory provision does not authorize it to forbid the filing of tariffs. There was no indication that Congress intended to relieve common carriers of the tariff-filing obligation, and there was unambiguous language requiring statutory filing, *id.* at 1192. Here, in contrast, Congress clearly intended that the Commission impose equal employment opportunity obligations on broadcasters. Indeed, Congress found the need for such requirements so compelling that it forbade the Commission from revising its EEO rules then in effect. Moreover, in *MCI*, the Commission's abandonment of its tariff requirement reflected a shift in the Commission's previous view of the statutory tariff-filing obligation. *Id.* at 1192-93. Here, the Commission has consistently, since 1969, interpreted its statutory authority as permitting the imposition of EEO requirements on broadcasters, and Congress has acquiesced in, and ratified, that view.

the Communications Act was enacted by the 1992 Cable Act in any way diminishes the import of the findings in Section 22(a) of the Cable Act. On the contrary, it makes even clearer their relevance to the Commission's authority to regulate broadcasters.

37. Evening Post's final argument -- that Congress' explicit grant to the Commission of authority to regulate the EEO practices of cable entities and other MVPDs in the 1992 Act indicates that it "did not intend for the Commission to have statutory authority to take action on broadcast EEO matters" -- is specious and is directly contradicted by the legislative histories of the 1984 and 1992 Cable Acts. Evening Post's argument might have some force if the original Communications Act of 1934 had granted the Commission authority to regulate the EEO practices of certain specified entities but *not* the EEO practices of broadcasters. One could then argue that the omission of authority to regulate broadcasters' EEO practices was intentional. But Congress was not writing on a blank slate when it granted the Commission explicit statutory authority to regulate cable EEO practices in 1984 and expanded that authority in 1992 to include all MVPDs. As discussed above, it *knew* at that time that the Commission had been regulating the EEO practices of broadcast licensees since 1969 and it explicitly *acknowledged* the Commission's statutory authority to do so. As the large body of case law cited above establishes, Congress would have had to affirmatively indicate its *disapproval* of the Commission's long-standing, consistent and vigorous exercise of its authority to regulate the EEO practices of broadcasters in order to avoid the inference of congressional ratification. It did the opposite, recognizing the Commission's "well-established" authority and indicating that its intent was to endorse and strengthen the Commission's EEO regulations. The legislative record thus belies Evening Post's suggestion that Congress did not intend the Commission to have statutory authority to regulate broadcast EEO practices.

38. There is another, particularly compelling reason to find in the current statutory context that Congress has ratified our authority to regulate the EEO practices of broadcasters. In resolving issues of administrative or judicial jurisdiction, the Supreme Court has held that any interpretation of congressional intent that will result in a "bizarre jurisdictional patchwork" is to be disfavored absent legislative history or a persuasive functional argument to the contrary.<sup>60</sup> In this case, Congress has *explicitly* granted the Commission authority to regulate the EEO practices of television broadcasters, cable entities, and all other MVPDs, including such relative newcomers as DBS and MMDS operators.<sup>61</sup> Thus, rejecting the inference of congressional ratification would leave us in the anomalous situation of having jurisdiction to regulate the EEO practices of broadcast television and cable television providers and MVPDs, but *not* radio broadcasters. There is no indication in the legislative history that this was Congress' intent. On the contrary, Congress has indicated its belief that Commission enforcement of EEO rules for the electronic media is essential and, building upon the foundation established by the Commission's broadcast EEO Rule, Congress enacted legislation to ensure that *every* medium of mass communication is subject to such rules. It would defeat that clear congressional intent and create a "bizarre jurisdictional patchwork" for us to hold that we lack statutory authority to enforce EEO rules against radio stations -- the oldest and arguably the most pervasive of the electronic media.

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<sup>60</sup> *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 799 (1985); *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 197 (1980).

<sup>61</sup> 47 U.S.C. §§ 334, 554.

39. For the foregoing reasons, we find that Congress has granted us explicit authority to regulate the EEO practices of television licensees and has ratified our authority to regulate the EEO practices of radio licensees. Whatever uncertainty may have existed 30 years ago concerning whether the Commission's public interest mandate was broad enough to authorize EEO regulation has now been resolved by congressional acquiescence and both tacit and explicit congressional approval.

40. Although we sought and received extensive public comment on the nexus between EEO regulation and our public interest mandate to foster diversity of programming, we have concluded that resolution of that issue is not dispositive, in and of itself, of our statutory authority for two reasons. First, as discussed above, Congressional ratification provides an independent basis for our authority. Second, it is clear from reviewing the 1984 and 1992 Cable Acts and their legislative histories that Congress's purpose in granting us authority to regulate the EEO practices of video providers and in ratifying our authority to regulate the EEO practices of broadcasters was partly but not solely to foster diversity of programming. Congress endorsed recruitment and nondiscrimination requirements for two distinct purposes: to foster diverse programming by increasing the number of women and minorities in positions that have an impact on programming decisions, *and* to deter racial and gender discrimination. Both are set forth as express purposes of the cable EEO rule amendments enacted in 1992. As noted above, Congress stated that EEO rules both "advance[] the Nation's policy favoring diversity in the expression of views in the electronic media" and are "required in order to effectively deter racial and gender discrimination."<sup>62</sup> Congress plainly thought it important to increase the number of minorities and women in upper-level positions in order to further the national policy favoring the expression of diverse views and perspectives in the electronic media.<sup>63</sup> But it is also clear that Congress did not limit the EEO requirements to upper-level positions. Section 634(d)(1) required the Commission to amend its cable EEO rules, including its recruitment rules, to "promote equality of employment opportunities for females and minorities in each of the job categories itemized" in section 634(d)(3). Those include *all* categories of employment, including such categories as "semiskilled operatives" and "unskilled laborers" that appear to have no direct influence on programming.<sup>64</sup> Similarly, the broadcast EEO Rule that Section 334 codified applied to all categories of employment, not just management or program-related positions. We believe that Congress required us to adopt and enforce EEO program requirements with respect to all job categories, including lower-level jobs, because word-of-mouth recruitment practices may be inherently discriminatory when minorities and women are poorly represented on an employer's staff -- particularly when they are scarce in the management ranks where hiring decisions are made. Outreach in recruitment, as well as a nondiscrimination requirement, is necessary to deter discrimination in such circumstances so that the homogenous workforce does not simply replicate itself.

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<sup>62</sup> 1992 Cable Act, Section 22(a). *See also* H.R. No. 102-628, 102d Cong., 2nd Sess. 111-12 (1992) ("The Committee finds that continued rigorous enforcement of equal employment opportunity rules and regulations is required in order to deter effectively racial and gender discrimination.").

<sup>63</sup> *See* 1992 Cable Act, Section 22(a)(2) ("increased numbers of females and minorities in positions of management authority in the cable and broadcast television industries advances the Nation's policy favoring diversity in the expression of views in the electronic media...").

<sup>64</sup> The 1984 Cable Act required the Commission to adopt EEO requirements for job categories ranging from officials and managers to lower-level positions such as unskilled laborers and service workers. In the 1992 Cable Act, Congress expanded the number of those job categories from nine to 15.

41. Since Congress clearly intends that we apply recruitment and other EEO requirements to *all* job categories in order to deter discrimination, we have concluded that we should apply our new EEO requirements to all job categories even if we were to conclude that some of those categories have no impact on programming decisions. Therefore, we conclude that whether there is a nexus between EEO regulation for all job categories and our public interest mandate to foster diversity of programming is not dispositive of our statutory authority. We nevertheless address in the following sections the nexus between our EEO rules and our statutory mandates to foster diversity of programming and minority ownership because we believe that the rules we adopt today further, and thus find additional statutory support in, those mandates.

c. Section 309(j)

42. In the *NPRM*, we observed that Section 309(j) of the Communications Act establishes a congressional policy favoring the dissemination of licenses among a wide variety of applicants, including members of minority groups and women, as part of a broad policy of fostering economic opportunity.<sup>65</sup> Section 309(j), as amended in 1997, requires the Commission to award all commercial broadcast licenses for which mutually exclusive applications are filed (except for initial digital television applications) by competitive bidding.<sup>66</sup> In implementing the competitive bidding requirements, the Commission must:

promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women ....<sup>67</sup>

Additionally, the Commission must promote “economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women,” and ensure that those entities “are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures ....”<sup>68</sup>

43. We tentatively concluded in the *NPRM* that Section 309(j) provides statutory authority to implement new EEO rules because the statutory goal of fostering minority and female ownership in the provision of commercial spectrum-based services would be furthered by nondiscrimination and outreach requirements, which are designed to foster equal employment opportunities for minorities and women in the broadcast industry.<sup>69</sup> We stated our belief that employment in the broadcasting industry provides minorities and women with the skills needed to acquire and operate a broadcast station and may help them in becoming aware of ownership opportunities. Such employment may also facilitate their acquisition of

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<sup>65</sup> *NPRM*, 13 FCC Rcd at 23017-18 (paras. 36-37).

<sup>66</sup> 47 U.S.C. § 309(j), as amended by Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997).

<sup>67</sup> 47 U.S.C. § 309(j)(3).

<sup>68</sup> 47 U.S.C. § 309(j)(4).

<sup>69</sup> *NPRM*, 13 FCC Rcd at 23018 (paras. 37-38).

capital needed to purchase a broadcast station, as financing sources are generally more willing to work with borrowers that have a track record in the business they seek to own and operate. Furthermore, we noted that we have previously concluded that there is a link between the policies furthered by our EEO rules and the fostering of ownership by minorities and women.<sup>70</sup> We also noted that Congress appears to have concluded that such a link exists. In codifying the cable EEO requirements in 1984, the House Commerce Committee asserted that “a strong EEO policy is necessary to assure that there are sufficient numbers of minorities and women with professional and management level experience within the cable industry, so that there are significant numbers of minorities and women with the background and training to take advantage of existing and future cable system ownership opportunities.”<sup>71</sup> We asked commenters to submit evidence establishing the nexus between employment opportunities for minorities and women and ownership opportunities.

44. After considering the comments received in response to the *NPRM*, we conclude that Section 309(j) provides statutory authority to implement new EEO rules. We disagree with commenters who maintain that our reliance on Section 309(j) is misplaced because it relates to the use of competitive bidding for commercial broadcast licenses.<sup>72</sup> As we pointed out in the *NPRM*, the reference in Section 309(j) to tax certificates, a preferential tax treatment available upon the sale of broadcast stations and cable systems to minorities, suggests that Congress did not intend to limit the Commission’s authority under Section 309(j) to measures directly associated with the competitive bidding process.

45. Moreover, we believe that there is a strong nexus between employment of minorities and females and ownership opportunities. Numerous commenters support this view.<sup>73</sup> MMTC asserts that employment opportunities help minorities obtain the skills needed to become owners.<sup>74</sup> AWRT states that

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<sup>70</sup> See, e.g., *Report*, 9 FCC Rcd at 6319 (noting that “management positions ... are often stepping stones to ownership.”); *Regulatory Treatment of Mobile Services, Third Report and Order*, 9 FCC Rcd 7988, 8097 (1994) (“EEO rules for commercial mobile radio service (CMRS) providers are appropriate and necessary to achieve the statutory goal of increased ownership opportunities for minorities and women in spectrum-based services. By having EEO rules that apply to all CMRS providers, we will provide increased communications experience for minorities and women. This experience will, in turn, enable them more easily to become owners of communications enterprises.”).

<sup>71</sup> H.R. Rep. No. 934, 98th Cong., 2d Sess. at 84-85 (1984). Congress reiterated this position when it passed the 1992 Cable Act, declaring that “a strong EEO policy is necessary to assure sufficient numbers of minorities and women gain professional and management level experience within the television industry, and thus that significant numbers of minorities and women obtain the background and training to take advantage of existing and future television broadcasting ownership opportunities.” H.R. Rep. No. 628, 102d Cong., 2d Sess. at 114 (1992).

<sup>72</sup> National Association of Broadcasters (NAB) Comments at 18; Evening Post Comments at 6.

<sup>73</sup> See e.g., Minority Media and Telecommunications Council and 29 other organizations (MMTC) Comments at 169; American Women in Radio and Television (AWRT) Comments at 7 (a national, non-profit organization of professional women and men who work in radio, television, cable, advertising and related fields); National Hispanic Foundation for the Arts (NHFA) Comments at 6-10 (non-profit organization whose mission is to improve the image of Latinos in this country by developing a better perception of Latinos in the entertainment industry); NOW Foundation and five other organizations (NOW) Comments at 8-11; U.S. Small Business Administration (SBA) Comments at 1.

<sup>74</sup> MMTC Comments at 169.

increasing the number and type of employment opportunities available for women and minorities will increase the number of women and minorities who seek ownership opportunities because training and experience are “critical elements” in deciding to seek ownership of broadcast and cable facilities.<sup>75</sup> AWRT also states that an informal survey of its membership reveals that those members who are, or have been, owners of broadcast facilities had significant prior experience working in the industry and view their employment experiences as integral to both their decision to move up to ownership and their success as an owner.<sup>76</sup> According to NOW, the connection between management experience and ownership opportunities is “fundamental.”<sup>77</sup> NOW posits that “[w]omen and minorities have a particular need for broadcast experience because they typically must be more qualified than their White male counterparts in order to find financial backing. Under-capitalization poses one of the most significant obstacles to women and minorities hoping to purchase mass media outlets.”<sup>78</sup>

46. Commenters also cite the experiences of broadcast station owners and provide affidavits from numerous broadcast station owners as evidence of the nexus between employment and ownership opportunities.<sup>79</sup> Many of these owners describe how they or their colleagues started in entry-level or even internship positions and worked their way up the ladder to management positions and then to ownership.<sup>80</sup> In addition, many of the owners attest that employment opportunities provide minorities and women with the skills and training needed to acquire and successfully operate stations;<sup>81</sup> that lack of access to capital is one of the greatest impediments to broadcast station ownership by minorities and women;<sup>82</sup> and that

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<sup>75</sup> AWRT Comments at 7.

<sup>76</sup> *Id.*

<sup>77</sup> NOW Comments at 8.

<sup>78</sup> *Id.* at 10.

<sup>79</sup> *See, e.g.*, NOW Comments at 12 (citing the experiences of Cathy Hughes, CEO of Radio One, and Joseph Rey, the principal investor in Rainbow Broadcasting Ltd., as evidence of the nexus between employment opportunities for women and minorities and ownership opportunities); NHFA Comments at 6-11 and Testimony of Nely Galán (citing the experience of Nely Galán, President of Entertainment at Telemundo Network Group, LLC, as evidence that a strong nexus exists between hiring minorities and women and promoting ownership opportunities for these groups); MMTC Comments, Vol. III, Exhibits 1, 2, 3, 6, 8, 9, 10, 11, 12, 17, 19, 20, 21 and 22.

<sup>80</sup> MMTC Comments, Vol. III, Exhibits 1 (Declaration of Alfredo Alonso), 3 (Declaration of W. Don Cornwell), 8 (Declaration of Serena Ferguson Mann), 9 (Declaration of Skip Finley), 10 (Declaration of Ragan A. Henry), 11 (Declaration of Cathy Hughes), 12 (Declaration of Chesley Maddox-Dorsey), 19 (Declaration of Rokia Smith) and 20 (Declaration of Jeffrey H. Smulyan).

<sup>81</sup> MMTC Comments, Vol. III, Exhibits 1 (Declaration of Alfredo Alonso), 2 (Declaration of Thomas Castro), 10 (Declaration of Ragan A. Henry), 11 (Declaration of Cathy Hughes), 12 (Declaration of Chesley Maddox-Dorsey), 17 (Declaration of Russell Perry), 21 (Declaration of Dennis Swanson) and 22 (Declaration of James L. Winston); NHFA Comments, Testimony of Nely Galán.

<sup>82</sup> MMTC Comments, Vol. III, Exhibits 6 (Declaration of Willie D. Davis), 10 (Declaration of Ragan A. Henry), 12 (Declaration of Chesley Maddox-Dorsey), 17 (Declaration of Russell Perry) and 22 (Declaration of James L. Winston).

broadcast experience, particularly management experience, is essential for minorities and women to secure financing to acquire stations.<sup>83</sup> Further, a number of the station owners express concern that, without any EEO outreach requirements, minorities and women will not have the opportunity to obtain the training and experience needed to move up to station ownership.<sup>84</sup>

47. NAB rejects this evidence as “irrelevant or anecdotal at best.”<sup>85</sup> However, NAB does not explain why it believes that this evidence is irrelevant, nor does it explain why it thinks that the Commission should disregard anecdotal evidence from an array of individuals with extensive experience in the broadcast industry.<sup>86</sup> Another commenter argues that the proposed broadcast EEO Rule rests upon the unsupported assumption that “all broadcast employees are on a lifetime broadcast career track, from entry level through programming and management ranks to ownership.”<sup>87</sup> This commenter asserts that many employees in fact leave broadcast stations to go to work for nonbroadcast employers<sup>88</sup> and cites numerous examples of minority and female employees who left broadcasting to pursue other careers.<sup>89</sup> This argument misses the point. It is not necessary to find that all minority and female employees, or even a majority of minority and female employees, move up through the ranks to ownership in order to establish a nexus between minority and female employment and ownership opportunities. Rather, we think it is sufficient that the employment of minorities and women in the broadcast industry greatly enhances the opportunities for minorities and women to own broadcast stations and that, without such employment, ownership opportunities for minorities and women will be diminished. Based on the record, we conclude that this is the case.

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<sup>83</sup> MMTTC Comments, Vol. III, Exhibits 1 (Declaration of Alfredo Alonso), 6 (Declaration of Willie D. Davis), 11 (Declaration of Cathy Hughes), 12 (Declaration of Chesley Maddox-Dorsey) and 21 (Declaration of Dennis Swanson).

<sup>84</sup> MMTTC Comments, Vol. III, Exhibits 2 (Declaration of Thomas Castro), 6 (Declaration of Willie D. Davis), 11 (Declaration of Cathy Hughes), 12 (Declaration of Chesley Maddox-Dorsey) and 17 (Declaration of Russell Perry).

<sup>85</sup> NAB Reply Comments at 2.

<sup>86</sup> See *Mausolf v. Babbit*, 125 F.3d 661, 667-70 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 2366 (1998) (“*Mausolf*”) (regulations promulgated by an agency will be upheld if they are reasonably related to the purposes of the enabling legislation; under rational basis test of 5 U.S.C § 706(2)(A), snowmobiling restrictions were rationally based on biological opinions finding possible adverse impact of snowmobiling on gray wolf population and on anecdotal evidence in record of harassment of gray wolves). Cf. *Schliefer v. City of Charlottesville*, 159 F.3d 843, 849, 850 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 1252 (1999) (“*Schliefer*”) (In the First Amendment context, where government must demonstrate that the recited harms are real, not merely conjectural and that the regulation will in fact alleviate these harms in a direct and material way, the standard “has never required scientific or statistical ‘proof’ of the wisdom of the legislature’s chosen course;” anecdotal evidence cited by the court).

<sup>87</sup> Haley Bader & Potts (HBP) Comments at 21 (law firm representing owners of 30 radio stations).

<sup>88</sup> *Id.*

<sup>89</sup> HBP Comments, Declaration of Harold W. Gore at 2; Declaration of John J. Sowada at 2; Declaration of Eric F. Brown at 2; Declaration of Louis H. Burton, Jr. at 2; Declaration of Mike Boen at 2; Declaration of Dave Vagle at 2.

d. Public Interest Mandate to Promote Programming Diversity

48. An additional statutory basis for new EEO rules is grounded in the Commission's authority to regulate broadcasting to serve the public interest and promote diversity of programming.<sup>90</sup> The Commission has broad authority under the Communications Act to regulate and license broadcasters as the public convenience, interest, or necessity requires.<sup>91</sup> Moreover, Congress amended Section 1 of the Communications Act in 1996 to make it clear that the Commission's mandate is to regulate interstate and foreign communications services so that they are "available, so far as possible, to all people of the United States, *without discrimination on the basis of race, color, religion, national origin, or sex ...*"<sup>92</sup> This recent amendment, which applies to all entities subject to the Communications Act,<sup>93</sup> amplifies the Commission's general public interest mandate to ensure that broadcasting and other programming services serve the needs and interests of all sectors of the community, and indicates more specifically that such services shall be provided to all Americans without discrimination on the basis of race or any other suspect classification. Further, in Section 257(b) of the Communications Act,<sup>94</sup> Congress specifically identifies "diversity of media voices" as one of the "policies and purposes" of the Communications Act.

49. A broadcaster can more effectively fulfill the needs of its community, and therefore serve the public interest, when it provides equal employment opportunity to all applicants and employees

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<sup>90</sup> We discussed this statutory basis in the *NPRM*, 13 FCC Rcd at 23019-22 (paras. 39-45).

<sup>91</sup> This authority is based on several provisions of the Act. For example, Section 301 of the Act provides that no person can transmit radio signals in the U.S. except under a license granted by the Commission. 47 U.S.C. § 301. Section 303 authorizes the Commission to license and regulate use of the radio spectrum "as public convenience, interest, or necessity requires," to "generally encourage the larger and more effective use of radio in the public interest," and to enact regulations to carry out the provisions of the Act. 47 U.S.C. § 303(f), (g), and (r). The Supreme Court has held that Section 303(r) confers authority on the Commission to issue regulations codifying its view of the public interest licensing standard, so long as that view is based on consideration of permissible factors and is otherwise reasonable. *National Citizens*, 436 U.S. at 793. Section 307 directs the Commission to grant and renew station licenses "if public convenience, interest, or necessity will be served thereby." 47 U.S.C. § 307(a), (b). Section 309 directs the Commission to determine whether the "public interest, convenience, and necessity will be served" by the grant of applications for licenses, license modifications, or license renewals. 47 U.S.C. § 309(a). Section 310(d) imposes the same standard on the grant of assignment and transfer applications. *See* 47 U.S.C. § 310(d). The 1996 Act modified the procedures for processing broadcast renewal applications and refined the standard to be applied by the Commission in determining whether to grant renewal applications. Prior to enactment of the 1996 Act, the grant of renewal applications was controlled by the general "public interest, convenience, and necessity" standard set forth in Section 309(a). As amended in 1996, the Communications Act directs the Commission to grant a broadcast renewal application if it finds, with respect to the station at issue, that the licensee has served the public interest, convenience, and necessity; the licensee has not committed any serious violations of the Act or the FCC's rules; and the licensee has not committed a series of violations of the Act or rules that constitute a pattern of abuse. 47 U.S.C. § 309(k). The 1996 amendment thus makes it clear that the public interest standard is broader in scope than compliance with specific provisions of the Communications Act or the Commission's Rules.

<sup>92</sup> 47 U.S.C. § 151, as amended (1997) (emphasis added) (italicized clause added by the 1996 Act).

<sup>93</sup> H.R. Rep. 104-458, 104th Cong., 2d Sess. at 143.

<sup>94</sup> 47 U.S.C. § 257(b).

regardless of race, ethnic origin, color, or religion. Such a program furthers one of the Commission's main objectives, to promote diverse programming -- programming that airs different points of view and reflects the needs and interests of all sectors of the community, including minorities and women. As the Commission stated in *Streamlining* and the *NPRM*, we do not assume that minority and female employment will always result in minority and female-oriented programming. Nor do we believe that all minorities or all women share the same viewpoints.<sup>95</sup> Nonetheless, we believe that, as more minorities and women are employed in the broadcast industry, it is more likely that varying perspectives will be aired and that programming will be oriented to serve more diverse interests and needs than would be the case if stations employed few minorities and women.<sup>96</sup>

50. Congress has recognized the nexus between diversity of employment and diversity of programming, as evidenced by the legislative history of the Cable Television Consumer Protection and Competition Act of 1992, where it noted that:

The Committee believes now, as it did in 1984, that increased equal employment opportunities (EEO) for women and minorities, particularly in decision-making and managerial positions, '... is a crucial means of assuring that program service will be responsive to a public consisting of a diverse array of population groups.'<sup>97</sup>

51. Moreover, the Supreme Court has recognized that the FCC has statutory authority to regulate the employment practices of its licensees as a way of fostering diversity of viewpoints in programming. Such regulation, the Court stated, "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 ... to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups."<sup>98</sup> In addition, in *Metro Broadcasting, Inc. v.*

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<sup>95</sup> *NPRM*, 13 FCC Rcd at 23020 (para. 41).

<sup>96</sup> *NPRM*, 13 FCC Rcd at 23020 (para. 41), *citing Streamlining*, 11 FCC Rcd at 5155-56. According to Office of Communication, Inc, United Church of Christ and seven other organizations (UCC), social science studies indicate that "race is relevant to viewpoint." Comments of UCC, Appendix at 24 n.80. UCC also cited a study conducted by the American Bar Association Journal and the National Bar Association Magazine that indicates differing perceptions of Black and White lawyers on the fairness of the judicial system as applied to Blacks. *Id.*

<sup>97</sup> H. R. Rep. No. 628, 102d Cong., 2d Sess. 111 (1992), *quoting*, H. R. Rep. No. 934, 98th Cong., 2d Sess. 85 (1984). *Accord*, H. R. Rep. No. 628, 102d Cong., 2d Sess. 114 (1992):

The Courts and the Commission have consistently recognized the increasing amount of programming designed to address the needs and interests of minorities and women is fundamentally related to the number of minority and women employees in the upper-level positions within media companies. In addition, the Committee recognizes that a strong EEO policy is necessary to assure sufficient numbers of minorities and women gain professional and management level experience within the television industry, and thus that significant numbers of minorities and women obtain the background and training to take advantage of existing and future television broadcasting ownership opportunities.

<sup>98</sup> *NAACP v. FCC*, 425 U.S. 662, 670 n.7 (1976) [*citing Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) ("*Office of Communication*")]. *Cf. National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (FCC has authority under its public interest mandate to regulate anti-competitive practices of broadcast networks that prevented networks or licensees from making the fullest use of

FCC,<sup>99</sup> the Supreme Court held that two minority ownership policies -- the award of an “enhancement” for minority ownership in comparative proceedings for new broadcast licenses and the minority “distress sale” policy -- were substantially related to the important governmental objective of “enhancing broadcast diversity,” and thus survived an intermediate level of equal protection scrutiny. Although the *Adarand* decision reversed *Metro Broadcasting* to the extent that *Metro Broadcasting* held that federal racial classifications are subject to a less rigorous standard of scrutiny than state racial classifications, it did not alter the recognition that the Commission’s statutory mandate includes fostering a diversity of views in the broadcast service.<sup>100</sup>

52. Contrary to the views expressed by some commenters, recognizing that there is a nexus between diversity of employment and diversity of programming does not amount to stereotyping. As the Court noted in *Metro Broadcasting*, with respect to the minority ownership policies at issue in that case:

The judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping. Congressional policy does not assume that in every case minority ownership and management will lead to more minority-oriented programming or to the expression of a discrete ‘minority viewpoint’ on the airwaves. Neither does it pretend that all programming that appeals to minority audiences can be labeled ‘minority programming’ or that programming that might be described as ‘minority’ does not appeal to nonminorities. Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group.<sup>101</sup>

The Court added:

While we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves.<sup>102</sup>

53. Thus, it is well established under *NAACP v. FPC*, *Metro Broadcasting* and Supreme Court decisions that preceded them, that fostering diversity of viewpoints is a goal encompassed by the

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radio in the public interest).

<sup>99</sup> 497 U.S. 547 (1990).

<sup>100</sup> According to the Court: “Safeguarding the public’s right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC’s mission. We have observed that the ‘public interest’ standard necessarily invites reference to First Amendment principles.” *Metro Broadcasting*, 497 U.S. at 567, quoting *National Citizens Committee*, 436 U.S. at 795 and *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973).

<sup>101</sup> *Metro Broadcasting*, 497 U.S. at 579.

<sup>102</sup> *Id.* at 582.

Commission's public interest mandate.<sup>103</sup> Indeed, "it has long been a basic tenet of national communications policy" that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."<sup>104</sup> The Court has noted that the benefits of diversity are not limited to minorities but, rather, redound to all viewers and listeners.<sup>105</sup>

54. The courts have also recognized that there is a nexus between the identity of media owners and employees and diversity of programming. The minority ownership policies at issue in *Metro Broadcasting* withstood intermediate scrutiny because the Court found they were "substantially related" to the statutory goal of promoting diversity of information and viewpoints on the air waves.<sup>106</sup> Accordingly, the Court affirmed the FCC's judgment that there is a nexus between rules fostering minority ownership of broadcast stations and the statutory goal of fostering diversity of viewpoints.<sup>107</sup> Further, in *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, the D.C. Circuit recognized the Commission's authority to enforce both employment "affirmative action" and anti-discrimination rules in the license renewal context to advance its public interest mandate to foster diverse programming. The court held that the Commission had abused its discretion by unconditionally renewing a broadcast license where a substantial question of fact had been raised regarding whether the licensee had engaged in employment discrimination.<sup>108</sup>

55. In *Lutheran Church*, the court concluded that the Commission's broadcast EEO program requirements were not narrowly tailored to advance the stated interest in diversity because the requirements applied to low-level positions that lack influence over programming. In the *NPRM*, we stated our belief

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<sup>103</sup> See, e.g., *National Citizens Committee*, 436 U.S. at 795-800; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). See also *Community Television of Southern California v. Gottfried*, 459 U.S. 498 (1983), which held that the FCC did not abuse its discretion when it declined to impose a greater obligation to provide special programming for the hearing impaired on a noncommercial licensee than a commercial licensee, even though the Rehabilitation Act of 1973 applies to the former but not the latter. The Court stated that the FCC cannot permit licensees to ignore the needs of particular groups within the viewing public, but held that the FCC's duty to enforce this obligation derives from the Communications Act, not other federal statutes. Thus, the Supreme Court acknowledged that the Commission's public interest mandate permits and perhaps requires it to determine whether its licensees are providing diverse programming to all sectors of its community. See Comments of UCC, Appendix at 23 and cases cited therein.

<sup>104</sup> *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27) [quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)].

<sup>105</sup> *Metro Broadcasting*, 497 U.S. at 568.

<sup>106</sup> *Metro Broadcasting*, 497 U.S. at 569-600. Cf. *National Citizens Committee*, 436 U.S. at 793-802 (recognizing nexus between diversity of ownership generally and diversity of viewpoints and upholding FCC's broad authority to foster diversity of ownership).

<sup>107</sup> The Court noted that Congress had recognized the nexus between diversity of ownership and diversity of programming. *Metro Broadcasting*, 497 U.S. at 578-79.

<sup>108</sup> *Bilingual*, 595 F.2d at 628, 633-35. See also *National Organization for Women, New York Chapter v. FCC*, 555 F.2d 1002, 1017-19 (D.C. Cir. 1977); *Black Broadcasting Coalition of Richmond v. FCC*, 556 F.2d 59 (D.C. Cir. 1977) (*per curiam*).

that program content is not determined solely by the individuals at the station with authority to select programming, but may also be influenced by interaction between these individuals and other station employees, which exposes the former to views and perspectives of the latter. We also noted that low-level positions provide a way for individuals with little or no communications experience, including minorities and women, to enter the broadcast and cable industries. This, in turn, could lead to higher-level positions of greater responsibility that could affect programming and/or provide the experience desired by financial institutions to finance ownership in the broadcast and cable industries.<sup>109</sup> We sought comment on these issues.<sup>110</sup>

56. NAB and broadcasters question whether a nexus exists between employment of minorities and ownership opportunities. NAB asserts that the Commission has offered no evidence to support the existence of such a nexus.<sup>111</sup> In addition, these commenters question whether there is a nexus between minority and female employment and diverse programming.<sup>112</sup> NAB notes that the court in *Lamprecht v. FCC*,<sup>113</sup> found the female ownership preference policy unconstitutional because it found no statistically meaningful link between ownership by women and programming of any particular kind, based on the evidence before it.<sup>114</sup> According to the court, the only available study, upon which it relied heavily, showed that stations owned primarily by women are just one and a quarter times as likely to broadcast

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<sup>109</sup> *NPRM*, 13 FCC Rcd at 23021-22 (para. 44).

<sup>110</sup> *NPRM*, 13 FCC Rcd at 23022 (para. 45).

<sup>111</sup> NAB Comments at 18; NAB Reply Comments at 2. Institute for Justice (Institute) also argues that the Commission offers no evidence to support its view that increased employment of minorities and women will increase diverse programming. Institute Comments at 9 (public interest law firm whose mission includes advancing the civil rights of citizens).

<sup>112</sup> NAB Reply Comments at 2; Camrory Comments at 5; HBP Comments at 6, 20; Delta Radio, Inc. and 11 other broadcasters (Delta Radio) Comments at 11; 46 Named State Broadcast Associations (46 Named StBAs) Comments at 13; 46 Named StBAs Reply Comments at 12-14. HBP supplies declarations from its broadcast clients attesting to this conclusion and to the respondents' inability "to provide an example of a programming decision that was influenced by the race or gender of a station staff member, whether or not the staff person was in a position to influence programming." *Id.* at 20. Camrory, HBP and S&B also reject the notion that lower-level employees influence program content. Camrory Comments at 5; S&B Comments at 19; HBP Comments at 21. Camrory argues, however, that a nexus between minority and female employment and diverse programming need not be shown in order to justify the Commission's EEO programs. According to Camrory, formats are selected based on audience demographics, which also affect hiring decisions. Camrory notes that it is not arguing that "the race or gender of a station employee -- high or lower level -- may not help shape a station's non-entertainment programming. Thus, since news and public affairs programming is a very important public interest component of overall station operations, diverse employment may well contribute to a Commission-favored diversity of viewpoint at least as to non-entertainment programming." Camrory Comments at 5-6. Camrory also concedes that "minority managers managing minority-owned stations (for example, an Hispanic-owned, Spanish language radio station) are much more attuned to the Hispanic community than are general market stations." Camrory Comments at 6.

<sup>113</sup> 958 F.2d 382 (D.C. Cir. 1992)

<sup>114</sup> NAB Comments at 20, *citing Lamprecht*, 958 F.2d at 398.

programming targeted at female audiences as are stations owned primarily by men.<sup>115</sup> NAB also argues, citing *Lutheran Church*, that the Commission has failed to define “what it means by diverse programming,” and that the *Lutheran Church* court questioned whether “intrastation” diversity is an important interest.<sup>116</sup>

57. In contrast, a variety of commenters believes there is a nexus between employment opportunities and diverse programming<sup>117</sup> and that the Commission has authority to impose equal employment opportunity obligations to foster diverse programming as part of our public interest mandate.<sup>118</sup> AFTRA concludes based on its experience administering hundreds of collective bargaining agreements with television and radio stations across the country that a nexus between employment of minorities and females at all levels and program diversity does exist. AFTRA notes that, while it cannot be said that program diversity at those stations results solely from the employment of minorities and females, it is its experience that these employees have considerable influence over programming. It adds that it represents a varied array of broadcast employees, including production assistants, writers, reporters and anchors, all of whom exert considerable influence over the production of programming.<sup>119</sup>

58. A number of commenters provide anecdotal or other evidence to show that there is a nexus between employment of minorities and women and program diversity. For example, Cathy A. Hughes states that “When we start seeing women in management positions, then we start getting coverage on breast cancer, premature child birth, and issues that are of interest to the overwhelming majority of women;” Paula Madison states that “Diversity plays an important role in how program decisions are made at NewsChannel4....At every point in [the process of developing news stories], there is a diverse group of people making the decisions, and the role of race in any of our stories is discussed regularly and openly throughout our staff;” and Dennis Swanson states “I believe that having a diversified staff at the department head level has helped WNBC be more conscientious towards a wider range of programming and news views. Our news director is an African-American woman, and our station relations director is a

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<sup>115</sup> *Lamprecht*, 958 F.2d at 397. By contrast, the court found that stations owned primarily by Indians or Alaskans are more than eleven times as likely to broadcast “Indian or Alaskan programming” as are stations with no Indian or Alaskan owners, while the multiplier for Asians or Pacific Islanders is more than eight, for Hispanics more than seven, for Blacks, almost four. *Id.* The Court did not define women’s programming. It noted that the Supreme Court in *Metro Broadcasting* had assumed that there is such a thing as “minority programming,” and it, in turn, assumed the same with respect to “women’s programming” and other distinct programming types. *Id.* at 395 and 395 n.4. It also noted that the study it cited did not define terms such as “women’s programming” or “minority programming” but relied instead on the reporting stations to characterize themselves. *Id.* at 396 n.8.

<sup>116</sup> NAB Comments at 21-22.

<sup>117</sup> American Federation of Radio and Television Artists (AFTRA) Comments at 6 (national labor organization representing 80,000 performers in news, entertainment, advertising and sound recording industries); AWRT Comments at 6; MMTTC Comments at 148-49; UCC Comments at 13-14; NOW Comments at 12-20; NOW Reply Comments at 17-18; NHFA Comments at 6. NOW argues that the EEO rules have resulted in increased employment of women and minorities between 1971 and 1997 (with the percentage of women nearly doubling from 23.3% to 40.8% and the percentage of minorities more than doubling from 9.1% to 19%) and a consequent increase in program diversity. NOW Reply Comments at 19.

<sup>118</sup> NOW Comments at 4; Lawyers Committee for Civil Rights Under Law Comments at 3-4.

<sup>119</sup> AFTRA Comments at 6.

Latina woman. Both exert strong influences on our station's on-air content. In addition, minority news reporters, such as Ti Hua Chang, raise our level of sensitivity to minority communities."<sup>120</sup> The evidence suggests that employment of women and minorities at lower levels also promotes diversity because lower-level employees are sometimes promoted to higher levels.<sup>121</sup> Some commenters furnish affidavits illustrating that entry level positions may be stepping stones to higher-level positions that have a clear impact on programming.<sup>122</sup> While NAB dismisses this evidence as anecdotal or irrelevant,<sup>123</sup> it does not explain why it is not relevant. We believe that we can rely in part on anecdotal evidence to establish a nexus between employment opportunity and diverse programming.<sup>124</sup> We believe that such reliance is particularly justified where the nexus is not easily susceptible to statistical proof because it is impossible to establish from empirical evidence the connection between programming decisions and the backgrounds of the decisionmakers.

59. The comments also indicate that there is an indirect nexus between employment opportunities and diverse programming because employment opportunities are linked to ownership opportunities and increased minority and female ownership leads to increased diversity of programming.<sup>125</sup>

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<sup>120</sup> MMTC Comments, Volume III, Exhibits 11, 14, 21. *See also* MMTC Comments, Volume III, Exhibits 2, 3, 7, 10: Declarations of Thomas Castro ("There is a direct linkage between integrating the work force and the product that goes on the air. . . . An interracial media staff is necessary to tell a facet of great stories that, otherwise, may never be told."); W. Don Cornwell (tie between employment diversity and program diversity); William H. Dilday ("An integrated workforce also works in more direct ways by increasing the availability of employees who can cover minority issues, know what questions to ask, and put a much more balanced story on the air." Black manager at station resulted in more balanced coverage with respect to sports at local Black colleges); Ragan A. Henry ("Minorities in the media will likely serve to broaden the view of managers on their community's perspectives."); Testimony of Nely Galan, NHFA Comments; NOW Comments at 14-20; UCC Comments at 14.

<sup>121</sup> MMTC Comments, Volume III, Exhibit 3: Declaration of W. Don Cornwell (virtually all managers at his broadcasting company got their start in entry level positions). *See* NOW Reply Comments at 18 ("employees at all levels have the power to influence programming."). AWRT asserts: "The individuals who hold lower-level positions are the ready pool of people available for internal training and promotion. In some cases, the best means to obtain the requisite experience to hold a position of greater influence, or to understand enough about the business to know what experience is necessary, is by working up from entry level positions." AWRT Comments at 6. NOW agrees, noting that employees of diverse backgrounds bring different perspectives into the workplace that may influence the otherwise narrow programming choices of decision-makers and that lower-level jobs are also a stepping stone to upper-level employment. NOW cites several examples of upper-level employees who started as secretaries. NOW Comments at 18-19.

<sup>122</sup> MMTC Comments, Volume III, Exhibits 4 (Declaration of Veronica Cruz), 9 (Declaration of Skip Finley), 10 (Declaration of Ragan A. Henry), 21 (Declaration of Dennis Swanson); NHFA Comments at 12 & Testimony of Nely Galan.

<sup>123</sup> NAB Reply Comments at 2.

<sup>124</sup> *See Mausolf, supra; Schliefer, supra.*

<sup>125</sup> UCC Comments at 13-14; UCC Appendix at 25-26; NOW Comments at 3, 8-9 ; NHFA Comments at 6, 11 and Testimony of Nely Galan; MMTC cites a 1990 survey of twenty Black broadcast station owners "which found that 50% of the owners had prior broadcasting experience before they purchased their first station." MMTC Comments at 169, *citing* A. Evans, *Are Minority Preferences Necessary? Another Look at the Radio Broadcasting Industry*, 8 Yale Law and Policy Review 380, 391-92 (1990).

We have already discussed the record evidence of the nexus between employment opportunity and ownership. The comments also indicate that there is a nexus between diversification of ownership and diversity of programming. A number of commenters cite an econometric study by Jeff Dubin and Matthew L. Spitzer that concludes that “increasing the number of minority-owned broadcasting stations increases the amount of minority-oriented programming.”<sup>126</sup> This study, based on data compiled from a 1987 survey of radio stations conducted by the FCC, concludes:

To sum up the test of our hypotheses, then, we have seen that minority ownership has a distinct and significant impact on minority programming, even after we control for the composition of minorities in the marketplace. Programming does also respond to composition of minorities in the marketplace. The magnitude of the coefficients for Black ownership on Black programming and Hispanic ownership on Spanish programming are significantly larger than the coefficient for female ownership on female programming. We also see, however, that a greater degree of female ownership leads to increases in programming targeted to several other minority groups. Stations with female ownership are more likely to program primarily for females, but are also more likely to increase programming for Blacks, Hispanics, Asians, and American Indians. The combined effects are similar in magnitude to those for the minority group owners taken separately. To increase Black programming, it may be most effective to increase the number of Black owners. To increase minority programming, it would be at least as effective to increase the number of female owners. We did not find that increasing the number of radio stations in a market increased the amount of minority programming, but we did find that radio stations may be using the presence of other stations in the market that program for minorities as a signal to guide the stations in their programming choices. As the percentage of other stations programming for a given minority group increases, the likelihood that the respondent’s station will program for that minority group increases as well.<sup>127</sup>

Thus, this study suggests that increasing minority ownership leads to increases in programming directed primarily to members of minority groups. Therefore, contrary to views expressed by some commenters, market demographics do not appear to be the sole determinant of programming.

60. Further empirical evidence for the proposition that “minority ownership increases the net amount of minority-targeted programming” is found in a recent, as yet unpublished, study by Peter Siegelman and Joel Waldfogel.<sup>128</sup> Siegelman and Waldfogel “show that Black and White (and Hispanic/Anglo) preferences in radio programming are substantially different.”<sup>129</sup> Their research and

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<sup>126</sup> Jeff Dubin & Matthew L. Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. Cal. L. Rev. 841 (1995).

<sup>127</sup> *Id.* at 869-72.

<sup>128</sup> Preference Externalities, Minority Ownership, and the Provision of Programming to Minorities, Peter Siegelman & Joel Waldfogel, mimeo. 27, The Wharton School, January 1999.

<sup>129</sup> *Id.* at 2. According to Siegelman and Waldfogel, “[w]e find very little overlap in listenership -- by and large, Blacks listen to Black format stations, Whites listen to White format stations, Hispanics to Hispanic format stations.” *Id.* at 13. Just over half of Black listening is concentrated in only two formats, Black and Black/Adult Contemporary, which account for less than 2.5% of non-Black listening. *Id.* at 13-14. This study uses a list of 43

analysis also suggests that “minority ownership increases the net amount of minority-targeted programming. Even though most minority-targeted stations are White-owned, markets with more minority-owned stations also have more minority-targeted stations, which means that minority-owned stations add to the total programming available to minority listeners.”<sup>130</sup>

61. FCC staff analysis using the BIA MasterAccess data also indicates that minority-owned stations program differently, on the whole, from non-minority-owned stations. Over 78% of all minority-owned stations have Urban, Spanish, and Religion formats, compared with only 21% of stations in other small-station groups and 15% of stations in large station-groups.

62. Based on the foregoing, we believe that equal employment opportunities for minorities and women further the public interest goal of diversity of programming, both directly and also indirectly by promoting minority and female ownership. Accordingly, we believe that the governmental interest in fostering diversity of programming provides additional authority for reinstating EEO rules.

### 3. Annual Employment Reports

63. We tentatively concluded in the *NPRM* that we have authority to require broadcasters and cable entities to file annual employment reports to enable us to monitor industry employment trends.<sup>131</sup> We observed that the court in *Lutheran Church* did not conclude that the Commission lacks authority to collect statistical employment data to analyze industry employment trends or to prepare our annual broadcast and cable employment trend reports. Further, we noted that the Commission has broad authority under the Communications Act to collect information and prepare reports.<sup>132</sup> We also noted that the Commission is required by statute to collect employment data for the broadcast television and cable industries.<sup>133</sup>

64. Although some commenters raised constitutional concerns, as discussed above, regarding the potential use of this data by the Commission and others, none of the commenters challenged our tentative conclusion that we have authority to collect the data.<sup>134</sup> We conclude that we have authority under the statutory provisions cited above to require broadcasters and cable entities to file annual employment

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formats from Duncan’s American Radio, Spring 1993 and 1997. Listening data is from Arbitron’s Radio USA, Spring 1993 and 1997.

<sup>130</sup> *Id.* at 27.

<sup>131</sup> *NPRM*, 13 FCC Rcd at 23022 (para. 47). On September 30, 1998, the Commission suspended the requirement for broadcast licensees and permittees to file annual employment reports (Form 395-B) until further notice while it considers the adoption of new EEO rules that address the concerns of the court in *Lutheran Church* and makes any appropriate changes to its data collection procedures. See *Suspension of Requirement for Filing of Broadcast Station Annual Employment Reports and Program Reports*, 13 FCC Rcd 21998 (1998) (“*Suspension Order*”). The annual employment reporting requirements for cable entities have remained in effect.

<sup>132</sup> See, e.g., 47 U.S.C. §§ 154(k) (annual report to Congress); 308(b); 403.

<sup>133</sup> See 47 U.S.C. §§ 334(a)(2) and 554(d)(3).

<sup>134</sup> See AFTRA Comments at 7; Camrory Comments at 7-8; NHFA Comments at 15; NOW Comments at 28-29; SBA Comments at 1.

reports to enable us to monitor industry employment trends. We continue to believe that knowledge of these industry trends will assist us in evaluating the effectiveness of, and continued need for, our EEO rules, and in making appropriate recommendations to Congress for legislative change. We note that the legislative history of the 1992 Cable Act indicates that Congress relied on the Commission's employment trend reports in concluding that women and minorities continue to be underrepresented in policy and decision making positions in the cable industry and that modifications of the cable EEO rules were necessary.<sup>135</sup> Moreover, as discussed above, we do not believe that the filing of annual employment reports will impermissibly pressure broadcasters or cable entities to adopt racial or gender preferences in hiring because the data in the annual employment reports will not be used for screening renewal applications or considered in assessing compliance with our EEO requirements.

## B. Broadcast and Cable EEO Rules, Policies, and Forms

### 1. Anti-Discrimination Provisions

65. In the *NPRM*, we proposed to retain our prohibition against employment discrimination.<sup>136</sup> In addition, we proposed to continue our longstanding policy of deferring action on individual complaints of employment discrimination against broadcasters and cable entities pending final action by the EEOC or other government agencies and/or courts established to enforce nondiscrimination laws. We stated, however, that we would retain the discretion to consider allegations of discrimination prior to a final determination by the EEOC or a court where the facts so warrant. We also requested comment on whether to require that the Commission be contemporaneously notified of discrimination complaints filed with the EEOC or a court.

66. Several commenters directly support our retention of the prohibition against employment discrimination.<sup>137</sup> Other commenters, without addressing the issue directly, demonstrate their support for a nondiscrimination requirement implicitly through their comments and proposals.<sup>138</sup> We conclude that we should retain our prohibition against employment discrimination. As discussed above, the Commission has statutory authority to prohibit discrimination by broadcasters and cable entities and, in the case of broadcast television licensees and permittees and cable entities, is *required* to do so.<sup>139</sup> Moreover, we believe that a finding that a broadcaster has engaged in employment discrimination would raise a serious

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<sup>135</sup> See H.R. Rep. No. 628, 102d Cong., 2d Sess. 111 (1992).

<sup>136</sup> *NPRM*, 13 FCC Rcd at 23025 (para. 59).

<sup>137</sup> NAB Comments at 5; 46 Named StBAs Comments at 30; NHFA Comments at 15-16; Curators of the University of Missouri (Curators) Comments at 8 (licensee of one Missouri Television station several Missouri radio stations); Fisher Broadcasting, Inc. (Fisher) Reply Comments at 12 (licensee of broadcast stations in Washington and Oregon).

<sup>138</sup> See *e.g.*, MMTC Comments at 275-332; National Cable Television Association (NCTA) Comments at 15-16 (an association serving and representing the cable industry); NOW Comments at 29-30; UCC Comments at 10 n.23.

<sup>139</sup> 47 U.S.C. §§ 334 and 554.

question as to its character qualifications to be a Commission licensee and to fulfill its statutory obligation to provide broadcast service "to all people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex..."<sup>140</sup> We would have no confidence that an entity that has discriminated against job applicants or employees based on race, ethnicity, or gender would serve the needs and interests of its entire community of license in a nondiscriminatory fashion.

67. We also agree with those commenters who state that we should generally defer action on individual discrimination complaints against broadcasters and cable entities pending final action by the EEOC or a court of competent jurisdiction, consistent with the policy articulated in *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 51 Fed. Reg. 21798 (1986) ("*MOU*").<sup>141</sup> As we noted in the *NPRM*, the policy set forth in the *MOU* was developed primarily because Congress intended the EEOC to be principally responsible for the resolution of employment discrimination disputes and efforts on our part to separately resolve such disputes would result in unnecessary duplication. Furthermore, as several commenters observe, the EEOC has substantial expertise in adjudicating employment discrimination complaints.<sup>142</sup> Thus, we will continue to forward individual discrimination complaints received at the Commission to the EEOC for processing. In addition, we will continue to take cognizance of any final determinations of employment discrimination in licensing decisions.

68. We are unpersuaded by MMTC's argument that the Commission should repeal its policy of generally declining to review individual allegations of discrimination against broadcasters pending a finding of discrimination by the EEOC or a court.<sup>143</sup> MMTC asserts that this policy effectively immunizes discriminators from Commission review because discrimination cases against broadcasters rarely result in a final order.<sup>144</sup> MMTC claims that, even in cases where the EEOC or court has found that a broadcaster has discriminated, the broadcaster can avoid Commission review of the discrimination charge by offering the complainant a nominal sum in excess of the amount of the verdict in exchange for the complainant's consent to a motion to vacate the judgment.<sup>145</sup> Notwithstanding MMTC's claims, we are concerned that repeal of our general policy of deferring individual discrimination complaints could result in duplication of efforts and inconsistent decisions. Furthermore, we believe that where there is a conclusion that a broadcaster has engaged in employment discrimination, the Commission may take cognizance of findings of

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<sup>140</sup> 47 U.S.C. § 151.

<sup>141</sup> NAB Comments at 15; 46 Named StBAs Comments at 30; Curators Comments at 8; S&B Comments at 25; Delta Radio Comments at ii; Fisher Reply Comments at 12.

<sup>142</sup> 46 Named StBAs Comments at 31-32; Curators Comments at 8-9.

<sup>143</sup> MMTC Comments at 324-25.

<sup>144</sup> *Id.* at 326. According to MMTC, discrimination cases against broadcasters rarely result in a final order because broadcasting is a closely-knit industry and broadcast professionals fear retaliation or "blackballing"; broadcasters use their financial resources to delay resolution of the case and "wear down" the resource-poor complainant; and broadcasters will enter into a monetary settlement with a complainant rather than risk their licenses. *Id.* at 326-27.

<sup>145</sup> *Id.* at 327.

fact, notwithstanding any post-judgment settlement, particularly one intended to circumvent Commission consideration of allegations of discrimination.

69. Nevertheless, we retain the discretion to consider allegations of discrimination prior to a final determination by the EEOC or a court where the facts so warrant. However, we do not intend to routinely exercise our discretion to consider allegations of discrimination before an EEOC or court decision. We disagree with commenters who suggest that the FCC's EEO rules and policies substantially duplicate the work of the EEOC.<sup>146</sup> While the EEOC and the FCC share as a common goal the elimination of discriminatory employment policies and practices at broadcast stations and cable systems,<sup>147</sup> the primary functions of the two agencies are different. Whereas the EEOC reviews discrimination complaints for the purpose of providing relief to victims of discrimination, either individually or as a group, and deterring future discrimination, the FCC's principal concern in reviewing discrimination allegations is the fitness of broadcasters and cable entities to fulfill their obligations under the Communications Act.

70. We will not require that broadcasters and cable entities contemporaneously notify the Commission of discrimination complaints filed with the EEOC. One commenter urges that broadcasters be required to report any discrimination complaints at least on an annual basis because broadcast license renewals now arise only every eight years.<sup>148</sup> However, in view of our decision to continue our policy of generally deferring action on individual discrimination complaints pending final action by the EEOC or a court, we see no reason to require that broadcasters contemporaneously notify the Commission of the filing of discrimination complaints. We note, moreover, that broadcasters are required under Section 1.65(c) of the Commission's Rules to report any adverse findings or adverse final actions involving discrimination complaints on an annual basis.<sup>149</sup> Thus, the Commission will not have to wait until a broadcaster files for renewal of its license to learn of an adverse finding or adverse final action on a discrimination complaint.

71. We requested comment in the *NPRM* on a proposal set forth by MMTC and 21 other organizations ("Joint Commenters") in *Streamlining* that the Commission consider all evidence which might be probative of discrimination or other EEO violations.<sup>150</sup> The Joint Commenters suggested that this type of evidence could include, among other things: evidence of a broadcaster's misconduct at commonly owned stations and headquarters units; evidence from individual allegations of discrimination in exceptional cases; evidence from nonresponsive answers or omissions on Form 396, in pleadings or in responses to Commission inquiries; evidence of failure to maintain records of EEO efforts; and evidence derived from logical inferences of potential discrimination drawn from a broadcaster's irrational explanations to the

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<sup>146</sup> See e.g., Congressmen Michael Oxley and Ralph Hall (Oxley/Hall) Comments at 3; Texas Association of Broadcasters (TAB) Comments at 3-5.

<sup>147</sup> *MOU*, 151 Fed. Reg. at 21799.

<sup>148</sup> MMTC Comments at 251.

<sup>149</sup> Section 1.65(c) of the Rules provides that "[a]ll broadcast permittees and licensees must report annually to the Commission any adverse finding or adverse final action taken by any court or administrative body that involves conduct bearing on the permittee's or licensee's character qualifications and that would be reportable in connection with an application for renewal as reflected in the renewal form." 47 C.F.R. § 1.65(c).

<sup>150</sup> *NPRM*, 13 FCC Rcd at 23026 (para. 60).

Commission for EEO nonperformance, such as claims that minorities prefer not to work in a particular format or that minorities and women prefer occupations outside of broadcasting. We invited comment on whether we should consider any of these types of evidence to be probative of discrimination. In its comments, MMTC sets forth a comprehensive proposal for a “zero tolerance policy” for discrimination and urges that the Commission consider these types of evidence to be probative of discrimination as one aspect of this zero tolerance policy.<sup>151</sup> Two other commenters agree that these types of evidence should be considered to be probative of discrimination.<sup>152</sup>

72. We agree with MMTC that discrimination by broadcasters and cable entities is manifestly contrary to the public interest and cannot be tolerated. We have thus incorporated several aspects of MMTC’s proposed zero tolerance policy into the rules and policies we are adopting in this proceeding. Regarding MMTC’s proposal as to the types of evidence that should be considered to be probative of discrimination, we think it appropriate, given the unique circumstances in each instance, to determine on a case-by-case basis whether these or other similar types of evidence are indicative of discrimination or other EEO violations and whether they warrant action by the Commission prior to a final determination by the EEOC or a court. For example, under certain circumstances, if there are well-supported allegations of discrimination made by a large number of individuals against one broadcast station or cable unit, or allegations of discrimination that shock the conscience or are particularly egregious, we may consider these allegations prior to a final determination by the EEOC or a court. In addition, if a broadcaster or cable entity engages in a pattern of deliberate and systematic violations of the EEO program requirements and such practices have the effect of denying women and minorities access to job opportunities, we may consider this to be evidence of discrimination.

73. MMTC also proposes as part of its zero tolerance policy for discrimination that the Commission expressly prohibit broadcasters from using compulsory binding arbitration agreements<sup>153</sup> and establish clear and fair conditions governing broadcasters’ use of voluntary binding arbitration agreements.<sup>154</sup> Additionally, MMTC proposes that the Commission take steps to bar the practice of selling a broadcast station using procedures that exclude minority buyers.<sup>155</sup> MMTC further suggests that, if a broadcaster uses an expressly racist or sexist appeal in seeking the business of advertisers, the Commission should investigate to determine whether the broadcaster has created a hostile working environment for minorities or women.<sup>156</sup> While these racist practices are repugnant and may be, in certain circumstances,

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<sup>151</sup> See MMTC Comments at 275-305.

<sup>152</sup> NOW Comments at 43; Gerri L. Gagnon Reply Comments at 2 (Associate Producer for Vermont Public Television).

<sup>153</sup> MMTC Comments at 251. MMTC defines compulsory binding arbitration agreements as agreements compelling an employee to agree that any discrimination complaints will be subject to binding arbitration. *Id.*

<sup>154</sup> *Id.* at 252.

<sup>155</sup> *Id.* at 310. Specifically, MMTC proposes that the Commission require broadcasters to certify on Forms 314 (Application for Consent to Assignment of Broadcast Station Construction Permit or License) and 315 (Application for Consent To Transfer Control of Corporation Holding Broadcast Construction Permit or License) that they did not trade with a broker which engaged in these practices and deny applications filed by broadcasters which fail to make this certification truthfully. *Id.*

<sup>156</sup> *Id.* at 307.

inconsistent with our *Character Policy Statement*,<sup>157</sup> we will not separately address these matters in this rule making because they are beyond the scope of this proceeding, which was initiated to revise the EEO rules in light of the court's decision in *Lutheran Church*.

74. One commenter complains that the Commission's broadcast EEO Rule should be expanded to prohibit discrimination based on disability.<sup>158</sup> Both Congress and this Commission have sought to ensure that persons with disabilities share in the benefits that modern communications services and products have to offer.<sup>159</sup> We note that employment discrimination based on disability is prohibited by the Americans with Disabilities Act of 1990.<sup>160</sup> Further, the rule changes we adopt today should assist all potential applicants, including those who are disabled, in obtaining information concerning openings at broadcast stations and cable entities. We believe, however, that the specific proposal raised in this context is beyond the scope of this proceeding.

75. Finally, we find substantial merit in several other aspects of MMTC's proposed zero tolerance policy. We address these aspects of MMTC's proposed zero tolerance policy below in our discussion of the EEO program requirements and enforcement scheme.

## 2. Broadcast EEO Program Requirements

### a. Rules and Policies

#### i. EEO Program and Related Provisions

76. Recruitment. In the *NPRM*, we stated our belief that effective recruitment is important because women and minorities have historically experienced difficulties in finding out about, or taking advantage of, employment opportunities in the communications industry. We nonetheless recognized that the issue as to the specific recruitment techniques to be utilized was a matter that would benefit from public

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<sup>157</sup> See *In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing*, 6 FCC Rcd 3448, 3449 (1991).

<sup>158</sup> Doreen Vincent Comments at 1 (video producer).

<sup>159</sup> See, e.g., Sections 225 (telecommunications services for hearing-impaired and speech-impaired individuals), 255 (access to telecommunications equipment and services by persons with disabilities), 303(u) (television receivers generally required to be equipped with a closed captioning chip), 710 (telephone service for the disabled) and 713 (video program accessibility) of the Communications Act; Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d(a)(1)(A) (accommodation by federal departments and agencies with respect to the accessibility of information, technology and data by employees and members of the public with disabilities); *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, FCC 99-181, released September 29, 1999; and *Implementation of Video Description of Video Programming*, FCC 99-353, released November 18, 1999.

<sup>160</sup> Pub. L. No. 101-336, 104 Stat. 327 (1990) ("ADA"). The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

input. Accordingly, we requested comment on whether we should adopt a rule imposing detailed requirements or whether we should afford flexibility in recruitment techniques.<sup>161</sup>

77. Based on our review of the Comments as discussed below, we are convinced that a meaningful program of recruitment involving broad outreach is essential to ensure equal employment. We also conclude that it is desirable to accord broadcasters flexibility in designing outreach programs that are tailored to the needs of their station and community. Moreover, we believe that the objective of ensuring that minority and female applicants have the opportunity to apply for positions in the broadcast industry may be achieved without a specific requirement that broadcasters in every situation use recruitment methods that specifically target those groups. Outreach that is truly broad and inclusive will necessarily reach minorities and females, as well as other segments of the community that in the past may have been deprived of the opportunity to compete for broadcast employment. Therefore, we will give broadcasters discretion to determine what combination of recruitment sources will yield broad and inclusive outreach. While targeted sources can enhance the effectiveness of recruitment efforts, stations will be allowed to determine whether, when and how to use them to meet their individual circumstances. However, we will reassess these conclusions and the effectiveness of this approach as we gain experience in applying our new EEO rule.

78. In order to achieve our goal of ensuring broad outreach while affording broadcasters flexibility in designing their EEO programs, we will require broadcasters<sup>162</sup> to comply with our new EEO program requirements, summarized as follows:

Basic Obligation: widely disseminate information concerning each full-time job vacancy (*see* para. 85); and comply with one of the following two outreach options:

OPTION A

Supplemental Recruitment Measures:

- (i) notice of openings to qualifying organizations that request such notice (*see* paras. 95, 96, 97); and
- (ii) two (for employment units with five to ten full-time employees) or four (for larger employment units)<sup>163</sup> longer-term recruitment initiatives within a two-year period including, *e.g.*: participation in at least 4 job fairs by station personnel who have substantial responsibility in making hiring decisions; hosting at least one job fair; co-sponsoring job fairs with women's and minority groups in the business and professional community; participation in scholarship programs directed to students desiring to pursue a career in broadcasting; sponsorship of at least two events in

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<sup>161</sup> *See NPRM*, 13 FCC Rcd at 23027-28 (paras. 63-65).

<sup>162</sup> Except where noted below, cable entities must comply with the same EEO program requirements as set forth in this paragraph.

<sup>163</sup> Cable employment units with six to ten full-time employees must undertake one recruitment initiative each year and larger employment units must undertake two recruitment initiatives per year.

the community designed to inform the public as to employment opportunities in broadcasting (*see* paras. 99, 100, 101, 102, 103)

Recordkeeping

- (i) collection, but not routine submission to the Commission of: (i) listings of all full-time jobs filled, identified by job title; (ii) the recruitment sources used to fill each vacancy, including any organizations which requested notification; (iii) the address, contact person and telephone number of each recruitment source used to fill each position; (iv) dated copies of all advertisements, letters, e-mails, faxes, etc. used to fill each vacancy; (v) documentation necessary to demonstrate performance of supplemental outreach initiatives, *e.g.*, job fairs, mentoring programs; (vi) the total number of interviewees for each vacancy and the referral source for each interviewee; (vii) the date each job was filled and the recruitment source that referred the hiree (*see* paras. 115, 116, 117, 118)
- (ii) placement in the station public file annually a report including the following: (i) all full-time jobs filled during the previous year; (ii) recruitment sources used to fill those vacancies; (iii) address, contact person and telephone number of each recruitment source; (iv) recruitment source for each hiree; (v) recruitment source for each interviewee; and (vi) description of any supplemental initiatives implemented during the previous year (*see* para. 123)

or

OPTION B

Alternative Recruitment Program:

- (i) design its own broad and inclusive outreach program; and
- (ii) demonstrate that it is widely disseminating information concerning job vacancies by analyzing the recruitment sources, race, ethnicity and gender of the applicants attracted by its recruitment efforts (*see* para. 104)

Recordkeeping

- (i) collect, but not routinely submit to the Commission: (i) listings of all full-time jobs filled, identified by job title; (ii) the recruitment sources used to fill each vacancy; (iii) the address, contact person and telephone number of each recruitment source used to fill each position; (iv) dated copies of all advertisements, letters, e-mails, faxes, etc. used to fill each vacancy; (v) data reflecting the recruitment source, gender, and racial/ethnic origin of applicants for each full-time job filled (*see* paras. 116, 119)
- (ii) place in the station's public file annually a report containing the following: (i) all full-time jobs filled during the previous year; (ii) recruitment sources used to fill

those vacancies; (iii) address, contact person and telephone number of each recruitment source; and (iv) recruitment source, race, gender and national origin for each applicant (*see* para. 123)

79. There is substantial support among the commenters that broad recruitment outreach is preferable to word-of-mouth recruitment, even though there is disagreement about the specific proposals set forth in the *NPRM*. MMTC contends that outreach in recruitment is the core of any meaningful EEO program.<sup>164</sup> Although NAB contends that the proposed rules are unduly burdensome, it advances an alternate proposal designed to provide employment information to a broad range of applicants.<sup>165</sup> Similarly, 46 Named StBAs expresses reservations concerning many aspects of the EEO program proposed in the *NPRM*, but supports the goal of broad outreach and the desirability of avoiding exclusive reliance on word-of-mouth recruitment. It proposes an alternative based on a model outreach program developed by the Broadcast Executive Directors Association ("BEDA").<sup>166</sup> Even commenters who oppose the adoption of any rule nonetheless urge that the Commission remain available to assist broadcasters in their efforts to broaden their recruitment outreach.<sup>167</sup> In sum, the record before us confirms our view that broad outreach efforts to ensure that all segments of the population, including minorities and women, are aware of broadcast employment opportunities are of crucial importance to the goals established by Congress of deterring unlawful discrimination and fostering diversity of programming.

80. In response to our request for comments as to how to implement a meaningful outreach program, many commenters support a flexible approach rather than one mandating the use of a specified number of recruitment sources of specified types. Several commenters submit comprehensive program proposals that they believe will ensure meaningful outreach while leaving maximum flexibility to broadcasters in designing their individual programs. The following is a review of several of these proposals.

81. NAB proposes three options for complying with Commission EEO requirements. First, NAB suggests that compliance with Office of Federal Contract Compliance Programs ("OFCCP") requirements should suffice as compliance with the Commission's Rule (although NAB states that there may be constitutional problems with the OFCCP requirements). As a second alternative, NAB proposes that broadcasters could achieve compliance by participating in a Broadcast Career Program operated by their State Broadcast Association ("StBA"). This refers to the model plan developed by BEDA, which is discussed below in connection with the proposal of 46 Named StBAs. In both cases, NAB proposes that we require only that broadcasters certify every two years that they have complied with the OFCCP or BEDA programs. The third alternative proposed by NAB is a flexible outreach program developed by the licensee. The proposal would allow broadcasters to choose from a "menu" of six general (*i.e.*, not related to a specific job vacancy) and nine specific outreach efforts. The general outreach efforts would include sponsorship of, or participation in, job fairs, scholarship, mentoring and intern programs, and training programs for existing employees. The specific outreach efforts would include standard recruitment

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<sup>164</sup> MMTC Comments at 220.

<sup>165</sup> NAB Comments at 5.

<sup>166</sup> 46 Named StBAs Comments at 3-5.

<sup>167</sup> HBP Comments at 28-29; S&B Comments at 23-25.

methods (such as placing newspaper or magazine advertisements, making on-air job announcements, etc.) and such methods as posting job notices on internet web pages. Under NAB's proposal, a licensee would achieve compliance by utilizing two general outreach initiatives, or one general and two specific outreach initiatives, or four specific outreach initiatives.<sup>168</sup>

82. The proposal of 46 Named StBAs is premised on a model program developed by BEDA. The program itself consists of suggestions or "highways" that StBAs might use in maximizing EEO outreach, including outreach activities by the StBA itself and activities of the StBA to assist individual broadcasters in maximizing their outreach. Thus, the program suggests that a StBA could develop relationships with educational institutions in its state in order to encourage and assist students who may wish to pursue careers in broadcasting; sponsor internships, mentoring programs, fellowships, apprenticeships, and training programs, and assist broadcasters who wish to implement similar initiatives; provide information and assistance concerning recruitment resources and methods; take steps to encourage broadcaster participation in the StBA program and increase public awareness of the program; and conduct surveys to evaluate the effectiveness of the program. The key element of the program, according to 46 Named StBAs, is the maintenance by BEDA and StBAs of web sites for the posting of job vacancy information. Commenters have pointed out that many StBAs, as well as NAB, maintain similar employment web pages. Internet usage has increased and internet access is available from 73.3% of public libraries, 46 Named StBAs asserts. Accordingly, it urges that broadcasters should be deemed to be in compliance with our rules if they post at least 67% of their vacancies on the BEDA web site or a web site maintained by a StBA. Recruitment should not be required for all vacancies, 46 Named StBAs contends, because there are some instances where there is good reason not to post a particular vacancy.<sup>169</sup>

83. AWRT suggests a recruitment program based on a "menu" approach. AWRT suggests a menu of 12 recruitment methods, including listing individual vacancies in various recruitment sources, and such additional techniques as job fairs, training and networking programs, and participation in media trade groups oriented to minorities and females.<sup>170</sup> AWRT proposes that broadcasters with more than 10

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<sup>168</sup> NAB Comments at Appendix C.

<sup>169</sup> 46 Named StBAs Comments at 26.

<sup>170</sup> Specifically, AWRT's proposed menu would afford broadcasters the following choices: (i) participation in local, regional, and national job fairs; (ii) co-sponsoring job fairs with women's and minority organizations; (iii) posting each top-four job category opening with a StBA; (iv) listing each top-four job category opening with media trade groups with a broad membership of women and minorities; (v) listing all job openings in a local newspaper of general circulation and in locally distributed publications of women's and minority organizations; (vi) online listing of all openings on the station's web site and linking that site to the home pages of women's and minority organizations; (vii) participation in internship programs with local high schools, colleges, and universities; (viii) contacting college and university placement centers and/or placing advertisements in the newspapers of such institutions; (ix) participation as a sponsor or member in conventions or local events of women's and minority organizations; (x) internal training and promotion opportunities available to all employees; (xi) listing all job openings on a 24-hour job line (*i.e.*, voice mail) maintained by the station and publicized on the air; and (xii) encouragement and use of networking by existing station personnel to reach women and minority applicants.

employees be required to utilize eight of the 12 methods, while broadcasters with fewer than 10 employees only be required to utilize five of the recruitment methods.<sup>171</sup>

84. MMTC contends that recruitment should include the use of sources targeted to minority and female job applicants. Accordingly, it does not oppose the option noted in the *NPRM* of requiring that recruitment include at least three such targeted sources. Nonetheless, it suggests that a better approach would be to require that broadcasters fax or e-mail notifications to virtually all local and several non-local sources of job applicants. MMTC argues that this would eliminate concern as to whether sufficient minority or female organizations had been contacted. It nonetheless recognizes that a problem could arise if claims were made that a broadcaster had failed to contact particular local organizations. It accordingly proposes that the Rule should specify a minimum number of organizations a broadcaster would be required to contact, ranging from 10 to 50, based on the size of the market.<sup>172</sup> MMTC also urges that non-traditional means of recruitment should be required as a supplement to recruitment conducted when a vacancy occurs. Thus, MMTC states that, contrary to its expectations, its research has led it to conclude that job fairs can be an effective means of recruitment, at least for entry-level positions. It also cites recruitment through job banks, the internet, and participation in trade events sponsored by minority and female groups as having "promise." It nonetheless argues that such activities must be conducted in a meaningful way, and that no credit should be given for activities that are insubstantial or constitute a sham.<sup>173</sup>

85. As noted, we believe that recruitment for all full-time hires is essential to meaningful outreach. Thus, recruitment for only some openings could leave the most desirable positions open to a limited number of potential applicants, possibly excluding significant segments of the community, such as females and minorities. Therefore, we will require that broadcasters widely disseminate information concerning all full-time openings except in rare circumstances, as described below. To fulfill this obligation, we will require that broadcasters develop and utilize for each vacancy a list of recruitment sources (which may be freely modified as circumstances warrant) sufficient to ensure wide dissemination of information about the opening. We will not dictate the number or type of sources that a broadcaster must include in its own recruitment list. However, if the sources used cannot reasonably be expected, collectively, to reach the entire community, then the broadcaster may be found in noncompliance with our EEO Rule. A broadcaster may widely disseminate job postings through any combination of methods sufficient to ensure that its recruitment efforts are inclusive.

86. We have carefully considered BEDA's proposal that an entity should be able to satisfy its outreach obligation fully by posting job vacancies on the BEDA or state association website. Internet-based job banks such as the BEDA model hold great promise for dramatically increasing the ability of prospective applicants to gain access to information about job vacancies, not just in their community but across the state and even the country. We commend BEDA for developing this new mechanism and encourage broadcasters to use these or similar websites to help them in their recruitment efforts. It is premature, however, to conclude that web posting is sufficient to ensure wide dissemination to all segments of the community. First, the BEDA job bank web site and those of state broadcast associations are still

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<sup>171</sup> AWRT Comments at 4-5.

<sup>172</sup> MMTC Comments at 221-23.

<sup>173</sup> MMTC Comments at 230-33.

developing. As far as we can determine, most state broadcast associations do not yet in fact have internet job banks, and those that do post only a limited number of vacancies from local broadcast stations. Second, in view of their newness these websites are not well known as a repository of job advertisements for prospective applicants. Most significantly, however, access to computers is not universal and this digital divide affects minorities and those living in rural areas to a greater extent than other segments of the population.<sup>174</sup> We have established the E-Rate program to provide greater access to the internet in our schools and libraries. But we are not convinced that access via the public library is a widespread mechanism for prospective applicants to conduct a job search. Accordingly, we cannot now recognize such internet job banks as presumptively sufficient to achieve broad outreach. We think it preferable to consider the internet as one of several recruiting mechanisms.

87. We will continue to monitor the development of the state association internet job banks, however., and we encourage broadcasters to keep us informed as to the progress of these activities and the success of the internet as a recruiting tool. After some experience with the new rule and internet- based initiatives such as the BEDA model we would be prepared to review, upon appropriate petition, our position on this matter. We would expect such a petition to demonstrate that the internet job bank (1) is well established and provides comprehensive statewide job listings; (2) is sufficiently publicized throughout the community; (3) is available to stations that are not members of the association sponsoring the internet job bank to list their job vacancies; and (4) that computer access has become sufficiently universal so that it could be reliably assumed that an internet job posting will be readily available to all segments of the community. Finally, we would review the extent to which applicants are applying for jobs as a result of web postings, whether and why any segment of the community is having particular difficulty in gaining access to such postings, and methods by which the petitioner would reach that segment of the population.

88. As we proposed in *Streamlining*, broadcasters may engage in joint recruitment efforts, but each broadcaster will remain individually responsible for achieving broad outreach. We have concluded, based on the comments and our experience enforcing EEO rules over the last 30 years, that there is considerable value in allowing individual broadcasters flexibility to design outreach programs that will work in their communities, and that there is no effective "one size fits all" recruitment model. Moreover, such flexibility will afford relief to broadcasters in smaller markets, which may not need to use as many recruitment sources to achieve broad outreach in their markets.

89. We recognize that there may be occasional exigent circumstances where recruitment may not be feasible. For instance, there may be a legitimate need to replace immediately an employee who departs without notice and whose duties cannot be fulfilled, even briefly, by other station employees. We

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<sup>174</sup> See, e.g., MMTC Comments at 29, citing National Telecommunications and Information Administration, "Falling Through the Net: A Survey of the 'Have Nots' in Rural and Urban America" (July 1995) and F. McKissack, "Cyberghetto: Blacks are Falling Through the Net", *The Progressive*, June, 1998; UCC Reply Comments at 19-20; and NOW Reply Comments at 43-44, citing National Telecommunications and Information Administration, "Falling Through the Net II: New Data on the Digital Divide" (July 1998) (<http://www.ntia.doc.gov/ntiahome/net2/index.html>) and the Benton Foundation, "Losing Ground Bit by Bit: Low-Income Communities in the Information Age" (June 1998) (<http://www.benton.org/Library/Low-Income>), among other sources. See also National Telecommunications and Information Administration, "Falling Through the Net: Defining the Digital Divide" (July 1999). This report found, based on 1998 data, a persistent and in some instances widening gap between the information rich and the information poor, including those who are younger, those with lower incomes and educational levels, certain minorities, and those in rural areas or central cities.

nonetheless do not believe that broadcasters should be excused from recruitment for any specified percent of vacancies, as some commenters advocate. Rather, hiring without recruitment should occur only in exceptional circumstances. We cannot anticipate every circumstance which might justify filling a position without recruitment. We will rely upon the good faith discretion of broadcasters. However, we expect nonrecruited vacancies to be rare relative to the number of vacancies for which recruitment is conducted, because our Rule generally requires recruitment for every vacancy.

90. We expect broadcasters to allow a reasonable time after recruitment is initiated for applications to be filed before the position is filled. We recognize that occasionally a shorter time might be necessary because of extraordinary circumstances. However, we caution that excessive instances of hires being made shortly after the initiation of recruitment could result in a finding of noncompliance if the evidence suggests that the broadcaster is not in good faith allowing adequate time for applicants to respond to its outreach efforts or is not considering their applications.

91. We do not accept NAB's proposal that broadcasters should be deemed in compliance with our EEO Rule based only on their certification of participation in a StBA program set up pursuant to the BEDA program. The BEDA program itself consists of suggestions that individual StBAs are not required to follow. Thus, the actual components of particular StBA programs will vary. The existence of different requirements in different states would be confusing to the public and difficult to enforce. Also, the BEDA program is premised on the use of the internet as the primary recruitment source, which we find inadequate at this point. Nonetheless, the efforts of the StBAs are to be commended. Moreover, there remains an ample role for programs developed by the StBAs in assisting broadcasters in meeting the EEO requirements we are adopting herein, in coordinating joint recruitment efforts, and in promoting the further development of the internet as a recruitment tool.

92. We have also considered MMTC's suggestion that broadcasters be required to use all available recruitment sources. This is an approach that may recommend itself to many broadcasters, especially insofar as such technologies as e-mail and fax make the notification of a large number of sources less burdensome. However, as MMTC concedes, there are difficulties in adopting this approach as a requirement, primarily in terms of identifying the universe of available sources. Also, it could result in sending notifications to many sources that are neither interested nor productive. The solution of placing a maximum on the number of sources broadcasters would be required to use does not entirely cure the problems because there could still be disputes in situations where a broadcaster asserts that the number of available sources is less than the maximum.

93. We will apply the recruitment requirement to all full-time employees, including lower-level employees. As indicated in the *NPRM*,<sup>175</sup> we believe that lower-level positions provide an important means of entry into the broadcast industry that can lead to higher-level positions and even ownership. Nothing in the record has convinced us otherwise. Indeed, we have received comments from a number of persons who currently hold high-level positions in broadcasting, whose personal experience confirms this to be the case.<sup>176</sup> Also, as discussed above, the application of outreach requirements to all levels is necessary to

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<sup>175</sup> *NPRM*, 13 FCC Rcd at 23021-22 (para. 44),

<sup>176</sup> MMTC Comments, Vol. III, Exhibits 1 (Declaration of Alfredo Alonso), 3 (Declaration of W. Don Cornwell), 8 (Declaration of Serena Ferguson Mann), 11 (Declaration of Cathy Hughes), 12 (Declaration of Chesley Maddox-Dorsey), and 20 (Declaration of Jeffrey H. Smulyan).

deter discrimination and we believe that Congress intended the Commission to apply EEO requirements to all job categories.

94. In addition, as discussed above, we are adopting two options from which broadcasters may choose to ensure the success of their outreach. As indicated above, under the first option, broadcasters would be required to undertake two kinds of supplemental recruitment measures. We emphasize, however, that, while we believe that these measures will aid in achieving broad outreach, they are only intended to be supplemental to a broadcaster's own broad and inclusive recruitment program efforts to widely disseminate job vacancy information, which, as was requested by many commenters, we are permitting broadcasters to design pursuant to their employment units' individual circumstances. Regardless of the option chosen, broadcasters have an affirmative obligation to recruit for vacancies that cannot be delegated to any outside group.

95. We have previously stated the reasons why we will not implement MMTC's proposals that broadcasters be required to fax or e-mail notifications to virtually all local and several non-local sources of job applicants or, in the alternative, contact a minimum number of organizations to ensure that a sufficient number of minority and female sources are notified of job vacancies. However, we will require broadcasters to provide notification of job vacancies to any organization that requests such notification, provided the organization is a kind that regularly distributes information about employment opportunities to job seekers or refers job seekers to employers. We believe that this requirement addresses MMTC's concern because it is designed to ensure that any sector of the community that believes that it has been inadequately served by the station's outreach program has a means of obtaining notices of openings. This notification requirement will provide a "safety valve" in the event that a community organization with ties to a particular sector of the community believes that such sector is not being adequately reached by the broadcaster's chosen recruitment procedures. In this way, the organization could be instrumental in spreading the word about openings to its constituents. For example, a recruitment organization with ties to a particular racial or ethnic group or to college students or to persons with a particular disability, could request notices of openings for the purpose of notifying its constituents of vacancies as they arise. The obligation to notify such organizations provides added assurance that a broadcaster's recruitment notices will reach all segments of the community. For example, a college campus placement office might be able to inform college students about openings more effectively than the broadcaster is doing through its selected channels. Similarly, an organization with ties to a particular ethnic group might be well situated to disseminate information about vacancies in a group's first language. An organization that serves disabled persons, such as blind people, could keep them informed of openings of which they might be unaware if those openings were advertised only in publications that are inaccessible to vision-impaired persons. We also expect broadcasters to make reasonable efforts to publicize the notification requirements in their communities so that qualifying groups are able to learn of the new procedure. Such efforts could take the form of, for example, announcements on their stations or newspaper advertisements. Joint announcements by broadcasters would also be a reasonable way to meet this requirement.

96. We believe that organizations that come forward to request vacancy notifications may prove to be very productive referral sources. These organizations have a well-defined interest and may be able to help broadcasters achieve the kind of robust and inclusive outreach that will promote equal employment opportunity. Further, this approach will enable interested groups to more closely monitor and, if necessary, seek to improve, broadcasters' recruitment efforts.

97. We will provide broadcasters ample discretion to determine the method of providing notice to requesting parties. Such methods may include electronic mail and facsimile and we encourage the use of such methods as they may require fewer personnel and financial resources to fulfill the notification requirement than more traditional methods. For example, a broadcaster may maintain an electronic list of recruitment sources and notify all the sources simultaneously with a single e-mail when a vacancy occurs. We will also allow notifications to be made as part of joint recruitment efforts among broadcasters. However, each broadcaster participating in the joint recruitment efforts remains individually responsible for ensuring that notifications relating to its employment unit are made. For example, a state broadcast association may have a job bank that notifies certain sources on behalf of an employment unit when a vacancy becomes available at that employment unit. As long as the state broadcast association notifies all organizations requesting vacancy announcements from that employment unit as part of this process, the employment unit itself does not have to do so. Therefore, given the flexibility provided by electronic forms of notice and joint recruitment, we believe that the notification requirement will place minimal burdens on broadcasters. However, if experience proves otherwise, especially with respect to burdens on small broadcasters, we can revisit this requirement.

98. We want to emphasize that the obligation to notify recruitment sources that request notice of vacancies is intended as a supplement to, not a substitute for, broadcasters' core, nondelegable obligation to widely disseminate information concerning all job vacancies. While recruitment sources will have the right to ask broadcasters for notices of vacancies, they have no obligation to do so. And even if a broadcaster does not receive a single request for notice of vacancy information, it will nevertheless be responsible for ensuring that notice of vacancies is widely disseminated. If it fails to do so, we will not regard as a legitimate excuse the fact that no recruitment organization requested notice.

99. As the second supplemental recruitment measure, we will require that broadcasters engage in outreach efforts beyond the traditional recruitment that occurs in response to individual vacancies. These include such supplemental recruitment measures as job fairs, intern programs, training programs, mentoring programs, and interaction with educational and community groups. Standard recruitment for specific vacancies is useful to ensure outreach to persons who already have broadcast experience. However, it is also desirable to encourage outreach to persons who may not yet be aware of the opportunities available in broadcasting or have not yet acquired the experience to compete for current vacancies. Such persons are likely to include minorities, females, and others who have in the past been excluded by word-of-mouth recruitment methods. Moreover, we recognized in 1994, as part of our overall review of the EEO requirements then in place, that lack of training may be a factor impeding the diversification of a broadcaster's workforce and that such methods as intern and training programs may be useful in addressing that problem.<sup>177</sup> Several commenters have endorsed supplemental recruitment measures as valuable tools for achieving outreach. For instance, MMTC indicates that its research showed that job fairs are an effective method of recruitment, at least for entry level positions. Accordingly, we conclude, based on our review of comments emphasizing the usefulness of such measures, that it is important to promote such nontraditional outreach methods, which have in the past been a secondary aspect of our EEO Rule.

100. We will accord broadcasters discretion as to how they implement this aspect of our Rule. We are impressed by the "menu" approach suggested by several commenters. We agree that the

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<sup>177</sup> See Report, 9 FCC Rcd at 6319.

effectiveness of particular supplemental recruitment measures will necessarily vary based on the circumstances at each station. To establish inflexible requirements regarding such measures could impose inappropriate requirements in some cases. We will accordingly incorporate in our EEO Rule a menu of options for supplemental recruitment initiatives, which will enable broadcasters to select the approaches that they believe will be most effective in their situations.

101. The first three menu options include participation in at least four job fairs by station personnel who have substantial responsibility in the making of hiring decisions; hosting at least one job fair; or co-sponsoring at least one job fair with an organization in the business and professional community whose membership includes substantial participation of women and minorities. We believe that job fairs are a useful method to reach a broad range of individuals who are interested in employment in the industry. The fourth option is participation in at least four activities sponsored by community groups active in broadcast employment issues, including conventions, career days, workshops and similar activities. Such participation will enable broadcasters to establish relationships with groups in the community that might otherwise be overlooked. The fifth option is the establishment of an internship program designed to assist members of the community to acquire skills needed for broadcast employment. Such an endeavor would serve the goal of broad outreach by increasing the number of qualified potential employees not only for one broadcaster, but for all broadcasters in the area. The sixth option is participation in general (as opposed to vacancy-specific) outreach efforts by such means as job banks or internet programs such as those described in the model program developed by BEDA. While such sources may be used as recruitment sources when specific vacancies occur, they can also be useful even when there is no specific vacancy to elicit interest from persons who may later be considered for a specific position. The seventh option is participation in scholarship programs directed to students desiring to pursue a career in broadcasting. The benefit of this outreach is that it attracts students, including minorities and females, toward careers in broadcasting, ultimately increasing the number of qualified potential employees. The eighth and ninth options are, respectively, the establishment of training and mentoring programs designed to enable station personnel to acquire skills that could qualify them for higher level positions. These options would not be satisfied by ordinary training required for employees to perform their current positions. These options are rather intended to increase employee skills so they can qualify for higher positions.

102. The tenth option is participation in at least four events or programs relating to career opportunities in broadcasting sponsored by educational institutions. Such participation again serves the purpose of increasing the universe of potential employees from which broadcasters attract job applicants. For instance, the BEDA program contends that it is important that educational institutions perceive broadcasting as a rewarding career for their students and offer courses and experiences that will be helpful to students who may choose a career in broadcasting.<sup>178</sup> The eleventh option includes sponsorship of at least two events in the community designed to inform the public as to employment opportunities in broadcasting. We believe that such activities can serve to increase public awareness of the opportunities available in broadcasting. The twelfth option is the only one related to regular recruitment efforts. It would entail listing each upper-level opening in a job bank or newsletter of a media trade group whose membership includes substantial participation of women and minorities. Finally, the thirteenth option includes participation in activities other than the twelve listed options that the licensee has designed to further the goal of disseminating information about employment opportunities in broadcasting to job candidates who might otherwise be unaware of such opportunities. This will provide flexibility for

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<sup>178</sup> 46 Named StBAs Comments at Exhibit 1, p. 2.

worthwhile initiatives that broadcasters may develop but that are not strictly within the scope of the menu options we have specified. While we are not requiring that broadcasters use particular recruitment sources, we encourage broadcasters to use an array of sources that furthers the goal of broad outreach.

103. For broadcasters who elect to utilize the supplemental recruitment measures, we will expect station employment units with more than ten full-time employees to implement four of these options every two years. For example, a broadcaster could fulfill this requirement by, during a two-year period, hosting one job fair, establishing an internship program, participating in a scholarship program, and co-sponsoring one job fair with an organization in the business and professional community whose membership includes substantial participation of minorities and women. For reasons discussed below, station employment units with five to 10 full-time employees should implement two of the options every two years. The pertinent two-year period will be that preceding the filing of Statements of Compliance (Form 397) or Broadcast EEO Program Reports (Form 396), discussed below.<sup>179</sup> We will not specify in detail what steps should be taken to implement each option because we wish to accord broadcasters maximum flexibility and opportunity to experiment. While each broadcaster will be responsible for implementing the menu options it selects, joint recruitment efforts may be used in connection with some of the menu options, including participation in job banks and internet programs.

104. A number of broadcasters have urged the Commission to give them discretion to design an outreach program that is responsive to the needs of the broadcaster's organization and the local community.<sup>180</sup> We are willing to allow broadcasters to forego the supplemental recruitment measures described above and to design their own outreach program to suit their needs, as long as they can demonstrate that their program is inclusive, *i.e.*, that it widely disseminates job vacancies throughout the local community. Accordingly, if a broadcaster elects to design its own program rather than utilize the supplemental measures, we will require that it collect data tracking the recruitment sources, gender, and race/ethnicity of its applicant pools so that the broadcaster, the public and the Commission can evaluate whether the program is effective in reaching the entire community. If the data collected does not confirm that notifications are reaching the entire community, we expect a broadcaster to modify its program as warranted so that it is more inclusive. Thus, the rules we are adopting require a broadcaster to analyze the effectiveness of its outreach program, and address any problems found. The records required to be maintained by broadcasters choosing this approach are detailed in our general discussion of recordkeeping below.

105. While we are affording broadcasters the option of either employing supplemental recruitment measures to ensure broad outreach or verifying broad outreach using applicant pool data, we believe that, having selected an option, a broadcaster should use the selected option for a sufficient period of time so that it, the public, and the Commission can meaningfully assess the success of the broadcaster's efforts. As will be discussed below, as part of our enforcement process, we are requiring broadcasters to

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<sup>179</sup> We recognize that some broadcasters may not have a full two years prior to the filing of the initial Statement of Compliance. Also, there will likely be situations where a broadcaster acquires a station during the two-year period. In such circumstances, a broadcaster may reasonably apportion the extent of its activities to reflect the period of time actually available to it. Absent evidence of bad faith, we will accept the broadcaster's reasonable judgment in this respect.

<sup>180</sup> *See, e.g.*, NAB Comments at 13; Virginia and North Carolina Associations of Broadcasters (VAB/NCAB) Comments at 10; Evening Post Comments at 20.

file Statements of Compliance every two years. We will permit a broadcaster to select a different option at the time it files its Statement of Compliance. Thereafter, the broadcaster should adhere to the option selected for at least the two-year period until the filing of its next Statement of Compliance.

106. Initially, we will require that broadcasters file with the Commission and place in their public file a statement as to their election between the two approaches (supplemental recruitment measures or alternative recruitment program) designed to ensure broad recruitment outreach within forty-five days of the effective date of the new rules. This will ensure that both the Commission and the public are aware of the approach the broadcaster intends to implement. In order to facilitate the initial election, we are preparing a form to be utilized for the initial election. Any broadcaster that does not receive a copy of the form by mail may obtain one from the Commission. A broadcaster may change its initial election when its first Statement of Compliance is due, even if that is less than the ordinary two-year period. Thereafter, as noted, a broadcaster will be expected to adhere to its election until the filing of its next Statement of Compliance. However, if there is a sale of the station subject to Commission approval pursuant to FCC Form 314 or FCC Form 315, the buyer may select a different option than that employed by the seller, even though it is within the two-year period. Copies of the initial election statements will be on file in the Commission's Public Reference Room. In the future, we intend to make information regarding a broadcaster's election electronically available on our web site.

107. Under our former EEO Rule, we did not require station employment units with fewer than five full-time employees to demonstrate compliance with the EEO program requirements. We will continue that policy under the EEO Rule being adopted herein. We emphasize, however, that all broadcasters, including those that are part of employment units with fewer than five full-time employees, are subject to the provision of the EEO Rule that prohibits discrimination. In accordance with our prior practice, we will consider employees to be full-time if their regular work schedule is 30 hours per week or more.

108. The term "station employment unit" refers to a station or group of commonly owned stations in the same market that share at least one employee. We believe that linking certain EEO program requirements to employment units will enable us, as well as broadcasters, to treat station combinations that share employees as one entity. Thus, broadcasters are required to undertake four menu options every two years per station employment unit, not per station. At the same time, large broadcasters cannot claim small station treatment by maintaining that each station in a station combination employs a small staff.

109. As proposed in the *NPRM*,<sup>181</sup> we will not require recruitment for internal promotions, nor will we require recruitment for temporary employees. Typically, we view temporary employees as including those hired as emergency replacements for absent regular employees or those hired to perform a particular job for a limited period of time. However, if a person is hired full-time to perform a regular station function for an extended period of time (*e.g.*, more than six months), such a hire will be treated as a permanent hire for which recruitment would be required. We recognize that some broadcasters may wish to hire employees initially on a temporary basis with the possibility of retaining them on a permanent basis if their performance is satisfactory. In such circumstances, if recruitment is done at the time of the temporary hire, any later decision to convert the employee's status to full-time may be treated as a promotion. However, if an employee is hired as a temporary employee without recruitment, recruitment should occur if the employee is later considered for a permanent position. We caution that excessive

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<sup>181</sup> See *NPRM*, 13 FCC Rcd at 23028 (para. 67)

instances of temporary hires being converted to permanent hires without a meaningful opportunity for recruited applicants to compete could result in a finding of noncompliance if the evidence suggests the practice has the effect of avoiding meaningful outside recruitment.

110. Questions were also raised as to the status of part-time employees, interns and former employees. Under our former EEO Rule, we expected broadcasters to recruit for part-time positions but did not focus on part-time hires in our review of EEO programs.<sup>182</sup> We see no reason to depart from this policy, which serves to minimize burdens on broadcasters, especially smaller broadcasters. We will include a provision in our Rule clarifying that, in the case of part-time hires, broadcasters need only substantially comply with the requirement to recruit for every vacancy. With respect to interns, we would expect that they would ordinarily constitute temporary hires or non-employee volunteers. They would thus not be subject to our recruitment requirements.<sup>183</sup> However, a decision to employ them permanently would be a hire subject to recruitment. Finally, no good reason has been cited for exempting hires involving former employees from recruitment requirements. Thus, we will expect recruitment for those hires.

111. Analysis/Recordkeeping. In the *NPRM*, we proposed that broadcasters analyze the success of their recruiting efforts in attracting minorities and females to apply for vacancies. We proposed requiring broadcasters to maintain records as to the race, national origin, and gender of all applicants generated by each recruitment source for each vacancy in order to assess the effectiveness of its recruitment efforts. We requested comments as to how broadcasters should analyze the success of their recruitment efforts and whether extensive applicant pool records were necessary to that process.<sup>184</sup>

112. Many broadcasters questioned the need for analysis based on extensive applicant pool data. They contend that recordkeeping is burdensome because it relies primarily on voluntary self-identification by applicants as to their racial and ethnic status. Commenters assert that it is difficult and time-consuming to compile such data in a reliable manner and that resources could be better devoted to other EEO efforts. They also urge that many job applicants resent inquiries as to race and ethnicity because they do not understand the relevance of such information to their applications for broadcast employment.<sup>185</sup>

113. Our purpose in proposing the collection and evaluation of applicant pool data, including the race, ethnicity, gender, and referral source of applicants, was to ensure that broadcasters are engaging

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<sup>182</sup> See, e.g., *WFSQ (FM)*, 7 FCC Rcd 6045, 6046 (1992); *Enterprise Media of Toledo, L.P.*, 12 FCC Rcd 3920, 3923-24 (1997).

<sup>183</sup> Curators asserts in its Comments at 4-5 that it has 40 to 60 student interns who, for insurance purposes, are carried on its payroll as part-time employees. For purposes of our EEO Rule, persons who function as student interns may be treated as such, irrespective of how they are treated for insurance purposes. Conversely, merely labeling an individual as an "intern" would not excuse a broadcaster from recruitment if the person were actually functioning as a permanent full-time employee.

<sup>184</sup> *NPRM*, 13 FCC Rcd at 23029-30 (paras. 72-73).

<sup>185</sup> See, e.g., NJBA Comments at 2-3, 5; TAB Comments in MM Docket No. 96-16 (incorporated by reference in its Comments herein) at p. 8-10; VAB/NCAB Comments at 7-9; Fisher Reply Comments at 7-8; 46 Named StBAs Reply Comments at 14-17.

in meaningful outreach and to provide a basis upon which broadcasters can evaluate their efforts. However, we have no desire to impose data collection and recordkeeping requirements on broadcasters that may be unnecessary for purposes of accomplishing the goals of our EEO rules. We believe that our goal of ensuring that broadcasters engage in broad outreach so that all qualified job candidates are informed of employment opportunities in the industry can be accomplished through compliance with the core obligation to recruit widely for job vacancies coupled with the use of the supplemental recruitment measures, without requiring the collection or reporting to the Commission of applicant pool data. Therefore, broadcasters who elect to utilize the supplemental recruitment measures we have adopted will not be required to maintain data concerning the recruitment source, race, ethnicity, and gender of their applicants to comply with this rule. However, if a broadcaster wishes to avail itself of the option of dispensing with the supplemental recruitment measures and designing its own program, we do not think it is unreasonable to require it to collect applicant pool data demonstrating that its outreach efforts are inclusive. We note that our decision in this regard is not intended to relieve broadcasters of recordkeeping requirements imposed under other federal and state laws.

114. Regardless of the chosen approach, we expect a broadcaster to utilize the relevant data concerning its recruitment efforts as part of ongoing efforts to analyze the productivity of its recruitment efforts in achieving broad outreach to all segments of the community, including minorities and women, and to determine whether any modifications in its EEO efforts or recruitment sources are warranted. We note in this respect that such modifications can extend beyond merely adding new sources if existing sources are not productive. They can also encompass efforts to contact unproductive sources in order to develop a relationship that may encourage the sources to become more productive.

115. Data as to the recruitment sources of the broadcaster's interviewees and hires (in the case of those broadcasters which opt to employ the supplemental recruitment measures) or applicant flow data (in the case of other broadcasters) will be one source of information concerning a broadcaster's EEO efforts that we may, as warranted, utilize in determining whether the broadcaster has demonstrated compliance with our EEO Rule. Thus, in appropriate cases, such data will be one pertinent source of information in making our overall determination as to whether the broadcaster made serious efforts to achieve broad outreach to all segments of the community, including minorities and women. Our ultimate determination will be premised on all relevant factors concerning a broadcaster's EEO efforts, not on statistical records alone. Some of the other relevant factors include the reach of the recruitment sources utilized (such as the circulation of media in which vacancies were advertised), whether the broadcaster adequately analyzed the results of its efforts, implemented effective measures to correct any problems, and avoided excessive reliance on word-of-mouth recruitment. In assessing a broadcaster's efforts, we will not consider the extent to which minorities and women were actually hired or the racial, ethnic, or gender composition of a station employment unit's workforce.

116. Under either approach, a broadcaster should maintain a list of vacancies for full-time permanent positions in its station's employment unit filled during the pertinent review period, identified by job title, as well as copies of any documentation necessary to show all vacancy-specific recruitment efforts undertaken. This could include such traditional verification as copies of newspaper advertisements. It could also include electronic records such as copies of e-mails or web pages. The records should be sufficient to show the name of the recruitment source, its address, telephone number, e-mail address (if applicable), contact person, and how the source received its notification (*e.g.*, regular mail, fax, e-mail, etc.). In the case of a broadcaster utilizing the supplemental recruitment measures, the records should

include proof that notification has been provided to organizations that have asked to be notified of job vacancies.

117. Next, we will require that broadcasters utilizing the supplemental recruitment measures retain documentation necessary to verify that they have engaged in the activities required under our second supplemental recruitment measure, such as participation in job fairs. Because of the diverse nature of these activities, we cannot prescribe precisely the type of records to be maintained. However, they should be sufficient not only to verify that some activity occurred, but also to fully disclose the nature of the activity and the scope of the broadcaster's participation in it, including the station personnel involved. Our purpose in adopting this requirement is to ensure that the activities engaged in by broadcasters are consistent in furthering the intent of our Rule.

118. We shall also expect broadcasters who elect to utilize the supplemental recruitment measures to retain records of the referral source for each individual whom it interviews or hires for a full-time position. This information is designed to provide a starting point for a broadcaster to analyze the success of its recruitment efforts. Thus, if it appears that, despite a broadcaster's outreach efforts, an excessive number of hires or interviewees are coming from inside, "word-of-mouth" recruitment sources, we will expect the broadcaster to consider whether its outside recruitment efforts are achieving a sufficiently broad outreach and attracting qualified candidates. Similarly, a broadcaster should consider the sufficiency of its recruitment efforts if it discovers that certain segments of the community are not being effectively notified of job vacancies. If the broadcaster determines, based on its analysis, that its recruitment efforts are not achieving a broad outreach or not attracting qualified candidates, then we expect the broadcaster to make any modifications to its program necessary to correct the deficiency. "Inside sources" include primarily personal or business acquaintances, such as employees or other broadcasters, who are referring other personal or business acquaintances. They also include fortuitous sources, such as "walk-ins." We are requiring that interviewee referral source data be kept because we believe that data concerning the recruitment source of interviewees, as well as hires, will provide the broadcaster a preliminary basis for assessing its efforts — in particular, the sources of its most qualified job applicants — without creating a significant recordkeeping burden. Thus, the broadcaster can easily inquire as to the recruitment source at the interview, if it is not previously known.

119. As noted, we will require those broadcasters which elect not to utilize the supplemental recruitment measures to maintain data concerning the recruitment source, race, ethnicity, and gender of applicants. Insofar as a broadcaster chooses to utilize applicant flow data, the following guidelines are provided in order to minimize the burdens. As part of our former EEO requirements, we required the reporting of "referrals." For purposes of this rule, the Commission does not expect the separate tracking of "referrals," as distinct from applicants, because it is potentially confusing. For example, in the past, some have viewed a "referral" as synonymous with an "applicant," whereas others have viewed a "referral" as including a person who has been referred to the station, even though the person may not be known to the referring source and may not even be seeking employment.<sup>186</sup>

120. We also emphasize that, in the case of those broadcasters who utilize applicant pool data, there is no requirement that the composition of applicant pools be proportionate to the composition of the local work force. However, few or no females or minorities in a broadcaster's applicant pools may be one

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<sup>186</sup> MMTTC Comments at 247.

indication (and only one indication) that the station's outreach efforts are not reaching the entire community. The representation of females and minorities in applicant pools is only one factor that we will look at in determining whether a broadcaster's outreach program is inclusive. We may ultimately determine that outreach efforts are reasonably designed to reach the entire community, even if few females or minorities actually apply for openings. Conversely, the fact that a sizeable number of females or minorities have applied for openings will not necessarily establish the inclusiveness of the station's efforts. Also, we recognize that an employer cannot control who applies for jobs. The only purpose of the data collection is to give the broadcaster, the public, and the Commission more information by which to monitor the effectiveness of a station's outreach efforts so that the broadcaster can take appropriate action to modify its outreach efforts should the information indicate that they are not reaching the entire community.

121. We will require that all records documenting outreach efforts be retained until the grant of the renewal application covering the license term during which the hire or activity occurs. However, in order to lessen any burdens, we will adopt the proposal of several commenters that records may be maintained in an electronic format, *e.g.*, by scanning pertinent documents into a computer format. In addition to reducing burdens, computer records can be backed up, which should lessen the chances of records being lost. We caution broadcasters that, absent a showing of extraordinary circumstances, we will not credit claimed activities that cannot be supported by records.

122. Although we are imposing some recordkeeping requirements on broadcasters, the new EEO Rule allows a broadcaster the flexibility to choose the outreach methods that best suit the characteristics of a particular employment unit, such as staff size and location, and there are different data collection requirements for each outreach method. Moreover, broadcasters may utilize electronic methods of keeping records, filing Statements of Compliance with the Commission, and disseminating information about job vacancies. Therefore, we conclude that the recordkeeping requirements we adopt in this *Report and Order* will not place undue burdens on broadcasters.

123. Public File. Given the Commission's limited resources, we believe that it is important that the community have a role in monitoring broadcaster compliance with our EEO Rule. In order to facilitate public input, we will require that all broadcasters place in their public files annually, on the anniversary of the date they are due to file their renewal applications, the following information, which we will refer to as the EEO public file report: (1) a list of all full-time vacancies filled by the station employment unit during the preceding year, identified by job title; (2) for each such vacancy, the recruitment source(s) utilized to fill the specific vacancy (including, in the case of broadcasters utilizing the supplemental recruitment measures, organizations entitled to notification of vacancies, which should be separately identified), including the address, contact person, and telephone number of each source; and (3) a statement as to whether they have elected to utilize the supplemental recruitment measures provided for in the EEO Rule. In addition, broadcasters which elect to utilize the supplemental recruitment measures will be required to include in their public file a list of the recruitment source that referred the hiree for each full-time vacancy; data reflecting the total number of persons interviewed for full-time vacancies during the preceding year and, for each recruitment source utilized in connection with any such vacancies, the total number of interviewees referred by that source; and a list and brief description of supplemental recruitment measures undertaken pursuant to the second supplemental recruitment measure discussed above during the preceding year.<sup>187</sup> Those broadcasters which do not elect to utilize the supplemental recruitment measures will be

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<sup>187</sup> We recognize that, in some years, the licensee may not have implemented any outreach initiatives because they are required to be completed over a two-year period. If a broadcaster has deferred its initiatives to the second

required to include in their public file, for each recruitment source utilized for any full-time vacancy during the preceding year, the total number of applicants generated by that source, the number of those applicants who were female, and the number of those applicants who were minority, identified by the applicable racial and/or national group with which each applicant is associated.

124. We shall amend the public inspection file rules, Sections 73.3526 and 73.3527, to reflect these new requirements.<sup>188</sup> Broadcasters are free to utilize any format in their public file report to avoid unnecessary duplication as long as the report clearly provides the information requested. For instance, if a broadcaster utilized the same recruitment sources for all its vacancies, it may maintain a single list of those sources, indicating that they were used for all vacancies. If a broadcaster utilized different sources for different vacancies, it may maintain a master list of all its sources and utilize a cross-reference system to show which sources were used for which vacancies. The EEO public file report need not be routinely submitted to the Commission, except in two instances. The EEO public file report covering the year preceding the filing of a renewal application will be submitted with that application as an attachment to Form 396, and will be one basis for our review of the broadcaster's compliance at renewal time. Also, for stations subject to mid-term reviews, the EEO public file report for the one-year period preceding the mid-term review will be filed with the Commission and will be one basis for mid-term reviews. Renewal and mid-term review procedures are discussed in greater detail below. We also require that, if a broadcaster has a web site for its station, it post that station's EEO public file report on that site at the same time that it places it in the station's public file.

125. Relief for Qualifying Stations. The Commission requested comment on a proposal to exempt certain small stations, *e.g.*, those with ten or fewer full-time employees, or those located in small markets, from certain EEO recordkeeping and reporting requirements.<sup>189</sup> The proposal to grant relief to small staff stations would increase the employment reporting and recordkeeping threshold of fewer than five full-time employees to, *e.g.*, ten or fewer full-time employees. There was no specific proposal regarding the appropriate market threshold for exempting stations in small markets. The *NPRM* requested comment on several factors to be considered when contemplating small station relief, including a case in which the court rejected a similar increase in employment threshold, *Office of Communications of the United Church of Christ v. FCC*, 560 F.2d 529, 532 (2nd Cir. 1977) ("*UCC*"); the possibility that the exemptions proposed would require approval from the Small Business Administration prior to implementation; and Section 334 of the Communications Act, which prohibits revision of EEO regulations and forms pertaining to broadcast television licensees and permittees.<sup>190</sup> Although a few commenters discussed small market exemptions, the majority of commenters who addressed this topic focused on the proposal to increase the employment threshold for stations.

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year, it may indicate "none" in the EEO public file report for the first year, accompanied by an appropriate explanation.

<sup>188</sup> We note that 47 C.F.R. §§ 73.3526 and 73.3527 have been revised by *Main Studio and Local Public Inspection Files Report and Order*, 13 FCC Rcd 1569 (1998), *petitions for reconsideration denied in part and granted in part*, 14 FCC Rcd 11113 (1999). The reconsideration does not affect any EEO issues.

<sup>189</sup> *NPRM*, 13 FCC Rcd at 23032 (para. 84).

<sup>190</sup> *Id.* at 23033 (para. 86).

126. While we believe that small market stations should be granted some relief from EEO requirements because of difficulties those stations have competing for employees with stations in larger markets, we believe that such relief is already built into the new broadcast EEO Rule, which affords flexibility to tailor EEO programs to a station's particular circumstances, including market size.<sup>191</sup> For instance, stations in small markets may find that they need fewer recruitment sources to achieve broad outreach than might be the case in larger markets. Also, because stations in smaller markets are likely to attract fewer applicants, they may find the Alternative Recruitment Program a less burdensome method of assessing the effectiveness of their outreach. In contrast, we believe that small staff stations warrant some additional relief from the EEO Rule adopted in this *Report and Order* because, as argued by some commenters, such stations have limited personnel and financial resources to carry out those requirements.<sup>192</sup>

In particular, we believe stations that are part of employment units with five to ten employees, the smallest staff stations subject to our EEO program requirements, would encounter these difficulties to such an extent that additional relief for these stations from EEO program requirements is warranted. However, we agree with other commenters who contend that a total exemption from the EEO Rule for stations with five to ten full-time employees would be ill-advised given these stations' important role in providing entry-level opportunities into the broadcast industry.<sup>193</sup> Furthermore, we believe that a total exemption for these stations is no longer necessary given, as already discussed, the more flexible EEO requirements for broadcast stations adopted in this *Report and Order*. Therefore, similar to an approach suggested by AWRT,<sup>194</sup> we will require stations that are part of an employment unit with five to ten full-time employees which elect to employ the supplemental recruitment measures to select only two options from the second supplemental recruitment measure menu during each two-year period, rather than the four required of larger stations. Moreover, as discussed below, broadcasters may elect to forego the supplemental recruitment measures entirely and simply collect applicant flow data demonstrating that their recruitment efforts are inclusive. This may be less burdensome to many small broadcasters, which, in our experience, tend to have relatively few vacancies. Also, as discussed below, although we are extending mid-term review procedures required by Section 334 of the Communications Act for television stations to radio stations, we will exempt radio stations that are part of an employment unit with five to ten employees from this requirement.<sup>195</sup> Given their small staffs and relatively few vacancies, we do not believe it would be a productive use of scarce Commission resources to conduct mid-term reviews of small radio stations' EEO practices.

127. Qualifying stations will be expected to meet all other EEO requirements, including, *e.g.*, filing Statements of Compliance and Forms 396 and 395-B. We emphasize that a station will not qualify for this relief if it shares one or more employees with one or more commonly owned stations in the same

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<sup>191</sup> For similar reasons, we find it unnecessary to grant additional administrative relief from EEO requirements to foreign language television stations, as one commenter requests. Lincoln Broadcasting Company (Lincoln) Reply Comments at 5 (licensee of a California television station).

<sup>192</sup> *See, e.g.*, VAB/NCAB Comments at 15; S&B Comments at 21.

<sup>193</sup> *See, e.g.*, AFTRA Comments at 4-5 of Attachment; NOW Reply Comments at 35-36.

<sup>194</sup> AWRT Comments at 4.

<sup>195</sup> In light of Section 334 of the Act, we do not have the authority to extend this relief to television stations with five to ten employees.

market and their combined staffs total more than ten full-time employees. Stations in such a situation are considered one employment unit and are required to report all of their employees on one Annual Employment Report, as described below. We will continue to follow our policy of not requiring station employment units with fewer than five full-time employees to demonstrate compliance with EEO program requirements.

128. Our decision today is consistent with the *UCC* decision. That case held that when the Commission changes the criteria for application of existing regulatory requirements, it must articulate a rational explanation for the change.<sup>196</sup> Here, the Commission will continue applying its EEO requirements to stations that are part of an employment unit with five or more employees, the same threshold it has applied in the past. We are simply tailoring our requirements to minimize undue burdens on certain stations. In fashioning the new requirement that stations undertake certain supplemental recruitment measures selected from a "menu," we have decided to require stations with more employees to undertake more of those measures than smaller staff stations because the latter have fewer resources to carry out those requirements. In addition, we are exempting radio station employment units with five to ten employees from the new mid-term review of radio stations. The court acknowledged in *UCC* that "[w]hen initial cut-off or threshold criteria for determining the applicability of particular regulations are involved, the agency's reasoning need at times consist only of 'practical considerations of administration.'"<sup>197</sup> Since these are new requirements and reasonable practical considerations have guided our choice of criteria for applying them, our determination is consistent with *UCC*. We note that SBA has approved the approach we are adopting for small broadcast stations, as well as the similar approach we are adopting for small cable entities, discussed below.<sup>198</sup>

129. Other Matters Concerning Broadcast EEO Rule. We proposed in the *NPRM* to require broadcasters to analyze various specific recruitment practices, including such areas as promotions and selection techniques or tests, to ensure that they are nondiscriminatory. We will incorporate these provisions into our EEO Rule, with minor modifications, with the exception of the item relating to the analysis of recruitment efforts.<sup>199</sup> We will address that topic in a separate rule provision. Also, two commenters assert, with specific reference to selection techniques and tests, that these provisions would impose requirements more stringent than those imposed by Title VII. We do not intend to impose any substantive requirements regarding selection techniques and tests that go beyond those imposed by Title VII. Further, we would treat any complaint that a broadcaster had in fact discriminated in the specified areas in accordance with our general policy concerning individual complaints of employment discrimination. Thus, as discussed above, we will, in general, decline to review individual complaints of discrimination pending a finding of discrimination by the EEOC or court. However, we may act prior to such a finding if we find that action is warranted in light of circumstances in a particular case.

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<sup>196</sup> 560 F.2d 529, 532-533.

<sup>197</sup> *UCC* at 532, quoting *Goldberg v. Weinberger*, 546 F.2d 477, 480 (2d Cir. 1976), cert. denied, 431 U.S. 937 (1977).

<sup>198</sup> Letter from Aida Alvarez, Administrator, U.S. Small Business Administration, to Roy Stewart, Chief, Mass Media Bureau, Federal Communications Commission (January 19, 2000).

<sup>199</sup> See Section 73.2080(c)(4), as set forth in Appendix C hereto.

130. In the *NPRM*, we proposed to include in our EEO Rule language clarifying that it is not intended to require that any person be given preferential treatment based on race, color, national origin, religion, or gender. We will adopt this language to clarify the intent of our EEO Rule.<sup>200</sup>

131. In the *NPRM*,<sup>201</sup> we discussed the option of requiring that the number of recruitment sources be tailored to the size of the local minority labor force. In light of the flexible recruitment program we are adopting, we find it unnecessary to adopt this proposal. We also asked whether we should continue our prior practice of not requiring the filing of EEO recruitment information concerning minorities in markets where the minority labor force is less than five percent.<sup>202</sup> We conclude that this practice is no longer justified because our EEO Rule emphasizes broad and inclusive outreach rather than recruitment methods that specifically target minority and female applicants. Accordingly, we will discontinue this practice.

132. MMTC urges that we should expand the scope of our broadcast EEO Rule to include headquarters offices. It notes that EEO rules applicable to cable entities apply to headquarters offices. However, the inclusion of headquarters offices in the cable EEO rules is the result of a statutory requirement.<sup>203</sup> There is no similar statutory requirement applicable to broadcasters. The issue of whether we can or should extend the scope of our broadcast EEO Rule to encompass entities other than licensees is beyond the scope of this proceeding.

133. Some commenters suggest that we should accept compliance with OFCCP requirements as compliance with our EEO Rule in the case of those broadcasters subject to those requirements. We will not adopt this proposal. OFCCP regulations place a general nondiscrimination requirement on entities with federal contracts in excess of \$10,000.<sup>204</sup> The regulations require an "affirmative action compliance plan" for employers who have 50 or more employees and federal contracts of \$50,000 or more.<sup>205</sup> Enforcement of the plans is based primarily on compliance evaluations that may occur at the discretion of OFCCP.<sup>206</sup> The requirements of OFCCP differ in scope and enforcement mechanisms from the EEO Rule we are adopting herein. It would be confusing to the public to have a separate agency with separate requirements responsible for the EEO outreach efforts of some broadcasters. It would also be counterproductive to our desire to encourage joint industry efforts to develop effective recruitment methods if some segments of the industry were not subject to our EEO Rule. Moreover, adoption of this proposal would greatly complicate enforcement of our rules by making it necessary for us to consider complaints based on alleged violations of the requirements of another agency, or to deal with situations where a broadcaster that has claimed

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<sup>200</sup> See Section 73.2080(c)(1), as set forth in Appendix C hereto.

<sup>201</sup> *NPRM*, 13 FCC Rcd at 23028 (para. 66).

<sup>202</sup> *Id.* at 23028 (para. 68).

<sup>203</sup> See *Amendment of Part 76 of the Commission's Rules to Implement the Equal Employment Opportunity Provisions of the Cable Communications Act of 1984*, 102 FCC 2d 562, 566-67 (1985).

<sup>204</sup> See 41 C.F.R. §§ 60-1.4 and 60-1.5.

<sup>205</sup> See 41 C.F.R. § 60-1.40 and Part 60-2.

<sup>206</sup> See 41 C.F.R. § 60-1.20.

exemption based on OFCCP compliance is later found by OFCCP not to be in compliance with its requirements. Finally, we do not believe that our EEO Rule will create significant duplication. A broadcaster may, of course, claim credit for steps taken to comply with OFCCP requirements if they also serve to establish compliance with our EEO Rule.

134. Enforcement. Some broadcast representatives argue that a mandatory EEO program is unnecessary,<sup>207</sup> that it is duplicative of the EEOC,<sup>208</sup> or that it is too vague a standard to enforce.<sup>209</sup> However, many commenters assert that the best way to ensure that broadcasters implement viable EEO practices in their recruitment programs is for the Commission to enforce mandatory EEO provisions.<sup>210</sup> MMTC argues that, in the past, voluntary efforts to integrate public schools and businesses failed and statutes were necessary to prevent discrimination.<sup>211</sup> MMTC also maintains that, before the Commission adopted its EEO Rule, the broadcast industry had 40 years to provide equal opportunity voluntarily but failed to do so and that the industry commenters to the *NPRM* could have voluntarily implemented many of their proposals over the last 30 years since the EEO Rule was adopted but have not done so.<sup>212</sup> In addition, MMTC asserts that enforcement of mandatory provisions will not prevent any broadcaster from implementing a voluntary program that carries out steps that go beyond Commission EEO requirements.<sup>213</sup>

As part of its proposal for a “zero tolerance policy,” MMTC urges that we should more carefully identify habitual EEO violators, broaden and improve the effectiveness of our inquiry procedures, and not wait eight years until renewal time to assess EEO compliance.<sup>214</sup> In order to ensure that licensees will comply with the requirements of the EEO Rule, we believe that certain enforcement provisions are necessary and we outline them below.

135. NAB proposes that stations be required to certify compliance with the Commission's EEO Rule every two years and to maintain documentation that proves they have properly certified their compliance.<sup>215</sup> NAB also suggests that licensees should make the supporting documentation available to the Commission for its review but that the public file should contain only the compliance certification and

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<sup>207</sup> S&B Comments at 23.

<sup>208</sup> TAB Comments to *Streamlining* at ii.

<sup>209</sup> HBP Comments at 7.

<sup>210</sup> MMTC Comments at 31; MMTC Reply Comments at 26; UCC Comments at 5; AFTRA Comments to *Streamlining* at 1; NOW Comments at 3. NOW also argues in its Reply Comments at 6 that the Commission needs to continue its own EEO enforcement instead of relying on other agencies because only the Commission possesses expertise in regulating the broadcast industry and is concerned with issues such as diversity of programming, which do not concern the EEOC and other entities that focus on specific instances of discrimination.

<sup>211</sup> MMTC Comments at 31.

<sup>212</sup> MMTC Reply Comments at 32.

<sup>213</sup> MMTC Comments at 36.

<sup>214</sup> MMTC Comments at 278.

<sup>215</sup> NAB Comments at ii; NAB Reply Comments at 14.

no supporting documentation.<sup>216</sup> AWRT suggests that broadcasters should evaluate their EEO programs at least every two years and should file a report at least every four years that covers at a minimum the previous year's EEO efforts.<sup>217</sup> AWRT states that, by requiring reports at least every four years, broadcasters would be filing EEO efforts reports at mid-term and at the time they file for renewal.<sup>218</sup> Our new requirements for a Statement of Compliance and for radio station mid-term reviews, described below, incorporate aspects of both of these proposals, as well as MMTC's "zero tolerance" policy.

136. Every two years, except in the renewal year when all broadcast licensees will file a Broadcast Equal Employment Opportunity Program Report (Form 396), all television and radio licensees that are part of an employment unit with five or more full-time employees will be required to review their EEO programs and file with the Commission a Statement of Compliance indicating whether they have complied with the Commission's EEO Rule during the two-year period prior to the date of the Statement. The Statement will be a new form (FCC Form 397, described more fully in the section of this *Report and Order* dealing with forms). If a station believes that it was not, or may not have been, in compliance, we will require that it submit an appropriate explanation. Licensees will file the Form 397 every second, fourth and sixth year of the license term on the anniversary of the date that they are due to file for renewal of their licenses, resulting in the filing of three Statements of Compliance during a license term. Form 397 will require a statement as to the approach the broadcaster intends to use during the next two-year period and broadcasters may change their election between the two approaches (supplemental recruitment measures or alternative recruitment program) at the time they file Form 397. Requiring filing of a Statement of Compliance periodically during the license term will encourage licensees to evaluate their EEO efforts on an ongoing basis instead of only at renewal time. It will also encourage compliance with the EEO Rule on a continuing basis instead of only at the end of an eight-year license term, substantially fulfilling that aspect of MMTC's zero tolerance policy urging that the Commission engage in enforcement efforts throughout a license term as well as at renewal time.<sup>219</sup>

137. In the eighth and final year of their license term, along with their renewal application, all broadcast licensees will file Form 396, indicating whether they have complied with the outreach provisions of the EEO Rule, attaching a copy of the station's EEO public file report covering recruitment activity for full-time positions during the previous year, and providing a narrative statement in which they describe how the station achieved broad and inclusive outreach. Broadcasters may also change their election between the two approaches (supplemental recruitment measures or alternative recruitment program) designed to ensure broad recruitment outreach at the time they file their renewal applications. Form 396 will also require a statement as to the approach the broadcaster intends to use during the next two-year period.

138. In the *NPRM*, we requested comment on a new standard for mid-term review of television licensees' employment practices.<sup>220</sup> The previous mid-term review standard required a station to compare

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<sup>216</sup> NAB Comments at iii.

<sup>217</sup> AWRT Comments at 9.

<sup>218</sup> *Id.*

<sup>219</sup> MMTC Comments at 333.

<sup>220</sup> *NPRM*, 13 FCC Rcd at 23030 (para. 76).

its employment profile with the applicable labor force, a practice that we are discontinuing in response to the *Lutheran Church* decision. We disagree with NAB's argument that Congress is the appropriate entity to determine the new standard for mid-term review.<sup>221</sup> Section 334 of the Communications Act states that the Commission shall "require a mid-term review of television broadcast station licensees' employment practices...." Congress left the standard of review for mid-term reviews to the Commission's discretion and the Commission fashioned the previous mid-term review standard. Therefore, the Commission is required by statute to conduct mid-term reviews and to fashion an appropriate review standard, and we have the authority to change the standard of review without first seeking Congressional approval. Although several commenters made suggestions regarding the mid-term review,<sup>222</sup> we believe that the process that we have selected is the most appropriate, providing us with ample information to assess a licensee's EEO program, while not being overly burdensome to licensees.

139. We also believe that, in light of the longer eight-year license terms currently in effect, it is appropriate to extend the mid-term review process to radio station employment units with more than ten full-time employees. This will facilitate more frequent monitoring of the effectiveness of a station's EEO efforts both by the station itself and by the Commission and the public. In this respect, we concur with the proposal in MMTC's zero tolerance policy that review of EEO efforts should not be limited to renewal time.

140. We agree with MMTC that, to ensure effective Commission enforcement, mid-term reviews should be "more than mere box-checking."<sup>223</sup> Accordingly, we will require that station employment units subject to mid-term review file with Form 397 the EEO public file report covering recruitment activity for full-time positions during the previous year, or from the date the licensee acquired the station, if less than a year. This mid-term filing will be due four years after the date the most recent renewal application was due to be filed. Mid-term reviews will be based on review of the Statement of Compliance, including review of the data contained in the EEO public file report filed at the time of the mid-term review.

141. Because the filing dates for the Statements of Compliance and EEO public file reports are tied to the date of filing of renewal applications, the due dates will apply to a given station regardless of when the licensee acquired the station. Consequently, if there is a substantial change of ownership requiring approval pursuant to FCC Form 314 or FCC Form 315 during the two-year period to be covered by a Statement of Compliance or during the one-year period covered by an EEO public file report, the new licensee will file the Statement and the report by the due date. However, when determining the bases for the Statement and the EEO public file report, the new licensee will consider only the recruitment efforts it conducted concerning full-time positions during the period it controlled the station. Thus, in these cases, the period covered by the Statement of Compliance may be less than two full years and the period covered by the EEO public file report may be less than one full year. Likewise, a mid-term review may cover a period of less than one year, because the mid-term review will cover only the licensee's recruitment efforts concerning full-time positions during the period it controlled the station, if less than a year.

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<sup>221</sup> NAB Comments at 29.

<sup>222</sup> NAB Comments at 29; AWRT Comments at 3-5.

<sup>223</sup> MMTC Comments at 38, n.72.

142. If a station is subject to a time brokerage agreement, the licensee's Statement of Compliance, Form 396 and EEO public file report will include data concerning only its own recruitment efforts for full-time positions and not the efforts of the broker. If a licensee is a broker of another station or stations, however, its recruitment activity concerning full-time positions at the brokered station(s) should be included in the data on which the licensee-broker's own Statement of Compliance, Form 396 and EEO public file report are based concerning its own station. If a licensee-broker owns more than one station, it shall include its recruitment activity concerning full-time positions at the brokered station in the Statements of Compliance, Forms 396 and EEO public file reports for its own station that is most closely affiliated with, and in the same market as, the brokered station. If a licensee-broker does not own a station in the same market as the brokered station, then it shall include such information in the Statements of Compliance, Forms 396 and EEO public file reports for its own station that is geographically closest to the brokered station.

143. The first Statement of Compliance after the effective date of this *Report and Order* will be due June 1, 2000, to be filed by television stations in the District of Columbia, Maryland, Virginia, and West Virginia, whose licenses expire on October 1, 2004. At that time, as part of the mid-term review process, they will also be required to file a copy of their EEO public file report concerning positions after these rules become effective. The first Statement of Compliance for radio stations will be due on June 1, 2001, to be filed by radio stations in the District of Columbia, Maryland, Virginia, and West Virginia, whose licenses expire on October 1, 2003. Thereafter, television stations in the December 1, 2004, renewal group will file Statements by August 1, 2000, and radio stations in the December 1, 2003, renewal group will file by August 1, 2001, and so on for all television and radio renewal groups. As we begin this system, the earliest Statements will cover less than two full years. Licensees filing Statements of Compliance at the beginning of the implementation of this new EEO Rule and licensees who acquire stations during a license term may reasonably pro-rate their use of recruitment menu items based on the period of time actually available if their Statement of Compliance would be based on less than a full two-year period. For example, if a licensee acquired a station only a year before a Statement of Compliance for that station was due, a licensee would be expected to have undertaken only two menu options during that time period. Further, licensees filing Statements of Compliance during the initial two year period after our Rule becomes effective need only certify as to their compliance since the effective date of the Rule, rather than the period of two years specified in the form. Also, in the case of licensees subject to mid-term review during the first year after our Rule becomes effective, the EEO public file report accompanying the Statement of Compliance need only include information concerning activities since the effective date of the Rule, rather than the full year ordinarily covered by the EEO public file report. The effective date of the Rule will be determined as set forth in paragraph 235, below.

144. The Statement of Compliance, EEO Public File Report and Form 396 should be based on recruitment efforts documented in items contained in a station's own records. The Commission's broadcast public file rules, 47 C.F.R. §§ 73.3526 and 73.3527, will be amended to require licensees to maintain copies of their most recent Statement of Compliance. Also, each year on the anniversary of the date a licensee is due to file its renewal application(s), it must place in its public file a copy of its EEO public file report. In addition, a station should retain any records necessary to document its recruitment efforts, depending on the approach the station has chosen, even though the records will not be required to be placed in the public file or filed with the Commission on a regular basis.<sup>224</sup> As part of an inquiry, the Commission

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<sup>224</sup> MMTC proposes that the Commission should require licensees to maintain records sufficient to allow a meaningful ascertainment of whether a station complied with the EEO Rule. MMTC Comments at 219.

may request information from the licensee in addition to that contained in the public file, as described below. These records could include copies of letters notifying sources of job openings, copies of the station's job listings in newspapers or on web sites, and, if applicable, copies of requests by community organizations that they be notified of openings and copies of notices sent to them, information verifying participation at job fairs, and other similar types of outreach information.

145. We agree with several commenters who favor random and/or targeted inquiries by the Commission to verify compliance with the EEO Rule and we will substantially implement those recommendations.<sup>225</sup> Thus, in order to verify compliance with the EEO Rule and the accuracy of the Statement of Compliance, Form 396 and the EEO public file report, the Commission may send inquiries to licensees. The Commission may at random conduct an inquiry of a licensee requesting information relating to the licensee's compliance with the EEO Rule. In addition, we will perform random audits, including on-site audits.<sup>226</sup> Specifically, each year we will randomly select for audit approximately five percent of all licensees in the radio and television services, ensuring that, even though the number of radio licensees is significantly larger than television licensees, both services are represented in the audit process. We may also conduct an inquiry if the Commission has evidence of a possible violation of the EEO Rule. Initially, the inquiry may request the contents of the station's public file. Further inquiry or inquiries may be conducted requesting additional documentation of recruitment efforts that is not in the public file. As part of its zero tolerance policy, MMTC urges that we should improve the effectiveness of our inquiries.<sup>227</sup> We agree. Based on the circumstances of the case, the inquiry could potentially include 1) a request for data covering any period of the license term; and 2) interviews of witnesses, including any complainant and present or former station employees.

146. Licensees will be subject to a variety of sanctions and remedies for EEO Rule violations or deficiencies. Such violations or deficiencies might include, for example: engaging in discrimination; failure to file a Statement of Compliance when due; failure to file an EEO public file report when due; failure to file Form 396 when due; misrepresentation of outreach efforts or other information; non-responsiveness or evasion in responding to a written Commission inquiry; failure to recruit for all vacancies absent exigent circumstances; failure to widely disseminate information concerning vacancies for full-time positions; and failure to analyze routinely the adequacy of the various program elements in achieving broad outreach to all segments of the community. In the case of broadcasters which elect the supplemental recruitment measures options, violations or deficiencies would also include failure to undertake the required options listed in the supplemental recruitment measures menu; and failure to notify organizations that request vacancy notices. Also, it may constitute a violation of the EEO Rule if, based on all of the evidence, we determine that a licensee has attempted to evade our requirements through token or sham efforts, including, but not limited to situations where there is evidence that EEO efforts were not initiated until the final 12 months of the license term. Sanctions and remedies that may be issued by the

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<sup>225</sup> NAB Comments at 15; NAB Reply Comments at 14; 46 Named StBAs Comments at 27; UCC Comments at 18; AWRP Comments at 11. Fisher suggests that the Commission should be authorized to inquire about licensees' recruitment efforts but states that this should be done only at renewal time unless circumstances warrant further scrutiny. Fisher Reply Comments at 11.

<sup>226</sup> We anticipate that the number of random/inquiries will not exceed five percent of employment units annually.

<sup>227</sup> MMTC Comments at 278.

Commission for deficiencies in licensees' EEO compliance include admonishments, reporting conditions, forfeitures, short term renewal of license, or designation for hearing for possible revocation of license or denial of renewal. The appropriate sanction or remedy will be determined on a case-by-case basis. Sanctions will be greater in cases involving recidivism or continuous EEO non-compliance, and, based on the facts of each case, could raise a question of intentional discrimination. In sum, as suggested in MMTC's zero tolerance policy, we intend to carefully monitor compliance with our EEO Rule to uncover attempts to evade our requirements or egregious violations that may suggest discrimination.

147. The public may file complaints throughout the license term based on the Statement of Compliance or the contents of the public file. Complaints raising a properly documented question of a violation of the EEO Rule will be investigated or referred to the EEOC, as appropriate, immediately, not just at the end of the license term. The public may also file an informal objection or petition to deny an application based on EEO violations. The rules and policies already in place concerning settlements of petitions to deny and threats to file such petitions, as delineated in 47 C.F.R. §§ 73.3588 (petitions) and 73.3589 (threats to file), and *Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 4780 (1989), will continue to be applied.

148. Sunset. Some commenters urge the Commission to sunset its EEO rules at some time. The Commission's EEO regulations help to ensure that all qualified persons will continue to have an equal opportunity to compete for job openings. Broad and inclusive outreach measures help to deter discriminatory practices, by providing everyone with a chance to be considered for hiring opportunities. Congress has made its intent clear that we should enforce outreach and nondiscrimination requirements for broadcast television providers, cable television providers and MVPDs, and we believe that such requirements are equally necessary for radio broadcasters, as discussed above. As we must honor congressional intent and cannot, in any event, predict when discontinuance of EEO regulations may be warranted, we will not establish in advance a date on which our EEO regulations will sunset.

ii. Religious Broadcasters

149. As we stated in the *NPRM*, we believe it appropriate to codify in our EEO Rule that religious broadcasters may establish religious belief or affiliation as a qualification for all radio station employees.<sup>228</sup> Religious broadcasters who establish religious affiliation as a qualification for a job position will not be required to comply with the FCC's specific recruitment requirements for that position.<sup>229</sup> Rather, they will be expected to make reasonable good faith efforts to recruit widely among their co-religionists. This approach acknowledges that the more specific recruitment requirements set forth above may not be suited to recruitment limited to members of a certain faith. With respect to television station employees, we will continue to allow religious broadcasters to establish religious belief or affiliation as qualification as a nonbinding policy, rather than a rule, due to the limitations imposed by Section 334 of the Communications Act. Although, as discussed above, we do not believe that Section 334 prevents us from adopting new EEO program requirements to replace those invalidated by the court in *Lutheran Church*, that section does prevent us from revising the nondiscrimination requirement, which was not invalidated, as applied to television licensees.

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<sup>228</sup> *NPRM*, 13 FCC Rcd at 23028 (para. 70).

<sup>229</sup> *Id.* at 23029 (para. 71).

150. In keeping with *Streamlining Broadcast EEO Rule and Policies*, 13 FCC Rcd 6322 (1998) ("*Order and Policy Statement*"), we proposed to define a religious broadcaster as a licensee that is, or is closely affiliated with, a church, synagogue, or other religious entity, including a subsidiary of such an entity.<sup>230</sup> Should a question arise as to whether a broadcaster falls under this definition, we proposed to make an individual determination based upon an evaluation of the religious entity's characteristics, including whether the entity operates on a nonprofit basis, whether it has a distinct religious history, and whether the entity's articles of incorporation set forth a religious purpose.<sup>231</sup>

151. We have determined to follow the EEOC's approach and adopt our original proposal which contemplates individual case-by-case review with multi-factor analysis whenever a question arises as to whether a licensee is eligible to claim religious broadcaster status. Courts have held that such initial determinations are necessary in order to determine if entities can avail themselves of religious exemptions, and must be performed on an individual case-by-case basis.<sup>232</sup> Accordingly, we shall adopt our proposed definition of religious broadcaster as part of the anti-discrimination section of the EEO Rule.

152. In all cases, however, we will allow broadcasters to determine for themselves in the first instance if they qualify for religious broadcaster status. In this respect, we will rely on a licensee's good faith claim to religious broadcaster status. If a situation were to arise where we examine a licensee's claim to religious broadcaster status and disagree that a licensee qualifies as a religious broadcaster, for purposes of this rule, we will apply such a ruling prospectively as long as the broadcaster's claim to religious status was made reasonably and in good faith. Thus, no licensee whose claim that it qualifies as a religious broadcaster is made reasonably and in good faith will be penalized retroactively under this rule.

153. With respect to the *NPRM*, we terminated MM Docket No. 96-16, with the exception of the petition for reconsideration filed by ACLJ in response to *Order and Policy Statement*. We note that one of the bases for the petition was that *Order and Policy Statement* lacked a proper notice and comment period prior to its adoption. That issue was rendered moot with the issuance of the *NPRM* which requested comments on the policy adopted in *Order and Policy Statement*. The petition further contended that the recruitment requirements of our EEO Rule at that time violated *Adarand*. This issue was also rendered moot with the release of the *Lutheran Church* decision. With respect to the petition's other issues, ACLJ has filed up-to-date comments in this proceeding which address those same issues. Accordingly, we will dismiss ACLJ's petition for reconsideration and consider its comments in this *Report and Order*.

154. In response to comments filed by the Church State Council of Seventh Day Adventists (Adventists), the religious liberty and public policy arm of the Adventist Church in a five-state western region, and the American Center for Law and Justice (ACLJ), we clarify that religious broadcasters are not required to demonstrate the validity of a religious qualification as applied to each vacancy at their stations.

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<sup>230</sup> Id.

<sup>231</sup> Id.

<sup>232</sup> See *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610, 618 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989) ("*Townley*") (determination of whether a corporation qualifies as "religious" in order to be exempt from Title VII is to be done on a case-by-case basis by weighing all significant religious and secular characteristics to determine whether a corporation's purpose and character are primarily religious).

<sup>233</sup> As we indicated in the *NPRM*, religious broadcasters may use religious belief or affiliation as a qualification for all vacancies, unless they themselves determine otherwise.<sup>234</sup> It is the licensee that makes this determination.

155. ACLJ submits that, under our proposal, religious broadcasters would still be required to complete and maintain "virtually identical" EEO forms that were required prior to the *Lutheran Church* decision.<sup>235</sup> ACLJ asserts that under *Lutheran Church*, these compliance requirements are inherently unconstitutional and burdensome.<sup>236</sup> As indicated below, we have revised our forms to address these concerns. Nonetheless, filing EEO forms is part of the normal duties of all who are granted broadcast licenses by the Commission. It has long been established that all broadcast licenses come with enforceable public obligations.<sup>237</sup>

156. ACLJ also claims that the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et seq.*, prohibits government imposition of recruitment standards on religious organizations. The RFRA prohibits "[g]overnment" from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."<sup>238</sup> We reject ACLJ's argument that application of the FCC's EEO regulations violates the RFRA. The application of our EEO Rule will not substantially burden the exercise of religion since religious broadcasters are not required to comply with our specific recruitment requirements for vacancies with a religious qualification.<sup>239</sup> Indeed, the very purpose of our Rule's religious qualification exemption was to ensure that religious broadcasters would not be burdened by impermissible governmental interference when conducting their religious affairs.<sup>240</sup> Further, ACLJ did not demonstrate that the RFRA is applicable to our EEO Rule when applied to religious institutions that choose to be licensees of broadcast stations.<sup>241</sup> We note that the Supreme Court has held that the RFRA is

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<sup>233</sup> ACLJ Comments at 13-17 (legal and educational organization which preserves religious freedom).

<sup>234</sup> *NPRM*, 13 FCC Rcd at 23028-29 (paras. 70-71).

<sup>235</sup> ACLJ Comments at 11-12.

<sup>236</sup> *Id.* at 12, *citing Lutheran Church* (citation omitted).

<sup>237</sup> *See Office of Communication*, 359 F.2d at 1003 (Once a broadcaster has sought and been granted an FCC license, the license it receives carries enforceable public obligations.).

<sup>238</sup> 42 U.S.C. § 2000bb-1.

<sup>239</sup> *See also Tony and Susan Alamo Foundation v. Sect. of Labor*, 471 U.S. 290, 305-6 (1985) ("[T]he recordkeeping requirements of the Fair Labor Standards Act, while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs.").

<sup>240</sup> *Order and Policy Statement*, 13 FCC Rcd at 6324.

<sup>241</sup> *See Scott v. Rosenberg*, 702 F.2d 1263, 1275 (9th Cir. 1983), *cert.denied*, 465 U.S. 1078 (1984) (When churches decide to acquire television and radio stations, they avail themselves of facilities which, under congressional mandate, must be operated in the public interest.).

unconstitutional as applied to state action, but has not yet reached the issue of constitutionality with respect to federal action, as is the case here.<sup>242</sup>

157. National Religious Broadcasters (NRB), a national association of radio and television broadcasters that fosters and encourages the broadcasting of religious programming, fears that Commission consideration of whether a licensee has a distinct religious history for purposes of determining eligibility for religious broadcaster status would discriminate against some religious entities that are not as well-established as others.<sup>243</sup> We clarify that demonstrating “distinct religious history” is not a sole determining factor, and as indicated in the NPRM, is only one of several factors to be considered when determining religious broadcaster status.

158. Several commenters argue that the NPRM's consideration of a licensee's nonprofit operations for purposes of determining religious broadcaster status would unfairly prevent all for-profit religious broadcasters from claiming the religious qualification for their stations' vacancies. Accordingly, they request that we eliminate nonprofit status as a determining factor.<sup>244</sup> However, Americans United for Separation of Church and State (Americans United), argues that under Title VII, the Supreme Court has permitted employment on the basis of religion only with respect to the nonprofit activities of religious employers, so that our definition of religious broadcaster should not include for-profit religious organizations.<sup>245</sup> We clarify that nonprofit status is not a sole determining factor and, as indicated in the NPRM, is only one of several factors to be considered when determining religious broadcaster status.<sup>246</sup> Accordingly, a licensee's lack of nonprofit status will not automatically disqualify it from claiming religious broadcaster status. Also, although the Supreme Court has held that applying a Title VII exemption to a religious organization's nonprofit activities does not violate the Establishment Clause, the Court emphasized that its decision did not address for-profit activities.<sup>247</sup> Therefore, we believe it premature to eliminate nonprofit status as a determining factor. Further, courts have considered nonprofit status in determining if an organization is secular or religious in nature.<sup>248</sup>

159. Several commenters express concern that the NPRM allegedly defines "religious broadcaster" so as to exclude many religious broadcasters, particularly nondenominational evangelical

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<sup>242</sup> See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>243</sup> NRB Comments at 5-6.

<sup>244</sup> NRB Comments at 4-5; Christian Legal Society's Center for Law and Religious Freedom, Concerned Women for America and Focus on the Family (CLS) Comments at 17-18 (organizations concerned with the protection of fundamental religious liberties); Crawford Broadcast Company (CBC) Comments at 2 (owner of 25 stations with religious formats).

<sup>245</sup> Americans United Reply Comments at 3-6.

<sup>246</sup> NPRM, 13 FCC Rcd at 23029 (para. 71) (Other determining factors include an entity's distinct religious history and whether the entity's articles of incorporation set forth a religious purpose.).

<sup>247</sup> See *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 341 (1987).

<sup>248</sup> See *Townley at 619* (The court held the for-profit status of a company to be a secular characteristic.).

Christians, who are not associated with any particular church.<sup>249</sup> Some commenters recommend that the *NPRM's* definition be expanded to include broadcasters who air substantial amounts of religious programming.<sup>250</sup>

160. We clarify that a religious broadcaster is not required to affiliate with a church or a specific denomination in order to qualify under our EEO Rule and policy as a "religious broadcaster." As we stated in the *NPRM*, we define a religious broadcaster as a licensee which is, or is closely affiliated with, a church, synagogue, or other religious entity.<sup>251</sup> We included the term "religious entity" in addition to "church" or "synagogue" in recognition of the fact that not all religious entities consist of formal churches or organized religions. Should a question arise as to whether a licensee constitutes a religious entity, we propose to evaluate the entity's characteristics, including, *inter alia*, a religious purpose in the articles of incorporation and a distinct religious history.<sup>252</sup> These factors apply to both church affiliated and nondenominational religious broadcasters. Accordingly, commenters' concerns that nondenominational licensees cannot qualify for religious broadcaster status are unwarranted.

161. We will not add the airing of religious programming alone as an alternative ground for treatment as a religious broadcaster under our EEO Rule and policy. Our religious qualification is for licensees that are religious broadcasters, not for licensees that air religious programming. Indeed, any licensee may air religious programming for any reason.<sup>253</sup> However, we realize, based on comments, that religious broadcasters may air religious programming as part of their religious purpose. Therefore, we will consider religious programming as an additional factor to consider on a case-by-case basis when determining religious broadcaster status.<sup>254</sup>

### iii. Delegated Authority

162. In the *NPRM*, we proposed to delete certain language in Section 0.283 of the Commission's Rules, which requires the Chief of the Mass Media Bureau to refer certain matters to the Commission for disposition.<sup>255</sup> Specifically, Section 0.283(b)(1)(iii) directs all petitions to deny, informal objections and other petitions against television and radio broadcasting applications for new or modified

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<sup>249</sup> Adventists Comments at 1; Good News Radio Comments at 6 (licensee of broadcast station in California); Americans United Reply Comments at 6-7; CLS Comments at 19-20.

<sup>250</sup> CLS Comments at 28; NRB at 6; CBC Comments at 3. UCC also concurs with NRB. *See* UCC Reply Comments at 24-25.

<sup>251</sup> *NPRM*, 13 FCC Rcd at 23029 (para. 71).

<sup>252</sup> *Id.*

<sup>253</sup> *See Speer v. Presbyterian Children's Home and Service Agency*, 847 S.W.2d 227, 237 (Texas 1993) ("To be a religious corporation, an entity must actually act to further its religious purpose.").

<sup>254</sup> *See also Townley, supra* (For purposes of determining whether an entity was eligible to claim a religious exemption from Title VII, the court considered, among other things, if the entity produced a religious or secular product.).

<sup>255</sup> *See* 47 C.F.R. § 0.283

facilities or for renewal, assignment or transfer of control to be referred to the Commission if “*the applicant in question falls outside the applicable processing criteria in its employment of women and minorities.*”<sup>256</sup> Since use of the processing criteria, which involved a comparison of a station’s employment profile with the local labor force, is inconsistent with the *Lutheran Church* decision, we proposed to amend this section by deleting its reference to the criteria and deleting the above-quoted phrase in its entirety. There were no comments filed specifically addressing this proposal. Accordingly, we will adopt the proposed amendment. We note that the Mass Media Bureau Chief is still required to refer to the Commission the above-cited petitions to deny and informal objections if the document “presents documented allegations of failure to comply with the Commission’s Equal Employment Opportunity rules and policies,” and to refer to the Commission “all forfeiture matters relating to the Commission’s equal employment opportunity rules...”<sup>257</sup>

b. Forms

163. In a Memorandum Opinion and Order issued on September 30, 1998, the Commission suspended the requirement that television and radio broadcast licensees file Form 395-B until further notice while it considered adoption of new EEO rules that address concerns of the court in *Lutheran Church* and made any appropriate changes to its data collection procedures.<sup>258</sup> As discussed above, we have concluded that the *Lutheran Church* decision does not undermine our authority to require broadcasters and cable entities to submit minority and female employment information to enable us to monitor industry employment trends. We sought comment in the *NPRM* on our belief that these data serve as a useful indicator of industry trends, and also emphasized that this information would not be used for screening or assessing compliance with our EEO requirements. We also invited comment on our proposal to eliminate various sections of the form, including comparisons of employment statistics with local labor force statistics, and part-time employment data. Several commenters addressing this issue agree that the Commission should continue to collect this information to analyze industry employment trends.<sup>259</sup>

164. We hereby reinstate the requirement that licensees file Form 395-B to enable the Commission to monitor industry trends and report to Congress. We believe that it is particularly important for us to collect this data in order to monitor industry trends during the next several years because the EEO

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<sup>256</sup> 47 C.F.R. § 0.283(b)(1)(iii).

<sup>257</sup> 47 C.F.R. § 0.283(b)(1)(iii) and (c)(3), respectively.

<sup>258</sup> *See Suspension Order*, supra.

<sup>259</sup> *See* Camrory Comments at 7-8 (this view is predicated on the Commission's assurance that the information will not be used to assess compliance); CRB Comments at 11-12 and TCI Comments at 16-17 (commenters generally favor this process but believe that the Commission should revise Form 395-A); NOW Comments at 28 (the Commission has the authority to impose this requirement, and should continue to collect such data); AWRP Comments at 8 (the key to understanding the appropriate approach to EEO is data collection); NHFA Comments at 15 (this information is of great use to the Commission in tracking industry trends, but these forms should be modified to require minority and female ownership information); AFTRA Comments at 7 (the Commission has the authority to continue to collect and use data to analyze industry trends); MMTC at 241 (Form 395 data should be used only to evaluate whether reconfiguring of Commission enforcement resources, revision of EEO requirements or sunseting are appropriate).

requirements and enforcement mechanisms that we adopt today differ in significant respects from those we have employed in the past. Thus, we need to monitor industry trends in order to assess, on an industry-wide basis, the effectiveness of the new rules in achieving our objectives of inclusive outreach and deterring discrimination. For example, an increase in the number of women and minorities employed in the broadcast and cable industries would indicate that our EEO requirements are effective in ensuring outreach. We emphasize that we will not hesitate to propose changes to these EEO rules if industry trends suggest that the rules are not effective. We note that Congress has evidenced interest in and relied on this employment trend data in the past. As noted above, Congress cited the Commission's employment trend reports in the legislative history of the 1992 Cable Act as evidence that barriers to employment of women and minorities continued to exist, and that additional legislative action was warranted.<sup>260</sup> And Section 22(g) of the 1992 Cable Act required the Commission to report back to Congress on the effectiveness of [the Commission's] EEO regulations and recommend whether further legislative action was needed.<sup>261</sup> We do not believe that our obligation to monitor the effectiveness of our EEO regulations and procedures ended when we complied with that particular statutory requirement. We have a continuing responsibility to assess whether our policies are working, and we must collect the data necessary to fulfill that responsibility.<sup>262</sup>

165. Under the annual employment report filing requirement that we reinstate today, broadcasters will be required to file Form 395-B by September 30 of each year. The Commission will use the data only in aggregated form for trend reports and to report to Congress. The Commission will not use the data for assessing an individual station's EEO compliance. In light of the purpose of the report, we amend Sections 73.3526(d)(7) and 73.3527(e)(7) of the Commission's Rules,<sup>263</sup> so that broadcast stations will no longer be required to retain copies of Form 395-B in the station's public file.

166. Some commenters argue that stations with 100 or more employees are already required to file an "Employer Information Report EEO-1" (EEO-1) annually with the EEOC, and that there is no need for the Commission to duplicate these efforts.<sup>264</sup> One commenter urges the Commission to permit broadcasters employing fewer than 100 employees to voluntarily file an EEO-1.<sup>265</sup> We will not adopt these proposals. Unlike the EEO-1, Form 395-B distinguishes between full and part-time employees and our broadcast trend reports only report full-time data. Therefore, even assuming that all stations that are part of an employment unit with five or more full-time employees filed the EEO-1, either voluntarily or because

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<sup>260</sup> See H.R. Rep. No. 628, 102d Cong., 2d Sess. 111 (1992).

<sup>261</sup> 1992 Cable Act, Section 22(g).

<sup>262</sup> House Report No. 628 indicates that Congress expanded the number of upper-level job categories for which cable operators and MVPDs were required to report statistical information "to improve the Commission's ability to monitor industry employment trends and to evaluate the effectiveness of its rules and enforcement practices with regard to the representation of women and minorities in senior positions." H.R. Rep. No. 628, 102d Cong., 2d Sess. 111, 112 (1992). Thus, Congress clearly contemplated continued Commission monitoring of employment trends.

<sup>263</sup> 47 C.F.R. §§ 73.3526(d)(7) and 73.3527(e)(7).

<sup>264</sup> See NAB Comments at 16; 46 Named StBAs Comments at 29; Evening Post Comments at 22.

<sup>265</sup> Fisher Reply Comments at 12.

they were already required to do so, the data collected could not be compared to the employment data gathered for past Commission trend reports. OMB encourages us to “adopt procedures . . . that also could better utilize information collected via other mechanisms (such as other EEOC collections where possible).”<sup>266</sup> For the reasons discussed, we do not find the EEOC’s collection mechanism compatible with our information needs and we are aware of no other similar data collection mechanisms. OMB also urges that we explore the use of surveys and other statistical sampling mechanisms to monitor industry trends, instead of requiring annual reports.<sup>267</sup> We have considered such alternatives. However, we use the data collected not only to monitor trends in the entire industry, but also to monitor trends in various subgroups, such as particular markets and services. These subgroups would likely be too small to generate useful results by surveys or sampling mechanisms. We note that we have provided relief to broadcasters in this area by, as discussed below, requiring broadcasters to file only one Form 395-B for all commonly owned stations in the same market that share at least one employee.

167. A few commenters criticize the process for obtaining employment data, and the classifications used for race and ethnicity classifications on Form 395-B.<sup>268</sup> One commenter objects to the methods stated in the instructions for Form 395-B on how to obtain data on race and ethnicity, and states that the government should not require prospective employers to make visual determinations as to race and ethnicity.<sup>269</sup> We disagree that the instructions on our annual employment reports require employers to guess race and ethnicity. It is only one suggested method for identification. Another suggested method is to obtain the information from employment records, where employees may have identified their race or ethnicity.

168. Another commenter complains that the Commission has had difficulty in defining the various racial and ethnic categories about which broadcasters must report.<sup>270</sup> Specifically, a commenter argues that, in *1998 Biennial Regulatory Review -- Streamlining of Mass Media Rules, and Processes, Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, the Commission acknowledged that the racial and ethnic standards for “minority” need to be elaborated.<sup>271</sup> The Commission is required to follow the standards issued by the OMB for classifying data on race and ethnicity.<sup>272</sup> On October 30, 1997, OMB issued modified standards to be used by federal agencies in race and ethnic data collections.<sup>273</sup> We will implement appropriate changes in Form 395-B, as well as Forms 395-A, and 395-

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<sup>266</sup> OMB Comments at 2.

<sup>267</sup> *Id.*

<sup>268</sup> Oxley/Hall Comments at 1-2; TAB Comments at 8.

<sup>269</sup> Oxley/Hall Comments at 1-2.

<sup>270</sup> TAB Comments at 8-9.

<sup>271</sup> *See* 13 FCC Rcd 23056 (1998).

<sup>272</sup> Race and Ethnic Standards for Federal Statistics and Administrative Reporting, OMB Statistical Policy Directive No. 15.

<sup>273</sup> Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782 (1997).

M in the near future. For the time being, however, filers should continue to use the classifications defined in the current forms.

169. We maintain our current threshold for the filing of annual employment reports. Therefore, we will continue to require stations that are part of an employment unit with five or more full-time employees to file a Form 395-B. Thus, the smallest stations will continue to be exempt from this requirement.

170. As proposed in the *NPRM*,<sup>274</sup> we will require licensees to file one 395-B for all commonly owned stations in the same market, including AM/FM combinations, that share at least one employee. We believe that this change will afford relief to broadcasters by enabling them to file only one Form 395-B for all commonly owned stations sharing at least one employee. Only one commenter addressed this issue, and expressed general support for this change.<sup>275</sup> The *NPRM*<sup>276</sup> also raised the possibility of requiring licensees to file one Form 395-B for all commonly owned stations in the same market even if they share no employees. No commenter addressed this issue and we find no basis for adopting such a requirement.

171. With respect to the reporting of part-time employees, we do not believe that the Communications Act permits us to eliminate the requirement that part-time employment data for television stations be reported on the Form 395-B.<sup>277</sup> Because we want the requirements for radio and television stations to be as consistent as possible, we will continue this requirement for all broadcasters. In addition, for the reasons stated above in the broadcast recruitment section, we will continue to require the reporting of all full-time employees, including lower-level employees, on the Form 395-B.

172. The "Broadcast Equal Employment Opportunity Program Report" (Form 396) will be modified to reflect the new EEO Program requirements we adopt in this proceeding. With the revisions described below, we reinstate the requirement that licensees file a Form 396 with their renewal applications.<sup>278</sup> The Form 396 will continue to be filed with the licensee's renewal application and licensees will be required to list the call sign and location of all commonly owned stations which share one or more employees on the same form. The form will also include a section for licensees to specify any stations operated pursuant to a time brokerage agreement. Recruitment efforts conducted for brokered stations should be reported as explained above. In addition, all stations, including those that are part of an employment unit with fewer than five full-time employees, will be required to report whether any employment discrimination complaints have been filed, and the current status of any such complaints.

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<sup>274</sup> *NPRM*, 13 FCC Rcd at 23034 (para. 89).

<sup>275</sup> MMTC Comments at 185, n.316.

<sup>276</sup> *NPRM*, 13 FCC Rcd at 23034 (para. 89).

<sup>277</sup> See 47 U.S.C. § 334(a)(2). Although the statute concerns forms filed by television licensees, we have always used the same forms and required the same data for radio licensees as for television licensees.

<sup>278</sup> The Commission suspended the Form 396 filing requirement in *Suspension Order*. 13 FCC Rcd at 21998.

173. The new Form 396 will continue to include a box in which a licensee may indicate whether it is part of an employment unit that employs fewer than five full-time employees. Such licensees would report the existence and details of any discrimination complaints, complete a certification, and file the form with the Commission. Given that our EEO Rule emphasizes broad and inclusive outreach and does not require recruitment methods that specifically target minority or female applicants, we do not find it necessary to grant a filing exemption based on the size of the available minority labor force. Therefore, we delete the box on Form 396 that permitted licensees located in areas with minority labor forces of less than five percent an exemption from filing EEO program information.<sup>279</sup> Licensees of stations that are part of an employment unit with five or more full-time employees will be required to indicate on the Form 396 whether they have complied with the Commission's EEO Rule outreach requirements for the two-year period prior to the date they file for renewal. Form 396 will also require information as to the licensee's election for the next two-year period between the two recruitment approaches. In addition, these licensees will be required to attach to Form 396 the public file report from the previous year. As discussed above, the EEO public file report will contain information concerning all full-time vacancies during the covered period, all recruitment sources contacted and all other recruitment measures used, and additional information depending upon the recruitment option selected by the broadcaster. Generally, this approach is consistent with the proposals concerning reporting made by some commenters.<sup>280</sup>

174. We have eliminated sections pertaining to local labor force statistics, and alternative labor force statistics, from Form 396 because we will no longer compare broadcasters' employment statistics with those labor force statistics. Also, to conform Form 396 to our new EEO program requirements, we have deleted sections concerning the number of minority or female hires and the number of recruitment sources contacted, and the number of minorities and women who have been promoted. We expect licensees to demonstrate that their recruitment efforts resulted in broad and inclusive outreach. Thus, Form 396 will include a new section (Section III) for licensees to provide a narrative statement justifying why they believe their program has been successful in widely disseminating information concerning job openings throughout their community. For example, licensees could demonstrate the success of their outreach efforts by showing the circulation of any newspapers used to advertise vacancies and any additional recruitment sources used to reach sectors of the community that may not have been adequately reached by the newspaper advertisement or describing in detail the results of the menu options that they undertook, if applicable. Licensees will be required to explain on Form 396 any difficulties experienced concerning their outreach efforts and their efforts to overcome those problems.

175. MMTC recommends several changes to the Form 396.<sup>281</sup> Specifically, MMTC suggests that: the form should request three years of data; headquarters data should be reported; the form should require licensees to identify a top management official responsible for EEO implementation; the terms applicant and interviewee should be carefully defined; recruitment data should be broken down by race, sex, and job category; referral sources should be identified by name, frequency, and intensity of use; licensees should be required to thoroughly describe word-of-mouth recruitment practices to avoid

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<sup>279</sup> Correspondingly, we will delete the language in the instructions for Form 303-S ("Application for Renewal of License for AM, FM, TV, Translator, or LPTV [low power television] Station"), which indicated that such licensees needed to complete only the first two pages of Form 396.

<sup>280</sup> See, e.g., NAB Comments at 14; 46 Named StBAs at 26.

<sup>281</sup> MMTC Comments at 243-62.

discrimination; EEO complaints should be reported on a current and complete basis with regular updates; and the form should call for information on training and internships, and minority and female contractors. In addition, MMTC recommends that the form ask for "second generation" information such as the treatment of minorities and women after they have been hired, and should also include a section for a self-assessment narrative. MMTC also recommends that the EEO Program Report ask whether the initiatives reported in the Program Report will be continued throughout the coming license term, or whether modifications or additions are contemplated. In addition, it also suggests that the EEO Program Report ask whether it is the station's policy to maintain contact with well qualified but unsuccessful applicants, and to stay in touch with minority and female former employees in order to engage them in the search for new employees. Finally, MMTC requests that the Form 396 ask licensees whether they have placed a binding arbitration agreement into effect, and should make clear that compulsory binding arbitration agreements violate the Commission's EEO policy.

176. The public file requirement and Statement of Compliance process we are adopting will provide more information that interested parties can use to monitor a broadcaster's compliance with our EEO requirements on a more frequent basis throughout the license term than was available under our former rule. We agree with MMTC that review of EEO compliance should not be limited to renewal time. We believe these new enforcement requirements will address several of MMTC's concerns and further the underlying goal of its proposed zero tolerance policy. We have nonetheless determined that broadcasters should have maximum flexibility in fashioning their EEO programs. Therefore, we will not ask them to provide details concerning the station's policy regarding contacts with unsuccessful applicants and whether the initiatives reported in the Program Report will be continued. Moreover, as we stated above, MMTC's proposal concerning compulsory binding arbitration agreements is beyond the scope of this proceeding. For the reasons stated above, we will not require licensees to report headquarters EEO program information in connection with renewal applications. While we have adopted several of MMTC's other suggestions concerning this form, we find that its remaining suggestions, such as requesting three years of data, would be too burdensome to require routinely of all broadcasters.

177. Each television and radio licensee that is part of an employment unit with five or more full-time employees will be required to file with the Commission a "Statement of Compliance" (Form 397), every second, fourth and sixth year of the license term. On Form 397, licensees will be required to answer with a "yes" or "no" response whether they have complied with the Commission's EEO Rule during the two years prior to the date they file Form 397. Stations answering "no" to this question will be required to submit an explanation with Form 397. Midway through the license term, television licensees and radio licensees that are part of an employment unit with more than ten full-time employees will be required to file, with Form 397, their station's EEO public file report for the previous year.

178. The Commission hereby reinstates the requirement that a construction permit, assignment, or transfer applicant that proposes to be part of an employment unit that will employ five or more full-time employees file a "Model EEO Program" (Form 396-A), as part of its construction permit, assignment, or transfer application.<sup>282</sup> We have revised Form 396-A to conform with the EEO requirements that we adopt in this *Report and Order*. Among other things, the new Form 396-A will have revised instructions and questions in Section IV to clarify that recruitment measures should be broad and inclusive. In addition, to accord broadcasters flexibility in fashioning their EEO programs, the Form 396-A will no longer ask

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<sup>282</sup> In *Suspension Order*, we suspended the requirement that applicants file this form. 13 FCC Rcd at 21998.

applicants to list certain categories of proposed recruitment sources in Section IV, but will instead allow applicants to propose the recruitment contacts that they believe will achieve wide dissemination and be productive in generating qualified applicants whenever vacancies occur. Applicants will also be required to identify in Section V of Form 396-A whether they elect to utilize the supplemental recruitment measures or to use the alternative recruitment program, in accordance with the discussion above.

### 3. Cable EEO Program Requirements

#### a. Rules and Policies for EEO Program

179. Recruitment. In the *NPRM*, we noted that our cable EEO rules contain some of the same provisions that the court in *Lutheran Church* found unconstitutional and therefore proposed to modify these rules to avoid possible constitutional problems.<sup>283</sup> Specifically, we proposed to eliminate provisions in the cable EEO rules which may pressure or otherwise encourage cable entities to hire or maintain a staff that reflects the composition of the local labor force. In addition, we proposed new cable EEO rules, which, like the broadcast EEO Rule that we adopt today, emphasize broad and inclusive recruitment outreach. We sought comment on whether to adopt specific recruitment requirements for cable entities or to afford cable entities flexibility in crafting their recruitment programs.

180. Commenters support our proposal to modify the cable EEO rules consistent with the court's decision in *Lutheran Church*.<sup>284</sup> Accordingly, we modify our cable EEO rules as proposed in the *NPRM* to remove all requirements that cable entities compare their employment profile and employee turnover with the local labor force. In addition, the Commission will no longer compare individual cable units' employment profiles with the local labor force, even as a screening device. We believe that these modifications will ensure that cable entities are not pressured or encouraged to adopt racial or other preferences in hiring. Consistent with these modifications, we also revise the annual employment reports (Forms 395-A and 395-M) and Supplemental Investigation Sheets ("SIS" or "SIS form") filed by cable employment units (defined in 47 C.F.R. § 76.71) as described below.

181. Regarding recruitment, commenters agree that broad and inclusive recruitment is necessary to ensure that all qualified applicants, including minorities and women, are informed of, and have an opportunity to compete on a level playing field for, job openings in the cable industry.<sup>285</sup> Commenters generally favor a flexible approach to recruitment for cable entities over one mandating the use of a minimum number of minority and female recruitment sources, whether or not tied to the size of the local minority labor force.<sup>286</sup> Commenters maintain that giving cable entities flexibility to fashion their own recruitment strategies will result in more individualized, and thus more effective, EEO programs.<sup>287</sup> While

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<sup>283</sup> *NPRM*, 13 FCC Rcd at 23023-24 (para. 51).

<sup>284</sup> NCTA Comments at 3; Camrory Comments at 2-3; CRB Comments at 2; Ameritech New Media, Inc. (Ameritech) Comments at 1.

<sup>285</sup> See NCTA Comments at 4-5; TCI Comments at 10-11; CRB Comments at 5; Camrory Comments at 3.

<sup>286</sup> NCTA Comments at 5-11; NCTA Reply Comments at 4-5; TCI Comments at 10-13; Small Cable Business Association (SCBA) Comments at 8 (organization representing 300 small cable businesses and systems); CRB Comments at 5-7; Camrory Comments at 3-4.

most of the specific, comprehensive recruitment proposals offered by commenters were geared toward broadcasters, one commenter recommends offering both broadcasters and cable entities a "menu" of options for recruitment.<sup>288</sup> Another commenter suggests conforming the cable EEO rules with the revised broadcast EEO Rule to the extent possible to eliminate confusion between the two sets of requirements.<sup>289</sup>

182. For the reasons set forth above with respect to broadcasters, we believe that broad and inclusive recruitment by cable entities is essential to deter discrimination and foster diversity of programming. We also believe that our objective of ensuring that minority and female applicants have the opportunity to apply for positions in the cable industry, underlying the recruitment requirement set forth in Section 634(d)(2)(B), can be achieved without requiring recruitment methods that are specifically targeted to those groups.<sup>290</sup> Broad outreach efforts should be effective to reach minorities and women, as well as other segments of the community that may previously have been deprived of the opportunity to compete for employment in the cable industry due to limited access to word-of-mouth recruitment networks. We conclude that adoption of a recruitment rule for cable entities similar to that adopted for broadcasters will afford cable entities flexibility to design outreach programs that best suit their individual circumstances and needs. We recognize, however, that some modifications to the rule are necessary to conform the rule to statutory requirements particular to cable. Accordingly, we adopt for cable entities a modified version of the broadcast recruitment rule, as described below. In addition, we revise the cable EEO rules, as well as the annual employment reports and SIS forms filed by cable employment units, to make it clear that cable entities are not required to target any particular recruitment sources. Cable entities are given wide discretion in designing their outreach programs provided they reach a broad cross-section of the community, including minorities and women, with information concerning job vacancies.

183. As in the case of broadcasters, we will afford cable entities the option of ensuring that their EEO programs are successful in achieving broad outreach through the use of one of two approaches: the use of the two supplemental recruitment measures as detailed in the discussion concerning the broadcast EEO Rule; or the use of the alternative recruitment program. The requirements we will apply to cable entities are similar to those applicable to broadcasters with one exception. Thus, while we are incorporating into our recruitment rule for cable entities a menu of options for supplemental recruitment measures similar to the menu we are adopting for broadcasters, which includes job fairs, intern programs, training programs, mentoring programs, and interaction with educational and community groups, instead of requiring cable employment units to implement four of these options every two years as with broadcasters, we will require cable employment units to implement two of these options each year. The two-year period for broadcasters coincides with the requirement to file the Statements of Compliance every two years. Cable employment units, on the other hand, are required by statute to file annual employment reports, which include a series of compliance questions. Rather than require cable employment units to file a separate Statement of Compliance every two years like broadcasters, we think it would be less burdensome

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<sup>287</sup> NCTA Comments at 9-10; CRB Comments at 5.

<sup>288</sup> NOW Comments at 24-27.

<sup>289</sup> Camrory Comments at 3.

<sup>290</sup> Section 634(d)(2)(B) provides that cable entities shall "use minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants, to supply referrals whenever jobs are available in its operation." 47 U.S.C. § 554(d)(2)(B).

to simply add a question regarding compliance with the new recruitment rule to the employment reports that cable employment units are required by statute to file annually. We modify the annual employment reports for cable employment units as described below to add this requirement. Since cable employment units will be certifying compliance with the recruitment requirements on an annual basis, we think it is appropriate to modify the required number of menu options to fit the shorter implementation period.

184. Initially, we will require that cable entities file with the Commission and place in their public file a statement as to their election between the two approaches (supplemental recruitment measures or alternative recruitment program) designed to ensure broad recruitment outreach within forty-five days of the effective date of the new rules. This will ensure that both the Commission and the public are aware of the approach the broadcaster intends to implement. In order to facilitate the initial election, we are preparing a form to be utilized for the initial election. Any cable entity that does not receive a copy of the form by mail may obtain one from the Commission. Thereafter, cable entities may change their election annually at the time of the filing of their annual program reports (FCC Form 395-A or FCC Form 395-M). We will amend those forms to provide for the election. We are permitting cable entities to modify their election annually (instead of every two years, as in the case of broadcasters) because, as noted, cable EEO compliance is administered on an annual basis as required by statute. Copies of the initial election statements will be on file in the Commission's Public Reference Room. In the future, we intend to make information regarding an entity's election electronically available on our web site.

185. Our recruitment rule for cable entities will apply to all full-time positions, both upper-level and lower-level. One commenter argues that any recruitment requirements for cable entities should be limited to upper-level positions that directly influence programming diversity because the court in *Lutheran Church* specifically found that the Commission has no evidence linking lower-level employees to programming diversity.<sup>291</sup> This commenter acknowledges that the *Lutheran Church* decision did not directly address the cable EEO rules, but asserts that the court's analysis of programming diversity as a justification for the broadcast EEO Rule applies equally to the cable EEO rules.<sup>292</sup> However, as discussed above, the Commission has express statutory authority under Section 634 of the Communications Act to adopt recruitment requirements and other EEO rules for cable entities. Moreover, Section 634(d)(2)(B) requires cable entities to recruit "whenever jobs are available,"<sup>293</sup> and Section 634(d)(3)(A) requires cable entities with five or more full-time employees to report both upper-level and lower-level employees on their annual employment reports.<sup>294</sup> The Commission, therefore, not only has statutory authority to apply recruitment requirements for cable entities to both upper-level and lower-level positions, but is required to do so.

186. For the reasons stated in our discussion of the broadcast recruitment requirements, we will apply the same policies on promotions, temporary employees, interns, part-time employees and former employees to cable entities as we are applying to broadcasters. Thus, we will not ordinarily require cable entities to recruit for internal promotions, temporary employees and interns. However, temporary

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<sup>291</sup> Ameritech Comments at 3-4.

<sup>292</sup> Id.

<sup>293</sup> See 47 U.S.C. § 554(d)(2)(B).

<sup>294</sup> See 47 U.S.C. § 554(d)(3)(A).

employees and interns will be subject to recruitment requirements if they are later considered for permanent positions. With respect to part-time positions, we will include a provision in our cable rules clarifying that, in the case of part-time hires, cable entities need only substantially comply with the requirement to recruit for every vacancy. For example, cable entities choosing that approach will not be required to provide notification to requesting organizations for part-time vacancies. We will also expect cable entities to conduct recruitment for hires involving former employees.

187. Analysis/Recordkeeping. In the *NPRM*, we proposed that cable entities retain certain records in order to meaningfully self-assess the effectiveness of their EEO programs and to prove that they have made good faith efforts to broaden their applicant pools for all vacancies. Among other things, we proposed to continue to require cable entities to maintain records as to the race, national origin and gender of all applicants generated by each recruitment source according to vacancy.<sup>295</sup> We nevertheless requested comment on whether extensive applicant pool records were necessary. While NCTA and TCI support retention of the requirement that cable entities maintain extensive applicant pool data,<sup>296</sup> other commenters complain that this recordkeeping requirement is time-consuming, burdensome and inherently unreliable because it relies primarily on voluntary self-identification by applicants of their race and national origin.<sup>297</sup>

188. As we explained in our discussion of the recordkeeping requirements for broadcasters, our purpose in establishing any recordkeeping requirement for cable entities is primarily to ensure that cable entities engage in meaningful outreach and to provide a basis upon which they and the Commission can analyze their recruitment efforts. As in the case of broadcasters, we conclude that this goal can be achieved in many cases, without the necessity of maintaining applicant pool data. However, we will afford those cable entities that believe they can best ensure meaningful outreach through the use of the alternative recruitment program, rather than the use of the supplemental recruitment measures, the option to do so.

189. Accordingly, we will require that cable entities maintain the same records of their EEO recruitment efforts as broadcasters, which will differ in part based on whether the cable entity elects to employ supplemental recruitment measures or the alternative recruitment program.<sup>298</sup> Thus, we will require cable entities to retain in their own records documentation necessary to verify that recruitment occurred for each vacancy, including a list of the vacancies filled during the pertinent review period, the recruitment sources contacted for each vacancy and other recruitment efforts undertaken. In addition, we will require that cable entities maintain records of the recruitment source of their hires and interviewees (in the case of those cable entities that elect to utilize supplemental recruitment measures) or maintain applicant pool data (in the case of cable entities that choose the alternative recruitment program). We will expect cable entities to use these records as a starting point in analyzing the success of their recruitment efforts in achieving broad outreach to all segments of the community and, in the event of problems in that respect, to make modifications in their recruitment efforts, as warranted. Thus, the rules we are adopting require a cable entity to analyze the effectiveness of its outreach program, and address any problems found.

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<sup>295</sup> *NPRM*, 13 FCC Rcd at 23029-30 (para. 73).

<sup>296</sup> NCTA Comments at 13-14; TCI Comments at 15; NCTA Reply Comments at 6-7.

<sup>297</sup> Ameritech Comments at 7-8; CRB Comments at 11.

<sup>298</sup> See discussion of broadcast recordkeeping requirements, above.

190. We will require that cable entities maintain these recruitment records for a minimum of seven years.<sup>299</sup> As requested by one commenter,<sup>300</sup> we clarify that cable entities may maintain records of their EEO efforts electronically, *e.g.*, by retaining electronic copies of e-mail notices of job openings to recruitment sources and scanning pertinent documents into a computer format. Permitting cable entities to maintain electronic records of their EEO efforts will reduce burdens on cable entities and will also reduce the likelihood that records could be lost, as computer records can be backed up. In this regard, we caution cable entities that, absent a showing of extraordinary circumstances, we will not credit claimed recruitment efforts that cannot be supported by records.

191. Public File. As with broadcasters, we believe that it is important that local community residents have a role in monitoring cable entities' compliance with our outreach requirements. In order to facilitate public participation in this process, we will require that each cable employment unit place in its public file annually, and post on its web site, if it has one, on the anniversary of the date that the employment unit's annual employment report is due to be filed, the following information: (1) a list of all full-time vacancies filled by the cable employment unit during the preceding year, identified by job title; (2) for each such vacancy, the recruitment source(s) utilized to fill the specific vacancy (including, in the case of cable entities utilizing the supplemental recruitment measures, organizations entitled to notification of vacancies, which should be separately identified), including the address, contact person, and telephone number of each source; and (3) a statement as to the cable entity's initial election between the two approaches (supplemental recruitment measures or alternative recruitment program) designed to ensure broad recruitment outreach and changes resulting from a substantial change of ownership (other changes in the entity's election will be in its annual employment reports, which already must be included in the public file). In addition, cable employment units which elect to utilize the supplemental recruitment measures will be required to include in their public file: (1) a list of the recruitment source that referred the hiree for each full-time vacancy; (2) data reflecting the total number of persons interviewed for full-time vacancies during the preceding year and, for each recruitment source utilized in connection with any such vacancies, the total number of interviewees referred by that source; and (3) a list and brief description of the menu options engaged in during the preceding year. Those cable employment units which do not elect to utilize the supplemental recruitment measures will be required to include in their public file data reflecting, for each recruitment source utilized for any full-time vacancy during the preceding year, the total number of applicants generated by that source, the number of those applicants who were female, and the number of those applicants who were minority, identified by the applicable racial and/or ethnic group with which each applicant is associated.

192. Relief for Qualifying Units. We will also insert a provision for cable employment units with six to ten full-time employees, similar to the provision that we are adopting for broadcast stations that are part of an employment unit with five to ten full-time employees, because we agree with SCBA that small staff cable employment units have limited financial/administrative resources<sup>301</sup> and that there should

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<sup>299</sup> Under Section 634(f)(1) of the Communications Act, if the Commission finds that a cable entity has failed to comply with the statutory EEO requirements three or more times during any seven-year period, such failure shall constitute a "substantial failure to comply" with Title VI of the Communications Act. 47 U.S.C. § 554(f)(1).

<sup>300</sup> Ameritech Comments at 9.

<sup>301</sup> In its Reply Comments, NCTA maintains that, just like small staff stations, small staff cable employment units have limited financial, personnel and time resources available for recruiting and, just like small market stations, small market cable employment units may have difficulties competing with units in larger markets.

be regulatory parity, to the extent possible, between the broadcast and cable industries.<sup>302</sup> The rule provision relating to qualifying cable employment units will state that they are required to choose only one option from the supplemental recruitment measures menu. Larger cable employment units will be required to choose two of these options. Qualifying cable employment units will be expected to meet all other EEO requirements, including, *e.g.*, filing Forms 395-A and 395-M, and maintaining a copy of their EEO public file report in their public file. We will continue our current policy of not requiring cable employment units with fewer than six full-time employees to demonstrate compliance with the EEO program requirements. We emphasize, however, that all cable entities, including those with fewer than six full-time employees, are subject to the provision of the EEO rules that prohibits discrimination. Further, although we are not requiring cable employment units with fewer than six full-time employees to comply with specific recordkeeping and reporting requirements, these units continue to be required to maintain an EEO program, pursuant to Section 634 of the Communications Act. In accordance with our prior practice, we will consider employees to be full-time if their regular work schedule is 30 hours per week or more.

193. Other Matters Concerning Cable EEO Rules. In the *NPRM*, we proposed to require that a cable entity analyze its efforts to recruit, hire and promote in a nondiscriminatory fashion and address any difficulties in implementation of its EEO program.<sup>303</sup> We suggested that such analysis include review of union agreements, seniority practices, productivity of recruiting sources, employee pay and benefits, utilization of media for recruitment purposes, and selection techniques or tests. Commenters who address the issue support adoption of this requirement for cable entities.<sup>304</sup> We will adopt this requirement for the reasons set forth in the *NPRM*. Furthermore, because we have decided to ask for this information by means of a question in the SIS, as discussed below, we will not require that cable employment units submit a separate statement detailing their analysis every five years along with their SIS, as we suggested in the *NPRM*.

194. We proposed in the *NPRM* to retain the general EEO policy requirements for cable entities, which are outlined in Section 76.73 of the Commission's Rules.<sup>305</sup> We also proposed to retain the EEO program requirements for cable entities which are included in Sections 76.75(a), (d) and (e).<sup>306</sup> No commenters addressed these proposals. Accordingly, we will retain these general EEO policy and program requirements for cable entities.

195. Finally, we will include in our cable EEO rules language clarifying that the provisions in those rules are not intended to require that any person be given preferential treatment based on race, color, national origin, religion, age, or gender.

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Therefore, NCTA urges the Commission to recognize the need for flexibility regarding recruitment contacts and sources used by small cable employment units in small markets. NCTA Reply Comments at 5.

<sup>302</sup> SCBA Comments at 2-7. However, for the reasons already discussed, we do not agree that a total exemption from EEO program requirements, as proposed by SCBA, is necessary.

<sup>303</sup> *NPRM*, 13 FCC Rcd at 23029 (para. 72).

<sup>304</sup> NCTA Comments at 12; TCI Comments at 13-14; CRB Comments at 7.

<sup>305</sup> *NPRM*, 13 FCC Rcd at 23024 (para. 54).

<sup>306</sup> *Id.* at 23024-25 (para. 55).

196. Enforcement. As required by 47 U.S.C. § 554(d)(3)(A), cable employment units with six or more full-time employees will be required to file annual employment reports with the Commission. The Commission will use the recruitment-related information provided in the Forms 395-A or 395-M, but not the employment profile, to determine annually whether units are in compliance with the EEO rules, as required by 47 U.S.C. § 554(e)(1).<sup>307</sup> Data required to be included in the Forms 395-A and 395-M are described herein. We emphasize, however, that statistics provided about race, ethnicity, and gender of employees will not be used to determine compliance with EEO rules but will only be used to monitor industry trends and report to Congress. Systems found to be in compliance will receive a Certificate of Compliance. Systems found not to be in compliance will receive notice that they are not certified for a given year.

197. Normally, before notifying a unit that the Commission has found it noncompliant, the Commission will send an inquiry to the unit requesting information addressing the Commission's concerns. As part of an inquiry, the Commission may request information from the cable entity concerning its recruitment efforts. Also, annual employment reports should be based on recruitment efforts documented in items contained in a unit's own records. Consequently, a unit should retain any records necessary to document its recruitment efforts, including documentation of information provided in annual employment reports and supplemental investigation responses (described below), even though the records will not be required to be placed in the public file or filed with the Commission on a regular basis. These records could include copies of letters notifying sources of job openings, copies of the unit's job listings in newspapers or on web sites, and, if applicable, copies of requests from sources that they be notified of openings and copies of notices sent to them, information verifying participation at job fairs, and other similar types of outreach information. In addition, the Commission's cable EEO public file rules, 47 C.F.R. §§ 76.79 and 76.1702, will be amended to require units, by the same date they are due to file their annual employment reports, to place in their public file a record of the items listed above.

198. As provided in 47 U.S.C. § 554(f), a cable entity may be found to have committed a "substantial failure to comply" with the requirements of the Communications Act if a unit is found to have three or more failures in compliance in a seven-year period. Thus, units will be required to retain for a minimum of seven years any records necessary to document their recruitment efforts.

199. As noted above, we are required by statute to certify annually whether units are in compliance with our EEO rules. Thus, in order to verify compliance with the EEO rules and the accuracy of the recruitment-related information in Forms 395-A or 395-M, the Commission may send inquiries to cable entities, as mentioned above. The Commission may at random conduct an inquiry of a unit requesting information relating to the unit's compliance with the EEO rules. We may also conduct an inquiry if the Commission has evidence of a possible violation of the EEO rules. Initially, the inquiry may request documentation of recruitment-related information reported in the Forms 395-A or 395-M. Further inquiry or inquiries may be conducted requesting additional retained recruitment effort documentation that is not reported in the forms, such as the information required to be included in a unit's public file and other data.

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<sup>307</sup> We had also proposed in the *NPRM*, 13 FCC Rcd at 23030 (para. 74), that we continue to evaluate cable entities' EEO programs every year as part of the annual certification process.

200. In addition to annual certifications, the Commission will investigate each cable and MVPD unit at least once every five years, as required by 47 U.S.C. § 554(e)(2). Units will be required to submit supplemental investigation information, as requested in the SIS form, with their regular 395-A or 395-M reports in the years they are investigated.<sup>308</sup> The requirements of the SIS form are described below. Supplemental investigation responses will be filed with annual employment reports when due, and thus will be required to be included in a unit's public file.

201. Most commenters support the continued use of such tools as the annual certifications and the supplemental investigations, as proposed herein.<sup>309</sup> TCI states that annual certifications, periodic inquiries, supplemental investigations every five years, and the possibility of a forfeiture for violations provide incentives to cable entities to evaluate their own programs annually, provides incentives for repeat violators to comply with rules, and serves as a deterrent to others.<sup>310</sup> We agree. Some commenters also suggest that the Commission base its evaluations of units' EEO programs on efforts and not on results and that the Commission not use labor force comparisons.<sup>311</sup> We adopt these suggestions, as discussed above. The public may file complaints concerning the EEO programs of units, which might be based on annual employment reports, supplemental investigation information, or the contents of a unit's public file. Cable entities found to be in violation of the EEO rules may be subject to sanctions and remedies including noncertification, admonishment, reporting conditions, and forfeitures. The appropriate sanction or remedy will be determined on a case-by-case basis.

b. Forms

202. Pursuant to statute, the Commission requires cable employment units with six or more full-time employees to file an employment report (Form 395-A) annually, which calls for responses to questions about the entity's EEO efforts as well as employment, hiring, and promotion data.<sup>312</sup> The information requested on Forms 395-A and 395-M, including a series of compliance questions, is required by statute.<sup>313</sup> Specifically, the current forms require cable employment units to provide employment data for all employees, as well as information on employee promotions and job hires. In addition, cable employment units must provide a "yes" or "no" response to a series of compliance questions. In the *NPRM*, we proposed to modify our cable forms to the extent necessary to avoid constitutional problems. As stated previously, we believe that broad rulemaking authority granted to us in Section 634 of the Communications

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<sup>308</sup> One commenter notes that the statute requires supplemental investigations to be conducted once every five years but suggests that the Commission recommend that Congress change the provision to once every eight years to bring cable more in line with reviews of broadcast EEO programs that take place at the time licensees file for license renewal. SCBA Comments at 5, n.10. This suggestion, however, is beyond the scope of this proceeding.

<sup>309</sup> See AWRT Comments at 9; NCTA Comments at 12; NCTA Reply Comments at 6; CRB Comments at 6, 8; TCI Comments at 8.

<sup>310</sup> TCI Comments at 9. See also NCTA Reply Comments at 8.

<sup>311</sup> TCI Comments at 9, n. 11; NCTA Comments at 12.

<sup>312</sup> 47 U.S.C. § 554(d)(3); 47 C.F.R. § 76.77. Form 395-M, the Multi-Channel Video Program Distributor Annual Employment Report, is similar to the Form 395-A.

<sup>313</sup> 47 U.S.C. §§ 554(d)(2), (3)(A),(B).

Act permits us to change both the cable EEO rules and the cable EEO forms to advance the congressional goals identified in the statute, as well as to avoid constitutional problems.

203. After consideration of the comments on this issue, we have concluded that we should continue to require cable employment units with six or more full-time employees to provide annual employment profile data on all positions in order to continue our monitoring of industry trends and to report to Congress.<sup>314</sup> Thus, these cable employment units will be required to submit to the Commission annual employment profile data for all jobs on Forms 395-A and 395-M. However, these employee statistics will not be used to assess EEO compliance but will be used solely for the preparation of trend reports and to report to Congress. Further, we will continue to require cable entities, consistent with 47 U.S.C. § 554(d)(3)(B), to keep copies of Form 395-A and 395-M available for public inspection.

204. We have determined, however, that it is appropriate to eliminate or revise certain questions on Forms 395-A and 395-M in Section III. Specifically, we will eliminate question three because we conclude that it is not "possible"<sup>315</sup> for us to require cable entities to enforce an obligation that a court has found infringes constitutional rights.<sup>316</sup> For the same reason, we eliminate all form sections concerning available labor force and occupational availability data, employee promotions, and job hires. Therefore, we have eliminated Sections V.B., V.C., and VI of Forms 395-A and 395-M. We also eliminate employee promotion and job hires data in Section VII.

205. We also believe that it is appropriate to amend the questions on Forms 395-A and 395-M to reflect our new EEO program requirements. Thus, former question one (now question two) will be revised to require cable entities to answer whether they have "widely" disseminated their EEO programs.<sup>317</sup> In addition, we amend the instructions to former question two (now question three) to clarify that we require that a unit engage in broad and inclusive outreach.<sup>318</sup> Question four will be changed to emphasize

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<sup>314</sup> While not challenging reinstatement of the reporting requirement on constitutional grounds, Ameritech argues that the Commission has statutory authority to regulate work place discrimination only to the extent that it affects programming, and that we should therefore modify the cable EEO reporting requirement to apply only to positions that can directly influence programming and program diversity. Ameritech Comments at 5. As discussed above, the Commission has *explicit* statutory authority to regulate the EEO practices of cable entities with respect to all job categories. See 47 U.S.C. § 554. Moreover, Section 634 of the Communications Act specifically requires cable entities with more than five full-time employees to file annual reports identifying the race, sex and job title of employees in 15 comprehensive categories. See 47 U.S.C. § 554(d)(3). Thus, the Commission not only has statutory authority to continue collecting employment information from cable entities with respect to all job categories, it is required to do so.

<sup>315</sup> See 47 U.S.C § 554(d).

<sup>316</sup> Question three asked, "Do you evaluate your employment profile and job turnover against the availability of minorities and women in your franchise area?"

<sup>317</sup> Former question one asked, "Do you disseminate your EEO program to job applicants, employees, and those with whom you regularly do business?"

<sup>318</sup> Former question two and current question three asks, "Do you contact minority organizations, women's organizations, media, educational institutions, and other potential sources of minority and female applicants for referrals whenever job vacancies are available in your organization?"

that promotions are to be offered to all persons in a nondiscriminatory manner.<sup>319</sup> Question five will be revised to make clear that any such efforts should be broad so as to include all segments of the community, and that no entity should be excluded on the basis of race, ethnicity or gender.<sup>320</sup> Further, question five will be amended to emphasize that efforts to seek out entrepreneurs shall be conducted in a nondiscriminatory manner. We also revise question six to ask whether cable employment units have analyzed the results of their EEO efforts in a nondiscriminatory manner.<sup>321</sup> The new Forms 395-A and 395-M will have a new question (question one, Section III) which will require cable employment units to answer whether they have complied with the outreach provisions in accordance with Section 76.75(b) or (f), as applicable, of the Commission's Rules. We believe that the rulemaking authority granted to us by Section 634, as discussed above, affords us sufficient latitude to make these changes. We will continue our current exemption for cable employment units with fewer than six full-time employees from filing employment and compliance data on the 395-A, 395-M, and SIS forms.

206. Cable employment units are subject to a more thorough review every five years with the SIS form, pursuant to statute.<sup>322</sup> The SIS requests information regarding specific recruitment efforts and job categories. The questions on the SIS reflect the compliance questions on the Forms 395-A and 395-M, but ask for narrative responses, instead of "yes" or "no" answers. Thus, consistent with the changes we stated above, we conclude that we may eliminate and revise the corresponding questions in Part 2 of the SIS. Specifically, we will delete question three from the SIS.<sup>323</sup> We also believe that it is appropriate to change former question one (now question two) to ask cable entities to describe their efforts to widely disseminate their EEO programs.<sup>324</sup> Also, we clarify that former question two (now question three) contemplates broad, inclusive outreach.<sup>325</sup> In addition, similar to the revisions to questions four, five, and six on Forms 395-A and 395-M, we amend questions four, five, and six on the SIS to clarify that we intend for such efforts to be conducted in a nondiscriminatory manner.<sup>326</sup> The SIS will also have a new question

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<sup>319</sup> Formerly, question four read, "Do you undertake to offer promotions to positions of greater responsibility to minorities and women in a nondiscriminatory manner?"

<sup>320</sup> Formerly, question five asked, "To the extent possible, do you seek out minority and female entrepreneurs and encourage them to conduct business with all parts of your organization?"

<sup>321</sup> Formerly, question six asked, "Do you analyze the results of your efforts to recruit, hire, promote, and use the services of minorities and women and use these results to evaluate and improve your EEO program?"

<sup>322</sup> See 47 U.S.C. § 554(e)(2); 47 C.F.R. § 76.77.

<sup>323</sup> Question three read, "Report the findings of the employment unit's evaluation of its employment profile and job turnover against the availability of minorities and women in the relevant labor force."

<sup>324</sup> Former question one asked, "Describe the employment unit's efforts to disseminate its equal employment opportunity program to job applicants, employees, and those with whom it regularly does business."

<sup>325</sup> Former question two and current question three read, "Name the minority organizations, organizations for women, media, educational institutions, and other recruitment sources used to attract minority and female applicants whenever job vacancies become available."

<sup>326</sup> Formerly, questions four, five, and six read as follows: "Explain the employment unit's efforts to promote minorities and women in a nondiscriminatory manner to positions of greater responsibility;" "Describe the employment unit's efforts to encourage minority and female entrepreneurs to conduct business with all parts of its

(question one) which will require cable employment units to describe their efforts to comply with the outreach provisions of Section 76.75(b) or (f), as applicable, of the Commission's Rules. Finally, the SIS will require the submission of the information placed in the entity's public file for the preceding year.

207. Part I of the SIS requires cable employment units to provide brief descriptions of specified job categories.<sup>327</sup> We will change this section to remove the requirement that cable entities provide a breakdown of employees by gender and race, and job descriptions for minorities and females. The *NPRM* proposed to require cable entities to submit a statement detailing an analysis of their EEO programs for the preceding 12 months, and ask questions concerning what training or internship programs for minorities and/or women they have implemented on their Form 395-A or 395-M Supplemental Investigation Sheet. Upon further reflection, we have decided not to require cable employment units to file such statements. We believe that the information that cable entities are to submit to the Commission on Forms 395-A, 395-M, and the SIS will be sufficient to allow us to assess their EEO outreach efforts. Also, cable employment units which elect to employ the supplemental recruitment measures will not be required to submit information concerning the total number of applicants received from each listed source, or the total number of minority and female applicants received. We will, however, continue to require cable entities to report part-time, as well as full-time, employees on Forms 395-A and 395-M, as required by statute.<sup>328</sup>

208. Commenters favor the process currently used by the Commission, with an annual submission of Form 395-A or 395-M, and an SIS filed once every five years.<sup>329</sup> These commenters support the form changes proposed in the *NPRM* and state that the Commission should revise Form 395-A to reflect the Commission's cable EEO rule modifications. These commenters are opposed, however, to a revision to the forms that would request information concerning the total number of applicants received from each listed source or the total number of minority applicants received. As stated earlier, we do not believe that maintaining or reporting to the Commission applicant pool data is necessary if entities elect to employ the specific supplemental recruitment measures which we believe ensure the success of their outreach. Therefore, we will not require that cable entities that elect to employ the supplemental recruitment measures report such data in their cable EEO forms. However, such entities will be required to submit with their SIS response data concerning the recruitment source of hires and interviewees for the preceding year that is required to be placed in the public file. Also, entities that elect not to employ the supplemental recruitment measures will be expected to submit with their SIS response data concerning applicant pools for the preceding year that is required to be placed in the public file.

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operation and provide an analysis of the results of those efforts;" "Report the findings of the employment unit's analysis of its efforts to recruit, hire and promote minorities and females and explain any difficulties encountered in implementing its EEO program."

<sup>327</sup> This section reads: "Give brief job descriptions for employees in the job categories specified below. The number specified in the box indicates the number of different job descriptions that are to be submitted for each category. If no female or minorities are employed in the specified job category, choose another job category and indicate this on the form. Job descriptions should include the position title and a brief description of the major duties and responsibilities of the individual(s) in the position. In addition, the number of individuals currently employed under the position title and a breakdown of these employees by sex and minority/national origin should be included."

<sup>328</sup> See 47 U.S.C. § 554(d)(3)(A), (B).

<sup>329</sup> See CRB Comments at 12; TCI Comments at 16; NCTA Comments at 12.

209. One commenter urges the Commission to permit cable entities to file a "Common Carrier Annual Employment Report" (FCC Form 395) or an EEO-1 in place of Form 395-A.<sup>330</sup> We will not adopt this proposal. Forms 395-A and 395-M collect job title information within 15 job categories and employment data for six upper-level job sub-categories, which are required by statute.<sup>331</sup> Neither the Form 395 nor the EEO-1 call for this information.

### C. Constitutional Issues

210. In the *NPRM*, we sought comment on our view that the EEO outreach and reporting requirements proposed in the *NPRM* would be constitutional under the *Lutheran Church* decision and other precedent.<sup>332</sup> We reasoned that EEO requirements designed simply to ensure that minority and female job candidates, as well as the community at large, are informed of job openings and encouraged to apply do not raise equal protection concerns as long as they are inclusive, assuring that all job candidates have access to information about job openings without regard to their race or gender; impose no greater burdens on non-minority broadcasters or cable entities than minority broadcasters or cable entities; and do not require, pressure, or encourage employers to adopt racial preferences.<sup>333</sup>

211. Several cable entities and other organizations commenting on the proposals concur with our view that they do not raise equal protection concerns. They state that the proposed outreach rule would require no more than inclusive outreach efforts to all sectors of the labor force, and would not in any way pressure or encourage employers to prefer minorities or women in hiring. Therefore, they contend, the proposed rule would not infringe rights protected by the Equal Protection Clause and would not be subject to heightened scrutiny.<sup>334</sup> They note that the proposed rule lacks the feature that caused its predecessor to be subjected to strict scrutiny. Under the new rule, broadcasters and cable entities would not be required to compare the racial composition of their employment profile with the racial composition of the labor force in their communities, and the Commission would not make that comparison in processing renewal applications.<sup>335</sup> Thus, the new rules would not indirectly pressure employers to make race-based hiring decisions contrary to the *Lutheran Church* decision. In addition, under the new rule, employers would gain no procedural advantage by bringing their levels of women and minority employees up to certain levels.<sup>336</sup>

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<sup>330</sup> Ameritech Comments at 9-10.

<sup>331</sup> See 47 U.S.C. §§ 554(d)(3)(A), (B); Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992, Equal Employment Opportunities, 3 FCC Rcd 5389 (1993) (petitions for reconsideration pending).

<sup>332</sup> *NPRM*, 13 FCC Rcd at 23011-13 (paras. 18-23).

<sup>333</sup> *Id.*

<sup>334</sup> See, e.g., UCC Comments at 5-7, Appendix ; MMTC Comments at 55-86; Time Warner Cable (Time Warner) Comments at 2 (owner of cable systems).

<sup>335</sup> See, e.g., UCC Comments at 5-6; MMTC Comments at 62, 74.

<sup>336</sup> The *Lutheran Church* panel concluded that the Commission's processing guidelines – which made it unlikely that that an employer's EEO program would be examined at renewal if women and minorities were employed at half the rate of their presence in the local labor force – encouraged employers to favor women and minorities in hiring. *Lutheran Church* at 353-54. No such processing guideline would be used in enforcing the

Accordingly, these commenters argue that the new rule could not be viewed as pressuring employers to hire minorities or women.<sup>337</sup> Further, these parties find nothing objectionable in the compilation or reporting of information concerning the race, ethnicity or gender of an employer's staff to enable the Commission to monitor industry trends and report to Congress.<sup>338</sup>

212. In contrast, broadcast industry commenters and several other organizations point to a number of aspects of the proposed recruitment requirements that they claim will be subject to strict scrutiny.<sup>339</sup> First, some of the commenters claim that the proposed requirement that broadcasters and cable entities use minority and female specific recruitment sources, as well as general recruitment sources, utilizes a "racial classification" and is therefore subject to strict scrutiny under *Adarand* -- regardless of whether it adversely affects any person.<sup>340</sup> One commenter claims that "by encouraging the recruitment of specific classifications of applicants, the Commission implicitly would be encouraging preferential hiring of those groups."<sup>341</sup>

213. Second, some commenters argue that the proposed requirement that broadcasters and cable entities monitor the productivity of their chosen recruitment sources by maintaining records of the race, ethnicity, and gender of applicants generated by each source, and change recruiting sources that prove unproductive, would be subject to strict scrutiny.<sup>342</sup> Forty-six Named StBAs, for example, assert that this

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proposed rule.

<sup>337</sup> MMTC also argues that the proposed collection of data on the race and gender of *applicants* to assess the productivity of recruitment sources would not pressure employers to grant preferences in hiring because "there is no possible regulatory benefit or detriment available to a broadcaster by hiring or not hiring minorities or women." MMTC Reply Comments at 5.

<sup>338</sup> See, e.g., TCI Comments at 15-16; UCC Comments at 16-18; MMTC Comments at 82.

<sup>339</sup> See, e.g., NAB Comments at 25-29; 46 Named StBAs Comments at 10-14; Institute Comments at 2-6; Delta Radio, Inc. and 11 other broadcasters (Delta Radio) Comments at 7-10; Evening Post Comments at 12-16.

<sup>340</sup> Institute at 2-3; Delta Radio at 8-10; Pacific Legal Foundation (PLF) at 3 (non-profit corporation that engages in litigation in matters affecting the public interest); VAB/NCAB Comments at 3-5; Roger Clegg Comments, Attachment (Vice-President and General Manager of the Center for Equal Opportunity); 46 Named StBAs Reply Comments at 7-8.

One commenter makes an attempt to identify how qualified candidates might be disadvantaged by a minority-specific recruitment requirement. Institute asserts that such a requirement would disadvantage non-minorities because broadcasters have finite advertising budgets. Thus, it argues, a requirement that a broadcaster run an advertisement in a minority publication will "inevitably mean that in some instances, a broadcaster will not run an advertisement in a non-minority publication," and that some non-minorities will thus fail to learn about the opening. Institute Comments at 4. See also Roger Clegg Comments, Attachment ("A recruitment policy that is aimed at increasing applications from some groups and not others -- as the FCC would require -- is discriminatory.").

<sup>341</sup> CRB Comments at 11 (law firm representing various cable operators).

<sup>342</sup> See, e.g., NAB Comments at 25-27; 46 Named StBAs Comments at 10-11; VAB/NCAB Comments at 12-13; TAB Comments at 4-5; Golden Orange Broadcasting Company (Golden Orange) Comments at 2 (owner of a California television station); Evening Post Comments at 13-14; CRB Comments at 11; Curators Comments at 7-8;

requirement would require race-based decision-making and would pressure stations to make hiring decisions on the basis of race.<sup>343</sup> NAB similarly finds the proposed requirement for stations to assess the productivity of their recruitment sources to “instill improper pressures,” though it does not specify what stations will be “pressured” to do that is “improper.”<sup>344</sup> Institute complains that the applicant monitoring requirement replaces “an unconstitutional system of proportional hiring with an equally flawed system of proportional recruiting.”<sup>345</sup> It charges that the “true aim” of the policy is to ensure “proportional numbers of minorities are in the applicant pool rather than assuring that job vacancies are advertised in a nondiscriminatory manner.”<sup>346</sup>

214. Third, some commenters assert that reinstatement of the requirement that broadcasters file the annual employment report on Form 395-B “threatens to improperly force stations to consider race or gender when hiring.”<sup>347</sup> For example, while acknowledging that the Commission stated that it will use the data submitted in these reports only to monitor industry trends, NAB “opposes reinstatement of this reporting requirement because the Commission has not guaranteed that the Commission or others will not use the collected information against an individual broadcaster in case the ‘numbers’ look low.”<sup>348</sup>

215. Fourth, a few commenters assert that proposed regulations requiring that broadcasters and cable entities exercise care to ensure that their selection techniques and tests, seniority practices, promotional practices, fringe benefit policies and dealings with labor unions do not have the effect of discriminating against qualified minorities or women raise equal protection concerns. They argue that these provisions are subject to strict scrutiny because they increase stations’ and cable entities’ race consciousness and pressure them to make race-conscious employment decisions.<sup>349</sup> Regarding the proposed

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Institute Comments at 2-6; ACLJ Comments at 2-3; 46 Named StBAs Reply Comments at 9-10.

<sup>343</sup> 46 Named StBAs Comments at 10; 46 Named StBAs Reply Comments at 9-10.

<sup>344</sup> NAB Comments at 25-27. *See also* Curators Comments at 7 (targeted recruitment coupled with requirement for analysis of productivity of sources would “pressure stations to make race-conscious hiring decisions”); Golden Orange Comments at 2. Golden Orange argues that any self-assessment requirement that focuses on the results of the outreach program, rather than the employer’s outreach efforts, would create the “pressure” that the court found offensive in *Lutheran Church*.

<sup>345</sup> Institute Comments at 5.

<sup>346</sup> *Id.*

<sup>347</sup> NAB Comments at 28. *See also* 46 Named StBAs Comments at 11-12; 46 Named StBAs Reply Comments at 11-12.

<sup>348</sup> NAB Comments at 28. *See also* 46 Named StBAs Comments at 11-12; NAB Reply Comments at 11.

<sup>349</sup> 46 Named StBAs Comments at 12; Curators comments at 7-8; PLF Comments at 3-4; Roger Clegg Comments (Attachment). PLF and 46 Named StBAs argue that the requirement to avoid the use of selection techniques and tests that have the effect of discriminating against minorities and women is more stringent than the parallel Title VII requirement; the latter, they argue, permits employers to use tests that the employer demonstrates are job related even if they have a disparate impact on minorities and women. *See* 46 Named StBAs Comments at 12-13; PLF Comments at 4. As discussed below, the Commission requirement was never intended to be more stringent than the parallel Title VII requirement, and, in fact, the Commission will apply its requirement in a less stringent manner than the Title VII requirement. Thus, the 46 Named StBAs and PLF have no cause for

requirement that employers refrain from discriminating in making hiring and promotion decisions, one commenter asserts that the “FCC makes plain that stations are expected to recruit, hire, and promote minorities and women, even if they do not have the qualifications or pass the tests required of other personnel.”<sup>350</sup>

216. Finally, the commenters who claim that our proposed rules would be subject to strict scrutiny under the Equal Protection Clause generally also assert that they are unlikely to withstand such scrutiny because they are not narrowly tailored to serve a compelling governmental interest.<sup>351</sup>

217. Since the new EEO program requirements we adopt today impose several distinct obligations, we will address the constitutionality of each. The basic recruitment obligation we impose gives broadcasters and cable entities discretion to recruit from whatever sources they choose as long as they widely disseminate information concerning job vacancies so that all qualified persons, including minorities and women, have an equal opportunity to apply for the position. Thus, this basic recruitment obligation requires fair and active outreach to all qualified persons, as many commenters advocate.<sup>352</sup> The courts have consistently held that recruitment measures that are designed to *expand* the applicant pool, and that do not favor anyone *in* the applicant pool on the basis of race, are race-neutral and are not subject to strict scrutiny.<sup>353</sup> No commenter has cited any case, and we are not aware of any case, that has ever held inclusive outreach requirements to be constitutionally suspect, much less unconstitutional. Indeed, the court in *Lutheran Church* held that “[i]f the regulations merely required stations to implement racially

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complaint in this regard.

<sup>350</sup> PLF Comments at 4.

<sup>351</sup> See, e.g., Evening Post Comments at 16-20; S&B Comments at 15-22; Institute Comments at 6-8.

<sup>352</sup> See, e.g., VAB/NCAB Comments at 7-8; CRB Comments at 11. CRB, representing cable companies, urges that “[r]ather than require certain outreach thresholds or targets for particular classes, the Commission simply should require nondiscriminatory and aggressive outreach to all segments of the population.” CRB Comments at 11. Similarly, VAB/NCAB, representing broadcasters, does not oppose the imposition of recruitment requirements, but urges the Commission to adopt EEO requirements that “focus on whether a broadcaster is acting in a fair and nondiscriminatory manner and has taken reasonable steps to provide employment opportunities to all qualified persons.” VAB/NCAB Comments at 7-8.

<sup>353</sup> See *Raso v. Lago*, 135 F.3d 11 (1st Cir. 1998) (curtailment of statutory preference to reside in redeveloped housing granted to former residents of area, most of whom were white, in order to make some of apartments available to all applicants regardless of race was not subject to strict scrutiny); *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997) (affirmative efforts to recruit women did not constitute reverse discrimination or support a finding that employer’s reasons for hiring a woman were pretexts); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994) (both voluntary and consent decree provisions requiring recruitment of Black and women employees viewed by court as race neutral measures); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-58 (11th Cir. 1994) (*Peightal*) (affirmative action plan for county fire fighters designed to remedy past discrimination held narrowly tailored, in part, because fire department had tried “race-neutral” measures such as recruitment outreach to minorities and women in an attempt to diversify its applicant pool, with only limited success); *Shuford v. Alabama State Board of Education*, 897 F. Supp. 1535, 1553 (M.D. AL 1995) (“*Shuford*”) (outreach requirements are not subject to strict scrutiny because they only expand the pool of qualified applicants).

neutral recruiting and hiring programs, the equal protection guarantee would not be implicated.”<sup>354</sup> The basic outreach requirement we adopt today does just that, and thus raises no equal protection concerns.

218. While we have decided, for policy reasons, not to require broadcasters to use recruitment sources specifically targeting minority and female job applicants, we disagree with those commenters who argue that a targeted recruitment requirement would be constitutionally suspect. As long as recruitment requirements are inclusive and do not afford any group superior access to information about job vacancies or pressure employers to make employment decisions on the basis of race or gender, we do not believe that they would raise constitutional concerns.<sup>355</sup> Nevertheless, we have decided, as discussed above, to afford broadcasters considerable discretion in selecting the recruitment sources that will disseminate vacancy information most effectively to everyone in their communities, including minorities and women, rather than dictating the number or type of sources that all broadcasters must use. Thus, the constitutional objections raised by some commenters to targeted recruitment requirements are moot at the present time. As discussed above, we intend to monitor the effectiveness of the new rules to determine if different requirements are in order.

219. In addition to the wide dissemination requirement, broadcasters and cable entities will be required to undertake two kinds of supplemental recruitment measures: (1) sending notices of job vacancies to any recruitment organization that requests such notice, and (2) conducting supplemental recruitment initiatives selected from a menu of options, such as periodic participation in job fairs and internship programs. Under the first supplemental requirement, any national or local community organization that distributes information about employment opportunities to job seekers or refers job seekers to employers will be entitled to request notice of openings without regard to the organization’s affiliation with members of any racial, ethnic, or gender group. Thus, this requirement will not favor any group based on a suspect classification, and will not require employers to take any action based on a suspect classification. It will simply ensure that if, despite the employer’s good faith efforts to widely disseminate information concerning job vacancies, any group believes its constituents are not adequately being reached or simply wants to assist in disseminating the information, it can do so. Similarly, the supplemental measures selected from the menu do not require employers to take any action based on race, ethnicity or gender, and do not favor or disadvantage any job applicant based on his or her race, ethnicity or gender. They are simply designed to supplement employers’ vacancy-specific recruitment actions with longer term recruitment and training activities that will raise the level of community awareness of opportunities in the broadcasting and cable industries and develop a talent pool for companies to draw from as future vacancies occur.

220. Further, the records that broadcasters and cable entities will be required to keep, place in their public files, or file with the Commission to document compliance with their basic and supplemental recruitment obligations are race neutral. They are designed to provide a means to verify that broadcasters and cable entities have widely disseminated information concerning their vacancies and notified requesting

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<sup>354</sup> *Lutheran Church*, 141 F.3d at 351.

<sup>355</sup> *See Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994) (consent decree provisions requiring strengthened recruitment of Blacks and women viewed favorably by court); *Peightal*, 26 F.3d at 1557-58 (affirmative action plan for county firefighters was held to be narrowly tailored, in part, because fire department had previously tried “race-neutral” measures such as recruitment outreach to minorities and women in an attempt to diversify applicant pool, with only limited success).

organizations before filling those vacancies. The information is also designed to verify that broadcasters and cable entities have considered in good faith the applicants who respond to their outreach efforts. Thus, the requirements of the rules that broadcasters and cable entities recruit for all vacancies encompasses an obligation to consider the applications received as part of the hiring process.

221. Many broadcasters and cable entities who filed comments in this proceeding have asked for complete discretion regarding how to conduct their outreach programs to suit their own needs and communities. We have decided to give them the option of designing their own outreach programs, subject only to the requirements that they widely disseminate information concerning job openings (which they can do through any channels they desire) and monitor the composition of their applicant pools so that they can determine whether their outreach efforts have in fact been successful in permeating their community. Several commenters argue that requiring employers to maintain records of the race, ethnicity and gender of job applicants generated by their recruitment sources and change sources if their recruitment sources prove unproductive or their efforts fail to reach the entire community would be constitutionally suspect. They claim that such requirements would pressure stations to make hiring decisions on the basis of race or otherwise “instill improper pressures.”<sup>356</sup> Forty-six Named StBAs assert that analyzing the representativeness of applicant pools “will effectively create a quota system for hiring.”<sup>357</sup> None of these commenters explains, however, how monitoring the race, ethnicity or gender of applicants will pressure employers to prefer anyone who applies for a job on the basis of race or gender or take any other action that could be prejudicial to any job applicant, and we do not believe it will. Indeed, in enforcing the recruitment requirements, the Commission will not even know the race, ethnicity or gender of the persons hired from the applicant pools. Thus, the regulatory scheme will not pressure employers to favor any applicant on the basis of his or her race, ethnicity or gender because granting a preference based on those factors will not improve the employer’s posture under that scheme or make its EEO practices less likely to be scrutinized by the agency.

222. Nor is there any merit in the argument that we are instituting an unconstitutional system of “proportional recruiting.”<sup>358</sup> The sole purpose of the applicant pool data is to assist employers and the agency in evaluating whether employer outreach efforts are inclusive. We have made it clear that there is no requirement of applicant pool “proportionality” to the composition of the local work force, nor could there be, since employers cannot control who applies for a position. Nevertheless, we believe that monitoring the composition of its applicant pools will give an employer some useful information about whether its outreach efforts are missing a significant sector of the community, such that it should modify its recruitment measures to be more inclusive. For example, if an employer’s outreach efforts fail to attract any Hispanic applicants in a metropolitan area with a large Hispanic population, it may decide that the recruitment sources it is using are not disseminating its job advertisements as widely as it thought, and it should take action to rectify the situation. Such action might consist, for example, in advertising its openings in a newspaper of wider circulation or perhaps in a Spanish-language newspaper. We do not see how any job applicant would be prejudiced by either the collection of the information or the subsequent

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<sup>356</sup> See NAB Comments at 25-27; 46 Named StBAs Comments at 9-10.

<sup>357</sup> 46 Named StBAs Comments at 9-10.

<sup>358</sup> Institute Comments at 5. See also 46 Named StBAs Comments at 9, asserting that the “fatal flaw” in the proposed regulatory scheme is the “requirement that hiring pools be proportional to the minority population.”

broadening of outreach efforts. As the court observed in *Shuford*,<sup>359</sup> no job applicant can rightly complain about being forced to compete with a larger field of qualified candidates.

223. The cable entities who support the collection of data concerning the race and gender of applicants recognize that there is a difference between reaching out widely in recruiting and making discriminatory hiring decisions.<sup>360</sup> Our new rule requires broad outreach, and we believe that employers trying to reach out in good faith to all parts of their communities may find it helpful to collect data to monitor the effectiveness of their efforts. But the collection of statistics to test whether broad outreach has been effective in no way requires or fosters hiring discrimination, which is unlawful under the Commission's rules and Title VII.<sup>361</sup>

224. In addition, we note that the alternative recruitment program is completely optional; any employer who prefers not to collect data concerning the race, ethnicity or gender of its applicants can comply with the basic and supplemental recruitment requirements fashioned by the Commission, none of which require the collection of such data. No broadcaster or cable entity has cause to complain about a program with which it is not required to comply.

225. We also do not believe that there is any substance to the argument that reinstatement of the Form 395-B filing requirement implicates equal protection concerns because it will force or pressure broadcasters to consider race, ethnicity or gender in making hiring decisions. We stated in the *NPRM* and repeat in this *Report and Order* that we will require the filing of that data only for the purposes of monitoring industry trends and reporting to Congress. We also state in the clearest possible terms that we will *not* use the data to assess broadcasters' or cable entities' compliance with our EEO rules.

226. Thus, contrary to NAB's contention, we *have* guaranteed that we will not use the Form 395-B information against any broadcaster in enforcing our EEO rules. Moreover, having stated that we will not use the employment profile data collected on Form 395 to assess compliance with our EEO rules, we will be legally foreclosed from doing so.<sup>362</sup> Therefore, no broadcaster or cable entity has reasonable cause for concern that the Form 395 employment profile data will be used against it in FCC enforcement actions. The fact that a few commenters suggest, without any factual foundation, that an agency has a concealed motive, cannot thereby deprive the agency of authority to adopt requirements that are clearly

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<sup>359</sup> 897 F. Supp. at 1552-53.

<sup>360</sup> See, e.g., TCI Comments at 14-16; NCTA Comments at 13-14.

<sup>361</sup> Moreover, the fact that in some circumstances statistical evidence relating to the employment of minorities and women is relevant does not render a nondiscrimination or outreach requirement constitutionally suspect. Statistical evidence plays a key role in determining compliance with Title VII and other statutes barring employment discrimination, but those statutes plainly are not unconstitutional. See B. Lindemann and P. Grossman, *Employment Discrimination Law*, 34-45 (statistics in disparate treatment cases), 89-106 (statistics in adverse impact cases), 1687-1740 (statistical proof generally).

<sup>362</sup> See, e.g., *Service v. Dulles*, 354 U.S. 363, 388-89 (1957) (Department of State was legally obligated to comply with its own regulations governing discharge of employees, notwithstanding more permissive statutory provisions); *Gardner v. FCC*, 530 F.2d 1086, 1089-91 (D.C. Cir. 1976) (an agency is bound by its own rules and established procedures). Of course, we are also foreclosed by the *Lutheran Church* decision from using the Form 395-B employment profile data to assess compliance with our EEO rules.

within its statutory authority. Of course, we cannot guarantee that no third party will file a petition against a broadcaster based on the Form 395-B employment profile data -- or some other equally inadequate basis, for that matter. But we will dismiss any such petition summarily.

227. Finally, a few commenters complain that even those provisions of the Commission's proposed rules that would merely require broadcasters and cable entities to take steps to assure that their policies and procedures for hiring and promoting employees do not discriminate against any person on the basis of race, ethnicity, or gender are constitutionally suspect because they "would collectively add to the pressure on stations to take race-based employment actions ...."<sup>363</sup> These commenters appear to be arguing that even a race-neutral measure that is designed to *prevent racial discrimination* is subject to strict scrutiny because it is "race conscious."<sup>364</sup> Under this reasoning, Title VII and all other laws banning discrimination would be subject to strict scrutiny. The only authority cited for this novel proposition is *Lutheran Church*, but nothing in that decision supports it. As noted above, the court stated in *Lutheran Church* that race-neutral outreach or nondiscrimination requirements would raise no constitutional concerns.<sup>365</sup> We do not believe that rules requiring only nondiscriminatory employment decisions could reasonably be viewed as pressuring employers to "take race-based employment actions ...."<sup>366</sup> Indeed, the Supreme Court plurality explained in *City of Richmond v. J.A. Croson*,<sup>367</sup> that a government entity is free to employ a "whole array of race-neutral devices" to ensure that individuals or businesses provide equal opportunities to minorities and do not discriminate against them:

Many of the formal barriers to new entrants ... may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race. The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. *Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.*<sup>368</sup>

228. Thus, we are confident that we can take steps to ensure that minorities and women are not either intentionally or "unthinkingly" denied an equal opportunity to compete for jobs in the broadcast and cable industries without treading on rights guaranteed by the Equal Protection Clause. Indeed, nondiscrimination and inclusive outreach requirements like those we adopt today advance the principle that

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<sup>363</sup> 46 StBAs Comments at 13. *See also* PLF Comments at 3-5.

<sup>364</sup> PLF contends that, by requiring that broadcasters promote employees in a nondiscriminatory fashion and avoid the use of selection techniques and tests that have the effect of discriminating against minorities, the FCC expects stations "to recruit, hire, and promote minorities and women, even if they do not have the qualifications or pass the tests required of other personnel." PLF Comments at 4. Neither the cited rules nor anything the Commission has said can reasonably be interpreted in the manner suggested by PLF.

<sup>365</sup> *See Lutheran Church*, 141 F.3d at 351.

<sup>366</sup> 46 Named StBAs Comments at 13.

<sup>367</sup> 488 U.S. 469 (1989).

<sup>368</sup> *Id.* at 510 (emphasis added).

is at the heart of the Equal Protection Clause: equal protection of the laws and equal opportunity for all citizens, regardless of race or gender. It turns equal protection analysis on its head to suggest that they are suspect under it.

## V. CONCLUSION

229. In this *Report and Order*, we establish a new broadcast EEO Rule and policies and amend our cable EEO rules and policies. We believe that the rules and policies adopted herein are consistent with the court's decision in *Lutheran Church*, while at the same time ensuring equal employment opportunity in the broadcast and cable industries through vigorous outreach and prevention of discrimination. We acknowledge that some commenters urged us to adopt remedial rules, or, alternatively, initiate a national employment disparity study, pursuant to *City of Richmond v. Croson* and *Adarand Constructors v. Pena*, to gather a record sufficient to sustain a remedial approach. We will not pursue either of these alternatives at this time, but will keep MM Docket No. 98-204 open to allow any interested party to submit whatever information it deems germane to these issues and proposals. We will consider any submissions and determine what, if any, action is appropriate at a later date.

## VI. PROCEDURAL MATTERS AND ORDERING CLAUSES

230. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *NPRM*. The Commission sought written public comments on the possible significant economic impact of the proposed policies and rules on small entities in the *NPRM*, including comments on the IRFA. Pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, a Final Regulatory Flexibility Analysis ("FRFA") is contained in Appendix B.

231. *Paperwork Reduction Act of 1995 Analysis.* The actions herein have been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to, and become effective upon, approval by the Office of Management and Budget as prescribed by the Act. One commenter submits that the FCC's proposed collection of information from broadcasters and cable entities is not necessary for the legitimate functions of the Commission, that it therefore does not have practical utility, and that the administrative burden should be reduced by not collecting it.<sup>369</sup> We disagree. As stated in the *NPRM*, the court in *Lutheran Church* did not abrogate the Commission's authority to require broadcasters and cable entities to file employment data in order to enable the Commission to analyze industry trends or prepare annual trend reports.<sup>370</sup> Furthermore, statutory provisions require the Commission to collect employment data for television and cable industries.<sup>371</sup> As we further stated in the *NPRM* and this *Report and Order*, knowledge of industry trends enables the Commission to monitor the effectiveness of, and need for, EEO rules and make appropriate recommendations to Congress for legislative change.

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<sup>369</sup> Oxley/Hall Comments at 2-3.

<sup>370</sup> *NPRM*, 13 FCC Rcd at 23023 (para. 49).

<sup>371</sup> *Id.*

232. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 634 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 554, this *Report and Order* IS ADOPTED, and Part 0, Part 73 and Part 76 of the Commission's Rules ARE AMENDED as set forth in attached Appendix C. It is our intention in adopting these rule changes that, if any provision of the rules, or the application thereof to any person or circumstance, are held to be unlawful, the remaining portions of the rules not deemed unlawful, and the application of such rules to other persons or circumstances, shall remain in effect to the fullest extent permitted by law.

233. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by the American Center for Law and Justice IS DISMISSED.

234. IT IS FURTHER ORDERED that the late-filed comments and reply comments in this proceeding are considered as part of the record in this proceeding.

235. IT IS FURTHER ORDERED that, pursuant to the Contract with America Advancement Act of 1996, the rule amendments set forth in Appendix C WILL BECOME EFFECTIVE either 60 days after their publication in the Federal Register or upon receipt by Congress of a report in compliance with the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, whichever is later, and the information collection contained in these rules will become effective 60 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

236. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

237. IT IS FURTHER ORDERED that MM Docket No. 96-16 is terminated.

238. IT IS FURTHER ORDERED that the present phase of MM Docket No. 98-204 is terminated. However, MM Docket No. 98-204 will remain open for the limited purpose described in paragraph 229 and to facilitate any additional proceedings upon further order of the Commission. This action does not affect the effective date of the EEO Rules adopted herein.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

## APPENDIX A

## LIST OF COMMENTING PARTIES

Comments

1. American Center for Law and Justice (ACLJ)
2. American Federation of Television and Radio Artists (AFTRA)
3. American Women in Radio and Television (AWRT)
4. Ameritech New Media, Inc. (Ameritech)
5. Association of America's Public Television Stations (APTS)
6. Camrory Broadcasting, Inc.; Chambers Communications Corp.; James Chladek; Continental Broadcasting, Inc.; Palm Beach Radio Broadcasting, Inc.; Prime Time Christian Broadcasting, Inc.; Radio 95, Inc.; and Shockley Communications Corporation (Camrory)
7. Christian Legal Society's Center for Law and Religious Freedom; Concerned Women for America; and Focus On the Family (CLS)
8. Church State Council of Seventh Day Adventists (Adventists)
9. Roger Clegg (Roger Clegg)
10. Cole, Raywid & Braverman (CRB)
11. Crawford Broadcasting Company (CBC)
12. Curators of the University of Missouri (Curators)
13. Delta Radio, Inc.; United Communications Corporation; Main Street Broadcasting Company, Inc.; Brooks Broadcasting, LLC; KMRI Radio, LLC; Pollack Broadcasting Company; WDAC Radio Company; Pinebrook Foundation, Inc.; Alpha & Omega Communications, LLC; Pollack/Belz Communication Company, Inc.; Pollack/Belz Broadcasting Company, LLC; Baldwin Broadcasting Company; Eagle III Broadcasting, LLC (Delta Radio)
14. Evening Post Publishing Company & Great Empire Broadcasting, Inc. (Evening Post)
15. Forty-Six Named State Broadcasters Associations (46 Named StBAs)
16. Golden Orange Broadcasting Company (Golden Orange)
17. Good News Radio (GNR)
18. Haley Bader & Potts (HBP)
19. Institute for Justice (Institute)
20. Minority Media and Telecommunications Council; African American Media Incubator; Alliance for Community Media; Alliance for Public Technology; American Civil Liberties Union; Black College Communications Association; Civil Rights Forum on Communications Policy; Cultural Environment Movement; Fairness and Accuracy in Reporting; League of United Latin American Citizens; Mexican American Legal Defense and Education Fund; Minority Business Enterprise Legal Defense and Education Fund; National Asian American Telecommunications Association; National Asian Pacific American Legal Consortium; National Association of Black Owned Broadcasters; National Association of Black Telecommunications Professionals; National Association for the Advancement of Colored People; National Association of Black Journalists; National Bar Association; National Council of La Raza; National Hispanic Media Coalition, including its Los Angeles, New York, Chicago, Tucson, Albuquerque, Phoenix and San Antonio Chapters; National Latino Telecommunications Taskforce; National Urban League; People for the American Way; Project on Media Ownership; Puerto Rican Legal Defense and Education Fund; Rainbow/PUSH Coalition; Telecommunications Advocacy Project; Telecommunications Research and Action Center; Women's Institute for Freedom of the Press (MMTC)
21. National Association of Broadcasters (NAB)
22. National Cable Television Association (NCTA)
23. National Hispanic Foundation for the Arts (NHFA)
24. National Religious Broadcasters (NRB)
25. New Jersey Broadcasters Association (NJBA)

26. NOW Foundation; NOW Legal Defense and Education Fund; Center for Media Education; Feminist Majority Foundation; Philadelphia Lesbian and Gay Task Force; Women's Institute for Freedom of the Press (NOW)
27. Office of Communication, Inc., United Church of Christ; National Council of the Churches of Christ in the U.S.A.; Office of Communication, Evangelical Lutheran Church in America; Presbyterian Church [U.S.A.]; United Methodist Church, Ecumenical Office; American Baptist Churches, USA; Black Citizens for a Fair Media (UCC)
28. Office of Management and Budget (OMB)
29. Michael Oxley/Ralph Hall - Members, United States Congress (Oxley/Hall)
30. Pacific Legal Foundation (PLF)
31. Patrice Rhodes (Patrice Rhodes)
32. Small Cable Business Association (SCBA)
33. Smithwick & Belendiuk, P.C. (S&B)
34. Laurey Tantra (Tantra)
35. Tele-Communications, Inc. (TCI)
36. Texas Association of Broadcasters (TAB)
37. Time Warner Cable (Time Warner)
38. United States Small Business Administration (SBA)
39. Doreen Vincent (Vincent)
40. Virginia Association of Broadcasters and North Carolina Association of Broadcasters (VAB/NCAB)
41. The WBUR Group (WBUR)
42. Suzanne White (Suzanne White)

#### Reply Comments

1. Americans United for Separation of Church and State (Americans United)
2. Eight Broadcast Groups (Eight Broadcast Groups)
3. Fisher Broadcasting Inc. (Fisher)
4. Forty-Six Named State Broadcasters Associations
5. Gerri L. Gagnon (Gerri L. Gagnon)
6. Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee)
7. Lincoln Broadcasting Company, (Lincoln)
8. Minority Media and Telecommunications Council; African American Media Incubator; Alliance for Community Media; Alliance for Public Technology; American Civil Liberties Union; Black College Communications Association; Civil Rights Forum on Communications Policy; Cultural Environment Movement; Fairness and Accuracy in Reporting; League of United Latin American Citizens; Mexican American Legal Defense and Education Fund; Minority Business Enterprise Legal Defense and Education Fund; National Asian American Telecommunications Association; National Asian Pacific American Legal Consortium; National Association of Black Owned Broadcasters; National Association of Black Telecommunications Professionals; National Association for the Advancement of Colored People; National Association of Black Journalists; National Bar Association; National Council of La Raza; National Hispanic Media Coalition, including its Los Angeles, New York, Chicago, Tucson, Albuquerque, Phoenix and San Antonio Chapters; National Latino Telecommunications Taskforce; National Urban League; People for the American Way; Project on Media Ownership; Puerto Rican Legal Defense and Education Fund; Rainbow/PUSH Coalition; Telecommunications Advocacy Project; Telecommunications Research and Action Center; Women's Institute for Freedom of the Press
9. National Association of Broadcasters
10. National Cable Television Association
11. NOW Foundation; NOW Legal Defense and Education Fund; Center for Media Education; Feminist

Majority Foundation; Philadelphia Lesbian and Gay Task Force; Women's Institute for Freedom of the Press

12. Office of Communication, Inc., United Church of Christ; National Council of the Churches of Christ in the U.S.A., Communication Commission; Evangelical Lutheran Church in America; Presbyterian Church [U.S.A.]; United Methodist Church; American Baptist Churches, USA; Black Citizens for a Fair Media

## APPENDIX B

## FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Notice of Proposed Rule Making (NPRM)* in this proceeding.<sup>2</sup> The Commission sought written public comments on the possible significant economic impact of the proposed policies and rules on small entities in the *NPRM*, including comments on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

**A. Need for and Objectives of the Rules**

The D.C. Circuit court in *Lutheran Church - Missouri Synod v. FCC*<sup>3</sup> held that the equal employment opportunity (EEO) program requirements of the Commission's EEO Rule for broadcasters were unconstitutional and remanded to the Commission to determine whether we have authority to enforce an employment nondiscrimination requirement. The *Report and Order* adopts new EEO rules and policies for broadcasters and cable entities, including multichannel video programming distributors (MVPDs), consistent with the *Lutheran Church* decision. The new EEO rules retain the FCC's anti-discrimination provisions and prohibit broadcasters and cable entities from engaging in discriminatory practices. In addition, the rules require broadcasters and cable entities to establish and maintain an EEO program designed to provide equal opportunity for everyone, including minorities and women. The new rules emphasize inclusive recruitment outreach and prohibit entities from preferring members of any racial, national origin, or gender group in hiring. We note that SBA has approved our approach for small stations and small cable entities in this *Report and Order*.<sup>4</sup>

**B. Summary of Significant Issues Raised by the Public Comments in Response to the IRFA**

Three comments were filed specifically in response to the IRFA.<sup>5</sup> SCBA states that EEO recruiting, recordkeeping and reporting requirements substantially impact small cable systems since they have limited financial and administrative resources. It urges the Commission to consider its comments regarding small cable entities filed in response to the *NPRM*.<sup>6</sup> For the purpose of providing EEO relief to small cable operators, SCBA believes that a small cable company should be defined by its number of employees, and

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>2</sup> See *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policy and Termination of the EEO Streamlining Proceeding*, 13 FCC Rcd 23004 (1998).

<sup>3</sup> 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh'g denied*, 154 F.3d 487, *pet. for reh'g en banc denied*, 154 F.3d 494 (D.C. Cir 1998) ("*Lutheran Church*").

<sup>4</sup> Letter from Aida Alvarez, Administrator, U.S. Small Business Administration, to Roy Stewart, Chief, Mass Media Bureau, Federal Communications Commission (January 19, 2000).

<sup>5</sup> Comments of Small Cable Business Association (SCBA), U.S. Small Business Administration (SBA), and Congressmen Michael G. Oxley and Ralph M. Hall (Oxley/Hall).

<sup>6</sup> SCBA Comments at 3.

not its amount of gross revenues, as currently defined by the SBA. It states that a cable system's gross revenues or number of subscribers does not correspond well to EEO rules. We note that the *Report and Order* considers SCBA's concerns and provides relief to small cable employment units on the basis of unit staff size, and by streamlining reporting and recordkeeping requirements for all cable entities.

The SBA urges the FCC to look at the economic impact of its proposed EEO requirements on small stations consistent with the RFA, and if necessary, to maintain its EEO exemptions for small stations defined as those with fewer than five employees.<sup>7</sup> We note that this FRFA conforms to the RFA, and that the Report and Order continues to exempt broadcast station employment units with fewer than five full-time employees from the FCC's specific EEO requirements, as well as providing additional relief for employment units that have between five and ten full-time employees.

### C. Description and Estimate of the Number of Small Entities to Which the Rules Would Apply

The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules.<sup>8</sup> Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. § 601(6). The RFA, 5 U.S.C. § 601(3), generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. 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 SBA. Pursuant to 4 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 SBA 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."<sup>9</sup> The rules we adopt in this *Report and Order* will affect broadcast stations and cable entities, including multichannel video programming distributors.

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 following estimates of small businesses to which the new rules will apply do not exclude any radio or television station from the definition of a small business on this basis and are therefore overinclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. As discussed further below, we could not fully apply this criterion, and our estimates of small businesses to which the rules may apply may be overinclusive to this extent. Last, with respect to applying SBA size standards revenue caps, the SBA has defined "annual receipts" specifically in 13 C.F.R. § 121.104, and its calculations include an averaging process. We do not currently require submission of financial data from licensees that we could use in applying the SBA's definition of a small business. Thus, for purposes of estimating the number of small entities to which the rules apply, we are limited to considering the revenue

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<sup>7</sup> SBA Comments at 1.

<sup>8</sup> 5 U.S.C. § 604(a)(3).

<sup>9</sup> While we stated in the NPRM that we tentatively believe that the SBA's definition of "small business" in this context greatly overstates the number of radio and television broadcast stations that are small businesses and is not suitable for purposes of determining the impact of the proposals on small television and radio stations, for purposes of this FRFA, we include the SBA's definition in determining the number of small businesses to which the rules would apply.

data that are publicly available, and those data may not correspond completely with the SBA definition of annual receipts.

*Television and Radio Stations:* The rules in this *Report and Order* will apply to television and radio stations. The Small Business Administration defines a television broadcasting station that has no more than \$10.5 million in annual receipts as a small business.<sup>10</sup> Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.<sup>11</sup> Included in this industry are commercial, religious, educational, and other television stations. Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.<sup>12</sup>

There were 1,509 full-service television stations operating in the nation in 1992.<sup>13</sup> That number has remained fairly constant as indicated by the approximately 1,616 operating full-service television broadcasting stations in the nation as of September 1999.<sup>14</sup> For 1992<sup>15</sup> the number of television stations that produced less than \$10.0 million in revenue was 1,155 establishments.<sup>16</sup> Thus, the rules will affect approximately 1,616 television stations; approximately 77%, or 1,244 of those stations are considered small businesses.<sup>17</sup> These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television affiliated companies.

The rule changes would also affect radio stations. The SBA defines a radio broadcasting station that has no more than \$5 million in annual receipts as a small business.<sup>18</sup> A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.<sup>19</sup> Included in this

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<sup>10</sup> 13 C.F.R. § 121.201, Standard Industrial Code (SIC) 4833.

<sup>11</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

<sup>12</sup> *Id.*

<sup>13</sup> FCC News Release No. 31327, Jan. 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, Appendix A-9.

<sup>14</sup> FCC News Release, Broadcast Station Totals as of September 30, 1999 (released November 22, 1999).

<sup>15</sup> Census for Communications' establishments are performed every five years ending with a "2" or "7". See Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, note 53, III.

<sup>16</sup> The amount of \$10 million was used to estimate the number of small business establishments because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$10.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

<sup>17</sup> We use the 77 percent figure of TV stations operating at less than \$10 million for 1992 and apply it to the 1999 total of 1,616 TV stations to arrive at stations categorized as small businesses.

<sup>18</sup> 13 C.F.R. § 121.201, SIC 4832.

<sup>19</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, Appendix A-9.

industry are commercial, religious, educational, and other radio stations.<sup>20</sup> Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.<sup>21</sup> The 1992 Census indicates that 96 percent (5,881 of 6,127) of radio station establishments produced less than \$5 million in revenue in 1992.<sup>22</sup> Official Commission records indicate that 11,334 individual radio stations were operating in 1992.<sup>23</sup> As of September 1999, official Commission records indicate that 12,615 radio stations were operating.<sup>24</sup>

*Small cable entities, including MVPDs:* The rule changes would also affect small cable entities, including MVPDs. SBA has developed a definition of a small entity for cable and other pay television services, which includes all such companies generating \$11 million or less in annual receipts.<sup>25</sup> This definition includes cable system operators, closed circuit television services, direct broadcast satellite services (DBS), multipoint distribution systems (MDS), satellite master antenna systems (SMATV), and subscription television services. According to the Bureau of the Census, there were 1,423 such cable and other pay television services generating less than \$11 million in revenue that were in operation for at least one year at the end of 1992.<sup>26</sup> Below we discuss these services to provide a more succinct estimate of small entities.

*Cable Systems:* The Commission has developed, with SBA's approval, its own definition of small cable system operators. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.<sup>27</sup> Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable companies at the end of 1995.<sup>28</sup> Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the rules proposed herein.

The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> The Census Bureau counts multiple radio stations located at the same facility as one establishment. Therefore, each co-located AM/FM combination counts as one establishment.

<sup>23</sup> FCC News Release No. 31327, Jan. 13, 1993.

<sup>24</sup> FCC News Release, Broadcast Station Totals as of September 30, 1999 (released November 22, 1999).

<sup>25</sup> 13 C.F.R. § 121.201, SIC 4841.

<sup>26</sup> 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D, SIC 4841 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

<sup>27</sup> 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 6393 (1995).

<sup>28</sup> Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

United States and is not affiliated with any entity or entities whose gross annual revenue in the aggregate exceeds \$250,000,000.<sup>29</sup> The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$520 million in the aggregate.<sup>30</sup> Based on available data, we find that the number of cable operators serving 617,000 subscribers or fewer totals 1,450.<sup>31</sup> Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, 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.

*MDS:* The Commission has defined “small entity” for purposes of the auction of MDS as an entity that, together with its affiliates, has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.<sup>32</sup> This definition of a small entity in the context of MDS auctions has been approved by the SBA.<sup>33</sup> The Commission completed its MDS auction in March 1996 for authorizations in 493 basic trading areas (BTAs). Of 67 winning bidders, 61 qualified as small entities.<sup>34</sup>

MDS also includes licensees of stations authorized prior to the auction. As noted, the SBA has developed a definition of small entities for pay television services, which includes all such companies generating \$11 million or less in annual receipts.<sup>35</sup> This definition includes multipoint distribution systems, and thus applies to MDS licensees and wireless cable operators that did not participate in the MDS auction. Information available to us indicates that there are 832 of these licensees and operators that do not generate revenue in excess of \$11 million annually. Therefore, for purposes of this FRFA, we find there are approximately 892 small MDS providers as defined by the SBA and the Commission’s auction rules, and some of these providers may be subject to our EEO rules.

*DBS:* As of November 1999, there are four DBS licensees, one of which is not in operation. Providing DBS service requires a great investment of capital to build, launch, and operate satellite systems. Typically, small businesses do not have the financial ability to become DBS licensees because of the high implementation costs associated with launching satellites. Most recent industry statistics suggest that the revenue attributed to DBS subscribers for EchoStar was \$682.8 million for the year of 1998 and \$1.55 billion for DIRECTV. We do not have similar revenue information for the third operating licensee, Dominion Video Satellite, Inc. However, we do not believe that any DBS licensees could be categorized as

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<sup>29</sup> 47 U.S.C. § 543(m)(2).

<sup>30</sup> 47 C.F.R. § 76.1403(b) (SIC 4833)

<sup>31</sup> Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>32</sup> 47 C.F.R. § 21.961(b)(1).

<sup>33</sup> *See Amendment of Parts 21 and 74 of the Commission’s Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995).

<sup>34</sup> One of these small entities, O’ahu Wireless Cable, Inc., was subsequently acquired by GTE Media Ventures, Inc., which did not qualify as a small entity for purposes of the MDS auction.

<sup>35</sup> 13 C.F.R. § 121.201.

small businesses.

*Estimates Based on Staff Size:* As described, for purposes of providing relief from our EEO rules for entities with fewer staff resources, the *Report and Order* classifies such entities by number of employees. We estimate that, in 1997, the total number of full-service broadcast stations with fewer than five employees was 5,186, of which 340 were television stations.<sup>36</sup> Similarly, we estimate that, in 1997, 2,750 cable system or SMATV employment units employed fewer than six full-time employees. Also, in 1997, 725 MVPD employment units employed fewer than six full-time employees.

We also estimate that, in 1997, the total number of full-service broadcast stations with five to ten employees was 2,145, of which 200 were television stations.<sup>37</sup> Similarly, we estimate that, in 1997, 322 cable system or SMATV employment units employed six to ten full-time employees. Also, in 1997, 65 MVPD employment units employed six to ten full-time employees.

#### **D. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

The *Report and Order* adopts changes to existing EEO recordkeeping and reporting requirements. It also specifies which EEO materials are required to be kept in the public inspection file. All broadcasters and cable entities must adhere to the EEO rules' general anti-discrimination provisions. Broadcasters with station employment units of five to ten full-time employees are provided some relief from EEO requirements, and station employment units of fewer than five full-time employees are exempt altogether, with the exception that all broadcasters are subject to the nondiscrimination requirement and must report any employment discrimination complaints filed against them. Cable employment units, including MVPD employment units, employing six to ten full-time employees are also provided some relief from the *Report and Order's* specific EEO program requirements, and cable employment units with fewer than six full-time employees are not required to demonstrate compliance with the EEO program requirements. Generally, no special skills will be necessary to comply with the requirements.

Specifically, the *Report and Order* requires broadcasters and cable entities to widely disseminate information concerning job vacancies. Additionally, broadcasters and cable entities must undertake two supplemental recruitment measures described herein. The first supplemental recruitment measure requires broadcasters and cable entities to provide notification of full-time job vacancies to any requesting organization if the organization regularly distributes information about employment opportunities or refers job seekers to employers. Depending on the size of a station's staff, the second supplemental recruitment measure requires broadcasters to engage in at least four (for station employment units with more than ten full-time employees) or two (for station employment units with five to ten full-time employees) of the following menu options every two years: job fairs, job banks and other general outreach efforts, scholarship programs, in-house training programs, mentoring programs, community events related to employment opportunities in the industry, industry career events/programs by educational institutions, internship programs, the listing of upper-level vacancies in a job bank or newsletter of media trade groups whose membership includes substantial participation of women and minorities, and other activities to disseminate information regarding industry employment opportunities, as designed by the broadcaster.

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<sup>36</sup> We base this estimate on a compilation of 1997 Broadcast Station Annual Employment Reports (FCC Form 395-B), performed by staff of the Equal Employment Opportunity Branch, Mass Media Bureau, FCC.

<sup>37</sup> We base this estimate on a compilation of 1997 Broadcast Station Annual Employment Reports (FCC Form 395-B), performed by staff of the Equal Employment Opportunity Branch, Mass Media Bureau, FCC.

Cable employment units with more than ten full-time employees must engage in at least two options from the supplemental recruitment measures menu every year and cable employment units with six to ten full-time employees must engage in at least one option every year. Broadcasters and cable entities that desire more flexibility in their recruitment procedures may dispense with the supplemental recruitment measures as long as they are able to demonstrate success in achieving broad outreach to all segments of the community, as based upon an analysis of the recruitment source, race, national origin, and gender of the applicants attracted by their outreach efforts.

In addition, the *Report and Order* requires broadcasters and cable entities to retain records to demonstrate that they have recruited for all full-time permanent positions. To alleviate recordkeeping burdens, records may be kept in an electronic format. Such recordkeeping shall include: listings of all full-time vacancies filled, listings of recruitment sources, the address/contact person/telephone number of each recruitment source, and dated copies of advertisements and other documentation announcing vacancies. Broadcasters and cable entities engaging in supplemental recruitment measures must show organizations which requested notification and must also maintain: records and proof of participation in menu options, the total number and referral source of all interviewees, and dates of hire along with the name of the recruitment source which referred the hiree. These revised recordkeeping requirements significantly reduce the cost of compliance because broadcasters and cable entities that use this approach no longer have to keep extensive records on the race and gender of all applicants and interviewees, as was the case under our former EEO rules. For those broadcasters and cable entities that opt out of the supplemental recruitment measures, we will require that they maintain records of the recruitment source, race, national origin, and gender of qualified applicants in order to demonstrate that they widely disseminated information about job openings. Some broadcasters and cable entities, especially the ones with fewer employees, may have only a few vacancies generally available so that this option may be less burdensome to them. Broadcasters' records must be maintained until grant of the renewal application for the term during which the hiring activity occurred. Cable entities must retain their records for a minimum of seven years. To determine compliance with the EEO rules, the Commission may conduct inquiries requesting the records of a broadcaster or cable entity.

The *Report and Order* also requires stations and cable employment units to place annually the following EEO records in their local public inspection file: listings of full-time vacancies filled and recruitment sources used for each vacancy during the preceding year and the address/contact person/telephone number of each recruitment source. Broadcasters and cable entities engaging in supplemental recruitment measures must also include in their public file: an indication of the organizations requesting notification, the recruitment source of all full-time hires during the preceding year, the total number of persons interviewed for full-time vacancies during the preceding year as well as the total number of interviewees referred by each recruitment source for that vacancy, and a brief description of the menu option items undertaken during the preceding year. Those broadcasters and cable entities that opt out of the supplemental recruitment measures must include in their public file: the total number of applicants generated by each recruitment source utilized for any full-time vacancy during the preceding year, and the number of those applicants who were female and the number who were minority, identified by the applicable racial and/or national origin group with which each applicant is associated. Station units must retain the materials in their file until final action has been taken on the station's next license renewal application, and cable entities must retain their materials for a period of five years.

In addition, broadcasters must file a Statement of Compliance (Form 397) every second, fourth and sixth year of the license term, on the anniversary of the date the station is due to file its renewal, stating whether the station has complied with the EEO Rule. Broadcasters must place a copy of the latest Statement in the public inspection file. Broadcasters must also continue to place a copy of Form 396 ("Broadcast EEO

Program Report”) in the public inspection file. However, broadcasters are no longer required to place a copy of their station’s Form 395-B (“Broadcast Station Annual Employment Report”) in the public file. Cable employment units must continue to place a copy of Forms 395-A (“Cable Television Annual Employment Report”) or 395-M (“Multi-Channel Video Program Distributor Annual Employment Report”) in their public file. Also, most broadcasters must submit the contents of their station’s EEO public inspection file to the FCC at renewal time and midway through the license term for the Commission’s mid-term review and cable entities with six or more full-time employees must submit copies of their EEO public inspection file to the Commission every five years. However, broadcasters may limit their submissions to cover only the last 12 months of EEO activity. These changes reduce burdens on all station and cable employment units, both by more clearly defining what must be retained and by specifying the period of retention.

The *Report and Order* eliminates sections concerning specific categories of recruitment sources from Form 396-A (“Model EEO Program Report”). The *Report and Order* also eliminates many sections from Form 396, including sections requesting information on local labor force statistics, and the number of minority and female hires and promotions. The *Report and Order* provides further relief to broadcasters by enabling them to file only one Form 395-B for all commonly owned stations in the same market sharing at least one employee. Form 396 will include a new section for broadcasters to provide a narrative statement demonstrating how the station achieved broad and inclusive outreach. With respect to cable entities, the *Report and Order* eliminates all sections on Forms 395-A and 395-M concerning available labor force and occupational data, employee promotions and job hires.

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

This *Report and Order* sets forth the Commission’s new EEO rules and procedures, and considers all of the significant alternatives presented in the comments. We have determined that our finalized rules fulfill our public interest goals while maintaining minimal regulatory burdens and ease and clarity of administration. The new EEO rules and procedures are designed to keep essential filing and recordkeeping burdens at a minimum, and increase the efficiency of application processing for all broadcasters and cable entities, including small entities.

The *NPRM* requested comment on the Commission’s proposal to exempt small staff stations or stations located in small markets from specific EEO recordkeeping and reporting requirements. The *NPRM* proposed to increase the current staff exemption threshold of fewer than five full-time employees to ten or fewer full-time employees. There was no specific proposal regarding the market threshold for exempting stations. Although we received a few comments regarding small market exemptions, the majority of comments addressed our proposal to increase the staff exemption threshold. Commenters argue that an increase is warranted since stations with small staffs have limited personnel and financial resources to carry out EEO requirements. Other commenters argue against a total exemption from the broadcast EEO Rule for stations with ten or fewer employees since such stations play a pivotal role in providing essential entry-level opportunities into the broadcast industry. As discussed in the *Report and Order*, we believe that a total exemption is unnecessary since the new EEO Rule streamlines and clarifies recordkeeping requirements, thereby benefiting all broadcasters, including stations with fewer employees. For this same reason, we also believe that additional EEO relief is not warranted for small market stations. Such relief is already built into the new Rule, as further evidenced by the flexibility it affords broadcasters to tailor their EEO programs to their station’s particular circumstances, including market size. However, because fewer staff resources are available to them, we believe that station employment units with five to ten full-time employees, which are the smallest staff stations subject to our EEO program requirements, warrant

additional relief from EEO program requirements. Therefore, for those broadcasters employing supplemental recruitment measures, we will require station employment units with five to ten full-time employees to engage in only two of the menu options listed in the EEO Rule during each two-year period. Station employment units with more than ten full-time employees are required to engage in four menu options during each two-year period. While not providing a total exemption from our EEO Rule, this approach does provide additional EEO relief to station employment units with five to ten employees. Further, we will exempt radio station employment units with six to ten employees from new mid-term review procedures. Currently, mid-term reviews for all television stations with five or more full-time employees are required by statute. However, only about 200 television stations (or 13%) had between five and ten employees in 1997.<sup>38</sup> Also, a station will not qualify for relief if it shares one or more employees with one or more commonly owned stations in the same market and their combined staffs total more than ten full-time employees since such stations are considered one employment unit for EEO purposes.

We also received comments arguing that cable systems with small staffs should be provided EEO relief since they, too, have limited personnel and financial resources. Upon consideration, we will require cable employment units with six to ten full-time employees that use the supplemental recruitment measures to engage in only one option from the supplemental recruitment measures menu each year, as opposed to the two options required otherwise.

We will continue to exempt broadcast station employment units with fewer than five full-time employees from our specific EEO program requirements. In addition, cable employment units with fewer than six full-time employees will still not be required to demonstrate compliance with the EEO program requirements.

#### **F. Federal Rules that May Duplicate, Overlap, or Conflict with the EEO Rules**

Oxley/Hall maintain that the FCC's proposed EEO program substantially replicates the work of the Equal Employment Opportunity Commission (EEOC).<sup>39</sup> As we stated in the *Report and Order*, while the EEOC and FCC share as a common goal the elimination of discriminatory employment practices, the primary functions of the two agencies differ greatly. Whereas the EEOC reviews discrimination complaints in order to provide relief to victims of discrimination, the FCC's principal concern with respect to discrimination allegations is to determine the fitness of broadcasters and cable entities to fulfill their obligations under the Communications Act. Moreover, the *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 51 Fed. Reg. 21798 (1986), coordinates and minimizes overlap of the enforcement efforts of the two agencies.

**Report to Congress:** The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). In addition, the Commission's Consumer Information Bureau, Reference Information Center, will send a copy of this *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register.

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<sup>38</sup> We base this estimate on a compilation of 1997 Broadcast Station Annual Employment Reports (FCC Form 395-B), performed by staff of the Equal Employment Opportunity Branch, Mass Media Bureau, FCC.

<sup>39</sup> Oxley/Hall Comments at 3.

## APPENDIX C

**I. Part 1 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:****Subpart B - Delegated Authority**

Section 0.283 is revised by amending paragraph (b)(1)(iii) to read as follows:

**§ 0.283 Authority delegated.**

\* \* \* \* \*

(b) \* \* \*

(1) Petitions to deny, informal objections, and other petitions, directed against AM, FM, and TV applications for new or modified facilities, or for renewal, assignment or transfer of control, will be referred to the Commission if they:

(i) \* \* \*

(ii) \* \* \*

(iii) present documented allegations of failure to comply with the Commission's Equal Employment Opportunity rules and policies.

\* \* \* \* \*

**II. Part 73 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:****Subpart H - Rules Applicable to All Broadcast Stations**

Section 73.2080 is amended to delete the present language in its entirety and replace it with the following:

**§ 73.2080. Equal employment opportunities ("EEO").**

(a) *General EEO policy.* Equal opportunity in employment shall be afforded by all licensees or permittees of commercially or noncommercially operated AM, FM, TV or international broadcast stations (as defined in this part) to all qualified persons, and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin, or sex. Religious radio broadcasters may establish religious belief or affiliation as a job qualification for all station employees. However, they cannot discriminate on the basis of race, color, national origin or gender from among those who share their religious affiliation or belief. For purposes of this rule, a religious broadcaster is a licensee which is, or is closely affiliated with, a church, synagogue, or other religious entity, including a subsidiary of such an entity.

(b) *General EEO program requirements.* Each broadcast station shall establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity and nondiscrimination in every aspect of station employment policy and practice. Under the terms of its program, a station shall:

(1) Define the responsibility of each level of management to ensure vigorous enforcement of its policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance;

(2) Inform its employees and recognized employee organizations of the equal employment opportunity policy and program and enlist their cooperation;

(3) Communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, national origin, or sex, and solicit their recruitment assistance on a continuing basis;

(4) Conduct a continuing program to exclude all unlawful forms of prejudice or discrimination based upon race, color, religion, national origin, or sex from its personnel policies and practices and working conditions; and

(5) Conduct a continuing review of job structure and employment practices and adopt positive recruitment, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility.

(c) *Specific EEO program requirements.* Under the terms of its program, a station employment unit must:

(1) Recruit for every job vacancy in its operation. A job filled by an internal promotion is not considered a vacancy for which recruitment is necessary. Religious radio broadcasters who establish religious affiliation as a qualification for a job position are not required to comply with these recruitment requirements with respect to that job position or positions, but will be expected to make reasonable, good faith efforts to recruit applicants who are qualified based on their religious affiliation. Nothing in this section shall be interpreted to require a broadcaster to grant preferential treatment to any individual or group based on race, color, national origin, religion, or gender.

(i) A station employment unit shall use recruitment sources for each vacancy sufficient in its reasonable, good faith judgment to widely disseminate information concerning the vacancy.

(ii) In addition to such recruitment sources, a station employment unit shall provide notification of each vacancy to any organization that distributes information about employment opportunities to job seekers or refers job seekers to employers, upon request by such organization. To be entitled to notice of vacancies, the requesting organization must provide the station employment unit with its name, mailing address, e-mail address (if applicable), telephone number, and contact person, and identify the category or categories of vacancies of which it requests notice. (An organization may request notice of all vacancies).

(2) Engage in at least four (if the station employment unit has more than ten full-time employees) or two (if it has five to ten full-time employees) of the following initiatives during each two-year period preceding the filing of a Statement of Compliance pursuant to subsection (g) hereof:

(i) participation in at least four job fairs by station personnel who have substantial responsibility in the making of hiring decisions;

(ii) hosting of at least one job fair;

(iii) co-sponsoring at least one job fair with organizations in the business and professional community whose membership includes substantial participation of women and minorities;

(iv) participation in at least four events sponsored by organizations representing groups present in the community interested in broadcast employment issues, including conventions, career days, workshops, and similar activities;

(v) establishment of an internship program designed to assist members of the community to acquire skills needed for broadcast employment;

(vi) participation in job banks, internet programs, and other programs designed to promote outreach generally (*i.e.*, that are not primarily directed to providing notification of specific job vacancies);

(vii) participation in scholarship programs designed to assist students interested in pursuing a

career in broadcasting;

(viii) establishment of training programs designed to enable station personnel to acquire skills that could qualify them for higher level positions;

(ix) establishment of a mentoring program for station personnel;

(x) participation in at least four events or programs sponsored by educational institutions relating to career opportunities in broadcasting;

(xi) sponsorship of at least two events in the community designed to inform and educate members of the public as to employment opportunities in broadcasting;

(xii) listing of each upper-level category opening in a job bank or newsletter of media trade groups whose membership includes substantial participation of women and minorities;

(xiii) participation in other activities designed by the station employment unit reasonably calculated to further the goal of disseminating information as to employment opportunities in broadcasting to job candidates who might otherwise be unaware of such opportunities.

(3) Analyze its recruitment program on an ongoing basis to ensure that it is effective in achieving broad outreach to potential applicants, and address any problems found as a result of its analysis.

(4) Periodically analyze measures taken to:

(i) Disseminate the station's equal employment opportunity program to job applicants and employees;

(ii) Review seniority practices to ensure that such practices are nondiscriminatory;

(iii) Examine rates of pay and fringe benefits for employees having the same duties, and eliminate any inequities based upon race, national origin, color, religion, or sex discrimination;

(iv) Utilize media for recruitment purposes in a manner that will contain no indication, either explicit or implicit, of a preference for one race, national origin, color, religion or sex over another;

(v) Ensure that promotions to positions of greater responsibility are made in a nondiscriminatory manner;

(vi) Where union agreements exist, cooperate with the union or unions in the development of programs to assure all persons equal opportunity for employment, irrespective of race, national origin, color, religion, or sex, and include an effective nondiscrimination clause in new or renegotiated union agreements; and

(vii) Avoid the use of selection techniques or tests that have the effect of discriminating against any person based on race, national origin, color, religion, or sex.

(5) Retain records to document that it has satisfied the requirements of paragraphs (c)(1) and (2) of this section. Such records, which may be maintained in an electronic format, shall be retained until after grant of the renewal application for the term during which the vacancy was filled or the initiative occurred.

Such records need not be submitted to the FCC unless specifically requested. The following records shall be maintained:

(i) listings of all full-time job vacancies filled by the station employment unit, identified by job title;

(ii) for each such vacancy, the recruitment sources utilized to fill the vacancy (including, if applicable, organizations entitled to notification pursuant to paragraph (c)(1)(ii) of this section, which should be separately identified), identified by name, address, contact person and telephone number;

(iii) dated copies of all advertisements, bulletins, letters, faxes, e-mails, or other communications announcing vacancies;

(iv) documentation necessary to demonstrate performance of the initiatives required by paragraph (c)(2) of this section, if applicable, including sufficient information to fully disclose the nature of the initiative and the scope of the station's participation, including the station personnel involved;

(v) the total number of interviewees for each vacancy and the referral source for each interviewee; and

(vi) the date each vacancy was filled and the recruitment source that referred the hiree.

(6) Annually, on the anniversary of the date a station is due to file its renewal application, the station shall place in its public file, maintained pursuant to § 73.3526 or § 73.3527, and on its web site, if it has one, an EEO public file report containing the following information:

(i) a list of all full-time vacancies filled by the station's employment unit during the preceding year, identified by job title;

(ii) for each such vacancy, the recruitment source(s) utilized to fill the vacancy (including, if applicable, organizations entitled to notification pursuant to paragraph (c)(1)(ii) of this section, which should be separately identified), identified by name, address, contact person and telephone number;

(iii) the recruitment source that referred the hiree for each full-time vacancy during the preceding year;

(iv) data reflecting the the total number of persons interviewed for full-time vacancies during the preceding year and the total number of interviewees referred by each recruitment source utilized in connection with such vacancies; and

(v) a list and brief description of initiatives undertaken pursuant to paragraph (c)(2) of this section during the preceding year, if applicable.

(7) Stations shall substantially comply with paragraph (c)(1)(i) of this section in connection with hires for part-time positions. The provisions of paragraph (c) are not otherwise applicable to hires for part-time positions.

(d) *Alternative Recruitment Requirements.* A station employment unit may elect not to utilize the provisions of paragraph (c)(1)(ii) (notification to community groups) and (c)(2) (menu options) hereof, provided that it complies with the following requirements:

(1) The station employment unit shall maintain records as required by paragraph (c)(5)(i) through (iii) and shall maintain, in lieu of the records required by paragraph (c)(5)(iv) through (vi), data reflecting the recruitment source, gender, and racial and/or ethnic status of applicants for each full-time job vacancy filled by the station employment unit;

(2) The station employment unit shall include in the annual EEO public file report required by paragraph (c)(6) the information specified in paragraph (c)(6)(i) and (ii) and, in lieu of the information required by paragraph (c)(6)(iii) through (v), data reflecting, for each recruitment source utilized for any full-time vacancy during the preceding year, the total number of applicants generated by that source, the number of applicants who were female, and the number of applicants who were minority, identified by the applicable racial and/or ethnic group with which each applicant is associated.

(3) Station employment units electing to proceed under this paragraph shall otherwise comply with the requirements specified in paragraph (c).

(e) *Election Procedures.* Within forty-five days of the effective date of this Rule, each station employment unit shall elect whether it wishes to utilize the recruitment procedures specified in paragraph (c) or the alternate recruitment procedures specified in paragraph (d) and shall file with the Commission a statement indicating the election which shall also be placed in the station(s) public inspection file maintained pursuant to § 73.3526 or § 73.3527. An applicant for a new station or for the transfer or assignment of an existing license filed on FCC Form 314 or 315 shall state its election on FCC Form 396-A submitted with the application. A station employment unit may change its election every two years at the time of the filing of the Statement of Compliance referenced in paragraph (i)(1) below, or at the time of the filing of its renewal application. If the station employment unit wishes to change its election, it shall so state in its Statement of Compliance or FCC Form 396 accompanying the renewal application.

(f) *Mid-term review for broadcast stations.* The Commission will conduct a mid-term review of the employment practices of each broadcast television station and each radio station that is part of an

employment unit of more than ten full-time employees four years following the station's most recent license expiration date as specified in § 73.1020. Each such licensee is required to file with the Commission the station's EEO public file report, as described in paragraphs (c)(6) or (d)(2) of this section, along with the relevant Statement of Compliance (Form 397), as described in paragraph (i)(1) of this section, four months before the date specified in the previous sentence. The EEO public file report should cover the station's activities during the 12-month period prior to its submission.

(g) *Small Station Exemption.* The provisions of paragraphs (b), (c), (d), (e), and (f) of this section shall not apply to station employment units that have fewer than five full-time employees.

(h) *Definitions.* For the purposes of this Rule:

(1) a full-time employee is a permanent employee whose regular work schedule is 30 hours per week or more. A part-time employee is a permanent employee whose regular work schedule is less than 30 hours per week.

(2) a station employment unit is a station or a group of commonly owned stations in the same market that share at least one employee.

(i) *Enforcement.* The following provisions apply to employment activity concerning full-time positions at each broadcast station employment unit (defined in this part) employing five or more persons in full-time positions, except where noted.

(1) Each broadcast station shall file with the Commission a Statement of Compliance (FCC Form 397) stating whether the station has complied with the outreach provisions of the broadcast EEO Rule, § 73.2080, during the two-year period prior to the date the station files the Statement. Before filing the Statement, stations shall review their recruitment activity during the two-year period along with requirements of the EEO Rule and determine whether they have been in compliance with the EEO Rule during the relevant period. The Statement of Compliance shall also report any change in the station's recruitment election pursuant to paragraph (e) hereof. All broadcast stations, including those that are part of an employment unit with fewer than five full-time employees, shall file a Broadcast Equal Employment Opportunity Program Report (Form 396) with their renewal application. As with Form 397, stations shall indicate on Form 396 whether they have complied with the Broadcast EEO Rule. In addition, stations shall provide a narrative statement demonstrating how their recruitment efforts achieved broad and inclusive outreach during the two years prior to filing the Form 396. Stations should also include in Form 396 any change in recruitment election pursuant to paragraph (e) hereof. If the station believes it was not or may not have been in compliance, it shall submit an appropriate explanation on Form 396 or 397, as applicable.

The Statement of Compliance (Form 397) is filed every second, fourth and sixth year of the license term, on the anniversary of the date the station is due to file its application for renewal of license. Form 396 is filed on the date the station is due to file its application for renewal of license. If a broadcast licensee acquires a station pursuant to FCC Form 314 or FCC Form 315 during the period that is to form the basis for the Statement of Compliance or Form 396, its Statement should be based on the licensee's EEO recruitment activity during the period starting with the date it acquired the station. Stations are required to maintain a copy of their Statement of Compliance and Form 396 in the station's public file in accordance with the provisions of §§ 73.3526 and 73.3527.

(2) On the date a station is due to file for renewal of license, as part of Form 396, it shall file with the Commission an EEO public file report concerning recruitment activity during the 12-month period preceding the filing date. The required contents of the public file report are described in paragraphs (c)(6) or (d)(2) of this Rule. On the date each television station or radio station which is part of an employment unit with more than ten full-time employees files its Statement of Compliance (Form 397) at the mid-term point of its license term, the station shall file, together with Form 397, an EEO public file report concerning recruitment activity during the 12-month period prior to filing the EEO public file report. If any broadcast

licensee acquires a station pursuant to FCC Form 314 or FCC Form 315 during the twelve months covered by the EEO public file report, its EEO public file report shall cover the period starting with the date it acquired the station.

(3) If a station is subject to a time brokerage agreement, the licensee shall file Statements of Compliance, Forms 396, and EEO public file reports concerning only its own recruitment activity. If a licensee is a broker of another station or stations, the licensee-broker shall include its recruitment activity for the brokered station(s) in determining the bases of the Statements of Compliance, Forms 396 and the EEO public file reports for its own station. If a licensee-broker owns more than one station, it shall include its recruitment activity for the brokered station in the Statements of Compliance, Forms 396, and EEO public file reports filed for its own station that is most closely affiliated with, and in the same market as, the brokered station. If a licensee-broker does not own a station in the same market as the brokered station, then it shall include its recruitment activity for the brokered station in the Statements of Compliance, Forms 396, and EEO public file reports filed for its own station that is geographically closest to the brokered station.

(4) Broadcast stations subject to this section shall maintain records of their recruitment activity necessary to demonstrate that they are in compliance with the EEO Rule. Stations shall ensure that they maintain records sufficient to verify the accuracy of information provided in Statements of Compliance, Forms 396, and EEO public file reports. To determine compliance with the EEO Rule, the Commission may conduct inquiries of licensees at random or if it has evidence of a possible violation of the EEO Rule. In addition, the Commission will conduct random audits. Specifically, each year approximately five percent of all licensees in the television and radio services will be randomly selected for audit, ensuring that, even though the number of radio licensees is significantly larger than television licensees, both services are represented in the audit process. Upon request, stations shall make records available to the Commission for its review.

(5) The public may file complaints throughout the license term based on a station's Statement of Compliance or the contents of a station's public file. Provisions concerning filing, withdrawing, or non-filing of informal objections or petitions to deny license renewal, assignment, or transfer applications are delineated in §§ 73.3584 and 73.3587-3589 of the Commission's Rules.

(j) *Sanctions and Remedies.* The Commission may issue appropriate sanctions and remedies for any violation of this Rule.

Section 73.3526 is revised by amending paragraph (e)(7) to read as follows:

**§ 73.3526 Local public inspection file of commercial stations.**

\* \* \* \* \*

(e) \* \* \*

(7) *Equal Employment Opportunity file.* Such information as is required by § 73.2080 to be kept in the public inspection file. These materials shall be retained until final action has been taken on the station's next license renewal application.

\* \* \* \* \*

Section 73.3527 is revised by amending paragraph (e)(6) to read as follows:

**§ 73.3527 Local public inspection file of noncommercial educational stations.**

\* \* \* \* \*

(e) \* \* \*

(6) *Equal Employment Opportunity file.* Such information as is required by § 73.2080 to be kept in the public inspection file. These materials shall be retained until final action has been taken on the station's next license renewal application.

\* \* \* \* \*

**III. Part 76 of Chapter 1 of the Code of Federal Regulations is amended as follows:**

**Subpart E -- Equal Employment Opportunity Requirements**

Section 76.75 is revised by amending introductory text of Section 76.75, paragraphs (b), (c) and (f) and adding paragraphs (g), (h), (i), (j) and (k):

**§ 76.75 Specific EEO program requirements.**

Under the terms of its program, an employment unit must:

\*\*\*\*\*

(b) Establish, maintain and carry out a positive continuing program of outreach activities designed to ensure equal opportunity and nondiscrimination in employment. The following activities shall be undertaken by each employment unit:

(1) Recruit for every job vacancy in its operation. A job filled by an internal promotion is not considered a vacancy for which recruitment is necessary. Nothing in this section shall be interpreted to require a cable entity to grant preferential treatment to any individual or group based on race, national origin, color, religion, age, or gender.

(i) An employment unit shall use recruitment sources for each vacancy sufficient in its reasonable, good faith judgment to widely disseminate information concerning the vacancy.

(ii) In addition to using such recruitment sources, a cable employment unit shall provide

notification of each vacancy to any organization that distributes information about employment opportunities to job seekers or refers job seekers to employers, upon request by such organization. To be entitled to notice of vacancies, the requesting organization must provide the cable employment unit with its name, mailing address, e-mail address (if applicable), telephone number, and contact person, and identify the category or categories of vacancies of which it requests notice. (An organization may request notice of all vacancies).

(2) Engage in at least two (if the unit has more than ten full-time employees) or one (if the unit has six to ten full-time employees) of the following initiatives during each twelve-month period preceding the filing of an annual employment report:

(i) participation in at least two job fairs by unit personnel who have substantial responsibility in the making of hiring decisions;

(ii) hosting of at least one job fair;

(iii) co-sponsoring at least one job fair with organizations in the business and professional community whose membership includes substantial participation of women and minorities;

(iv) participation in at least two events sponsored by organizations representing groups present in the community interested in cable employment issues, including conventions, career days, workshops, and similar activities;

(v) establishment of an internship program designed to assist members of the community in acquiring skills needed for cable employment;

(vi) participation in job banks, internet programs, and other programs designed to promote outreach generally (*i.e.*, that are not primarily directed to providing notification of specific job vacancies);

(vii) participation in a scholarship program designed to assist students interested in pursuing a career in cable communications;

(viii) establishment of training programs designed to enable unit personnel to acquire skills that could qualify them for higher level positions;

(ix) establishment of a mentoring program for unit personnel;

(x) participation in at least two events or programs sponsored by educational institutions relating to career opportunities in cable communications;

(xi) sponsorship of at least one event in the community designed to inform and educate members of the public as to employment opportunities in cable communications;

(xii) listing of each upper-level category opening in a job bank or newsletter of media trade groups whose membership includes substantial participation of women and minorities; and

(xiii) participation in other activities reasonably calculated by the unit to further the goal of disseminating information as to employment opportunities in cable communications to job candidates who might otherwise be unaware of such opportunities.

(c) Retain records sufficient to document that it has satisfied the requirements of paragraphs (b)(1) and (b)(2) of this section. Such records, which may be maintained in an electronic format, shall be retained for a period of seven years. Such records need not be submitted to the Commission unless specifically requested. The following records shall be maintained:

(1) Listings of all full-time job vacancies filled by the cable employment unit, identified by job title;

(2) For each such vacancy, the recruitment sources utilized to fill the vacancy (including, if applicable, organizations entitled to notification pursuant to paragraph (b)(1)(ii) of this section, which should be separately identified), identified by name, address, contact person, and telephone number;

(3) Dated copies of all advertisements, bulletins, letters, faxes, e-mails, or other communications

announcing job vacancies;

(4) Documentation necessary to demonstrate performance of the initiatives required by paragraph (b)(2) of this section, if applicable, including information sufficient to fully disclose the nature of the initiative and the scope of the unit's participation, including the unit personnel involved;

(5) The total number of interviewees for each vacancy and the referral sources for each interviewee; and

(6) The date each vacancy was filled and the recruitment source that referred the hiree.

\* \* \* \* \*

(f) A cable entity may elect not to utilize the provisions of paragraph (b)(1)(ii) (notification to requesting community groups) and (b)(2) (menu options) hereof, provided that it complies with the following alternative recruitment requirements:

(1) The employment unit shall maintain records as required by paragraph (c)(1) through (3) hereof and shall maintain, in lieu of the records required by paragraph (c)(4) through (6) hereof, data reflecting the recruitment source, gender, and racial and/or ethnic status of applicants for each full-time job vacancy filled by the employment unit;

(2) The employment unit shall place annually in its public file maintained pursuant to § 76.1702 the information specified in § 76.1702(b)(1) and (2) and, in lieu of the information required by § 76.1702(b)(3) through (5), data reflecting, for each recruitment source utilized for any full-time vacancy during the preceding year, the total number of applicants generated by that source, the number of applicants who were female, and the number of applicants who were minority, identified by the applicable racial and/or ethnic group with which each applicant is associated.

(3) Cable employment units electing to proceed under this paragraph shall otherwise comply with the requirements specified in paragraph (b) hereof.

(g) A cable entity shall analyze its recruitment program on an ongoing basis to ensure that it is effective in achieving broad outreach, and address any problems found as a result of its analysis.

(h) Within forty-five days of the effective date of this Rule, each cable employment unit with six or more fulltime employees shall elect whether it wishes to utilize the recruitment procedures specified in paragraph (b) or the alternate recruitment procedures specified in paragraph (f) and shall file with the Commission a statement indicating the election which shall also be placed in the public inspection file maintained pursuant to § 76.1702. An employment unit may change its election annually at the time of the filing of the FCC Form 395-A or FCC Form 395-M. If the employment unit wishes to change its election, it shall so state in its FCC Form 395-A or FCC Form 395-M. A cable employment unit may also change its election at the time of a substantial change in its ownership by placing a statement of its new election in the public inspection file.

(i) Analyze on an ongoing basis its efforts to recruit, hire, promote and use services without discrimination on the basis of race, national origin, color, religion, age, or sex and explain any difficulties encountered in implementing its equal employment opportunity program. For example, this requirement may be met by:

(1) Where union agreements exist, cooperating with the union or unions in the development of programs to assure all persons equal opportunity for employment, and including an effective nondiscrimination clause in new or renegotiated union agreements;

- (2) Reviewing seniority practices to ensure that such practices are nondiscriminatory;
  - (3) Examining rates of pay and fringe benefits for employees having the same duties, and eliminating any inequities based upon race, national origin, color, religion, age, or sex discrimination;
  - (4) Evaluating the recruitment program to ensure that it is effective in achieving a broad outreach to potential applicants.
  - (5) Utilizing media for recruitment purposes in a manner that will contain no indication, either explicit or implicit, of a preference for one race, national origin, color, religion, age, or sex over another; and
  - (6) Avoiding the use of selection techniques or tests that have the effect of discriminating against qualified minority groups or women.
- (j) Cable entities shall substantially comply with paragraph (b)(1)(i) of this section in connection with hires for part-time positions. The remaining provisions of this section are not otherwise applicable to hires for part-time positions but are applicable only to full-time positions, defined as requiring a regular work schedule of 30 or more hours per week.
- (k) The provisions of paragraphs (b)(1)(ii), (b)(2), (c), (f) and (g) of this section shall not apply to cable employment units that have fewer than six full-time employees.

Section 76.77 is revised by amending paragraphs (a), (b), and (c), and adding paragraphs (e), (f), and (g).

#### **§ 76.77 Reporting requirements and enforcement.**

- (a) *Annual employment reports.* Employment data on the annual employment report required by §76.1802 shall reflect the figures from any one payroll period in July, August, or September of the year during which the report is filed. Unless instructed otherwise by the Commission, the same payroll period shall be used for each successive annual employment report. Employment units shall also provide EEO recruitment information covering a 12-month period, as requested and explained on the form. If a cable entity acquires a unit during the twelve months covered by the annual employment report, the recruitment activity in the report shall cover the period starting with the date the entity acquired the unit.
- (b) *Certification of Compliance.* The Commission will use the recruitment information submitted on a unit's annual employment report to determine whether the unit is in compliance with the provisions of this subpart. Employment profile statistics provided about race, ethnicity, and gender of employees will not be used to determine compliance with the EEO rules. Units found to be in compliance with these rules will receive a Certificate of Compliance. Units found not to be in compliance will receive notice that they are not certified for a given year.
- (c) *Investigations.* The Commission will investigate each unit at least once every five years. Employment units are required to submit supplemental investigation information with their regular annual employment reports in the years they are investigated. If an entity acquires a unit during the period covered by the supplemental investigation, the information submitted by the unit as part of the investigation shall cover the period starting with the date the operator acquired the unit. The supplemental investigation information shall include a copy of the unit's EEO public file report for the preceding year.

\* \* \* \* \*

(e) *Records and inquiries.* Employment units subject to this subpart shall maintain records of their recruitment activity in accordance with §76.75 to demonstrate whether they are in compliance with the EEO rules. Units shall ensure that they maintain records sufficient to verify the accuracy of information provided in their annual employment reports, supplemental investigation responses, and in the EEO program information required by §76.1702 to be kept in a unit's public file. To determine compliance with the EEO rules, the Commission may conduct inquiries of employment units at random or if the Commission has evidence of a possible violation of the EEO rules. Upon request, employment units shall make records available to the Commission for its review.

(f) *Public complaints.* The public may file complaints based on annual employment reports, supplemental investigation information, or the contents of a unit's public file.

(g) *Sanctions and remedies.* The Commission may issue appropriate sanctions and remedies for any violation of the EEO rules.

Section 76.79 is revised by amending the Note to read as follows:

**§ 76.79 Records available for public inspection.**

\* \* \* \* \*

NOTE: Cable operators must also comply with the public file requirements of §76.1702.

Section 76.1702 is revised to read as follows:

**§ 76.1702 Equal employment opportunity.**

(a) Every employment unit with six or more full-time employees shall maintain for public inspection a file containing copies of all annual employment reports filed with the Commission pursuant to §76.77 and the equal employment opportunity program information described in paragraph (b) or (c) of this section. These materials shall be placed in the unit's public inspection file annually by the date that the unit's annual employment report is due to be filed and shall be retained for a period of five years. The public inspection file should also contain the election information required by § 76.75 (h), insofar as it is not included in the entity's annual employment report. The file shall be maintained at the central office and at every location with six or more full-time employees. A headquarters employment unit file and a file containing a consolidated set of all documents pertaining to the other employment units of a multiple cable operator shall be maintained at the central office of the headquarters employment unit. The cable entity shall provide reasonable accommodation at these locations for undisturbed inspection of its equal employment opportunity records by members of the public during regular business hours.

(b) The following equal employment opportunity program information shall be included annually in the unit's public file, and on the unit's web site, if it has one, at the time of the filing of its FCC Form 395-A or FCC Form 395-M, except as indicated in paragraph (c) hereof:

(1) A list of all full-time vacancies filled by the cable employment unit during the preceding year, identified by job title;

(2) For each such vacancy, the recruitment source(s) utilized to fill the vacancy (including, if applicable, organizations entitled to notification pursuant to §76.75(b)(1)(ii) of this section, which should be separately identified), identified by name, address, contact person and telephone number;

(3) The recruitment source that referred the hiree for each full-time vacancy during the preceding year;

(4) Data reflecting the the total number of persons interviewed for full-time vacancies during the preceding year and the total number of interviewees referred by each recruitment source utilized in connection with such vacancies; and

(5) A list and brief description of the initiatives undertaken pursuant to §76.75(b)(2) during the preceding year, if applicable.

(c) An entity that elects to utilize the alternative recruitment procedure pursuant to §76.75(f) shall annually include in the public inspection file the information required therein.

Section 76.1802 is revised to read as follows:

**§ 76.1802 Equal employment opportunity.**

Each employment unit with six or more full-time employees shall file an annual employment report on FCC Form 395-A (if cable operator or SMATV) or Form 395-M (if MVPD) with the Commission on or before September 30 of each year, in accordance with §76.77.

**APPENDIX D**

**FORMS**

## BROADCAST AND CABLE INITIAL ELECTION STATEMENT

(For FCC Use Only)

Code No.

Legal Name of the Licensee or Operator		
Mailing Address of the Licensee or Operator		
Cable Operator MSO Name		
City	State or Country (if foreign address)	Zip Code
County and State in which cable unit's employment office is located		Telephone Number (include area code)
Facility ID Number or Employment Unit ID Number	Broadcast Call Sign	E-Mail Address (if available)

**TYPE OF BROADCAST STATION:**    Commercial Broadcast Station                      Noncommercial Broadcast Station  
(if applicable)

- |                                       |  |  |
|---------------------------------------|--|--|
| <input type="checkbox"/> Radio        | <input type="checkbox"/> TV            | <input type="checkbox"/> Educational Radio |
| <input type="checkbox"/> Low Power TV | <input type="checkbox"/> International | <input type="checkbox"/> Educational TV    |

List call sign and location of all stations included on this statement. List commonly owned stations that share one or more employees. Also list stations operated by the licensee pursuant to a time brokerage agreement. Indicate on the table below which stations are operated pursuant to a time brokerage agreement. To the extent that licensees include stations operated pursuant to a time brokerage agreement on this report, responses should take into consideration the licensee's EEO compliance efforts at brokered stations, as well as any other stations, included on this form. For purposes of this form, a station employment unit is a station or a group of commonly owned stations in the same market that share at least one employee.

Call Sign	Facility ID Number	Type (check applicable box)	Location (city, state)	Time Brokerage Agreement (check applicable box)
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No

**SEND NOTICES AND COMMUNICATIONS TO THE FOLLOWING NAMED PERSON AT THE ADDRESS INDICATED BELOW:**

Name		Street Address	
City	State	Zip Code	Telephone No. (    )

**FILING INSTRUCTIONS.** Broadcast station licensees and cable entities are required to afford equal employment opportunity to all qualified persons and to refrain from discriminating in employment and related benefits on the basis of race, color, national origin, religion, and sex. See 47 C.F.R. Sections 73.2080 and 76.71 et seq. Pursuant to these requirements, a broadcast station employment unit that employs five or more full-time station employees, and a cable employment unit with six or more full-time employees must file an initial election statement. If a broadcast station employment unit employs fewer than five full-time employees, or a cable employment unit employs fewer than six full-time employees, no election statement need be filed.

A copy of this statement must be kept in the broadcast station's or cable unit's public file. Failure to meet these requirements may result in sanctions or remedies. These requirements are contained in 47 C.F.R. Sections 73.2080 or 76.75 and are authorized by the Communications Act of 1934, as amended.

Does your broadcast station employment unit employ fewer than five full-time employees?  Yes  No  N/A  
 Does your cable employment unit employ fewer than six full-time employees?  Yes  No  N/A  
 Consider as "full-time" employees all those permanently working 30 or more hours a week.

If your broadcast station employment unit employs fewer than five full-time employees, or your cable employment unit employs fewer than six full-time employees, complete the certification below, return the form to the FCC, and place a copy in your broadcast station(s) or cable unit(s) public file. You do not have to complete the rest of this form. If your station employment unit employs five or more full-time employees or your cable employment unit employs six or more full-time employees, you must complete all of this form and follow all instructions.

**CERTIFICATION.** This report must be certified, as follows: A. By licensee, if an individual; B. By the individual owning the reporting system if individually owned; C. By a partner, if a partnership (general partner, if a limited partnership); D. By an officer, if a corporation or an association; or E. By an attorney of the licensee, in case of physical disability or absence from the United States of the licensee.

WILLFUL FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

I certify to the best of my knowledge, information and belief, all statements contained in this report are true and correct.

Signed	Name of Respondent
Title	Telephone No. (include area code)
Date	

**RECRUITMENT ELECTION**

Please indicate whether the broadcast station employment unit or cable employment unit will utilize the supplemental recruitment measures, or the alternative recruitment option, as described in Paragraph 78 in Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, Report and Order, FCC 00-20, released February 2, 2000 ("Report and Order"). This Report and Order can be downloaded from the Commission's web site at [http://www.fcc.gov/Bureaus/Mass\\_Media/Orders/2000/fcc00020.txt](http://www.fcc.gov/Bureaus/Mass_Media/Orders/2000/fcc00020.txt).

Supplemental Recruitment Measures (Option A)       Alternative Recruitment Option (Option B)

**FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT**

The FCC is authorized under the Communications Act of 1934, as amended, to collect the personal information we request in this report. We will use the information you provide to determine if the benefit requested is consistent with the public interest. If we believe there may be a violation or potential violation of a FCC statute, regulation, rule or order, your request may be referred to the Federal, state or local agency responsible for investigating, prosecuting, enforcing or implementing the statute, rule, regulation or order. In certain cases, the information in your request may be disclosed to the Department of Justice or a court or adjudicative body when (a) the FCC; or (b) any employee of the FCC; or (c) the United States Government, is a party to a proceeding before the body or has an interest in the proceeding. In addition, all information provided in this form will be available for public inspection. If you owe a past due debt to the federal government, any information you provide may also be disclosed to the Department of Treasury Financial Management Service, other federal agencies and/or your employer to offset your salary, IRS tax refund or other payments to collect that debt. The FCC may also provide this information to these agencies through the matching of computer records when authorized. We have estimated that each response to this collection of information will average 5 hours. Our estimate includes the time to read the instructions, look through existing records, gather and maintain required data, and actually complete and review the form or response. If you have any comments on this estimate, or on how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD-PER, Paperwork Reduction Project (3060-XXXX), Washington, D. C. 20554. We will also accept your comments via the Internet if you send them to [jboley@fcc.gov](mailto:jboley@fcc.gov). Remember - you are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently valid OMB control number or if we fail to provide you with this notice. This collection has been assigned an OMB control number of 3060-XXXX.

**THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974, 5 U.S.C. 552a(e)(3), AND THE PAPERWORK REDUCTION ACT OF 1995, P.L. 104-13, OCTOBER 1, 1995, 44 U.S.C. 3507.**

August 2000

Pursuant to a revision of the due dates for filing Annual Employment Reports, Annual Employment Reports are now due to be filed with the Commission by September 30 of each year. The employment data reported on the Annual Employment Reports may reflect information from any payroll period in July, August or September of the year in which the report is filed. Amendment of Section 73.3612 and 76.77 of the Commission's Rules Concerning Filing Dates for the Commission's Equal Employment Opportunity Annual Employment Reports, 13 FCC Rcd 6973 (1998). In 2000, however, September 30 falls on a Saturday. Consequently, we will require that the Forms 395-B for 2000 be filed no later than October 2, 2000.

## NOTICE

**Submit two  
copies**

**Submit two  
copies**

Enclosed you will find the 2000 Annual Employment Report (FCC Form 395-B). **Every** broadcast station, including educational, religious stations with an all volunteer staff and stations with fewer than 5 full-time employees, **must** file **two** copies of the form. Networks and headquarters units must also file two copies by the same deadline.

Pursuant to Section 73.3612 of the Commission's Rules, the due date for filing forms FCC 395-B is September 30 of each year. In 2000, however, September 30 falls on a Saturday. Consequently, we will require that the forms FCC 395-B for 2000 be filed no later than October 2, 2000.

Please read carefully the accompanying instructions and pay particular attention to:

- (a) stations whose employment units have fewer than 5 full-time employees (do not report employment data);
- (b) the proper classification of employees;
- (c) payroll period to be used; and
- (d) filing of headquarters reports  
(DO NOT CHECK THE HQ BOX ON PAGE 1 UNLESS YOU ARE REPORTING EMPLOYEES THAT DO NOT WORK AT THE STATION.

Return the completed form in duplicate to FCC, 445 12th Street, S.W., Room TW-B204, Washington, D. C. 20554. Forms filed prior to the deadline will greatly expedite our processing. All reports filed after the **October 2, 2000** deadline will be considered delinquent. Failure to file may result in penalties. Should you have any questions concerning the completion of this form, call the EEO Branch at (202) 418-1450.

Thank you for your cooperation.

## INSTRUCTIONS FOR COMPLETION OF FCC FORM 395-B BROADCAST STATION ANNUAL EMPLOYMENT REPORT

### 1. Who Must File

All licensees and permittees of commercial and noncommercial AM, FM, LPTV, TV and international BROADCAST stations.

### 2. What Information Must Be Filed

- a. If the filing concerns a particular reporting unit (see item 5 below) which had fewer than 5 full-time employees during the selected payroll period (see item 4 below), (a) so indicate in Section III of the form; (b) provide the pertinent identifying information asked for in Sections I and II; and (c) complete and sign the certification statement in Section IV of the form. Do not provide the substantive information (statistical data) asked for in Sections V-A and V-B.
- b. If the filing concerns a particular reporting unit which had 5 or more full-time employees during the selected payroll period, (a) provide the pertinent identifying information asked for in Sections I and II, and all information asked for in Sections III, V-A, and V-B; and (b) complete and sign the certification statement in Section IV.

### 3. When and Where to File

Send TWO copies of each Annual Employment Report required under these instructions to the Federal Communications Commission, 445 12th Street, S.W., Room TW-B204, Washington, D. C. 20554, no later than September 30 of each year.

### 4. Reporting Period

The employment data filed on FCC Form 395-B must reflect the employment figures from any one payroll period in July, August or September. The same payroll period should be used in each year's report.

### 5. Reporting Units

The employment data filed on FCC Form 395-B may be filed in duplicate:

For each combined report. Licensees must file employment data on FCC Form 395-B on a combined report. Specifically, licensees must file one Form 395-B for all commonly owned stations in the same market that share at least one employee.

For each Headquarters Office of a multiple station owner. Report on a separate Form 395-B, those employees whose primary duties lie in the operation of the individual stations. (A separate Form 395-B need not be filed to cover headquarters employees whose duties relate to the operation of a station covered in a combined Report, described above, if all such employees are included in such combined Report).

6. **Facility ID Number.** Radio and TV Facility ID Numbers can be obtained at the FCC's Internet Website at [www.fcc.gov/mmb/asd/seacall.html](http://www.fcc.gov/mmb/asd/seacall.html) or by calling: Radio - 202-418-2730, TV - 202-418-1600. Further, the Facility ID Number is now included on all Radio and TV authorizations and postcards.

### 7. Race/Ethnic Categories

- a. White, not of Hispanic Origin - A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.
- b. Black, not of Hispanic Origin - A person having origins in any of the black racial groups of Africa.
- c. Hispanic - A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race.
- d. Asian or Pacific Islander - A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippine Islands, and Samoa.
- e. American Indian or Alaskan Native - A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.

### 8. Job Categories

The following "job category definitions" are provided for your guidance and may be used in completing FCC Form 395-B. A person is to be listed in the job category which represents the work primarily done by that person; a person is to be listed only once. Specific job titles below are not all inclusive or rigid. The proper categorization of any employee depends on the kind and level of the employee's responsibilities.

- a. **Officials and Managers** - Occupations requiring administrative personnel who set broad policies, exercise overall responsibility for execution of these policies, and direct individual departments or special phases of a firm's operations. Includes: presidents and other corporate officers, general managers, station managers, controllers, chief accountants, general counsels, chief engineers, facilities managers, sales managers, business managers, promotion directors, research directors, personnel managers, news directors, operations managers, and production managers.
- b. **Professionals** - Occupations requiring either college graduation or experience of such a kind and amount as to provide a comparable background. Includes: on-air personnel, correspondents, producers, writers, editors, researchers, designers, artists, musicians, dancers, accountants, attorneys, nurses, publicists, film buyers, rating and research analysts, systems analysts and programmers, financial analysts, stage

-- DO NOT RETURN THESE INSTRUCTIONS TO THE COMMISSION --

managers, cinema photographers, senior staff assistants, personnel interviewers, and continuity directors.

- c. **Technicians** - Occupations requiring a combination of basic scientific knowledge and manual skill which can be obtained through about 2 years of post high school education, such as is offered in many technical institutes and junior colleges, or through equivalent on-the-job training. Includes: engineers, technicians and engineering aides, including: transmitter, studio maintenance and master control engineers, and news camera, news sound, film lab and drafting technicians. Also film editors, projectionists, and software specialists.
- d. **Sales** - Occupations engaging wholly or primarily in direct selling. Includes: sales account executives, sales analysts, account representatives and sales trainees.
- e. **Office and Clerical** - Includes all clerical-type work regardless of level of difficulty, where the activities are predominantly non-manual though some manual work not directly involved with altering or transporting the products is included. Includes: secretaries, production assistants, traffic managers, traffic department employees, telephone operators, junior rating and research analysts, assistant camera technicians, news and feature assistants, billing clerks, mail clerks, messengers, cashiers, typists, key punch operators, bookkeepers, photo lab assistants, librarians, (music, film or other) readers, administrative assistants, tab operators, TWX operators, PBX operators, printing and duplicating operations, production coordinators, ledger clerks, operations assistants, pages and guides, stock clerks, office machine operators, including computer console operators. (The positions of traffic managers and administrative assistants have been included in the office and clerical category because in most instances they are not truly managerial positions. However, those stations that require managerial functions of either position (director of a full department or special phase of the film's operation) may include them in the officials and managers category.)
- f. **Craftsperson (skilled)** - Manual workers of relatively high skill level having a thorough and comprehensive knowledge of the process involved in their work. Exercise considerable independent judgment and usually receive an extensive period of training. Includes: electricians, machinists, building construction workers, hair stylists, carpenters, painters, make-up artists, wardrobe person, heating and air conditioning mechanics.
- g. **Operatives (semiskilled)** - Workers who operate machine or processing equipment or perform other factory-type duties of intermediate skill level which can be mastered in a few weeks and require only limited training. Includes: chauffeurs, mobile messengers, drivers, apprentice carpenters and painters, scenic artists, film department assistants, material handlers. (Apprentices - persons employed in a program including work training and related instruction to learn a trade or craft which is traditionally considered an apprenticeship, regardless of whether the program is registered with a Federal or State agency.)
- h. **Laborers (unskilled)** - Workers in manual

occupations which generally require no special training. Perform elementary duties that may be learned in a few days and require the application of little or no independent judgment. Includes: studio grips, property persons, laborers performing lifting, pulling, piling, loading, etc., carwashers, set up helpers.

- i. **Service Workers** - Workers in both protective and nonprotective service occupations. Includes: cooks, counter and fountain workers, elevator operators, guards and watchpersons, doorkeepers, stewards, janitors, waiters and waitresses.

## 9. Total

Include in this column all employees in the Reporting Unit covered in the individual FCC Form 395-B. Consider as "full-time" employees all those working 30 or more hours a week.

## 10. Minority Group Identification

- a. Minority group information necessary for this section may be obtained either by visual surveys of the work force, or from post employment records as to the identity of employees. An employee may be included in the minority group to which she or he appears to belong, or is regarded in the community as belonging.
- b. Since visual surveys are permitted, the fact that minority group identifications are not present on the company records is not an excuse for failure to provide the data called for.
- c. Conducting a visual survey and keeping post-employment records of the race or ethnic origin of employees is legal in all jurisdictions and under all Federal and State Laws.
- d. FCC Form 395-B provides for reporting American Indians or Alaskan Natives; Asians or Pacific Islanders; Black, not of Hispanic origin; Hispanics, Whites, not of Hispanic origin; whenever such persons are employed. The category which most closely reflects the individual's recognition in his community should be used to report persons of mixed racial and/or ethnic origins.

## 11. Networks & Group Owners

Broadcast networks will file employment data in their role as group owners and report employees whose primary duties lie in the operation and/or management of the individual broadcast station.

## FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT

The FCC is authorized under the Communications Act of 1934, as amended, to collect the personal information we request in this form. If we believe there may be a violation or potential violation of a FCC statute, regulation, rule or order, your report may be referred to the Federal, state or local agency responsible for investigating, prosecuting, enforcing or implementing the statute, rule, regulation or order. In certain cases, the information in your request may be disclosed to the Department of Justice or a court or adjudicative body when (a) the FCC; (b) any employee of the FCC; or (c) the United States Government is a party to a proceeding before the body or has an interest in the proceeding. In addition, all information provided in this

form will be available for public inspection.

If you owe a past due debt to the federal government, any information you provide may also be disclosed to the Department of Treasury Financial Management Service, other federal agencies and/or your employer to offset your salary, IRS tax refund or other payments to collect that debt. The FCC may also provide this information to these agencies through the matching of computer records when authorized.

If you do not provide the information requested on this report, the report may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing information.

We have estimated that each response to this collection of information will vary from 10 minutes to 1 hour. Our estimate includes the time to read the instructions, look through existing

records, gather and maintain the required data, and actually complete and review the form or response. If you have any comments on this estimate, or on how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD-PERM, Paperwork Reduction Project (3060-0390), Washington, DC 20554. We will also accept your comments via the Internet if you send them to [jboley@fcc.gov](mailto:jboley@fcc.gov). Please **DO NOT SEND COMPLETED APPLICATIONS TO THIS ADDRESS**. Remember - you are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently valid OMB control number or if we fail to provide you with this notice. This collection has been assigned an OMB control number of 3060-0390.

**THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974, 5 U.S.C. 552a(e)(3), AND THE PAPERWORK REDUCTION ACT OF 1995, P.L.104-13, OCTOBER 1, 1995, 44 U.S.C. 3507.**

## BROADCAST STATION ANNUAL EMPLOYMENT REPORT

**SECTION I**

Legal Name of the Licensee		
Mailing Address		
City	State or Country (if foreign address)	ZIP Code
Telephone Number (include area code)	E-Mail Address (if available)	
	Facility ID Number	Call Sign

**SECTION II**

**A. TYPE OF RESPONDENT**

Commercial Broadcast Station

Noncommercial Broadcast Station

Headquarters

- Radio     TV  
                    Low Power TV  
                    International

- Educational Radio  
 Educational TV

HQ

**B. List call sign and location of all stations whose employees are on this report. This should include commonly owned stations which share one or more employees.**

Call Sign	Facility ID Number	Type (check applicable box)	Location (city, state)
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV	
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV	
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV	
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV	
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV	
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV	
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV	
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV	

**SECTION III**

**A. PAYROLL PERIOD COVERED BY THIS REPORT (DATE)** \_\_\_\_\_

**B. CHECK APPLICABLE BOX**

- Fewer than five full-time employees in employment unit during the selected payroll period (Complete page one only and certification statement and return to FCC)
- Five or more full-time employees in employment unit during the selected payroll period (Complete all sections of form and certification statement and return to FCC)

**SECTION IV CERTIFICATION**

This report must be certified, as follows: (a) By licensee, if an individual; (b) By a partner, if a partnership (general partner, if a limited partnership); (c) By an officer, if a corporation or an association; or (d) By an attorney of the licensee, in case of physical disability or absence from the United States of the licensee.

**WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).**

I certify to the best of my knowledge, information and belief, all statements contained in this report are true and correct.

Signed	Print Name
Title	Telephone No. (include area code)
Date	

**SECTION V - EMPLOYEE DATA**

**A. FULL-TIME PAID EMPLOYEE DATA**

JOB CATEGORIES	TOTAL (a-j)	MALE					FEMALE				
		WHITE (NOT HISPANIC) (a)	BLACK (NOT HISPANIC) (b)	HISPANIC (c)	ASIAN OR PACIFIC ISLANDER (d)	AMERICAN INDIAN, ALASKAN NATIVE (e)	WHITE (NOT HISPANIC) (f)	BLACK (NOT HISPANIC) (g)	HISPANIC (h)	ASIAN OR PACIFIC ISLANDER (i)	AMERICAN INDIAN, ALASKAN NATIVE (j)
OFFICIALS & MANAGERS											
PROFESSIONALS											
TECHNICIANS											
SALES WORKERS											
OFFICE & CLERICAL											
CRAFT WORKERS (SKILLED)											
OPERATIVES (SEMI-SKILLED)											
LABORERS (UNSKILLED)											
SERVICE WORKERS											
TOTAL											

**B. PART-TIME PAID  
EMPLOYEE DATA**

JOB CATEGORIES	TOTAL (a-j)	MALE					FEMALE				
		WHITE (NOT HISPANIC) (a)	BLACK (NOT HISPANIC) (b)	HISPANIC (c)	ASIAN OR PACIFIC ISLANDER (d)	AMERICAN INDIAN, ALASKAN NATIVE (e)	WHITE (NOT HISPANIC) (f)	BLACK (NOT HISPANIC) (g)	HISPANIC (h)	ASIAN OR PACIFIC ISLANDER (i)	AMERICAN INDIAN, ALASKAN NATIVE (j)
OFFICIALS & MANAGERS											
PROFESSIONALS											
TECHNICIANS											
SALES WORKERS											
OFFICE & CLERICAL											
CRAFT WORKERS (SKILLED)											
OPERATIVES (SEMI-SKILLED)											
LABORERS (UNSKILLED)											
SERVICE WORKERS											
TOTAL											

**BROADCAST EQUAL EMPLOYMENT OPPORTUNITY  
 MODEL PROGRAM REPORT**

Legal Name of the Applicant		
Mailing Address		
City	State or Country (if foreign address)	ZIP Code
Telephone Number (include area code)	E-Mail Address (if available)	
	Facility ID Number	Call Sign

Application for Construction Permit for New Station       Application for Assignment of License

Application for Transfer of Control

a. Service Type:     AM     FM     TV     Other (specify) \_\_\_\_\_

b. Community of License:    

City	State
------	-------

**INSTRUCTIONS**

Applicants seeking authority to construct a new commercial, noncommercial or international broadcast station, applicants seeking authority to obtain assignment of the construction permit or license of such a station, and applicants seeking authority to acquire control of an entity holding such construction permit or license are required to afford equal employment opportunity to all qualified persons and to refrain from discrimination in employment and related benefits on the basis of race, color, religion, national origin or sex. See 47 C.F.R. Section 73.2080. Pursuant to these requirements, an applicant who proposes to employ five or more full-time employees must establish a program designed to assure equal employment opportunity for women and minority groups (that is, Blacks not of Hispanic origin, Asians or Pacific Islanders, American Indians or Alaskan Natives and Hispanics). This is submitted to the Commission as the Model EEO Program. For purposes of this form, a station employment unit is a station or a group of commonly owned stations in the same market that share at least one employee.

**Guidelines for a Model EEO Program and a Model EEO Program are attached.**

NOTE: Check appropriate box, sign the certification below and return to FCC:

Station employment unit will employ fewer than 5 full-time employees; therefore no written program is being submitted.

Station employment unit will employ 5 or more full-time employees. Our Model EEO Program is attached. (You must complete all sections of this form.)

I certify that the statements made herein are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

Signed	Name of Respondent
Title	Date

WILLFUL FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT  
 (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT  
 (U.S. CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

## **GUIDELINES TO THE MODEL EEO PROGRAM**

The model EEO program adopted by the Commission for construction permit applicants, assignees, and transferees contains five sections designed to assist the applicant in establishing an effective EEO program for its station. The specific elements which should be addressed are as follows:

### **I. GENERAL POLICY**

The first section of the program should contain a statement by the applicant that it will afford equal employment opportunity in all personnel actions without regard to race, color, religion, national origin or sex, and that it has adopted an EEO program which is designed to fully utilize the skills of qualified persons.

### **II. RESPONSIBILITY FOR IMPLEMENTATION**

This section calls for the name (if known) and title of the official who will be designated by the applicant to have responsibility for implementing the station's program.

### **III. POLICY DISSEMINATION**

The purpose of this section is to disclose the manner in which the station's EEO policy will be communicated to employees and prospective employees. The applicant's program should indicate whether it: (a) intends to utilize an employment application form which contains a notice informing job applicants that discrimination is prohibited and that persons who believe that they have been discriminated against may notify appropriate governmental agencies; (b) will post a notice which informs job applicants and employees that the applicant is an equal opportunity employer and that they may notify appropriate governmental authorities if they believe that they have been discriminated against; and (c) will seek the cooperation of labor unions, if represented at the station, in the implementation of its EEO program and in the inclusion of nondiscrimination provisions in union contracts. The applicant should also set forth any other methods it proposes to utilize in conveying its EEO policy (e.g., orientation materials, on-air announcements, station newsletter) to employees and prospective employees.

### **IV. RECRUITMENT**

The applicant should specify the recruitment sources and other techniques it proposes to use to attract qualified job applicants. The purpose of the listing is to assist the applicant in developing specialized referral sources to ensure wide dissemination of vacancy information as job opportunities occur. Sources which subsequently prove to be nonproductive should not be relied on and new sources should be sought.

### **V. RECRUITMENT ELECTION**

Our EEO Rule requires broadcasters to select from two approaches how they will choose to ensure the success of their outreach. Specifically, as one option, broadcasters may adopt two supplemental recruitment measures specified in Section 73.2080 of the Commission's Rules. As a second option, broadcasters may forego the supplemental recruitment measures and design their own broad and inclusive outreach program, as long as they are able to demonstrate success in achieving broad outreach to all segments of the community, including minorities and females, based upon an analysis of the recruitment source, race, national origin, and gender of applicants attracted by their outreach efforts. See 47 C.F.R. Section 73.2080.

## **MODEL EQUAL EMPLOYMENT OPPORTUNITY PROGRAM**

### **I. GENERAL POLICY**

It will be our policy to provide equal employment opportunity to all qualified individuals without regard to race, color, religion, national origin or sex in all personnel actions including recruitment, evaluation, selection, promotion, compensation, training and termination.

It will also be our policy to promote the realization of equal employment opportunity through a positive, continuing program of specific practices designed to ensure the full realization of equal employment opportunity without regard to race, color, religion, national origin or sex.

To make this policy effective, and to ensure conformance with the Rules and Regulations of the Federal Communications Commission, we have adopted an Equal Employment Opportunity Program which includes the following elements:

## II. RESPONSIBILITY FOR IMPLEMENTATION

Name/Title

**will be responsible for the administration and implementation of our Equal Employment Opportunity Program. It will also be the responsibility of all persons making employment decisions with respect to the recruitment, evaluation, selection, promotion, compensation, training and termination of employees to ensure that our policy and program is adhered to and that no person is discriminated against in employment because of race, color, religion, national origin or sex.**

## III. POLICY DISSEMINATION

To assure that all members of the staff are cognizant of our equal employment opportunity policy and their individual responsibilities in carrying out this policy, the following communication efforts will be made:

- The station's employment application forms will contain a notice informing prospective employees that discrimination because of race, color, religion, national origin or sex is prohibited and that they may notify the appropriate local, State or Federal agency if they believe they have been the victims of discrimination.
- Appropriate notices will be posted informing applicants and employees that the station is an Equal Opportunity Employer and of their right to notify an appropriate local, State or Federal agency if they believe they have been the victims of discrimination.
- We will seek the cooperation of unions, if represented at the station, to help implement our EEO program and all union contracts will contain a nondiscrimination clause.

Other (specify)

## IV. RECRUITMENT

To ensure that information concerning each full-time vacancy is widely disseminated, we propose to use the following list of recruitment sources consistent with the requirements of 47 C.F.R. Section 73.2080:

## V. RECRUITMENT ELECTION

Please indicate which option the station will utilize for the next two years.

- Supplemental Recruitment Measures (Option A)       Alternative Recruitment Option (Option B)

**FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT**

The FCC is authorized under the Communications Act of 1934, as amended, to collect the personal information we request in this report. We will use the information you provide to determine if the benefit requested is consistent with the public interest. If we believe there may be a violation or potential violation of a FCC statute, regulation, rule or order, your request may be referred to the Federal, state or local agency responsible for investigating, prosecuting, enforcing or implementing the statute, rule, regulation or order. In certain cases, the information in your request may be disclosed to the Department of Justice or a court or adjudicative body when (a) the FCC; or (b) any employee of the FCC; or (c) the United States Government, is a party to a proceeding before the body or has an interest in the proceeding. In addition, all information provided in this form will be available for public inspection. If you owe a past due debt to the federal government, any information you provide may also be disclosed to the Department of Treasury Financial Management Service, other federal agencies and/or your employer to offset your salary, IRS tax refund or other payments to collect that debt. The FCC may also provide this information to these agencies through the matching of computer records when authorized. If you do not provide the information requested on this report, the report may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing information. Your response is required to obtain the requested authority. We have estimated that each response to this collection of information will average 1 hour. Our estimate includes the time to read the instructions, look through existing records, gather and maintain required data, and actually complete and review the form or response. If you have any comments on this estimate, or on how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD-PER, Paperwork Reduction Project (3060-0120), Washington, D. C. 20554. We will also accept your comments via the Internet if you send them to [jboley@fcc.gov](mailto:jboley@fcc.gov). Remember - you are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently valid OMB control number or if we fail to provide you with this notice. This collection has been assigned an OMB control number of 3060-0120.

**THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974, 5 U.S.C. 552a(e)(3), AND THE PAPERWORK REDUCTION ACT OF 1995, P.L. 104-13, OCTOBER 1, 1995, 44 U.S.C. 3507.**

## BROADCAST EQUAL EMPLOYMENT OPPORTUNITY PROGRAM REPORT

(To be filed with broadcast license renewal application)

(For FCC Use Only)

Code No.

Legal Name of the Licensee		
Mailing Address		
City	State or Country (if foreign address)	ZIP Code
Telephone Number (include area code)	E-Mail Address (if available)	
	Facility ID Number	Call Sign

**TYPE OF BROADCAST STATION :**

Commercial Broadcast Station

Noncommercial Broadcast Station

- Radio     TV  
 Low Power TV  
 International

- Educational Radio  
 Educational TV

List call sign and location of all stations included on this report. List commonly owned stations that share one or more employees. Also list stations operated by the licensee pursuant to a time brokerage agreement. Indicate on the table below which stations are operated pursuant to a time brokerage agreement. To the extent that licensees include stations operated pursuant to a time brokerage agreement on this report, responses or information provided in Sections I through IV should take into consideration the licensee's EEO compliance efforts at brokered stations, as well as any other stations, included on this form. For purposes of this form, a station employment unit is a station or a group of commonly owned stations in the same market that share at least one employee.

Call Sign	Facility ID Number	Type (check applicable box)	Location (city, state)	Time Brokerage Agreement (check applicable box)
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No

**CONTACT PERSON IF OTHER THAN LICENSEE**

Name			Street Address
City	State	Zip Code	Telephone No. ( )

**FILING INSTRUCTIONS**

Broadcast station licensees are required to afford equal employment opportunity to all qualified persons and to refrain from discriminating in employment and related benefits on the basis of race, color, national origin, religion, and sex. See 47 C.F.R. Section 73.2080. Pursuant to these requirements, a license renewal applicant whose station employment unit employs five or more full-time station employees must file a report of its activities to ensure equal employment opportunity. If a station employment unit employs fewer than five full-time employees, no equal employment opportunity program information need be filed. If a station employment unit is filing a combined report, a copy of the report must be filed with each station's renewal application.

A copy of this report must be kept in the station's public file. These actions are required to obtain license renewal. Failure to meet these requirements may result in sanctions or license renewal being delayed or denied. These requirements are contained in 47 C.F.R. Section 73.2080 and are authorized by the Communications Act of 1934, as amended.

Does your station employment unit employ fewer than five full-time employees?  Yes  No  
Consider as "full-time" employees all those permanently working 30 or more hours a week.

DISCRIMINATION COMPLAINTS. Have any complaints been filed before any body having competent jurisdiction under federal, state, territorial or local law, alleging unlawful discrimination in the employment practices of the station(s)?  Yes  No

If so, provide a brief description of the complaint(s), including the persons involved, the date of the filing, the court or agency, the file number (if any), and the disposition or current status of the matter.

--

If your station employment unit employs fewer than five full-time employees, complete the certification below, return the form to the FCC, and place a copy in your station(s) public file. You do not have to complete the rest of this form. If your station employment unit employs five or more full-time employees, you must complete all of this form and follow all instructions.

**CERTIFICATION**

This report must be certified, as follows:

- A. By licensee, if an individual;
- B. By a partner, if a partnership (general partner, if a limited partnership);
- C. By an officer, if a corporation or an association; or
- D. By an attorney of the licensee, in case of physical disability or absence from the United States of the licensee.

WILLFUL FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT  
(U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT  
(U.S. CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

I certify to the best of my knowledge, information and belief, all statements contained in this report are true and correct.

Signed	Name of Respondent
Title	Telephone No. (include area code)
Date	

The purpose of this document is to provide broadcast licensees, the FCC, and the public with information about whether the station is meeting equal employment opportunity requirements.

**GENERAL POLICY**

A broadcast station must provide equal employment opportunity to all qualified individuals without regard to their race, color, national origin, religion or sex in all personnel actions including recruitment, evaluation, selection, promotion, compensation, training and termination.

**RESPONSIBILITY FOR IMPLEMENTATION**

A broadcast station must assign a particular official overall responsibility for equal employment opportunity at the station. That official's name and title are:

NAME	TITLE

It is also the responsibility of all persons at a broadcast station making employment decisions with respect to recruitment, evaluation, selection, promotion, compensation, training and termination of employees to ensure that no person is discriminated against in employment because of race, color, religion, national origin or sex.

**I. STATEMENT OF COMPLIANCE**

The station(s) has complied with the outreach provisions of the FCC's Broadcast Equal Employment Opportunity Rule, 47 C.F.R. Section 73.2080, during the two-year period prior to filing this application.

Yes  No

See Explanation in Exhibit No.

**II. EEO PUBLIC FILE REPORT**

Attach as an exhibit a copy of the EEO public file report from the previous year. Stations are required to place annually such information as is required by 47 C.F.R. Section 73.2080 in their public files.

Exhibit No.

**III. NARRATIVE STATEMENT**

Provide a statement in an exhibit which demonstrates how the station achieved broad and inclusive outreach during the two-year period prior to filing this application. Stations that have experienced difficulties in their outreach efforts should explain.

Exhibit No.

**IV. RECRUITMENT ELECTION**

Please indicate which option the station employment unit will utilize for the next two years. See 47 C.F.R. Section 73.2080 of the Commission's Rules.

Supplemental Recruitment Measures (Option A)

Alternative Recruitment Option (Option B)

**FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT**

The FCC is authorized under the Communications Act of 1934, as amended, to collect the personal information we request in this report. We will use the information you provide to determine if the benefit requested is consistent with the public interest. If we believe there may be a violation or potential violation of a FCC statute, regulation, rule or order, your request may be referred to the Federal, state or local agency responsible for investigating, prosecuting, enforcing or implementing the statute, rule, regulation or order. In certain cases, the information in your request may be disclosed to the Department of Justice or a court or adjudicative body when (a) the FCC; or (b) any employee of the FCC; or (c) the United States Government, is a party to a proceeding before the body or has an interest in the proceeding. In addition, all information provided in this form will be available for public inspection. If you owe a past due debt to the federal government, any information you provide may also be disclosed to the Department of Treasury Financial Management Service, other federal agencies and/or your employer to offset your salary, IRS tax refund or other payments to collect that debt. The FCC may also provide this information to these agencies through the matching of computer records when authorized. If you do not provide the information requested on this report, the report may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing information. Your response is required to obtain the requested authority. We have estimated that each response to this collection of information will average 1 hour, 30 minutes. Our estimate includes the time to read the instructions, look through existing records, gather and maintain required data, and actually complete and review the form or response. If you have any comments on this estimate, or on how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD-PERF, Paperwork Reduction Project (3060-0113), Washington, D. C. 20554. We will also accept your comments via the Internet if you send them to jboley@fcc.gov. Remember - you are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently valid OMB control number or if we fail to provide you with this notice. This collection has been assigned an OMB control number of 3060-0113.

**THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974, 5 U.S.C. 552a(e)(3), AND THE PAPERWORK REDUCTION ACT OF 1995, P.L. 104-13, OCTOBER 1, 1995, 44 U.S.C. 3507.**

## BROADCAST STATEMENT OF COMPLIANCE

(For FCC Use Only)

Code No.

Legal Name of the Licensee		
Mailing Address		
City	State or Country (if foreign address)	ZIP Code
Telephone Number (include area code)	E-Mail Address (if available)	
	Facility ID Number	Call Sign

**TYPE OF BROADCAST STATION :**

Commercial Broadcast Station

Noncommercial Broadcast Station

- Radio     TV  
 Low Power TV  
 International

- Educational Radio  
 Educational TV

List call sign and location of all stations included on this statement. List commonly owned stations that share one or more employees. Also list stations operated by the licensee pursuant to a time brokerage agreement. Indicate on the table below which stations are operated pursuant to a time brokerage agreement. To the extent that licensees include stations operated pursuant to a time brokerage agreement on this report, responses or information provided in Sections I through III should take into consideration the licensee's EEO compliance efforts at brokered stations, as well as any other stations, included on this form. For purposes of this form, a station employment unit is a station or a group of commonly owned stations in the same market that share at least one employee.

Call Sign	Facility ID Number	Type (check applicable box)	Location (city, state)	Time Brokerage Agreement (check applicable box)
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No

**SEND NOTICES AND COMMUNICATIONS TO THE FOLLOWING NAMED PERSON AT THE ADDRESS INDICATED BELOW:**

Name			Street Address
City	State	Zip Code	Telephone No. ( )

**FILING INSTRUCTIONS**

Broadcast station licensees are required to afford equal employment opportunity to all qualified persons and to refrain from discriminating in employment and related benefits on the basis of race, color, national origin, religion, and sex. See 47 C.F.R. Section 73.2080. Pursuant to these requirements, a station employment unit that employs five or more full-time station employees must file a statement of compliance with equal employment opportunity requirements. If a station employment unit employs fewer than five full-time employees, no statement need be filed.

A copy of this statement must be kept in the station's public file. Failure to meet these requirements may result in sanctions or remedies. These requirements are contained in 47 C.F.R. Section 73.2080 and are authorized by the Communications Act of 1934, as amended.

Does your station employment unit employ fewer than five full-time employees?  Yes  No  
 Consider as "full-time" employees all those permanently working 30 or more hours a week.

If your station employment unit employs fewer than five full-time employees, complete the certification below, return the form to the FCC, and place a copy in your station(s) public file. You do not have to complete the rest of this form. If your station employment unit employs five or more full-time employees, you must complete all of this form and follow all instructions.

**CERTIFICATION**

This report must be certified, as follows:

- A. By licensee, if an individual;
- B. By a partner, if a partnership (general partner, if a limited partnership);
- C. By an officer, if a corporation or an association; or
- D. By an attorney of the licensee, in case of physical disability or absence from the United States of the licensee.

WILLFUL FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT  
 (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT  
 (U.S. CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

I certify to the best of my knowledge, information and belief, all statements contained in this report are true and correct.

Signed	Name of Respondent
Title	Telephone No. (include area code)
Date	

The purpose of this document is to provide broadcast licensees, the FCC, and the public with information about whether the station is meeting equal employment opportunity requirements.

### GENERAL POLICY

A broadcast station must provide equal employment opportunity to all qualified individuals without regard to their race, color, national origin, religion or sex in all personnel actions including recruitment, evaluation, selection, promotion, compensation, training and termination.

### RESPONSIBILITY FOR IMPLEMENTATION

A broadcast station must assign a particular official overall responsibility for equal employment opportunity at the station. That official's name and title are:

NAME	TITLE

It is also the responsibility of all persons at a broadcast station making employment decisions with respect to recruitment, evaluation, selection, promotion, compensation, training and termination of employees to ensure that no person is discriminated against in employment because of race, color, religion, national origin or sex.

### I. STATEMENT OF COMPLIANCE

The station(s) has complied with the outreach provisions of the FCC's Broadcast Equal Employment Opportunity Rule, 47 C.F.R. Section 73.2080, during the two-year period prior to filing this form.

Yes  No

See Explanation  
in Exhibit No.

### II. RECRUITMENT ELECTION

Please indicate which option the station employment unit will utilize for the next two years. See 47 C.F.R. Section 73.2080 of the Commission's Rules.

Supplemental Recruitment Measures (Option A)  Alternative Recruitment Option (Option B)

### III. MID-TERM REVIEW

Television station employment units with five or more full-time employees and radio station employment units with more than ten full-time employees filing in the middle of the license term must attach a copy of the EEO public file report from the previous year. Stations are required to place annually such information as is required by 47 C.F.R. Section 73.2080 in their public files.

### FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT

The FCC is authorized under the Communications Act of 1934, as amended, to collect the personal information we request in this report. We will use the information you provide to determine if the benefit requested is consistent with the public interest. If we believe there may be a violation or potential violation of a FCC statute, regulation, rule or order, your request may be referred to the Federal, state or local agency responsible for investigating, prosecuting, enforcing or implementing the statute, rule, regulation or order. In certain cases, the information in your request may be disclosed to the Department of Justice or a court or adjudicative body when (a) the FCC; or (b) any employee of the FCC; or (c) the United States Government, is a party to a proceeding before the body or has an interest in the proceeding. In addition, all information provided in this form will be available for public inspection. If you owe a past due debt to the federal government, any information you provide may also be disclosed to the Department of Treasury Financial Management Service, other federal agencies and/or your employer to offset your salary, IRS tax refund or other payments to collect that debt. The FCC may also provide this information to these agencies through the matching of computer records when authorized. If you do not provide the information requested on this report, the report may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing information. Your response is required to obtain the requested authority. We have estimated that each response to this collection of information will average 30 minutes. Our estimate includes the time to read the instructions, look through existing records, gather and maintain required data, and actually complete and review the form or response. If you have any comments on this estimate, or on how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD-PERF, Paperwork Reduction Project (3060-XXXX), Washington, D. C. 20554. We will also accept your comments via the Internet if you send them to jboley@fcc.gov. Remember - you are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently valid OMB control number or if we fail to provide you with this notice. This collection has been assigned an OMB control number of 3060-XXXX.

THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974, 5 U.S.C. 552a(e)(3), AND THE PAPERWORK REDUCTION ACT OF 1995, P.L. 104-13, OCTOBER 1, 1995, 44 U.S.C. 3507.

**INSTRUCTIONS FOR COMPLETING  
FCC FORMS 395-A & 395-M**

**YOU ARE STRONGLY URGED TO CONSULT THE COMMISSION'S CABLE EEO RULES  
BEFORE COMPLETING THIS FORM  
47 CFR Section 76.71 et seq.**

General Instructions

Supply the requested information for the unit identified by the EEO ID number appearing on the attachment containing the employee data grid (Section V). If the unit is to submit a Supplemental Investigation Sheet (SIS), one will be attached to the form and an X will appear in the brackets before "Supplemental Investigation Sheet Attached" located in the box "For FCC Use Only" on page 1 of the form. If the unit no longer exists due to consolidation with another unit, or is no longer under your control, attach as Exhibit A an explanation and proceed to Section VIII.

Section I

- A. In addition to the unit operator's legal name, supply, if applicable, the name of the MSO owning or controlling the operator.
- B. Supply the address to which you want correspondence sent.
- C. Supply the county and state of the unit's principal employment office.
- D. A full-time employee is one who permanently works 30 or more hours per week.
- E. Insert the payroll period in July, August or September used for this year's report.
- F. Place an X in the appropriate brackets for each possible exhibit.

Section II

Submit as Exhibit A a list of communities added to or deleted from the unit, using the format provided. To obtain this information, review the prior year's form for the unit, noting the communities then comprising the unit, and comparing that list with the names of the communities now comprising the unit.

(NOT APPLICABLE TO MVPD UNITS)

Section III

Carefully answer each of the nine (9) questions by checking either Yes or No. If the answer is No, attach as Exhibit B an explanation. The focus of question three is on whether cable units have engaged in broad and inclusive outreach. The Commission does not require the targeting of certain kinds of sources or organizations. With regard to question five, we clarify that efforts to seek out entrepreneurs should be broad enough to cover all segments of the community, and that no entity should be excluded on the basis of race, national origin or gender. In addition, indicate which option the cable employment unit will utilize for the next 12 months. Our EEO Rule requires cable entities to select from two approaches how they will choose to ensure the success of their outreach. Specifically, as one option, cable entities may adopt two supplemental recruitment measures specified in Section 76.75 of the Commission's Rules. As a second option, cable entities may forego the supplemental recruitment measures and design their own broad and inclusive outreach program, as long as they are able to demonstrate success in achieving broad outreach to all segments of the community, including minorities and females, based upon an analysis of the recruitment source, race, national origin, and gender of applicants attracted by their outreach efforts. See 47 C.F.R. Section 76.75.

#### Section IV

You may attach as Exhibit C any additional information you believe useful in the FCC's evaluation of your EEO efforts. There is no requirement to provide such information.

#### Section V

Report all permanent, not temporary, employees, both full-time and part-time, in the appropriate job categories, listed by gender and race, color or national origin.

#### Job Category Definitions

Officials and Managers -- Occupations requiring administrative personnel who set broad policies, exercise overall responsibility for execution of these policies, and direct individual departments or special phases or segments of a firm's operations or subdepartments of a major department. Incumbents within this category ordinarily exercise authority to hire and terminate employees. This category would include system managers and assistant managers, program directors and assistant directors, office managers, budget officers, promotions managers, public affairs directors, chief engineers and those holding equivalent positions. Employees whose occupations fall within the Corporate Officers, General Manager, Chief Technician, Comptroller, General Sales Manager and Production Manager categories also should be listed under this category.

Professionals -- Occupations requiring either college graduation or experience of such kind and amount as to provide a comparable background. Includes: accountants and auditors, editors, engineers, lawyers and labor relations specialists. This category would include persons engaged in the writing, preparation and reproduction of programming, writers and editors, producers and directors of programs, floor directors, announcers, singers, actors, music librarians and those in similar positions.

Technicians -- Occupations requiring a combination of basic scientific knowledge and manual skill which can be obtained through about 2 years of post high school education, such as is offered in many technical institutes and junior colleges, or through equivalent on-the-job training. Includes: computer programmers and operators, engineering aides, junior engineers and electronic technicians. This category would also include strand mappers, audio and video engineers, camera technicians (live or film), film processors, light technicians, drafters and design personnel, electronic converter repair technicians (technicians who perform more than clear and recycle functions) and advertising sales production personnel.

Sales -- Occupations engaging wholly or primarily in direct selling. This category would include advertising agents, cable service sales personnel (sales representatives), and individuals engaged in direct customer contact for the purposes of product and service promotion. This category includes employees who ordinarily are paid by commissions.

Office and Clerical -- Includes all clerical-type work regardless of level of difficulty, where the activities are predominantly nonmanual though some manual work not directly involved with altering or transporting the products is included. Includes: bookkeepers, cashiers, collectors of bills and accounts, messengers and clerks, office machine operators, stenographers, typists and secretaries, telephone operators, kindred workers, and customer service representatives.

Craft Workers (skilled) -- Manual workers of relatively high skill level having a thorough and comprehensive knowledge of the processes involved in their work. Exercise considerable independent judgment and usually receive an extensive period of training. Includes: hourly paid supervisors who are not members of management, mechanics and repair workers, electricians and motion picture projectionists, and splicers.

Operatives (semi-skilled) -- Workers who operate machine or processing equipment or perform other factory-type duties of intermediate skill level which can be mastered in a few weeks and require only limited training. Includes: apprentices,<sup>1</sup> operatives, truck and tractor drivers, welders, installers, line workers and trenching machine workers.

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<sup>1</sup>Apprentices -- Persons employed in a program including work training and related instruction to learn a trade or craft which is traditionally considered an apprenticeship regardless of whether the program is registered with a Federal or State agency.

Laborers (unskilled) -- Workers in manual occupations which generally require no special training. Perform elementary duties that may be learned in a few days and require the application of little or no independent judgment. Includes: gardeners and groundskeepers, laborers performing lifting or digging, stage hands and kindred workers.

Service Workers -- Workers in both protective and nonprotective service occupations. Includes: char workers and cleaners, elevator operators, guards and watch workers, janitors, and kindred workers.

NOTE: A person who does more than one job is to be listed in the job category which represents the most frequently performed task by that person; a person is to be listed only once in this section. Specific job titles listed in the categories above are merely illustrative. The proper categorization of any employee depends on the kind and level of the employee's responsibilities.

#### Minority Group Identification

(a) Minority group information necessary for this section may be obtained either by visual surveys of the workforce, or from post-employment records as to the identity of employees. An employee may be included in the minority group to which he or she appears to belong, or is regarded in the community as belonging.

(b) Since visual surveys are permitted, the fact that minority group identifications are not present on company records is not an excuse for failure to provide the data called for.

(c) Conducting a visual survey and keeping post-employment records of the race or ethnic origin of employees is legal in all jurisdictions and under all Federal and State laws. State laws prohibiting inquiries and recordkeeping as to race, etc., relate only to applicants for jobs, not to employees.

#### Race/Ethnic Categories

(b & g) White, not of Hispanic Origin -- A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

(c & h) Black, not of Hispanic Origin -- A person having origins in any of the black racial groups of Africa.

(d & i) Hispanic -- A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race.

(e & j) Asian or Pacific Islander -- A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or in the Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippines and Samoa.

(f & k) American Indian or Alaskan Native -- A person having origins in any of the original peoples of North America, and who maintain cultural identification through tribal affiliation or community recognition.

#### Section VI

Based on the same payroll period used for Section V, report all permanent, not temporary, employees both full-time and part-time, in the appropriate job sub-categories, listed by gender and race, color or national origin.

#### Job Sub-Category Definitions

Corporate Officers -- An employee who is responsible for setting broad policies for the overall operation of the company and who holds a corporate office as designated in the company's governing regulations (e.g., Articles of Incorporation, Articles of Partnership, By-Laws). Examples of positions falling within this category may include, Chairman of the Board, President and Vice-President.

NOTE: A person whose responsibilities fall within the Corporate Officers category and one of the five succeeding job categories (i.e., Vice President and General Sales Manager) should normally be reported in one of the succeeding categories. A person should be reported in only one sub-category.

General Manager -- An employee who exercises overall responsibility for an employment unit or system. Related title may include "systems manager."

Chief Technician -- An employee who has overall responsibility for the system's technical operations. The incumbent ordinarily oversees technical budgets and expenditures, inventory control and fleet management. Individual ordinarily supervises technical personnel in the installation, service, maintenance and construction departments and/or studio. Category includes related titles such as "Technical Operations Manager," "Technical Manager," "Plant Manager," or "Chief Engineer."

Comptroller -- An employee who manages the activities of the accounting department in the maintenance of the accounting book and other such records.

General Sales Manager -- A senior sales or marketing employee who oversees the marketing functions of the system which may include telemarketing in addition to direct sales.

Production Manager -- A senior employee responsible for advertising and/or production of local community programming.

NOTE: A person is to be listed in the one category which represents the most frequently performed task by that person. Specific job titles listed in the categories above are merely illustrative. The proper categorization of any employee depends on the kind and level of the employee's responsibilities.

## Section VII

Provide a list, by job title within each of the 15 job categories, of the employees reported in Sections V and VI. This list should include: the job title, the job category for each job title; the full or part-time status of each position; the gender of the employee holding the position; and the race or national origin of the employee holding the position. Job titles may be listed in any order. Job title data must be provided for all of the 15 job categories. Please list the full title of each position (e.g., Vice President and General Sales Manager).

The total number of positions reported on this list should equal the total number of employees reported in Section V.

Computer-generated lists may be submitted in lieu of the FCC-provided form. However, such lists must contain all of the information requested in these instructions. If you decide to submit a computer-generated list, use the FCC-provided form as a format reference.

## Section VIII

Sign and date the form in the spaces provided. Also, print the name of the official signing as well as the title of that person. Return the original and one copy to the Commission by October 2. Retain a copy for your files.

## Supplemental Investigation Sheet (SIS)

If required, attach as Exhibits D, E, and F the job descriptions requested in Part I, the responses to the questions checked in Part II, and the EEO public file report requested in Part III.

## **FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT**

The FCC is authorized under the Communications Act of 1934, as amended, to collect the personal information we request in this report. We will use the information you provide to determine if the benefit requested is consistent with the public interest. If we believe there may be a violation or potential violation of a FCC statute, regulation, rule or order, your request may be referred to the Federal, state or local agency responsible for investigating, prosecuting, enforcing or implementing the statute, rule, regulation or order. In certain cases, the information in your request may be disclosed to the Department of Justice or a court or adjudicative body when (a) the FCC; or (b) any employee of the FCC; or (c) the United States Government, is a party to a proceeding before the body or has an interest in the proceeding.

In addition, all information provided in this form will be available for public inspection. If you owe a past due debt to the federal government, any information you provide may also be disclosed to the Department of Treasury Financial Management Service, other federal agencies and/or your employer to offset your salary, IRS tax refund or other payments to collect that debt. The FCC may also provide this information to these agencies through the matching of computer records when authorized. If you do not provide the information requested on this report, the report may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing information. Your response is required to obtain the requested authority. We have estimated that each response to this collection of information will vary from 10 minutes to 1 hour, 15 minutes. Our estimate includes the

time to read the instructions, look through existing records, gather and maintain required data, and actually complete and review the form or response. If you have any comments on this estimate, or on how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD-PERM, Paperwork Reduction Project (3060-0095/0574), Washington, D. C. 20554. We will also accept your comments via the Internet if you send them to [jboley@fcc.gov](mailto:jboley@fcc.gov). Remember - you are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently valid OMB control number or if we fail to provide you with this notice. This collection has been assigned an OMB control number of 3060-0095/0574.

**THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974, 5 U.S.C. 552a(e)(3), AND THE PAPERWORK REDUCTION ACT OF 1980, P.L. 95-511, DECEMBER 11, 1980, 44 U.S.C. 3507**

## NOTICE

SHOULD YOU NO LONGER OPERATE THIS EMPLOYMENT UNIT, PLEASE FURNISH THE CURRENT OPERATOR'S NAME, ADDRESS, DATE OF TRANSFER AND RETURN THE FORM 395-A OR 395-M IMMEDIATELY. CALL (202) 418-1450 TO OBTAIN FORMS FOR NEWLY ACQUIRED UNITS OR IF YOU HAVE ANY EEO QUESTIONS.

THE PAYROLL PERIOD, SECTION I(E), IS THE END OF ANY TWO WEEK PERIOD BETWEEN JULY 1 AND SEPTEMBER 30, 2000. IT IS THE DATE USED TO REPORT THE COMPOSITION OF THE UNIT'S STAFF IN SECTION V DURING THE PRECEDING 12 MONTHS.

PLEASE EXPLAIN ANY CHANGES IN POSITION CLASSIFICATIONS FROM LAST YEAR (E.G., FROM TECHNICIAN TO CRAFT WORKER).

RETURN THE COMPLETED FORM IN DUPLICATE INCLUDING ANSWERS TO THE SUPPLEMENTAL INVESTIGATION SHEET (SIS) IF APPLICABLE AS SOON AS POSSIBLE. FOR YOUR INFORMATION, THE UPPER RIGHT HAND CORNER OF THE FORM 395-A OR 395-M WILL BE MARKED WITH AN "X" FOR THOSE UNITS THAT MUST FILL OUT AN SIS. PURSUANT TO SECTION 76.1802 OF THE COMMISSION'S RULES, THE DUE DATE FOR FILING FORMS FCC 395-A AND FCC 395-M IS SEPTEMBER 30 OF EACH YEAR. IN 2000, HOWEVER, SEPTEMBER 30 FALLS ON A SATURDAY. CONSEQUENTLY, WE WILL REQUIRE THAT THE FORMS 395-A AND 395-M FOR 2000 BE FILED NO LATER THAN OCTOBER 2, 2000. ALL REPORTS WILL BE CONSIDERED DELINQUENT AFTER MONDAY, OCTOBER 2, 2000. **UNITS FILING REPORTS AFTER OCTOBER 2, 2000 WILL NOT BE EEO CERTIFIED FOR THE 2000 REPORTING PERIOD.**

**Cable Television Annual Employment Report 2000**

**FCC FORM 395-A**

Not Approved by OMB  
3060-0095

Submit the original and one copy by October 2 to:

Federal Communications Commission  
Room 3-A625  
Washington, D. C. 20554

**SECTION I IDENTIFYING INFORMATION**

A. Name of Operator:		
MSO Name:		
B. Employment Unit's Mailing Address		
City	State	Zip Code
C. County and State in which unit's employment office is located		

- D. Category of Respondent (check applicable box)
- Fewer than six (6) full-time employees during the selected payroll period: Complete Sections I, II and VIII
- Six (6) or more full-time employees during the selected payroll period: Complete ALL sections of the Form 395-A and the Supplemental Investigation Sheet, if attached

For FCC Use Only
Emp. Unit ID # _____
<input type="checkbox"/> Supplemental Investigation Sheet (SIS) Attached

E. Pay Period Covered by this Report (inclusive dates)
--

- F. Attachments: (Check applicable boxes)
- |  |                          |                          |                              |
|--|--------------------------|--------------------------|------------------------------|
|  | Not Applicable           | Attached                 | Exhibit - For:               |
|  | <input type="checkbox"/> | <input type="checkbox"/> | A-Section II                 |
|  | <input type="checkbox"/> | <input type="checkbox"/> | B-Section III                |
|  | <input type="checkbox"/> | <input type="checkbox"/> | C-Section IV                 |
|  | <input type="checkbox"/> | <input type="checkbox"/> | D-SIS-Job Descriptions       |
|  | <input type="checkbox"/> | <input type="checkbox"/> | E-SIS Narrative Responses    |
|  | <input type="checkbox"/> | <input type="checkbox"/> | F-SIS EEO Public File Report |

**SECTION II COMMUNITY INFORMATION**

System Communities Comprising Local Employment Unit			
Ident No.	Name of Community	Location (State)	Type

Review the list of communities served on the previous year's submission and attach as Exhibit A any additions or deletions, using the format noted above.

Exhibit No. A
------------------

### SECTION III EEO POLICY AND PROGRAM REQUIREMENTS

Check YES or NO to each of the following questions. If answer to any question below is NO, attach as EXHIBIT B an explanation.

Exhibit No.  
B

YES NO

1. Have you complied with the outreach provisions of the FCC's Cable Equal Employment Opportunity Rule, 47 C.F.R. Section 76.75(b) or (f), during the twelve month period prior to filing this form?
2. Do you disseminate widely your EEO Program to job applicants, employees, and those with whom you regularly do business?
3. Do you contact minority organizations, women's organizations, media, educational institutions, and other potential sources of minority and female applicants for referrals whenever job vacancies are available in your organization?
4. Do you undertake to offer promotions to positions of greater responsibility in a nondiscriminatory manner?
5. To the extent possible, do you seek out entrepreneurs in a nondiscriminatory manner and encourage them to conduct business with all parts of your organization?
6. Do you analyze the results of your efforts to recruit, hire, promote, and use services in a nondiscriminatory manner and use these results to evaluate and improve your EEO program?
7. Do you define the responsibility of each level of management to ensure a positive application and vigorous enforcement of your policy of equal employment opportunity and maintain a procedure to review and control managerial and supervisory performance?
8. Do you conduct a continuing program to exclude every form of prejudice or discrimination based upon race, color, religion, national origin, age, or sex from your personnel policies and practices and working conditions?
9. Do you conduct a continuing review of job structure and employment practices and maintain positive recruitment training, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility?

RECRUITMENT ELECTION - Please indicate which option the cable employment unit will utilize for the next 12 months:

- Supplemental Recruitment Measures (Option A)  Alternative Recruitment Option (Option B)

### SECTION IV ADDITIONAL INFORMATION

You may provide as Exhibit C any additional information that you believe might be useful in evaluating your efforts to comply with the Commission's EEO provisions. There is no requirement to provide additional data or information.

Exhibit No.  
C







**SECTION VIII CERTIFICATION**

This report must be certified as follows:

- A. By the individual owning the reporting system if individually owned;
- B. By a partner, if a partnership; or
- C. By an officer, if a corporation or association.

I certify that to the best of my knowledge, information and belief, all statements contained in this report are true and correct.

Signed	Title
Date	Name of Respondent
Telephone No. (include area code)	

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT  
(U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE (U.S. CODE,  
TITLE 47, SECTION 312(a)(1), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

## Part I Employee Job Descriptions

Give brief job descriptions for employees in the job categories specified below. The number specified in the box indicates the number of different job descriptions that are to be submitted for each category. Job descriptions should include the position title and a brief description of the major duties and responsibilities of the individual(s) in the position.

- |                         |                        |                         |                         |                         |                           |
|-------------------------|------------------------|-------------------------|-------------------------|-------------------------|---------------------------|
| 1. <input type="text"/> | Officials and Managers | 4. <input type="text"/> | Sales Workers           | 7. <input type="text"/> | Operatives (semi-skilled) |
| 2. <input type="text"/> | Professionals          | 5. <input type="text"/> | Office and Clerical     | 8. <input type="text"/> | Laborers (unskilled)      |
| 3. <input type="text"/> | Technicians            | 6. <input type="text"/> | Craft Workers (skilled) | 9. <input type="text"/> | Service Workers           |

## Part II Inquiries Concerning EEO Program and Practices

Submit responses to the inquiries indicated by an "X." Responses should be brief, but must provide sufficient information to describe the employment unit's activity and efforts in the area of inquiry.

1.  Describe the employment unit's efforts to comply with the outreach provisions of 47 C.F.R. Section 76.75(b) or (f).
2.  Describe the employment unit's efforts to disseminate widely its equal employment opportunity program to job applicants, employees, and those with whom it regularly does business.
3.  Name the minority organizations, organizations for women, media, educational institutions, and other recruitment sources used to attract minority and female applicants whenever job vacancies become available.
4.  Explain the employment unit's efforts to promote in a nondiscriminatory manner to positions of greater responsibility.
5.  Describe the employment unit's efforts to encourage entrepreneurs to conduct business in a nondiscriminatory manner with all parts of its operation and provide an analysis of the results of those efforts.
6.  Report the findings of the employment unit's analysis of its efforts to recruit, hire and promote in a nondiscriminatory manner and explain any difficulties encountered in implementing its EEO program.
7.  Describe the responsibility of each level of the employment unit's management with respect to application and enforcement of its EEO policy and explain the procedure for review and control of managerial and supervisory performance.
8.  Describe the manner in which the employment unit conducts its continuing review of job structure and employment practices.
9.  Other Inquiries:

## Part III EEO Public File Report

Attach a copy of the EEO public file report from the previous year. Cable entities are required to place annually such information as is required by 47 C.F.R. Section 76.1702 in their public files.

**EMP UNIT ID:****MSO NAME:****OPR NAME:**

**FCC FORM 395-M**

**Multi-Channel Video Program Distributor  
Annual Employment Report 2000**

Not Approved by OMB  
3060-0574

Submit the original and one copy by October 2 to:

Federal Communications Commission  
Room 3-A625  
Washington, D. C. 20554

**SECTION I IDENTIFYING INFORMATION**

A. Name of Operator:		
MSO Name:		
B. Employment Unit's Mailing Address		
City	State	Zip Code
C. County and State in which unit's employment office is located		

- D. Category of Respondent (check applicable box)
- Fewer than six (6) full-time employees during the selected payroll period: Complete Sections I, II and VIII
  - Six (6) or more full-time employees during the selected payroll period: Complete ALL sections of the Form 395-M and the Supplemental Investigation Sheet, if attached

For FCC Use Only
Emp. Unit ID # _____
<input type="checkbox"/> Supplemental Investigation Sheet (SIS) Attached

E. Pay Period Covered by this Report (inclusive dates)
--

- F. Attachments: (Check applicable boxes)
- | Not Applicable           | Attached                 | Exhibit - For:               |
|--------------------------|--------------------------|------------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> | A-Section II                 |
| <input type="checkbox"/> | <input type="checkbox"/> | B-Section III                |
| <input type="checkbox"/> | <input type="checkbox"/> | C-Section IV                 |
| <input type="checkbox"/> | <input type="checkbox"/> | D-SIS-Job Descriptions       |
| <input type="checkbox"/> | <input type="checkbox"/> | E-SIS Narrative Responses    |
| <input type="checkbox"/> | <input type="checkbox"/> | F-SIS EEO Public File Report |

**SECTION II**

NOT APPLICABLE TO MVPD UNITS.

### SECTION III EEO POLICY AND PROGRAM REQUIREMENTS

Check YES or NO to each of the following questions. If answer to any question below is NO, attach as EXHIBIT B an explanation.

YES NO

1. Have you complied with the outreach provisions of the FCC's Cable Equal Employment Opportunity Rule, 47 C.F.R. Section 76.75(b) or (f), during the twelve month period prior to filing this form?
2. Do you disseminate widely your EEO Program to job applicants, employees, and those with whom you regularly do business?
3. Do you contact minority organizations, women's organizations, media, educational institutions, and other potential sources of minority and female applicants for referrals whenever job vacancies are available in your organization?
4. Do you undertake to offer promotions to positions of greater responsibility in a nondiscriminatory manner?
5. To the extent possible, do you seek out entrepreneurs in a nondiscriminatory manner and encourage them to conduct business with all parts of your organization?
6. Do you analyze the results of your efforts to recruit, hire, promote, and use services in a nondiscriminatory manner and use these results to evaluate and improve your EEO program?
7. Do you define the responsibility of each level of management to ensure a positive application and vigorous enforcement of your policy of equal employment opportunity and maintain a procedure to review and control managerial and supervisory performance?
8. Do you conduct a continuing program to exclude every form of prejudice or discrimination based upon race, color, religion, national origin, age, or sex from your personnel policies and practices and working conditions?
9. Do you conduct a continuing review of job structure and employment practices and maintain positive recruitment training, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility?

RECRUITMENT ELECTION - Please indicate which option the cable employment unit will utilize for the next 12 months:

- Supplemental Recruitment Measures (Option A)  Alternative Recruitment Option (Option B)

### SECTION IV ADDITIONAL INFORMATION

You may provide as Exhibit C any additional information that you believe might be useful in evaluating your efforts to comply with the Commission's EEO provisions. There is no requirement to provide additional data or information.



**SECTION VI - EMPLOYMENT DATA FOR UPPER-LEVEL JOB SUB-CATEGORIES**

Emp. Unit ID # \_\_\_\_\_

MALE					
TOTAL (b-k) (a)	White (not Hispanic) (b)	Black (not Hispanic) (c)	Hispanic (d)	Asian or Pacific Islander (e)	American Indian, Alaskan Native (f)

FEMALE				
White (not Hispanic) (g)	Black (not Hispanic) (h)	Hispanic (i)	Asian or Pacific Islander (j)	American Indian, Alaskan Native (k)

**JOB SUB-CATEGORIES**

CORPORATE  
OFFICERS

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GENERAL  
MANAGER

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CHIEF  
TECHNICIAN

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COMPTROLLER

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GENERAL SALES  
MANAGER

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PRODUCTION  
MANAGER

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**SECTION VIII CERTIFICATION**

This report must be certified as follows:

- A. By the individual owning the reporting system if individually owned;
- B. By a partner, if a partnership; or
- C. By an officer, if a corporation or association.

I certify that to the best of my knowledge, information and belief, all statements contained in this report are true and correct.

Signed	Title
Date	Name of Respondent
Telephone No. (include area code)	

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT  
(U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE (U.S. CODE,  
TITLE 47, SECTION 312(a)(1), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

Give brief job descriptions for employees in the job categories specified below. The number specified in the box indicates the number of different job descriptions that are to be submitted for each category. Job descriptions should include the position title and a brief description of the major duties and responsibilities of the individual(s) in the position.

- |                         |                        |                         |                         |                         |                           |
|-------------------------|------------------------|-------------------------|-------------------------|-------------------------|---------------------------|
| 1. <input type="text"/> | Officials and Managers | 4. <input type="text"/> | Sales Workers           | 7. <input type="text"/> | Operatives (semi-skilled) |
| 2. <input type="text"/> | Professionals          | 5. <input type="text"/> | Office and Clerical     | 8. <input type="text"/> | Laborers (unskilled)      |
| 3. <input type="text"/> | Technicians            | 6. <input type="text"/> | Craft Workers (skilled) | 9. <input type="text"/> | Service Workers           |

**Part II Inquiries Concerning EEO Program and Practices**

Submit responses to the inquiries indicated by an "X." Responses should be brief, but must provide sufficient information to describe the employment unit's activity and efforts in the area of inquiry.

1.  Describe the employment unit's efforts to comply with the outreach provisions of 47 C.F.R. Section 76.75(b) or (f).
2.  Describe the employment unit's efforts to disseminate widely its equal employment opportunity program to job applicants, employees, and those with whom it regularly does business.
3.  Name the minority organizations, organizations for women, media, educational institutions, and other recruitment sources used to attract minority and female applicants whenever job vacancies become available.
4.  Explain the employment unit's efforts to promote in a nondiscriminatory manner to positions of greater responsibility.
5.  Describe the employment unit's efforts to encourage entrepreneurs to conduct business in a nondiscriminatory manner with all parts of its operation and provide an analysis of the results of those efforts.
6.  Report the findings of the employment unit's analysis of its efforts to recruit, hire and promote in a nondiscriminatory manner and explain any difficulties encountered in implementing its EEO program.
7.  Describe the responsibility of each level of the employment unit's management with respect to application and enforcement of its EEO policy and explain the procedure for review and control of managerial and supervisory performance.
8.  Describe the manner in which the employment unit conducts its continuing review of job structure and employment practices.
9.  Other Inquiries:

**Part III EEO Public File Report**

Attach a copy of the EEO public file report from the previous year. Cable entities are required to place annually such information as is required by 47 C.F.R. Section 76.1702 in their public files.

**EMP UNIT ID:****MSO NAME:****OPR NAME:**

**SEPARATE STATEMENT OF CHAIRMAN WILLIAM E. KENNARD**

*Re: Equal Employment Opportunity Rules and Policies (MM Docket Nos. 98-204, 96-16)*

Today we adopt EEO rules for the twenty-first century.

It is very appropriate that we adopt these rules in a week that we began by honoring the life and legacy of Dr. Martin Luther King, Jr.

These rules help further Dr. King's dream of a colorblind society. While many of us share this dream, we are not there yet. If we were there, we would not be having a national dialogue about the virtual absence of minorities in prime time television.

The dream will not be realized until women and minorities have an equal opportunity both in front of the camera and behind it, as well as in boardrooms and executive suites.

This order advances the twin goals of prohibiting discrimination in hiring and promoting diversity on the public's airwaves.

The only good approach to discrimination is zero tolerance. I know many broadcasters and cable operators share this approach. I commend them for their efforts and thank them for their support.

But I think it is no mere coincidence that the adoption of EEO rules in 1969 was followed by a steady and very substantial increase among broadcasters in the percentage of upper-level jobs held by minorities and women. The EEO rules before us will continue the Commission's proud tradition of ensuring that broadcasters reach out to all segments of their community when it comes to seeking new hires.

These rules also reaffirm the Commission's long-standing obligation and commitment to ensuring that the public airwaves reflect the diversity of the public itself. The goals of diversity and non-discrimination must be pursued in front of the TV camera as well as behind it.

These rules reflect a common sense manner of pursuing these important goals. These rules also are carefully crafted to follow the letter and the spirit of the court's opinion in the Lutheran Church case.

Broadcasters and cable entities are thus given substantial flexibility to mold an outreach program that fits their individual circumstances and communities. What works in one community might not be effective in another.

But in all communities the outreach must be real, it must be effective, and it must serve the public by being all-inclusive.

I know that there are many who wanted us to go further, or to conduct studies to document the

current status of minority hiring and diversity on the air and take any appropriate remedial action.

These parties should note that we are keeping the docket in this proceeding open, so that any relevant studies and information can be filed with us and called to our attention in a specific docketed proceeding.

And while I am pleased that we are moving ahead, I had hoped we could do more.

For example, under the order as proposed, broadcasters who elect Option B must track race and gender data of their *applicants*, but not of those who actually *interview* for the job. Simply tracking who *applies* for a job only gives you part of the picture, because it does not show whether the outreach program is producing qualified applicants from all segments of the community. Obviously it is up to the broadcaster to determine who is qualified, but it is only after the applicant pool is whittled down to a *qualified applicant* pool can the effectiveness of the outreach be determined.

In this respect, we should have gone further.

**Separate Statement of Commissioner Susan Ness**

*Re: Equal Employment Opportunity Rules and Policies (MM Docket Nos. 98-204, 96-16)*

We make clear today that discrimination based on race, ethnicity or gender is antithetical to operating a broadcast station, cable system, or other multichannel video programming distribution system in the public interest. I have always advocated equal opportunity and believe that such efforts are critical if women and minorities are to be able to seek and obtain employment, training, promotion – and ownership -- in the mass media and telecommunications industries. The rules we adopt today further this important goal without affecting the ability of broadcasters, cable systems, and other programming providers to hire the most qualified people.

While I disagree with the Court's assessment in *Lutheran Church* that our previous rules violated Constitutional standards, I accept its ruling. I believe that the rules we adopt today respond to the letter and spirit of the Court's opinion.

Significantly, the rules afford licensees flexibility to tailor their outreach programs to the needs of the marketplace. We do not impose a one-size-fits-all regulatory regime but rather allow licensees to select from a long list of supplementary recruitment methods or, if they so choose, to devise their own outreach program. Many broadcasters, for example, have developed creative ways to reach out to minorities and women in their communities and I believe such efforts should be encouraged.

Outreach efforts should be effective, not symbolic. To this end, I do not want licensees to use token gestures in meeting our requirement to "widely disseminate" job listings. Rather, licensees should deploy a variety of methods, including postings on the Internet, advertisements in newspapers, and other notices in their effort to widely circulate information about job openings. Licensees should not rely on only one vehicle for disseminating job vacancy information to the population but should structure their efforts to maximize outreach throughout the community.

I strongly encourage broadcast associations to develop and publicize Internet-based job banks to aggregate and make available as many listings as possible. Such job banks eventually will facilitate a job search, not only in local communities but throughout any given state and, ultimately, throughout the Nation. Before such a tool can be effective, however, we must have a way of ensuring that listings are readily accessible to those who cannot afford a home computer with an Internet connection. Otherwise, our efforts to increase outreach may have the unintended consequence of reinforcing the digital divide.

Finally, I applaud the voluntary efforts by broadcasters and the cable industry to devise training programs that will enhance prospects for women and minorities to gain employment, rise to senior management posts, and position themselves for future ownership opportunities. Our EEO requirements should not represent the upper limit in

this area, and voluntary efforts by employers are critical to achieving true workplace diversity.

**STATEMENT OF COMMISSIONER MICHAEL K. POWELL**

*Re: Report and Order - In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (MM Docket 98-204)*

The public benefits of individuals in our society having equal employment opportunities, based on merit rather than discriminatory factors, are so numerous they are impossible to list. I believe few would disagree with this proposition. What is difficult is crafting initiatives designed to foster these ideals that do not run afoul of the Constitution's command that such programs be sufficiently justified and that the means chosen be carefully fitted to the stated purpose. Recognizing that EEO programs crafted to assist one class of persons can accrue to the detriment of another, the judiciary has increasingly demanded stronger justification for such programs. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

Many have bemoaned these developments in equal opportunity jurisprudence. In many ways, however, I think that these developments on balance have been positive. More demanding judicial scrutiny forces those of us who believe in the goals of opportunity and non-discrimination to be more cautious in establishing programs and to be more thoughtful and rigorous in articulating justifying rationales. The decision in *Lutheran Church*<sup>1</sup> forced the Commission to challenge many of its assumptions and to try to craft an EEO program for which the purpose and mechanics rest on more solid footing. It has been a valuable exercise. I think we have largely succeeded in this *Order* for a number of reasons.

First and foremost, we introduce a program that is squarely race and gender neutral and, thus, not constitutionally suspect. At bottom, the adopted EEO rules are merely imperatives to reach out widely in recruiting for employment vacancies. All working Americans, regardless of stripe, benefit from such a program. Moreover, I am comfortable that nothing in this program fairly can be said to coerce or oblige broadcasters to hire any number of minorities or women, which was a central concern with our prior rules to the *Lutheran Church* court. *Cf. Lutheran Church*, 141 F.3d at 351-55.

Second, these EEO rules are limited and permissible measures that facilitate the avoidance of unlawful discrimination. They do not serve in any way to coerce broadcasters to hire any person of a particular race or gender. Requiring stations to recruit broadly is designed to serve as a curb against unintentional discrimination that "could not conceivably be understood as 'obliging' or 'encouraging' the use of any preference. It simply advises a method for increasing vigilance against discrimination" *Lutheran Church*, 154 F.3d at 497 (Edwards, C.J., dissenting) (on suggestion for rehearing *en banc*).

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<sup>1</sup> *See Lutheran Church – Missouri Synod v. FCC*, 141 F.3d 344, *pet. for reh'g denied*, 154 F.3d 487, *pet. for reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) ("*Lutheran Church*").

My own support for this item rests most heavily on its anti-discrimination rationale—a basis the Commission did not proffer to the court in defense of its prior rules. I fully recognize that the *Lutheran Church* court cautioned that agencies are not free to police general societal discrimination and that any anti-discrimination rationale the FCC might offer would have to be tied to communications service. *Lutheran Church*, 141 F.3d at 355 (“Thus the FCC can probably only regulate discrimination that affects ‘communication service’— here, that means programming.”) I believe that the present rules, designed as curbs against discrimination, do relate to communications purposes, though not necessarily diversity of programming, as the court assumed. *Id.*

We are charged with the very unique responsibility of licensing the use of the airwaves. Such a license does not convey a property interest. *See FCC v. Nextwave Personal Communications, Inc.*, --- F.3d ---, 1999 WL 1267039 at \* 5 (2<sup>nd</sup> Cir. Dec. 22, 1999). Instead, precedent holds that the licensee acts as a public trustee promising to operate in the “public interest.” The concept is amorphous and heated debate over its parameters have long raged. I, myself, have frequently criticized its seemingly unbounded reach.<sup>2</sup> Yet, whatever the standard means, or what weight it can bear, it remains the law that failure to operate in the “public interest” can disqualify a licensee from holding a license. *See, e.g.*, 47 U.S.C. 309(a). As long as the public interest includes some component of worthiness to hold the public trust in the form of a license, it seems absolutely appropriate to condemn discrimination in our licensing policies. *See* 47 U.S.C. § 308(b).

Moreover, I find nothing in the Constitution that bars the Commission from adopting race and gender neutral outreach measures in order to curb or retard the possibility of discriminatory impacts.<sup>3</sup> Indeed, licensees are given authorization to operate under the license for up to eight years before renewal, and most are given an expectancy of renewal.<sup>4</sup> These measures allow licensees to make substantial investments in their stations. It is an appropriate and efficient response for the government to require limited neutral measures to curtail discrimination on an ongoing basis, rather than await petitions to oppose a license renewal.

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<sup>2</sup> *See Willful Denial and First Amendment Jurisprudence*, Commissioner Michael K. Powell, Speech before the Media Institute, Washington, D.C. April 22, 1998. The most controversial public interest debates arise when the government attempts to direct programming choices. This, of course, raises First Amendment concerns. The “public interest” question at issue here, to my mind, does not run to programming but to the qualifications of a government licensee, a clear communications purpose.

<sup>3</sup> It is well established that equitable measures to curb discriminatory impact do not violate the constitution. Such measures are not punitive, but instead equitable responses to business practices that may inadvertently affect suspect class members. This is the foundation of discriminatory impact claims under Title VII.

<sup>4</sup> *See, e.g.*, 47 U.S.C. § 307(c)(1); 47 C.F.R. § 73.1020.

Third, though not explored in the *Order*, I would have liked to explore additional bases on which to justify EEO rules that are not hinged on diversity rationales. For example, section 1 of the Communications Act identifies as one the Commission's responsibilities the regulation of interstate and foreign communications services so as to make them available, "so far as possible, to all people of the United States, without discrimination on the basis of race, color, religion, national origin and sex. . . ." 47 U.S.C. § 151. Though the conveyance of a license does not confer any property interest, a licensee is entitled to build a lucrative business and enjoy the profits exclusively that emanate from the license. I think it legitimate to attempt to widen the circle of those Americans that benefit from the fruits spawned by a license. One clear way to do so is to give as broad a cross-section of the public as possible the chance to work in enterprises built upon these licenses. Requiring a licensee to recruit broadly furthers the Congressional objective of making communication by wire "available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex," without substantially intruding on a licensee's commercial and business judgments. *Id.*

For the preceding reasons, I support this item. I must confess, however, my discomfort about our continued desire to place extraordinary weight on the relatively tenuous nexus between the hiring of low level employees and its impact on diversity of programming.<sup>5</sup> I am dubious of its validity and deeply worried that the courts have begun to view such rationale with dire skepticism.<sup>6</sup> I certainly hope that by proffering this

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<sup>5</sup> I reserve judgment on the nexus between owners (or executive management) and programming. The *Order* frequently blurs the nexus issue between those that involve owners and those that involve employees generally.

<sup>6</sup> See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602-630 (O'Connor, J., dissenting); *Lutheran Church*, 141 F.3d at 356; *Lamprecht v. FCC*, 958 F.2d 382 (D.C.Cir.1992) (sex-based preference failed when FCC introduced no evidence supporting a link between female ownership and "female programming").

rationale (again despite the *Lutheran Church* court's disapproval), we have not invited the judiciary to fracture any remaining legal foundation for diversity objectives.

STATEMENT OF  
COMMISSIONER GLORIA TRISTANI, DISSENTING IN PART

*Re: Equal Employment Opportunity Rules and Policies (MM 98-204, 96-16)*

One of the primary foundations of our broadcasting policy is promoting a diversity of viewpoints.<sup>1</sup> Broadcasting, and especially television, is still the means by which most Americans get their news and information. And children, whose values and self-image are still being formed, spend far more time with television than with any other medium.<sup>2</sup> It is simply unconscionable that a societal force of such reach and impact not be open to, and reflective of, all segments of the community.

Some question the link between EEO rules and diversity of programming. I do not. While not all minorities or all women share the same viewpoint, I believe that a broadcast industry that includes minorities and women would *more likely* air diverse viewpoints than a homogeneous workforce. Congress spoke to this issue in enacting the 1992 Cable Act:

The Committee believes now, as it did in 1984, that increased equal employment opportunities (EEO) for women and minorities, particularly in decision-making and managerial positions, ‘... is a crucial means of assuring that program service will be responsible to a public consisting of a diverse array of population groups.’<sup>3</sup>

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<sup>1</sup> See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990) (“Safeguarding the public’s right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC’s mission”); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (“[I]t has long been a basic tenet of national communications policy” that “the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public”), quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27, quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945); Communications Act, Section 257 (noting that one of the “policies and purposes” of the Communications Act favors a “diversity of media voices”).

<sup>2</sup> *Kaiser Family Foundation Report* (1999) (finding that, on average, children watch two hours and forty-six minutes of television a day, compared to 48 minutes spent listening to CD’s or tapes, the second most popular media activity).

<sup>3</sup> H.R. Rep. No. 628, 102d Cong., 2d Sess. 111 (1992), quoting, H.R. Rep. No. 934, 98<sup>th</sup> Cong., 2d Sess. 85 (1984). Accord H.R. Rep. No. 628, 102d Cong., 2d Sess. 114 (1992):

The Courts and the Commission have consistently recognized the increasing amount of programming designed to address the needs and interests of minorities and women is fundamentally related to the number of minority and women employees in the upper-level positions within media companies. In addition, the Committee recognizes that a strong EEO policy is necessary to assure sufficient numbers of minorities and women gain professional and management level experience within the television industry, and thus that significant numbers of minorities and women obtain the

Similarly, the Supreme Court has affirmed that the Commission's regulation of the employment practices of its licensees "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups."<sup>4</sup>

I support this item, not because it goes as far as perhaps I would *like*, but because the bulk of it goes as far as I think we *should* in the current legal landscape. I pray that it will be *enough* to create the kind of diversity on the public airwaves that Americans expect and deserve.

There are parts of today's Order that give me hope. One particularly ingenious provision is the "opt in" notification rule under Option A. Under this rule, minority and women's organizations, community groups and others can request that they be notified of any job openings that occur. This is a clearly race-neutral mechanism that could prove effective in ensuring that certain segments of the community are effectively notified of job openings.

Of course, getting the word out is not the same as getting a foot in the door. The Option A framework rests on the assumption that equal information will produce equal opportunity. We need to watch closely to see if this turns out to be true. And we need to continue working on studies that could justify a more race-conscious approach if today's assumptions prove too sanguine.

One area in which I would have gone further is Option B, where I agree with Chairman Kennard that we should have required the tracking of *interviewee* data, and not merely *applicant* data. Interviewee data is clearly superior to applicant data in measuring whether a broadcaster's outreach efforts are effective in reaching qualified applicants from all segments of the community. I am disappointed that a majority of the Commission did not agree. I therefore dissent from this part of the Order.

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background and training to take advantage of existing and future television broadcasting ownership opportunities.

<sup>4</sup> *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976).

**In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, MM Dockets Nos. 98-204, 96-16.**

**Dissenting Statement of Commissioner Harold W. Furchtgott-Roth**

In *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (1998), the United States Court of Appeals for the D.C. Circuit ruled that this Commission's Equal Employment Opportunity regulations denied the equal protection of the laws to persons seeking employment at broadcast stations. Those regulations also made broadcasters, the Court said, "involuntary participant[s] in a discriminatory scheme." *Id.* at 350. To have established and enforced a program that required regulatees to engage in the most historically odious sort of discrimination against potential employees -- discrimination based on race -- was a most grievous offense.

After careful consideration, I am not persuaded that the Commission's efforts to conform those regulations to the requirements of Equal Protection are adequate. Unfortunately, the revised regulations bear some of the same characteristics that led the Court of Appeals to find the original rules unconstitutional. Because these rules are not clearly constitutional, I cannot support their adoption. Moreover, I have doubts about significant parts of the Commission's theory of statutory authority for the regulations. Accordingly, I cannot support adoption of this Report & Order, however well-intentioned it might be.

**I. The Regulations Are Susceptible To Reasonable Constitutional Doubt**

The Order's conclusion as to the constitutionality of the outreach rules appears to hinge on the assertion that they are wholly race-neutral and thus not subject to strict scrutiny under *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). *See, e.g.*, Report & Order at para. 210 (arguing that EEO requirements "do not raise equal protection concerns"); *id.* at para. 217 (contending that outreach requirement is "race-neutral and . . . not subject to strict scrutiny" and "raises no equal protection concerns"); *id.* at 218 (asserting that commenters' arguments against race- and gender-targeted recruiting "are moot"). For the reasons that follow, I must question whether this is correct.<sup>1</sup>

**A. The Regulatory Scheme Is Not Neutral With Respect To Race And Gender**

As a factual matter, the instant rules go further than simply requiring outreach to all people, without regard to race. In several places, the regulations expressly employ race-based classifications and require broadcasters to so classify persons for reporting purposes. Moreover, the Commission's enforcement plan undermines the asserted race-neutrality of the outreach requirement. Finally, the impact of the overall regulatory scheme on the behavior of broadcasters reaches all the way to hiring, not just recruiting, decisions; the scheme subtly impels broadcasters to make all such decisions with an eye toward achieving some level of racial representation, even "balance," of employees and applicants.

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<sup>1</sup> In this statement, I focus on the broadcast rules. My points as to their constitutionality apply with equal force to the cable rules, however.

Under the specific EEO program requirements of Track A, a station potentially must “co-sponsor[] at least one job fair with organizations in the business and professional community whose membership includes substantial participation of women and minorities.” 47 CFR section 73.2080(c)(2)(iii). A station could also be required to “list[] . . . each upper-level category opening in a job bank or newsletter of media trade groups whose membership includes substantial participation of women and minorities.” *Id.* section (c)(2)(xii). Although the Commission discontinues its prior practice of requiring the use of minority- and women-specific referral sources -- suggesting that this action insulates the plan from being described as “targeted” outreach, *see* Report & Order at para. 218 -- these new requirements do essentially the same thing. Broadcasters no longer have to use minority- and women-specific groups as referral sources, *cf. Lutheran Church*, 141 F.3d at 351 (noting minority-specific referral source rule), but the menu of options includes a requirement that they sponsor job fairs and list jobs with such groups.

Pursuant to the alternative recruitment requirements of Track B, a station must maintain “data reflecting the recruitment source, gender, and racial and/or ethnic status of applicants for each full-time job vacancy filled” by the station. 47 CFR section 73.2080(d)(1). In addition, a station is required to include in its public file report “data reflecting, for each recruitment source utilized for any full-time vacancy. . . , the total number of applicants generated by that source, the number of applicants who were female, and the number of applicants who were minority, identified by the applicable racial and/or ethnic group with which each applicant is associated.” *Id.* section (d)(2).

Finally, per the rule reinstated today, all stations must file FCC Form 395-B, the Annual Employment Report. Section V of that document requires the charting of employees by job category and by male and female groupings subdivided into “White (not Hispanic),” “Black (not Hispanic),” “Hispanic,” “Asian or Pacific Islander,” and “American Indian, Alaskan native.” *See* Report & Order, Appendix D. A rule requiring broadcasters to place people in boxes on a chart with race and gender categories on its face uses race-based classifications.

Although the actual mandate that stations widely disseminate vacancy information makes no reference to race or gender, *see* 47 CFR 73.2080(c)(1)(i), the overall scheme adopted today pressures broadcasters to target potential applicants and possibly even employees on the basis of race and gender – whether proceeding under Track A or Track B.

The “self-assessment” rule, which applies under both Tracks, requires a station to “[a]nalyze its recruitment program on an ongoing basis to ensure that it is effective in achieving broad outreach to potential applicants, and address any problems found as a result of its analysis.” *Id.* section (c)(3). Also, in order to have its license renewed, a station must have complied with all substantive EEO requirements, such as the outreach rules, during the prior license period. The FCC conducts compliance review at the time of license renewal.

By what measure does one test the “effectiveness” of outreach? According to the Order, one gauges the adequacy of outreach efforts by the number of women and minorities in applicant

pools, and even in employment profiles.

Specifically, the Order provides that in order to “demonstrate” to the Commission that an outreach program under Track B “is inclusive, *i.e.*, that it widely disseminates job vacancies,” a station must “collect data tracking the recruitment sources, gender, and race/ethnicity of its applicant pools.” Report & Order at para. 104. This information will allow the broadcaster and the Commission to “evaluate whether the program is effective.” *Id.* But “[i]f the data collected does not confirm that notifications are reaching the entire community, [the Commission] expects a broadcaster to modify its program as warranted so that it is more inclusive.” *Id.*<sup>2</sup>

The Commission noisily disclaims that proportionality with the local labor force will be the exclusive test for adequacy of applicant pool composition. At the same time, it admits that it will have to rely, at least in part, on the numerical representation of minorities and women in applicant pools in order to assess compliance with the outreach rule. *Id.* at para. 120 (denying proportionality requirement for applicant pools but stating that “few or no” minorities or women would indicate inadequate “inclusiveness”).

Clearly, then, applicant pools must achieve some numerical level of minority and women applicants in order for a station’s outreach program to be deemed EEO compliant. The Commission declines to say, however, just what that composition is. Thus, the Commission makes plain its intent to use numerical data on the race and gender of applicants to evaluate outreach efforts -- and even vows to require heightened efforts of broadcasters’ whose data is inadequate -- but is strikingly silent on just how many minority and women applicants are enough. Eventually, the Mass Media Bureau will be forced to come up with some kind of processing guidelines for review of outreach programs.

Once one focuses on race and gender statistics, however, it is difficult to come up with anything other than proportionality, or some derivative of proportionality, as a calibrator of adequacy. The only other number with significance I can identify would be zero; one could say that the absence of minorities and women in applicant pools would establish noncompliance. Beyond zero, however, it is hard to say that any one number is materially more meaningful than another. Conversely, whatever the Commission requires to demonstrate “effective” outreach, it surely could not require *more* than proportionality.

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<sup>2</sup> See also *id.* at para. 8 (records concerning the race, ethnicity, and gender of applicants must be maintained in order to “monitor whether. . . outreach efforts have been successful in achieving broad outreach” and “[i]f the data collected indicates that outreach has not been inclusive, a broadcaster . . . will be expected to adjust its outreach program accordingly”); *id.* at para. 105 (describing the possibility of “verifying broad outreach using applicant pool data”); *id.* at para. 113 (describing collection of applicant pool data by station as necessary to “demonstrat[e] that its outreach efforts are inclusive”); *id.* at para. 115 (stating that “applicant flow data. . . will be one source of information concerning a broadcaster’s EEO efforts that we may, as warranted, utilize in determining whether a broadcaster has demonstrated compliance with our EEO rule”).

Given the lack of any other guidance as to compliance with the outreach rule, rational broadcasters wary of regulatory trouble will strive for some showing of rough proportionality in their applicant pools. At the very least, they will strive to have at least one woman or minority in every pool; while this is not a proportionality requirement, it is a fixed number or quota. *Cf. Lutheran Church*, 141 F.3d at 390 (reasoning that “the fact that the Commission looks at more than ‘numbers’ does not mean numbers are insignificant” since “a station would be flatly imprudent to ignore any of the factors it knows may trigger intense review” and “can assume that a hard-edged factor like statistics is bound to be one of the more noticed . . . criteria”).

The fact that the standard by which Track B outreach programs, neutral on their face, will be judged is by counting minority and female applicants that wind up at the station makes it hard if not impossible to call this regulatory plan truly “race-neutral.” The Commission has built into the back end of its policy what it shrewdly omitted from the face of the dissemination rule – that is, a requirement of some minimum (though vaguely defined) numerical representation of minorities and women in applicant pools.<sup>3</sup> *Cf. Lutheran Church*, 141 F.3d at 390 (reasoning that “the Commission has used enforcement to harden the suggestion” in its regulations).

The Commission also makes clear that the records broadcasters must keep under Track A regarding the referral sources of ultimate hires, *see* 47 C.F.R. section 73.2080(c)(5)(ii), (v)-(vi), are “designed to provide a starting point for a broadcaster to analyze the success of its recruitment efforts.” *Id.* at para. 118. But “if it appears that, despite a broadcaster’s outreach efforts, an excessive number of hires or interviewees are coming from inside, ‘word-of-mouth’ recruitment sources, we will expect the broadcaster to consider whether its recruitment efforts are achieving a sufficiently broad outreach.” *Id.*; *see also id.* at para. 115 (stating that “[d]ata as to the recruitment sources of the broadcasters’ interviewees and hires . . . will be one source of information concerning a broadcaster’s EEO efforts that we may, as warranted, utilize in determining whether a broadcaster has demonstrated compliance with our EEO rule”).

Clearly, then, the outreach regulations do *not* stop at the line between recruiting and hiring, as the Commission repeatedly asserts. As I read the plain language of the Report and Order cited above, a broadcaster could engage in every single act of outreach required under Track A but still be deemed noncompliant for failing to hire from referral sources with sufficient frequency, instead hiring too many people by word of mouth. Thus it is not just outreach that is

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<sup>3</sup> There are, of course, practical problems with using the number of persons who *apply* for a job to measure the number of people who *received notice* of the job. *Cf. City of Richmond v. J.A. Croson, Inc.*, 488 U.S. 469, 507 (1989) (criticizing the “completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population”). There are virtually infinite reasons why a person who hears about a job might not ultimately apply for it – perhaps they are already employed, or maybe they are not as interested in a broadcasting career (not the most dynamic sector of the communications industry today) as the Commission thinks they should be.

required for compliance. Instead, broadcasters operating under Track A must avoid hiring “through an insular recruitment and hiring process,” thereby “replicat[ing]” a “homogenous workforce” in which “minorities and women are poorly represented.” *Id.* at para. 3.<sup>4</sup> And the data on referral sources of employees will be used to police those hiring decisions.

Thus, under Track A, broadcasters who are not discriminating against anyone in the hiring process – indeed, who have never discriminated against anyone -- are *not* free to decide to hire whoever they want, as the Commission asserts. The Report & Order makes clear that they are expected to hire a certain amount of employees from referral sources. These rules are clearly aimed at a broadcaster’s employment decisions and are meant to affect the racial composition of his staff by preventing the “replication” of “homogenous” staffs. I do not see how this language can be squared with the Commission’s repeated claim that it has no intention of regulating hiring or injecting race and gender considerations into such decisions, and that its rules create no preferential effects whatsoever in hiring.<sup>5</sup>

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<sup>4</sup> If the broadcaster refuses to hire applicants because of their race or gender, that is of course another thing, and wholly actionable under employment discrimination laws.

<sup>5</sup>The breadth of this policy – which limits the ability of broadcasters to hire based on “word of mouth,” without any evidence of past or present discrimination --is remarkable when compared to Title VII. Under Title VII, employment “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.” *Griggs v. Duke Power*, 401 U.S. 424, 430 (1971). The Commission relies on a similar perpetuation-of-discrimination theory in order to tie the outreach rules to the non-discrimination (as opposed to the diversity) rationale. *See* Report & Order at para. 3 (“We believe that repeated hiring without broad outreach may unfairly exclude minority and women job candidates when minorities and women are poorly represented in an employer’s staff. . . . Outreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process.”). Generally, however, there must first be a showing of “prior discriminatory employment practices,” *Griggs*, 401 U.S. at 430, to warrant the inference of present, continuing discrimination. Yet the Commission presumes present discrimination on the part of those who make hiring decisions whenever minorities and women are “poorly represented” at stations, without *any* evidence *whatsoever* of past or present bad acts. Absent such evidence, the Commission’s policy begins to look like one of “outright racial balancing.” *Lutheran Church*, 141 F.3d at 355. Even on the Commission’s own dubious logic, however, the outreach rules could apply only to stations with “poor representation” of the suspect classes, for only in those circumstances could there be any chance of the “replication” effect that the Commission seeks to prevent.

Another measure of the efficacy of outreach under either Track A or B, according to the Order, is station employment profiles collected on Form 395. In explaining why it collects this expressly race- and gender-based hiring data, the Commission states that the data is necessary “in order to assess . . . the effectiveness of the new rules in achieving our objective[] of inclusive outreach.” Report & Order at para. 164. The Commission further explains that “an increase in the number of women and minorities employed in the broadcast . . . industr[y] would indicate that our EEO requirements are effective in ensuring outreach.” *Id.* If these employment numbers do not prove satisfactory to the Commission, it “will not hesitate to propose changes to [the] EEO rules if industry trends suggest that [they] are not effective.” *Id.*

In other words, if broadcasters do not achieve some minimum level of minority and female employment, the Commission will impose added regulation – and thus greater costs -- upon them. I do not think it can be denied that an express threat of greater industry regulation creates a strong incentive to achieve the Commission’s stated desire. Again, left without any clear idea as to what those employment profiles should look like, the rational broadcaster – or industry as a whole – will probably set its sights on something approaching proportionality and, if not that, at least some minimum number of minorities and women.

Finally, the Commission takes the highly irregular step of keeping open the docket in this proceeding, notwithstanding the adoption of final rules and regulations. *See id.* at 229. While it does not “at this time” pursue a direct remedial approach to the employment of minorities and women, the Commission will permit the submission of information “germane” to such regulation, such as a national employment disparity study. *Id.* The Commission “will consider any [such] submissions” and “determine [whether] action is appropriate at a later date.” This action is “to facilitate any additional proceedings upon further Order,” *id.* at para. 238, and to “facilitate the submission of information relevant to employment disparities,” FCC Press Release on EEO Regulations (Jan. 20, 2000).

Again, this none too subtly suggests that if subsequent studies show a “disparity” in the employment of minorities and women -- not of broadcasters’ failure to make job information widely available to any and all persons -- the Commission will take further regulatory action. Indeed, by keeping the docket open in this proceeding, the Commission actively invites such submissions and keeps the possibility of further rulemaking very much alive; no future Commission need obtain a majority vote in order to initiate a rulemaking on this matter. Had the docket simply been closed, as normally occurs when final rules are adopted, nothing would have prevented parties from filing any studies they wish with the Commission. But by leaving the docket conspicuously open, the Commission keeps the motor on this regulatory vehicle running, allowing for immediate reentry onto the regulatory fast track. The drone of that motor is more than background noise for broadcasters; it is a constant reminder of an express threat of more regulation.

In short, the Report & Order attempts to walk an excruciatingly fine constitutional line. It deletes the requirement that broadcasters use minority- and women-specific referral sources, but replaces that with other race- and gender-specific recruiting requirements, such as the job fair and job listing rules. And although the Commission does not use race

or gender classifications in the text of the outreach requirement, it makes clear that in enforcing the regulations it will expressly consider the race and gender composition of applicant pools in order to assess the “effectiveness” of a station’s outreach under Track B. Under Track A, the Commission intends to track hiring from referral sources and indicates that a broadcaster’s failure to hire from referral sources with sufficient frequency will present a regulatory problem. The Commission has also made clear that race- and gender-based employment data will be used to assess the effectiveness of the rules under both Track A and B, promising more regulation and less discretion for broadcasters if the current regime proves to achieve results that are, in its opinion, inadequate. Finally, the Commission declines to close this proceeding, inviting the filing of information on employment “disparities” for minorities and women.

Does this system influence or encourage hiring based on race? A reviewing court very well might find that it does. Given the realities of the overall scheme and the Commission’s self-avowed purpose of influencing the racial composition of broadcast employment ranks, I for one see a real risk that these regulations and the accompanying Order will operate to “pressure—even if they do not explicitly direct or require—stations to make race-based hiring decisions.” *Lutheran Church v. FCC*, 154 F.3d at 491; *see also Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978) (en banc) (discussing the “variety of *sub silentio* pressures and ‘raised eyebrow’ regulation[s]” to which broadcast licensees are subject and holding that facially neutral regulations can be invalid if they increase the likelihood of self-regulation “to avoid official pressure and regulation”); *Writers Guild of America, West v. FCC*, 423 F. Supp. 1064, 1098, 1105, 1117 (C.D. Cal. 1976) (finding that informal “jawboning” by agency officials is judicially reviewable), *vacated and remanded on jurisdictional grounds sub nom., Writers Guild of America v. ABC*, 609 F.2d 355 (9<sup>th</sup> Cir. 1979) (agreeing that “the use of these techniques by the FCC presents serious issues involving the Constitution, the Communications Act, and the APA”), *cert. Denied*, 449 U.S. 824 (1980). Indeed, one of the stated goals of the regulations is to affect the racial design of the employment force at broadcast stations, as well as the racial composition of station owners, in order to promote “diversity of programming.” *See, e.g.*, Report & Order at para. 59 (asserting nexus between employment and programming diversity).

Even if the regulations do not influence or encourage *hiring* based on race, they certainly impel *recruiting* based on race. This is due to the use of applicant pool data to evaluate the adequacy of outreach programs, as explained above. The Commission has not eliminated race-based decisionmaking under the EEO regulations, rather it has moved such decisionmaking one step back in the employment process.

The Order opines that such decisionmaking is harmless, however, because no one is injured when the pool of applicants is merely expanded. This view goes more to standing than to the merits of the Equal Protection issue. In any event, the substantive problem with this view is that it assumes an infinitely expandable pool of recruits, applicants, and interviewees. That assumption, while not without rhetorical appeal, is open to doubt.

At some point, a broadcast station, just like any other business, must draw the line on how many people it can afford, in terms of time and money, to recruit and interview. And when a station draws that line, these regulations might cause it to leave candidates not of the Commission's preferred race or gender standing on the other side. Those persons who are not selected as recruits or interviewees stand less of a chance of getting the job, of course. Thus, a person may be denied an opportunity to compete for the job on the same basis as all others – that is, they may be passed over for an interview or not recruited for a position based on their race. In this way, they have been harmed by a governmental scheme that incents the broadcaster, in order to achieve an acceptable applicant pool composition, to prefer one person as a recruit because of their race. *See Texas v. Lesage*, Sup. Ct. Slip Op. 98-1111 (Nov. 29, 1999) (“[A] plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant injury in such cases is ‘the inability to compete on an equal footing.’”) (quoting *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 667 (1993)); *see also* Comments of Institute for Justice at 4-5 (explaining harm caused by outreach rule).

For the foregoing reasons, I think the Commission's outreach rules are not merely cognizant of race and gender in the way that, for example, prohibitions on discrimination are. Instead, they classify people based on their race and gender, require broadcasters to do so, and encourage broadcasters to prefer people of a particular race or gender over others as recruits, and even as employees. This regulatory scheme is not clearly race- or gender-neutral with respect to the distribution of benefits in the employment process.

In contrast to the programs established in the Order, the proposal submitted by the Broadcast Executive Directors Association (BEDA) provides an example of a race- and gender-neutral outreach plan that would present no Equal Protection problem. *See* Report & Order at para. 82. In its final proposal, BEDA suggested that stations, among other things: post notices of full-time vacancies either directly or through its State Broadcast Association to any group that asks in writing to receive such notification; advertise full-time vacancies over the air, in local newspapers of general circulation, or on the internet; and, if using the internet, promote the website on the air. Stations would not be required to document the race and gender of applicants or interviewees or maintain records as to the source of referrals.<sup>6</sup>

These requirements effect the broad dissemination of information, and they do so without regard to the race or gender of the recipients of that information, job applicants, or ultimate hires. This, in my view, is what the phrase “race-neutral” means. This, in my view, is the kind of plan that doubtless “merely require[s] stations to implement racially neutral recruiting and hiring programs,” *Lutheran Church*, 141 F.3d at 351, and thus does not trigger equal protection

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<sup>6</sup> *See* Letter to Chairman William E. Kennard from Richard R. Zaragoza on behalf of the Broadcast Executive Directors Association, in the Matter of Equal Employment Opportunity, MM Docket Nos. 98-204 and 96-16, Dec. 29, 1999.

concerns. As one commenter succinctly put it, and as BEDA's plan shows, "broad outreach does not necessitate race-conscious action and can easily be accomplished through race-neutral means." Comments of Institute for Justice at 9. The Commission, however, never explains why an unquestionably neutral program would be inadequate to meet its stated goals, but instead continues to insist upon the collection and use of race and gender data and race- and gender-specific regulation. To my mind, a program such as that put forth by BEDA would have been the wiser constitutional course.

*B. The Legal Precedent for the Constitutionality of the Rules Is Weak*

Upon examination of the cases cited by the Commission as support for the constitutionality of these regulations, that precedent appears relatively weak. At best, the constitutionality of targeted outreach appears to be an open question in the vast majority of federal judicial circuits, including the D.C. Circuit. *See Lutheran Church*, 154 F.3d at 492 ("Whether the government can encourage – or even require – an outreach program specifically targeted on minorities is . . . a question we need not decide."). At worst, targeted outreach requires race-based decisionmaking, triggering strict scrutiny under the Equal Protection Clause.

Contrary to the assertion in the Order, it is simply not true that "courts have consistently held that recruitment measures designed to *expand* the applicant pool, and that do not favor anyone *in* the applicant pool on the basis of race, are race-neutral and are not subject strict scrutiny." Report & Order at para. 217 & n. 352.<sup>7</sup> I address *seriatim* each case cited for this proposition.<sup>8</sup>

*Raso v. Lago* neither addressed nor decided the standard of review for targeted outreach programs under the Equal Protection Clause. That case involved the interaction of a Massachusetts law granting a preference to former residents of Boston's "West End" for apartments in a new housing development, federal housing regulations requiring developers to engage in minority outreach for residents, and an extant consent decree governing the development that required a particular racial composition of residents. The state law preference for former "West Enders," which was entirely race neutral, had the effect of creating a preference for whites in the new development because most West Enders were white. HUD felt that implementation of the state law preference directly conflicted with its regulations as well as the

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<sup>7</sup> As discussed above, this characterization of the Commission's program as not creating pressures to favor any class of persons in the hiring process is subject to dispute.

<sup>8</sup> Curiously, the Commission characterizes its outreach program as non-targeted, but relies upon cases involving mostly targeted programs. I address the cases in any event, since it appears to me that the regulations are, as a practical matter and as previously explained, specifically aimed at minorities and women.

consent decree, to which it was a party. HUD thus negotiated an agreement whereby the statutory preference for West Enders would be curtailed.

HUD's targeted outreach regulations were not the focal point of the challenge in that case. As the Court observed, "outreach efforts are not the real source of the plaintiffs' problem—rather, it is the partial loss of their preference." 135 F.3d at 17 n. 8. As to the plaintiffs' ancillary attack on the regulations themselves, the Court rejected it on the ground that it had been "essentially abandoned on appeal." *Id.* at 17. So, to the extent that the outreach regulations were themselves challenged, the Court did not address that claim on the merits but instead found it waived.<sup>9</sup>

*Duffy v. Wolle*, 123 F.3d 1026 (8<sup>th</sup> Cir. 1997), did not uphold targeted outreach requirements against Equal Protection attack, or decide the applicable standard for such review, either. Instead, that case involved a reverse discrimination hiring claim under Title VII. Although the Court reasoned that affirmative efforts to recruit minorities and women result in no harm to others, it did so in the course of deciding that the existence of such a program was not enough to support a finding that the defendant employer's asserted reason for hiring someone other than the plaintiff was pretextual. *See* 123 F.3d at 1038 (holding that "we [do not] believe that the [defendant's] alleged interest in obtaining a pool of diverse applicants can support a finding of pretext" in hiring). Because the plaintiff's other evidence of "pretext" was also unpersuasive, the employer was not liable for employment discrimination under Title VII. This case thus did not hold that outreach measures are "race-neutral," regardless of group targeting, and thus not subject to strict scrutiny.

Neither does *Ensley Branch NAACP v. Seibels*, 31 F.3d 1548 (11<sup>th</sup> Cir. 1994), stand for the asserted proposition. The question presented there was not whether the targeted outreach required by the consent decree in that case was subject to strict scrutiny, but whether the race-based hiring "goals" in the decree violated Equal Protection. In the course of ruling those goals unconstitutional, the court said that the fact that the city had engaged in "race-neutral" efforts to solve its employment problems did not save their hiring goals under strict scrutiny. In describing those prior efforts, the court observed that the city "actively encouraged blacks to apply for jobs" and that "the consent decrees themselves required strengthened recruitment of blacks and

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<sup>9</sup> In response to the primary challenge, the Court of Appeals held that HUD did not violate the Equal Protection Clause when it cut back on the statutory preference for West Enders in order to make housing available to all, regardless of race. There was no record evidence that the HUD plan distributed housing based on any racial classifications. 135 F.3d at 16. Rather, it sought to mitigate the effects of a law that might have subjected HUD to sanctions under the consent decree. *Id.* at 17 ("HUD's concern that the preference, in this instance, if unmodified, would restrict the preference to whites and subject HUD to sanctions under the consent decree" was not an illegitimate, race-based motive). In closing, the Court expressly noted the limited scope of its holding. *Id.* ("[I]t is one thing for HUD to insist that all apartments it subsidizes must effectively be open to all races" but "it would be quite another thing if HUD planned to impose this requirement only where the beneficiaries of the statutory preference were white.").

women.” *Id.* at 1571. Admittedly, the Court described, in *dicta*, targeted recruiting programs as “race-neutral” in the course of evaluating another aspect of the decrees’ constitutionality. But it did not decide the question – as no party raised it – whether the targeted recruiting was itself constitutional, or what the applicable standard of review for such a program would be.

The same is true of *Peightal v. Metropolitan Dade County*, 26 F. 3d 1545 (11<sup>th</sup> Cir. 1994). Again, in the course of determining “whether a race-conscious remedy” – specifically, a hiring preference -- was “narrowly tailored to serve a compelling state interest,” the Court undertook the “initial inquiry” of asking whether the government had met its obligation first to consider race-neutral measures. *Id.* at 1557. As in *Seibels*, the Court characterized a recruiting program aimed at minorities and women as “race-neutral” and concluded that the city had therefore met its obligation to take such measures before introducing the hiring quotas. *Id.* at 1557-1558. But no challenge was made to the recruiting program itself, and this case therefore never held that such programs are race-neutral for purposes of analyzing their constitutionality under the Equal Protection Clause.

That leaves one district court decision, *Shuford v. Alabama State Board of Education*, 897 F. Supp 1535 (M.D. Ala. 1995). Unlike the foregoing cases, this one does analyze the constitutionality of affirmative outreach programs. And it does reason that procedures that only expand the applicant pool – that are “inclusive” as opposed to “exclusive” -- and that do not affect hiring decisions are not subject to equal protection analysis.

By its own admission, however, the district court’s reasoning “presents a new method of looking at affirmative action.” *Id.* at 1551. The court candidly recognized not just the novelty of its analysis, but that the analysis actually “is a deviation from general affirmative-action case law.” *Id.* at 1556. It is this portion of the opinion that the Order cites. *See* Order at para. 24 n.4. If this is the best case that can be cited for the Commission’s legal theory of the race-neutrality of targeted outreach, then the precedent for that theory is weak, to put it mildly.

Of course, the above-discussed cases are from the lower federal courts. The last word from the Supreme Court on “race-based decisionmaking” is *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The Court has never since suggested that the phrase “race-based decisionmaking,” as used for purposes of Equal Protection analysis, means anything other than what its plain terms indicate: the making of choices -- whether to fire, pass over for a promotion, hire, interview, or recruit a person -- on account of an individual’s race. Of course, the D.C. Circuit has already expressed its skepticism that *Adarand* can be limited to hiring decisions: “Under Title VII, courts have distinguished between ‘preliminary’ and ‘ultimate’ employment decisions. . . . [but] the Equal Protection Clause would not seem to admit such a de minimis exception.” *Lutheran Church*, 141 F.3d at 351.

## II. The Commission’s Theory of Statutory Authority Is Problematic

The Commission’s argument for statutory authority to regulate broadcast employment appears to

rest in large part on a ratification theory.<sup>10</sup> See Report & Order at para. 21. Under the cases cited by the Commission, however, *see id.* at para. 26 & n.39, it is not the agency practice itself that Congress blesses *post hoc*, but rather the agency's construction of a particular statutory provision, pursuant to which it has purportedly acted, that Congress implicitly accepts.<sup>11</sup> Thus, although section 334 is indeed an explicit legislative recognition of the Commission's EEO practices at the time of its enactment in 1992, there must have been some other grant of authority under which the Commission promulgated the EEO regulations, the construction of which Congress then ratified when it enacted section 334.

In fact, the express and exclusive provisions relied upon by the Commission in adopting EEO rules were the "public interest" provisions of Title III. See Nondiscrimination Employment Practices of Broadcast Licensee, 13 FCC 2d 766 (1968); 18 FCC 2d 240 (1969); 23 FCC 2d 430 (1970); 44 FCC 2d 735 (1974). The Report & Order even acknowledges that the "ratification" argument necessarily relates back to the "public interest" parts of the Communications Act. See Report & Order at para. 26 (arguing that Congress has long known of the Commission's position that "it has authority *under the public interest mandate* to adopt and enforce EEO rules") (emphasis added).

Even if accepted as a legitimate method of statutory construction, all that the majority's ratification theory proves is that Congress in section 334 acquiesced in the Commission's historic reading of the public interest language in Title III. Although it is difficult to untangle the Commission's ratification argument from its section 334 argument, it seems that, at bottom, the Report & Order relies upon the "public interest" standard as an ultimate source of asserted authority for these regulations.<sup>12</sup> To the degree that it does so, the Report & Order is not on firm legal ground. And, for reasons described below, section 309(j) does nothing to improve that situation.

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<sup>10</sup>I do not doubt that section 634 of the Communications Act grants the Commission statutory authority to make EEO rules for cable systems, according to the dictates of that provision. Whether the statute itself is constitutional, and whether the Commission has complied with those dictates, are other matters.

<sup>11</sup> See *Haig v. Agee*, 453 U.S. 280, 300 (1981) (holding that Congress had approved of administrative "interpretation [of the Passport Act of 1926]" as statutory authority for passport regulations); *Lorillard v. Pons*, 434 U.S. 575 (1978) (holding that Congress was presumed aware of the judicial construction of the Fair Labor Standards Act as requiring a jury trial when it incorporated sections of that law in the Age Discrimination in Employment Act); *Zemel v. Rusk*, 381 U.S. 1, 11 (1965) (holding that Congress had approved of administrative construction of the 1926 Passport Act's "broad rule-making authority" as basis for passport regulations); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933) (holding that Congress had acquiesced in administrative practice pursuant to 1922 Tariff Act and explaining that "administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the [statutory] command is indefinite and doubtful," thus presuming a contemporaneous statutory command).

<sup>12</sup> For radio licensees, the public interest language, without any "ratification" of its construction, is all the Commission has; section 334 applies only to television licensees.

A. Both Prongs of the Commission's "Public Interest" Standard Suffer From Legal Flaws

Originally, the EEO rules were adopted in the "public interest" of furthering the general national policy against employment discrimination, as evidenced in Title VII of the Civil Rights Act of 1964. Later, the Commission stated that the regulations were meant to create diversity of programming. See 13 FCC 2d 766. See *Nondiscrimination in Employment Practices (Broadcast)*, 60 FCC 2d 226, 229 (1976), reversed on other grounds, *Office of Communications of the United Church of Christ v. FCC*, 560 F.2d 529 (1977). Since then, the Commission has alternated between these goals as independent rationales or cited them as complementary aims.

Most recently, in the *Lutheran Church* litigation, the Commission clung solely to the diversity of programming goal, disavowing any reliance on non-discrimination. See 141 F.3d at 354. Today, it takes the opposite tack, deliberately downplaying the diversity of programming rationale. See Report & Order at para. 4 (non-discrimination goals "would be sufficient in themselves to warrant non-discrimination and outreach requirements" but the rules "also serve an important, constructive function in fostering greater diversity of viewpoints and programming").

Over time, and as described in detail below, each rationale has been drawn into question by the courts as a basis for employment discrimination rules. This, of course, explains the Commission's veering back and forth between the Scylla and Charybdis of its "twin aims." In the end, I am not sure that these regulations – in so far as they derive from the "public interest" sections of the Communication Act–will make it safely through the statutory strait.

1. The Scylla of Non-Discrimination.

As noted above, the original and exclusive policy goal of EEO regulations was founded on a pure nondiscrimination principle. Reliance upon the non-discrimination theory was perhaps fine, as a legal matter, in the 1960s. But reliance upon the goal of non-discrimination pursuant to statutory "public interest" provisions is now questionable under Supreme Court and D.C. Circuit precedent.

In *NAACP v. Federal Power Commission*, 425 U.S. 662 (1976), the Supreme Court held that the "public interest" provision of the Federal Power Act did not confer statutory authority upon the Federal Power Commission to regulate the employment practices of its regulatees. The Court stated that its "cases have consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare." *Id.* at 669.

Under *NAACP v. Federal Power Commission*, then, the Commission can not just promote the policy of nondiscrimination – as laudable a goal as that is – but must promote goals with a "direct relation," to the purposes of the Communication Act, *id.* (quoting *New York Central Securities Corp. v United States*, 287 U.S. 12, 24-25), such as the efficient distribution of radio spectrum.<sup>13</sup> Indeed, the Supreme Court went out of its way in that case to characterize the FCC's

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<sup>13</sup> Some of the Commission's stated goals clearly fail this test. For example, the Commission asserts its belief that the regulations will "increase our understanding of those from different backgrounds, decrease the sense of isolation of minority groups, and help us build bridges across racial, ethnic and socioeconomic divides." Report & Order at para. 4. While

employment regulations as tied to the communications policy goal of “ensur[ing] that . . . licensees’ programming fairly reflects the tastes and viewpoints of minority groups,” *id.* at 670 n. 7, as opposed to a non-discrimination goal. Likewise, in express recognition of the import of *NAACP v. FPC*, the D.C. Circuit has described the Commission’s EEO program as regulating “the employment practices of its licensees *only* to the extent those practices affect the obligation of the licensee to provide programming that ‘that fairly reflects the tastes and the viewpoints of minority groups,’ and to the extent those practices raise questions about the character qualifications of licensees.” *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F2d 621, 628 (1977) (emphasis added).<sup>14</sup>

Justifying the EEO rules as furthering an aim of nondiscrimination under the “public interest” standard is thus clearly problematic.<sup>15</sup> Indeed, this proposition is so obvious that the *Lutheran Church* court – having undermined the legitimacy of the alternative rationale of diversity of programming -- noted the statutory authority issue *sua sponte* and remanded the question for our consideration. *See* 141 F.3d at 354, 356.

## 2. The Charybdis of Diversity of Programming.

In view of the foregoing caselaw on statutory authority to prohibit employment discrimination under the “public interest” standard, the Commission might like to turn to the alternative rationale of programming diversity, as it did in the *Lutheran Church* litigation. But as susceptible as the anti-discrimination rationale is to doubt, the diversity rationale is even more so.<sup>16</sup>

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perhaps part of a broad social or even religious agenda, these are not directly related to communications policy.

<sup>14</sup> Not coincidentally, it was not until 1976 – just months after *Federal Power Commission* was handed down -- that the Commission first articulated an end other than nondiscrimination for its EEO policies. *See* Nondiscrimination in Employment Practices (Broadcast), 60 FCC 2d at 229 (EEO rules are meant to promote diverse programming).

<sup>15</sup> To the extent that the Commission wishes to rely upon character qualifications, as opposed to pure non-discrimination or diversity of programming rationales, it is hard to see why all holders of Title III licenses would not be subject to this same understanding of character adequate to hold a federal license. Such a definition of “character” seems arbitrarily limited to broadcasters, as opposed to all Title III license holders, of which there are many other than traditional broadcasters.

<sup>16</sup> No doubt this is why the Commission tries to link the outreach rule to the non-discrimination rationale, *see* Report & Order at paras. 3, 40 (discussing “perpetuation-of-discrimination” theory as basis for outreach rules), as opposed to the diversity rationale. As noted

First, the *Lutheran Church* court criticized the Commission's vague use of the term "diversity" of programming. The Court of Appeals observed that "[t]he Commission never defines exactly what it means by 'diverse programming.'" 141 F.3d at 354. On remand, this Report & Order provides no clearer a definition of "diversity" than the Commission articulated in that litigation. In fact, the Report & Order does not even attempt to grapple with this issue by, for example, distinguishing between the sorts of "diversity" it might have in mind or explaining how it measures "diversity." Instead, it speaks of promoting programming that is "responsive to the interests of a diverse community," an entirely circular concept. Report & Order at para. 4. This definitional problem remains as real as ever.

Second, as the D.C. Circuit noted the first time around, "[its] opinion . . . undermined the proposition that there is *any* link between broad employment regulation and the Commission's avowed interest in broadcast diversity." *Lutheran Church*, 141 F.3d at 356 (emphasis added). Although the Commission cobbles together anecdotal assertions by individual commenters as support for the claimed nexus between the race and gender of station employees and the station's programming, *see* Report & Order at para. 58, it is highly selective in its choice of quotations; many commenters denied the nexus as a matter of fact, and the Commission never explains why they are wrong or less credible and the others right or more credible. *See id.* at para. 56 & n.112. In any event, this smattering of personal beliefs provides scant support for the proposition that race and gender correlate with programming choices in a statistically significant enough fashion to justify the instant employment regulations. *Cf. Lamprecht v. FCC*, 958 F.2d 382, 393 (D.C. Cir. 1992) (holding that even under intermediate scrutiny "[a]ny 'predictive judgments' concerning group behavior and the differences in behavior among different groups must at the very least be sustained by meaningful evidence").<sup>17</sup>

Consider also the overall relationship between the adopted regulations and the ultimate goal of programming diversity. It is even more attenuated than the essential link between the race/gender of employees and programming discussed above. To get from the regulated behavior to the goal of diverse programming requires numerous leaps of evidentiary logic: first, broad outreach will lead to applicant pools with a certain number of minorities women; second, such applicant pools will in turn create interviewee pools with more minorities and women than otherwise would exist; third, the composition of such interviewee pools will then affect the composition of the employees at broadcast stations; fourth, those employees might someday become owners of broadcast properties; and fifth, those owners will then program stations based

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*supra* n. 5, the theory employed to justify the outreach rule as necessary to prevent discrimination goes far beyond even the broadest propositions of employment discrimination law.

<sup>17</sup> Even if there were sufficient evidence of such a correlation, the D.C. Circuit has expressed its "doubt . . . that the Constitution permits the government to take account of racially based differences, much less encourage them." *Lutheran Church*, 141 F.3d at 392.

on their personal race and gender. This is a daisy chain of hypotheticals.

Equally ill-supported is the specific link between the race and gender of low-level employees and programming output. To get from the coverage of non-editorial employees to its diversity goal, the Commission states its “belief” that “program content is not determined solely by the individuals at the station with authority to select programming, but may also be influenced by interaction between these individuals and other station employees, which exposes the former to the views and perspectives of the latter.” Report and Order at para. 55. Upon what record evidence is this assumption based? None. In fact, the Commission later concedes that “it is *impossible* to establish from empirical evidence the connection between programming decisions and the backgrounds of the decisionmakers.” *Id.* at para. 58 (emphasis added). If it is impossible to establish that connection in an empirical context, it is even harder to establish from an individual’s purely subjective impression of events at a station. *See, e.g., id.* (relying upon commenter who states, without offering supporting facts, “I *believe* that having a diversified staff . . . has helped WNBC be more conscientious towards a wider range of programming and news views”) (emphasis added). This is agency speculation of the idlest sort. *Cf. Bechtel v. FCC*, 10 F.3d 1875 (D.C. Cir. 1993) (finding preference for owners who manage stations to be without evidentiary foundation and thus arbitrary and capricious). Worse, it is not even speculation about the actual operation and management of broadcast stations; it is conjecture about social science -- namely, the potential psychological effects that exposure to one human being might have on another.<sup>18</sup>

Instead of real evidence, the Commission’s assumptions about the relationship of race and gender to an individual’s point of view seem based on impermissible stereotyping. *See generally Lamprecht*, 958 F.2d at 392-394. The Supreme Court has said this about making assumptions about individuals based on their gender: “Discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual capabilities.” *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984). For example, “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted [unlawfully] on the basis of gender.” *Price Waterhouse v. Hopkins*, 490 US 228, 250 (1989).

I think it no less an instance of sex stereotyping to say that women are naturally interested in programming or seeing coverage of topics such as “breast cancer” and “premature child birth.” *See* Report & Order at para. 58 (citing comments of Cathy Hughes as evidence of nexus between employment of women and program diversity). A woman’s pursuit of these topics as a programming executive will depend largely on sex-neutral business factors such as her target audience. A woman’s interest in these topics as a viewer will depend on personal factors such as her age or marital status; or maybe she would simply rather watch a financial report, a political talk show, or a documentary on international relations. I had hoped we were “beyond the day when an employer could evaluate employees by assuming or insisting

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<sup>18</sup> Where our judgments are afforded deference, it is with respect to areas within our agency’s expertise such as, say, the technological nature of digital television. Employment matters do not fall within that zone of expertise and thus deference. *Cf. Bechtel*, 10 F.3d at 881 (stating that where “predictive judgments” underlying a policy concern an area beyond the Commission’s expertise, deference to those judgments is not as warranted).

that they matched the stereotype associated with their group.” *Price Waterhouse*, 490 U.S. at 250. The Commission cannot simply assume – or require broadcasters to assume -- that a female station manager would be more likely to take a, say, kinder, gentler, more “feminine” approach to local news or have a certain point of view on political issues. *See Lamprecht v. FCC*, 958 F.2d at 395-396.

Even if it is true that a majority of women are interested in the kind of issues described above, what the law has always respected, whether under Title VII or the Equal Protection Clause, are the abilities and tastes of the *individual*. As Justice Ginsburg put it, “generalizations about ‘the way women are,’ estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average.” *United States v. Virginia*, 518 U.S. 515, 520 (1996). And the above-described problems associated with generalizing about people based on immutable characteristics such as gender go to race-based rules with equal force. *Cf. Lutheran Church*, 141 F.3d at 355 (noting that the danger of perpetuation of invidious group stereotypes is “poignantly illustrated by this case,” as “one of the NAACP’s primary concerns was its belief that the Church had stereotyped blacks as uninterested in classical music”).

In short, the diversity of programming rationale is riddled with definitional, empirical and, thus, legal flaws. Yet the anti-discrimination rationale has real problems under the *Federal Power Commission* decision. Choosing between them is like deciding whether to jump into the frying pan or the fire. To the extent that the Commission’s section 334 argument and ratification argument relate back to the public interest language of Title III, those arguments are legally problematic.

#### B. Section 309(j) Provides No Authority For Employment Regulations

To buttress its statutory argument, the Commission also cites section 309(j) of the Communications Act as authority for the EEO regulations. *See Report & Order* at paras. 42-47. This statute provides no support at all for these rules.

It is true enough that Congress expressed certain policy preferences with regard to minorities and women in this section. *See id.* at para. 42. But those policy preferences are to be implemented, by the plain terms of the statute, “[i]n identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection,” the “competitive bidding” section. 47 U.S.C. section 309(j)(3). This item is not a rulemaking to design systems for license auctions. Indeed, it is not about licensing at all. It is about employment practices of existing broadcasters. Section 309(j) simply has no applicability.

### III. Conclusion

As set forth above, there is legitimate reason to doubt the constitutionality of these revised EEO regulations. In essence, the Commission continues to insist on the collection and use of race and gender statistics, whether for assessing applicant pools in order to evaluate the “breadth” of outreach, for assessing the “insular” nature of hiring, or for determining the overall adequacy of the regulations. Although there is no case law squarely against what the Commission has done, neither is there any in direct support of it, as the Commission claims. Even if this cloud of constitutional doubt were removed – for instance, by the adoption of a truly race- and gender-neutral plan such as BEDA’s – the statutory authority for the rules, in so far as it is built on the public interest standard and section 309(j), is quite vulnerable. In the end, I cannot support these regulations.