

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of)
)
Implementation of)
Commission's Equal)
Employment Opportunity Rules)

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REPORT

Adopted: October 5, 1994; Released: October 5, 1994

By the Commission: Commissioner Ness issuing a separate statement.

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I. EXECUTIVE SUMMARY

In Section 22(a) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Congress made the following findings with respect to equal employment opportunity:

"(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."

Based on the foregoing findings, Congress amended the Communications Act of 1934, *inter alia*, to require the Commission to amend its EEO rules and reporting requirements with respect to cable television stations and to include multichannel video programming distributors (MVPDs) within the scope of the Commission's cable EEO rules. Congress also directed the Commission to commence mid-term reviews of television broadcast stations' employment practices and to inform such stations of necessary improvements in recruitment practices identified as a consequence of such review. Additionally, in Section 22(g) of the 1992 Cable Act, Congress directed that:

Not later than 2 years after the date of enactment of this Act, the Commission shall submit to the Congress a report pursuant to a proceeding to review and obtain public comment on the effect and operation of the amendments made by this section. In conducting such review, the Commission shall consider the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting equality of employment opportunity and promotion opportunity, and particularly the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting the congressional policy favoring increased employment opportunity for women and minorities in positions of management authority.

In Section 22(g), Congress also directed that:

The Commission shall forward to the Congress such legislative recommendations to improve equal employment opportunity in the broadcasting and cable industries as it deems necessary.

In compliance with the foregoing amendments to the Communications Act, the Commission initiated a rule making and implemented the changes to its EEO rules mandated by Congress. Further, the Commission, as directed by Congress, adopted a Notice of Inquiry to seek public comment on: the effectiveness of our EEO rules, procedures, policies, standards, and guidelines; the effect and operation of the amendments made by the 1992 Cable Act; and proposals for changes to our rules to improve their operation and effectiveness. The Report addresses these concerns.

Review of EEO Policies and Practices

First, the Report contains an extensive background discussion of the origins and history of our broadcast and cable EEO rules and policies, from 1968, when our involvement in the broadcast EEO area began, to the present. The Report details how our original EEO policies and rules were adopted, discusses how these policies and rules expanded and developed, and describes our current efforts-based EEO analysis. The Report also discusses our 1994 Policy Statement, which established non-binding guidelines for assessing forfeitures for violations of the Commission's broadcast EEO rule.

Analysis of EEO Effectiveness

Second, to assess the effectiveness of our EEO rules and policies, the Report contains a statistical examination of female and minority representation in broadcast and cable employment between 1986 and 1993. The examination reflects that the employment of women and minorities in the broadcast and cable industries increased from 1986 to 1993 in overall and total upper-level positions, as well as in each of the upper-level job categories. In fact, the data show that most of these increases outpaced the 1.1% growth of women employees and the 2.1% growth of minority employees overall in the national workforce. Thus, while the broadcast industry has been downsizing from 1986 to 1993, the percentage of women and minorities in all job categories has been increasing.

The Report concludes that our present policies have been and are effective in promoting equal employment opportunity in the broadcast and cable industries. However, our examination also suggests a continued need for EEO monitoring, as the 1993 percentages of women in the broadcast and cable industries and minorities in the broadcast industry overall remain below comparable figures for the 1993 overall national workforce. Also, individual cases sanctioned for EEO violations establish a

need for further EEO monitoring.

Comments Filed

Third, the Report discusses the comments received in response to our Notice of Inquiry, established pursuant to Congressional directive, which sought comments on the effect and operation of the equal employment opportunity amendments made by the 1992 Cable Act and on the general effectiveness of the Commission's rules, procedures, policies, standards and guidelines in promoting equality of employment opportunity in the cable, broadcast and other industries.

Need for Further Review

While the Report concludes that our EEO rules and policies are effective and must continue, it also concludes that more progress can and should be achieved. To try to improve and refine its EEO policies, the Commission has established a new Office of Communications Business Opportunities (OCBO), which will, inter alia, coordinate and oversee the FCC's EEO practices; support the creation and expansion of small, minority and female-owned communications businesses; coordinate Commission-wide EEO enforcement activities; make policy recommendations to the Commission regarding EEO matters; coordinate with other government agencies that have EEO responsibilities; promote employment opportunities for minorities and women within the communications industry; and engage in long-range planning in the EEO area.

Further, the Report enumerates areas and concerns raised in comments filed in response to our Notice of Inquiry that may warrant further exploration. These include, but are not limited to: (1) the relevance with respect to our broadcast EEO policies of market size or staff size and part-time employees; (2) how to encourage joint recruitment efforts; (3) whether our broadcast filing requirements are unduly burdensome, and, if so, whether they can be streamlined; (4) suggested changes to our mid-term TV review procedures; (5) possible further in-depth analysis of our EEO Policy Statement; and (6) possible improvements to our broadcast renewal application forms and annual employment report forms. The Report notes, however, that the 1992 Cable Act states that "[e]xcept as specifically provided in this section, the Commission shall not revise ... the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. Section 73.2080) as such regulations apply to television broadcast station licensees and permittees; or ... the forms used by such licensees and permittees to report pertinent employment data to the Commission."¹ Additional review is also warranted in

¹ 47 U.S.C. § 334.

response to comments about our cable EEO rules, particularly with respect to: the relevant labor force statistics to be used in EEO reviews; the effectiveness of the cable annual employment report forms; and how we might improve notification of cable operators, MVPDs and the public concerning various EEO requirements. The Report directs the Commission staff to determine and recommend to it the appropriate procedural vehicle for addressing all of the foregoing issues.

Long-Term EEO Monitoring

The Report also states our intention to institute a more extensive and far-reaching analysis of our EEO program to adapt our rules and policies to the telecommunications marketplace and workplace of the twenty-first century. We are on the brink of a huge and dramatic shift in our telecommunications infrastructure. The anticipated conversion of our information and communications delivery systems to digital technology will result in the technological convergence of those communications delivery systems, as well as the development of new communications services that can deliver voice, video and data. Although our EEO policies now apply to multichannel video programming distributors, thus applying to some new technologies, the current EEO enforcement and regulatory structure otherwise focuses mainly on broadcasters and cable system operators.

The Report states that we would consider broadening our current EEO policies to include a wider range of new and emerging communications technologies and industries and making other fundamental changes. Such expansion of our policies may be warranted to achieve regulatory parity in our EEO enforcement, given the convergence of telecommunications technologies. Broadening our EEO rules also may be justifiable based on the national goal of promoting participation by women and minorities in the design and deployment of advanced telecommunications services and technologies. Further, in light of technological convergence, imposing separate and unique EEO requirements on different telecommunications services may no longer be warranted.

The Report directs the staff to determine the best methods for addressing the EEO issues arising from technological convergence and the communications revolution. Our EEO policies and goals must be reviewed with reference to the entire industry, not just individual communications services. To guide us in our comprehensive analysis as to how to redesign and redirect our EEO policies thoroughly to reflect the communications revolution and bring those policies into the twenty-first century, we express our intent to solicit viewpoints and data from a wide range of entities, including public interest groups, consumer groups, labor groups, trade associations, think tanks, civil rights groups, academics, other government agencies, and the communications industry. It is expected that the OCBO will play

a primary role in this review and analysis. We also will seek additional population and workforce data, as well as projections about the future and statistical and economic data, as a foundation on which to build the Commission's enhanced EEO regulatory structure. Finally, we will explore the extent to which training and internship programs might serve to complement our EEO policies.

II. INTRODUCTION

1. This Report is submitted pursuant to the requirements of the Cable Television Consumer Protection and Competition Act of 1992.² In the 1992 Cable Act, Congress stated that it found that "minorities and females are not employed in significant numbers in positions of management authority in the cable and broadcast television industries."³ Therefore, Congress amended the Communications Act⁴ and directed the Federal Communications Commission ("FCC" or "Commission") to revise its Equal Employment Opportunity (EEO) rules to implement the amendments. To assist in a review of the revised rules, Congress directed the Commission to prepare a report and forward "such legislative recommendations to improve equal employment opportunities in the broadcasting and cable industries as it deems necessary."⁵

2. Notice of Inquiry. The Commission initiated its review by adopting a comprehensive Notice of Inquiry ("NOI") on April 21, 1994.⁶ In the NOI, we sought comment on the effectiveness of the amendments to the EEO provisions of the Communications Act of

² Pub. L. No. 102-385, 106 Stat. 1460 (amending the Communications Act of 1934 and codified at 47 U.S.C. § 151, et seq.) (hereinafter "1992 Cable Act" or "Cable Act of 1992").

³ Section 22(a)(1) of the 1992 Cable Act, 47 U.S.C. § 554(a)(1). See also H.R. Rep. No. 628, 102d Cong., 2d Sess. at 111 (1992).

⁴ See infra pp. 18 and 21-22.

⁵ Section 22(g) of the 1992 Cable Act required that:

Not later than 2 years after the date of enactment of this Act, the Commission shall submit to the Congress a report pursuant to a proceeding to review and obtain public comment on the effect and operation of the amendments made by this section. In conducting such review, the Commission shall consider the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting equality of employment opportunity and promotion opportunity, and particularly the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting the congressional policy favoring increased employment opportunity for women and minorities in positions of management authority.

⁶ MM Docket No. 94-34, 9 FCC Rcd 2047 (1994).

1934⁷ made in the 1992 Cable Act as well as the Commission's rules, procedures, policies, standards and guidelines in promoting equality of employment opportunity and promotion opportunity in the cable and broadcast industries; on questions and proposals regarding possible changes to the Commission's EEO rules, policies and enforcement thereof; and on how to further, to the greatest extent possible, the goals of Congress and the Commission with regard to minority and female representation in management positions. Finally, the Commission asked whether its EEO rules should be expanded to include entities other than broadcasters, cable operators and multichannel video programming distributors ("MVPDs"). In response to the NOI, we received more than 70 comments and seven reply comments.⁸ In this Report, we detail the history of broadcast and cable EEO enforcement at the Commission; present employment statistics reflecting the increase in minority and female employment in the broadcast industries from 1986 to 1993 and compare those figures to the national workforce; summarize comments received in response to the NOI; and discuss our observations of the current status of the communications industry and predictions for its future.

3. Review of our current EEO policies reveals that they have been and are effective in promoting equal employment opportunities in the broadcast and cable industries. However, our review also indicates that, given the information elicited as a result of the NOI, the emergence of new technologies, and the mergers occurring in the telecommunications industry, it is essential that we continue to examine our current EEO rules to make them as meaningful and relevant as possible without unnecessary or burdensome restrictions. At the same time, it is imperative that we undertake a long-term analysis of our EEO policies to determine the most appropriate way to monitor EEO compliance in the future for communications industries in general.

⁷ Sections 334 and 634 of the Communications Act of 1934, as amended, 47 U.S.C §§ 334 and 554.

⁸ A list of commenters and reply commenters appears in Appendix A. Comments originally were due on May 23, 1994, and reply comments on June 7, 1994. By Order, DA 94-495 (released May 16, 1994), the Commission extended the deadline for comments to June 13, 1994, and for reply comments to June 28, 1994. A few commenters filed in an untimely fashion. However, in the interest of compiling as complete a record as possible, we hereby accept those pleadings.

III. REVIEW OF EEO POLICY AND PRACTICES

A. Broadcast

4. Commission involvement in the broadcast EEO area began in 1968 when it considered a petition filed by the United Church of Christ ("UCC"). UCC sought the adoption of a rule that would prohibit a station from acquiring a Commission license if that station engaged in discrimination in employment practices on the basis of race, color, religion, or national origin. In response to UCC's petition, the Commission on July 3, 1968, adopted a Memorandum Opinion and Order and Notice of Proposed Rulemaking.⁹ In this proceeding, the Commission noted that it had consulted with the Equal Employment Opportunity Commission (EEOC) and the Justice Department as a prelude to taking any enforcement action in this area. As a result of its consideration of UCC's petition, related pleadings and consultations with the EEOC and the Justice Department, the Commission recognized that there was a national policy against discrimination in employment on the basis of race, religion, sex, or nationality and concluded that, because of the national policy against discrimination and the fact that broadcasters are licensed pursuant to, and must operate consistent with, a public interest mandate, discrimination allegations could be considered in deciding whether to grant a broadcast authorization. The Commission expressed its view that deliberate discrimination in employment may be inconsistent with the responsibility of each broadcaster to make a bona fide effort to ascertain and serve all elements of its community.¹⁰

5. In the 1968 Memorandum Opinion and Order, the Commission announced its intention to act on substantial complaints of discrimination whether by referral to the appropriate state or federal agency with primary jurisdiction or on its own motion where no such agency existed. In addition, the Commission stated that, where a complaint raised a substantial issue of discrimination against a station, it would refer the complaint to the EEOC and thereafter maintain appropriate liaison with that agency. If such an issue was raised in a complaint and it was covered by local or state fair employment laws, the Commission stated that it would refer the complaint to the appropriate state or local authority. In either case, the Commission asserted that

⁹ See Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 13 FCC 2d 766 (1968) ("1968 Memorandum Opinion and Order").

¹⁰ Id. at 770.

action on a major application¹¹ would await resolution of the referral and, if the results of the liaison indicated that there was a substantial issue, the application would be designated for hearing. Alternatively, the Commission contended that if the complaint did not fall within either federal or state civil rights provisions the Commission itself would act upon the complaint in accordance with the above-stated policy.¹²

6. In response to concerns that the Commission's policy would duplicate that of the EEOC, a letter from the Department of Justice appended to the 1968 Memorandum Opinion and Order pointed out that the Commission would be providing nondiscrimination coverage to many licensees not within the terms of Federal or state statutes as well as providing a significant added incentive toward compliance by broadcast licensees with existing provisions of law. The letter also stated that "[b]ecause of the enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees. The provision of equal opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries."¹³

7. In the same proceeding, the Commission implemented its nondiscrimination rules in a Report and Order adopted on June 4, 1969.¹⁴ The rules stated as follows:

Equal opportunity in employment shall be afforded by all licensees or permittees of commercially or noncommercially operated standard, FM, television or international broadcast stations to all qualified persons, and no person shall be discriminated against in employment because of race, color, religion, or national origin.¹⁵

In adopting these rules, the Commission reiterated its previous

¹¹ While the Commission did not define the term, "major application" in its decision, elsewhere in the decision it referred to action on renewal and construction permit applications.

¹² Id. at 771.

¹³ Id. at 777.

¹⁴ See Petition For Rulemaking To Require Broadcast Licensees To Show Nondiscrimination in Their Employment Practices, 18 FCC 2d 240 (1969) ("1969 Report and Order").

¹⁵ Id. at 245.

view that discriminatory employment practices are incompatible with a station's operation in the public interest.

8. In its 1969 Report and Order, the Commission not only adopted rules forbidding discrimination, but also adopted rules requiring: that stations establish, maintain and carry out a positive continuing program of specific practices designed to assure equal employment opportunity in every aspect of station employment policy and practice; and that stations' EEO programs address issues such as program dissemination, recruitment, managerial accountability and self-evaluation.¹⁶ The Commission stated that a formal rule was necessary because it agreed with the arguments put forth by some commenters that its EEO policy could not be effectively implemented by relying solely upon individual complaints. Moreover, the Commission added that reliance solely upon a complaint procedure to implement equal employment opportunity could not resolve general patterns of discrimination developed out of indifference as much as out of outright bias. The Commission concluded that a formal EEO rule was necessary to emphasize its policy, make it specific, and make available the remedy of forfeitures for noncompliance.

9. In 1969, the Commission issued a Further Notice of Proposed Rulemaking¹⁷ in the same proceeding and, in 1970, it adopted a Report and Order which implemented additional EEO rules.¹⁸ These rules required each licensee with five or more full-time employees to submit with its renewal application a written equal employment opportunity program designed to ensure nondiscrimination in recruitment, selection and hiring, placement and promotion, as well as in other areas of employment. The Commission also adopted a rule requiring each licensee with five or more full-time employees to file an annual statistical profile report (FCC Form 395). The Commission explained that these changes were intended to provide useful statistical data and to ensure that licensees would focus on the best method of assuring effective equal employment practices.

10. In the 1970 Report and Order, the Commission for the first time added gender as a category to the nondiscrimination rules, in response to comments made in response to the 1969 Further Notice of Proposed Rulemaking. The Commission stated that no

¹⁶ Id.

¹⁷ See Petition For Rulemaking To Require Broadcast Licensees To Show Nondiscrimination in Their Employment Practices, 18 FCC 2d 249 (1969).

¹⁸ See Petition For Rulemaking To Require Broadcast Licensees To Show Nondiscrimination in Their Employment Practices, 23 FCC 2d 430 (1970) ("1970 Report and Order").

station should discriminate on the basis of sex and that the national policy in this regard should be reflected in its rules. Since that time, no additional protected groups have been added to the broadcast nondiscrimination provisions of our rules.

11. Also in 1970, the National Organization for Women filed a Petition for Rulemaking, asking that broadcast licensees be required to file with the Commission programs designed to ensure equal employment opportunities for women. In a 1971 Report and Order, the Commission amended its rules to require written equal employment opportunity programs applicable to women as well as minority group members. The Commission stated that it is necessary to focus on those groups that comprise a substantial portion of the population and that have in the past suffered from discrimination in employment. It contended that women clearly fall within the confines of these criteria because they constitute over 50% of the population and have a long history of employment discrimination.¹⁹

12. In a 1975 Notice of Inquiry and Notice of Proposed Rulemaking, the FCC stated that its current EEO guidelines failed adequately to describe and exemplify the measures which licensees should undertake to promote the full realization of equal employment for all individuals. The Commission proposed adopting a model EEO program requirement to ensure a more positive and result-oriented formulation and implementation of licensees' EEO programs.²⁰ In a 1976 Report and Order, the Commission adopted a rule requiring that applicants for renewal of license who have not previously done so file with the Commission a Model Equal Employment Opportunity Program (Form 396) designed to provide equal employment opportunity for minorities and women.²¹ The Program consisted of ten separate sections, including dissemination of the licensee's EEO policies, recruitment, training and job hires.²² In sum, the Commission believed that

¹⁹ See Amendment of Part VI of FCC Forms 301, 303, 309, 311, 314, 315, 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).

²⁰ See Nondiscrimination In the Employment Policies and Practices of Broadcast Licensees, 54 FCC 2d 354 (1975).

²¹ See Nondiscrimination In the Employment Policies and Practices of Broadcast Licensees, 60 FCC 2d 226 (1976).

²² In this Order, the Commission stated that it did not contend that it had a sweeping mandate to further the national policy against discrimination nor had it sought to duplicate the detailed regulatory efforts of specialized agencies such as the EEOC. It stated that it sought instead to limit its role to that

the sample EEO program as set forth in the 1975 Notice of Inquiry represented a significant improvement and a substantial clarification of its previous EEO program requirements. It stated that the new information elicited in the model EEO program would significantly aid both broadcast licensees and the Commission in carrying out the goals of eliminating discrimination based on race, color, religion, national origin and sex and implementing meaningful programs of equal employment opportunity.

13. In 1976, the United States Supreme Court held that a general grant of authority to regulate an industry in the public interest does not authorize the regulation of employment discrimination per se and that discriminatory practices may be considered only to the extent that such conduct is directly related to the agency's particular statutory responsibilities. However, the Court noted that FCC regulations concerning discrimination by broadcasters can be justified insofar as they are necessary to enable the Commission to satisfy its obligation under the Communications Act to ensure that licensees' programming fairly reflects the tastes and viewpoints of minority groups.²³ This latter finding is consistent with the Commission's conclusion in 1968 that racial discrimination by licensees raises a question as to whether they are consulting in good faith with minority community leaders concerning programming to serve their areas' needs and interests.²⁴

14. In 1978, the Commission adopted a Report and Order which delineated its investigative jurisdiction and methods of cooperation with the EEOC. The Commission stated that it would refer complaints of employment discrimination, if appropriate, to the EEOC and that it would take cognizance of any final determinations reached concerning complaints of employment discrimination against broadcasters filed with government agencies and/or courts established to enforce nondiscrimination laws.²⁵

of assuring on an overall basis that stations are engaging in employment practices that are compatible with their responsibilities in the field of public service programming. Id. at 229-230.

²³ See NAACP v. Federal Power Commission, 425 U.S. 662 (1976).

²⁴ See 1968 Memorandum Opinion and Order, supra, at 770.

²⁵ See Memorandum of Understanding Between The Federal Communications Commission and the Equal Employment Opportunity Commission, 70 FCC 2d 2320 (1978).

15. The Commission requires broadcast licensees to establish and maintain an equal employment opportunity program designed to provide equal employment opportunities for minorities and women in all aspects of their employment policies and practices.²⁶ Broadcast stations with five or more full-time employees are required to file a "Broadcast Equal Employment Opportunity Program Report" (Form 396) as part of their renewal application. This Report requests general information concerning the recruitment and hiring practices of the licensee during the renewal year, i.e., the 12-month period prior to the filing of the renewal application. The information requested includes: examples of recruitment sources contacted to attract minority and female applicants; the number of minority and female referrals received from these sources; and the number of overall and upper-level hires²⁷ and promotions occurring at a station. Licensees also are required to file a Broadcast Station Annual Employment Report (Form 395-B) on a yearly basis.²⁸ These reports request data regarding a station's workforce profile for a two-week payroll period, broken down by full or part-time status, job category, gender and race or national origin.

16. Prior to 1987, the Commission's EEO enforcement in the broadcast area focused on whether licensees met our processing guidelines²⁹ regarding women and minorities overall and in the upper-four job categories as reflected in the last Form 395-B

²⁶ See 47 C.F.R. § 73.2080. The EEO compliance of broadcast stations is reviewed once every five years at renewal time for television and once every seven years at renewal time for radio. See 47 C.F.R. § 73.1020(a).

²⁷ Upper-level hires include hires for the top four of the nine job categories listed on Broadcast Station Annual Employment Reports: Officials and Managers, Professionals, Technicians, and Sales Workers. We note that upper-level hires are the same as upper-four hires.

²⁸ See 47 C.F.R. § 73.3612.

²⁹ The processing guidelines are used to analyze a comparison of the composition of the station's employment profile, as reflected in its Annual Employment Reports, with the relevant labor force, and are applied as follows: stations with five to ten full-time employees meet the guidelines if the proportion of minority and female representation on their overall staffs is at least 50% of that of the relevant labor force, and on their upper-level staffs at least 25% of that of the relevant labor force. Stations with 11 or more full-time employees meet the guidelines if the proportion of minority and female representation is at least 50% of that of the relevant labor force for both overall and upper-level job categories.

filed before the license term expired. Licensees meeting the processing guidelines were presumed to be in compliance with the Commission's EEO requirements and, absent Petitions to Deny, their renewal applications were granted unconditionally without further review. Further, the Commission rarely scrutinized a licensee's hires outside the context of the most recent Annual Employment Report. However, in 1987 the Commission adopted a Report and Order that emphasized the use of an efforts-based approach to assessing compliance.³⁰ As a result, the Commission departed from its reliance on the processing guidelines as the principal means of assessing compliance. Since 1987, all renewal applications have received a more complete review, irrespective of whether stations meet or fail our processing guidelines.

17. Currently, when reviewing a broadcaster's EEO compliance at renewal time, the Commission's primary focus is on the licensee's overall efforts to "establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practices."³¹ The efforts evaluation is a two-step process. The first step involves an evaluation of a station's efforts based on a full range of information available concerning its EEO record. The staff reviews the composition of the station's workforce as reported in its Annual Employment Reports filed during the license term; the station's EEO program filed as part of the renewal application including the recruitment sources listed, the number of minority and female referrals received, the number of minorities and women hired during the renewal year and the licensee's analysis of the effectiveness of its EEO efforts; any final determinations of complaints filed with government agencies and/or courts established to enforce nondiscrimination laws; and any petitions to deny or informal objections filed against the renewal. If the first step of review indicates that the station's EEO efforts are satisfactory, the station is found to be in compliance with our EEO Rule.

18. However, if the initial analysis indicates that a station's efforts may be less than satisfactory with regard to such areas as minority and/or female recruitment and hiring, it is subject to a second-step analysis. This analysis usually includes a request for additional information. Our request will typically ask for each job filled during the requested period (usually the last three years of the license term): the title and job

³⁰ See Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, 2 FCC Rcd 3967 (1987) ("Broadcast EEO"); see also 4 FCC Rcd 1715 (1989) ("NAB Report and Order").

³¹ 47 C.F.R. § 73.2080; see Broadcast EEO, *supra*; see also NAB Report and Order, *supra*.

classifications (based on classifications set forth in Form 395-B) of the position; the date the position was filled; the number, sex, race or national origin and referral source of applicants and interviewees; whether the job was part-time or full-time; the sex and race or national origin of the successful candidate; the recruitment sources contacted; and the number, race and sex of referrals received from each recruitment source. In addition, we request a list of all full-time employees, showing job title, job classification, sex and race ranked from highest to lowest paid. We review the station's inquiry response as well as relevant pleadings to determine if, among other things, the station notifies sources of minority and female referrals when vacancies occur and engages in continuous self-assessment of its EEO program. If a broadcast station is found to be in compliance with the Commission's EEO Rule, renewal is granted. If, however, it is not in compliance, the Commission may impose a variety of remedies and sanctions, such as admonishment, reporting conditions, renewal for less than a full term and/or forfeiture. Alternatively, if the facts so warrant, the Commission will designate the renewal application for hearing to determine whether renewal of license should be granted or denied.³²

19. Recently, the Commission issued an EEO Policy Statement,³³ which established non-binding guidelines for assessing forfeitures for violations of the Commission's broadcast EEO Rule. The Policy Statement indicated that the base forfeiture amount for violation of the broadcast EEO Rule is \$12,500. It provided guidance on what circumstances generally may lead to such a forfeiture, described upward and downward adjustment criteria and factors warranting a short-term renewal as well as circumstances that may require designation for hearing. In United States Telephone Association v. FCC, 28 F.3d 1232 (D.C. Cir. 1994) ("USTA"), the Court set aside our general forfeiture guidelines because they were promulgated without notice and comment rule making. While the Court in USTA did not address our EEO Policy Statement, members of the broadcast community have called for the withdrawal of the Policy Statement and the promulgation of new guidelines pursuant to notice and comment rule making. Since the USTA decision, the Commission has

³² See Applications of The Lutheran Church/Missouri Synod For Renewal of Licenses of Stations KFYO/KFYO-FM Clayton, Missouri, 9 FCC Rcd 914 (1994) (Lutheran Church); Applications of Dixie Broadcasting, Inc. For Renewal of Licenses of Stations WHOS(AM)/WDRM(FM) Decatur, Alabama, 7 FCC Rcd 5638 (1992) (Dixie Broadcasting); Application of WXBM, Inc. For Renewal of License of Station WXBM-FM Milton, Florida, 6 FCC Rcd 4782 (1991) (WXBM, Inc.).

³³ 9 FCC Rcd 929 (1994) (Policy Statement) (petitions for reconsideration and requests for clarification pending).

employed a case-by-case or precedential analysis in its EEO decisions. Most recently, this method has been used to decide the following renewal cases: Application of KSBW License, Inc. For Renewal of License For Station KSBW-TV Salinas, California, (FCC 94-239) Adopted September 19, 1994; Applications of WHYW Associates, L.P. For Renewal of License For Station WMYG(FM), (FCC 94-253) Adopted September 30, 1994.

20. In the 1992 Cable Act, Congress adopted provisions requiring that the Commission conduct mid-term reviews of broadcast television station licensees.³⁴ The legislative history of the 1992 Cable Act indicates that Congress intended the mid-term evaluation of a licensee's employment practices to be based on an analysis of workforce data using our present processing guidelines.³⁵ Therefore, we amended our rules to include the standard discussed in the Conference Report as the basis for examining employment practices.³⁶ The mid-term review is conducted by evaluating the first two Annual Employment Reports that are filed after a television station's license has been renewed. A deficiency letter is sent to those licensees that fail to meet the processing guidelines. However, the issuance of a mid-term deficiency letter to a licensee is not viewed as a sanction. Further, a station's compliance at mid-term with the processing guidelines is not evidence of overall EEO compliance efforts at renewal. Nevertheless, "at renewal time, we will take cognizance of all pertinent license term EEO data, including data relied upon for mid-term review."³⁷

21. At the present time, we license more than 13,000 radio and television stations. Of that number, approximately two-thirds

³⁴ We note that the 1992 Cable Act states that: [e]xcept as specifically provided in this section, the Commission shall not revise ... the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. Section 73.2080) as such regulations apply to television broadcast station licensees and permittees; or ... the forms used by such licensees and permittees to report pertinent employment data to the Commission.

47 U.S.C. § 334.

³⁵ See H.R. Rep. No. 862, 102d Cong., 2d Sess. 97 (1992) reprinted in 1992 U.S.C.C.A.N. 1231, 1279.

³⁶ Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992 Equal Employment Opportunities, 8 FCC Rcd 5389 (1993) (hereinafter "Cable Report and Order") (petitions for reconsideration pending).

³⁷ Id. at 5392.

have five or more full-time employees and, therefore, are required to file their EEO programs with their renewal applications. Approximately 80% of these stations' renewals are granted after review of their Annual Employment Reports, EEO programs, complaints and any other pleadings filed concerning the stations' renewals. We send inquiry letters to the remaining 20%. As a result of our review of these stations, we sanction approximately one-fifth of the remaining 20%. Thus, 4% of all stations subject to EEO review receive reporting conditions and/or sanctions. The majority of stations in this 4% category receive reporting conditions and/or forfeiture sanctions. Ultimately, approximately 96% of the renewals reviewed are granted without reporting conditions and/or sanctions.

B. Cable.

22. The Commission began its EEO enforcement in the cable area in 1972 when it adopted a Report and Order³⁸ which implemented new EEO rules for the cable industry³⁹, analogous to those already adopted for the broadcast industry.⁴⁰ These rules (which applied to cable system operators with five or more employees, in their capacity as operators and also in their capacity as licensees and permittees of community antenna relay stations ("CARS")), required the filing of three documents: EEO Program Statements, Annual Employment Reports and Annual Complaint Reports, listing EEO complaints filed against cable operators or

³⁸ See In re Amendment of the Commission's Rules to Require Operators of Community Antenna Television Systems and Community Antenna Relay Station Licensees to Show Nondiscrimination in Their Employment Practices, 34 FCC 2d 186 (1972).

³⁹ The Commission believed that the same considerations of public policy that apply to broadcast and common carrier facilities, see p. 23, infra, were applicable to cable systems. Accordingly, in 1971, the Commission released a Notice of Proposed Rulemaking to initiate its EEO enforcement of cable systems. See Amendment of the Commission's Rules To Require Operators of Community Antenna Television Systems and Community Antenna Relay Station Licensees To Show Nondiscrimination in Their Employment Practices, 29 FCC 2d 18, 18-19 (1971).

⁴⁰ The EEO processes for broadcast stations and cable operators are similar in that, in both cases, the Commission's primary focus is on efforts to recruit, hire and promote qualified minorities and women. However, differences exist in the type of information relied upon in reviewing EEO programs, the frequency with which Commission review occurs and the types of remedies and sanctions which can be imposed in the face of non-compliance.

CARS licensees.

23. Prompted by a study of Annual Employment Reports filed by cable systems in 1974, the Commission subsequently modified its EEO rules in a 1978 Report and Order.⁴¹ The Commission found that minorities and females were disproportionately represented in the lesser skilled and lower paying job categories within the cable industry and that, in general, these groups were not employed in numbers commensurate with their availability.⁴² These results suggested that the EEO programs being utilized by cable television operators were not sufficiently active or affirmative. As a result, the Commission emphasized that its EEO rules not only prohibited discrimination in employment,⁴³ but required cable operators to establish and pursue a positive, continuing program of specific practices to assure equal employment opportunity. At this time, the Commission also decided to update labor force statistics itself rather than relying on individual cable systems to do so. In addition, the Commission combined the Annual Complaint Report with the Annual Employment Report. In remedying cable systems' non-compliance with the EEO rules, the Commission used a variety of measures, including requests for more specific data, use of on-site investigations and, in the case of significantly deficient EEO programs, the establishment of goals and timetables.

24. Six years later, in 1984, the Cable Communications Policy Act of 1984 ("1984 Cable Act")⁴⁴ was enacted and, in 1985, the Commission adopted rules to implement the EEO provisions of the Act.⁴⁵ Under these rules, cable systems and headquarters units

⁴¹ See Nondiscrimination in the Employment Policies and Practices of Cable Television Applicants and Certificate Holders and Licensees of Cable Television Relay Stations, 69 FCC 2d 1324 (1978).

⁴² Id. at 1325.

⁴³ Specifically, cable operators may not discriminate against any person in employment because of race, color, religion, national origin or sex.

⁴⁴ See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 1 et seq., 98 Stat. 2779 (1984). We note that in this Act Congress included a prohibition against age discrimination along with a prohibition against discrimination against those categories already protected by the Commission's rules, namely, race, color, national origin, religion and sex.

⁴⁵ See In re Amendment of Part 76 of the Commission's Rules to Implement the Equal Employment Opportunity Provisions of the Cable Communications Policy Act of 1984, 102 FCC 2d 562

with six or more full-time employees are evaluated on an annual basis pursuant to staff review of the unit's Annual Employment Report (Form 395-A).⁴⁶ In addition to the Annual Employment Report, cable systems are required to complete a Supplemental Investigation Sheet (SIS) every five years. The Annual Employment Report is reviewed using a two-step process which involves a statistical analysis of the cable system's workforce and a review of the system's responses to questions regarding its EEO program. With limited exceptions, this analysis is the same as that used for broadcast entities. The only exceptions are that the analysis begins with cable systems with six or more full-time employees, as opposed to five or more full-time employees for broadcasters. In addition, for a cable headquarters unit, the upper-level staff is compared to national, not local, labor force statistics.

25. If a system appears to be in compliance with the EEO rules, it is granted certification for that year. If the system is not engaging in sufficient efforts or is not attracting a diverse pool of applicants, additional inquiries are made. If, based on the Annual Employment Report and responses to subsequent inquiries, it is determined that the system is not in compliance, certification is denied. When certification is denied, the Commission may impose various remedies or sanctions, including an admonition, reporting conditions, a monetary forfeiture, suspension of the CARS license until the violation is corrected, denial of a CARS application, or revocation of a license for a CARS facility. The Commission can also communicate its adverse findings to the local franchising authority.

26. Additionally, the staff conducts selective on-site reviews of cable systems to verify their EEO programs and ensure that employees are properly classified. The Commission encourages cable systems to conduct business with minority and female entrepreneurs.⁴⁷

27. In 1992, Congress enacted the 1992 Cable Act. Congress found

(1985).

⁴⁶ Form 395-A requires, *inter alia*, that cable systems identify full-time and part-time employees by race and sex in each of the following categories: officials and managers; professionals; technicians; salespersons; office and clerical personnel; skilled craftpersons; semi-skilled operatives; unskilled laborers; and service workers. In addition, Form 395-A requires the inclusion of the number of minorities and females in the relevant labor market for each of the specified job categories.

⁴⁷ See 47 C.F.R. § 76.75(e).

that minorities and females were not employed in significant numbers in managerial positions in the broadcast and cable television industries, and that increased numbers of minorities and females in managerial positions will advance the nation's policy favoring diversity in the expression of views in the electronic media. As a result, Congress adopted new EEO provisions within the 1992 Cable Act, which require that the Commission collect more specific employment data from cable entities, including specific information on the job titles of employees. In addition, the Act increased the current nine cable job categories to 15⁴⁸ and expanded the scope of the cable EEO provisions to include multichannel video programming distributors ("MVPDs").⁴⁹ The Commission also developed a new Form 395-M to cover MVPDs.⁵⁰ This form is similar to the Form 395-A. In July 1993, the Commission released a Report and Order to implement the EEO provisions of the 1992 Cable Act.⁵¹

28. There are approximately 2,300 cable employment units. Of those units, approximately 95% receive EEO certifications based upon our review of their Annual Employment Reports and any other available information. Further, all units receive an SIS once every five years. Each year, based upon our review of their Annual Employment Reports, SIS responses and any other available information, approximately 90% of these units receive certifications. Typically, the staff schedules audits of 25 cable companies a year and decertifies half of the units audited. Since the 1984 Act, the Commission has sanctioned two cable operators based upon information obtained during on-site

⁴⁸ The six job categories added by the 1992 Cable Act include Corporate Officers, General Manager, Chief Technician, Comptroller, General Sales Manager and Production Manager.

⁴⁹ The 1992 Cable Act defines an MVPD as "a person, such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(12).

⁵⁰ In order to facilitate the transitional filing period for MVPDs, the Commission waived the filing of 12-month hiring and promotion data as requested in Section V (subsections B and C) and Section VII of the 1994 Annual Employment Report.

⁵¹ See Cable Report and Order, supra.

reviews.⁵²

29. Currently, there is little information available on the effects of the EEO provisions of the 1992 Cable Act on equal employment opportunity in the cable industry. The revised Cable Television Annual Employment Report and the new MVPD Annual Employment Report (Form 395-M) were due to be filed at the Commission May 31, 1994. At this time, the majority of the forms have not been evaluated.

C. Common Carrier

30. The FCC first adopted EEO requirements for common carrier entities in 1970.⁵³ In extending EEO regulation to common carriers, the FCC opined that the same considerations leading to its conclusion that discriminatory employment practices by a broadcast licensee are incompatible with the licensee's operation in the public interest apply, as well, to a common carrier licensee. In the Report and Order adopting the new regulations, the Commission also noted that telephone or telegraph common carriers occupy "a privileged status" as a result of their monopoly position in their particular geographic areas, which requires the public to do business with them. The Commission concluded "[t]his unique public interest role makes it particularly important that [common carriers] not engage in discriminatory employment practices."⁵⁴

31. Like broadcasters, common carrier licensees are required both to develop and implement an EEO program and to file annual employment reports with the FCC. Common carrier licensees with sixteen or more employees are required to file EEO programs. The necessary elements of such common carrier EEO programs are similar to those described above for broadcast licensees. Once a program is on file, licensees must file any changes or amendments to the program no later than April 1 of each year after the initial filing. Unlike broadcast licensees, a common carrier licensee is neither required to evaluate its employment profile and job turnover against the availability of minorities and women in its recruitment area, nor to ensure some level of parity between its employment profile and the employment of minorities and females in the geographic area. There is no model EEO program (FCC Form 396) for common carriers.

⁵² Adelphia Communications Corporation's Unit 305, Palm Beach County, Florida, 9 FCC Rcd 908 (1994) (Adelphia Cable); Prime Cable, 4 FCC Rcd 1696 (1989).

⁵³ See Employment Practices by Common Carriers, 24 FCC 2d 725 (1970).

⁵⁴ Id. at 726.

32. Each common carrier licensee must file an annual employment report on FCC Form 395 on or before May 31 of each year.⁵⁵ Licensees with fewer than 16 employees need merely certify that such is the case and execute the form. All other licensees must provide complete employment data. The annual employment report form for common carrier licensees is similar to FCC Form 395-B for broadcast licensees. The only significant difference is that the form for common carrier licensees has a section that calls for information relating to on-the-job training programs in addition to the sections requesting data on full-time and part-time employees.

33. Section 21.307(d)(1) of the Commission's Rules, 47 C.F.R. § 21.307(d)(1), requires each licensee to submit an annual report on or before May 31 each year listing any complaints filed against the licensee which allege violations of federal, state, territorial or local law in any competent jurisdiction. The FCC Form 395 has been revised recently to incorporate this annual complaint reporting requirement.

34. We have summarized the origins and history of our EEO rules as well as detailed our current procedures for enforcing those rules. The following section provides statistics describing the increased employment of women and minorities in the broadcasting and cable industries from 1986 to 1993, and compares it to the increased employment of women and minorities in the overall national workforce during the same period.

⁵⁵ See 47 C.F.R. § 1.815(a).

IV. EMPLOYMENT LEVELS OF WOMEN AND MINORITIES

A. Broadcast

35. Women. From 1986 to 1993, women in the overall national workforce increased from 44.5% to 45.6%, a net gain of 1.1%. In contrast, from 1986 to 1993, women in the broadcast industry overall increased from 37.4% to 39.6%, a net increase of 2.2%. See Appendix C. During this same time period, women in the broadcast industry in total upper-level positions increased from 29.2% to 32.8%, a net increase of 3.6%. In the four individual upper-level job categories, women increased: from 30.1% to 34.0% for Officials and Managers, a net gain of 3.9%; from 30.3% to 33.0% for Professionals, a net gain of 2.7%; from 13.4% to 13.9% for Technicians, a net gain of .5%; and from 46.9% to 51.6% for Sales Workers, a net gain of 4.7%. See chart below.

Broadcasting Top 4 Job Categories
FEMALES

