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FCC 96-49

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Streamlining Broadcast EEO	)	
Rule and Policies, Vacating the EEO	)	MM Docket No. 96-16
Forfeiture Policy Statement	)	
and Amending Section 1.80 of	)	
the Commission's Rules To Include	)	
EEO Forfeiture Guidelines	)	

ORDER AND NOTICE OF PROPOSED RULE MAKING

Adopted: February 8, 1996 Released: February 16, 1996

Comment Date: April 30, 1996
Reply Comment Date: May 30, 1996

By the Commission: Commissioners Barrett and Ness issuing separate statements.

TABLE OF CONTENTS

Paragraph

I. INTRODUCTION 1
II. BACKGROUND 3
A. History of EEO Enforcement 3
B. Present EEO Enforcement 7
C. Petition For Rule Making Regarding Impact of Adarand Constructors v. Pena 13
III. DISCUSSION 16
A. Regulatory Streamlining Proposals 19
B. EEO Forfeiture Guidelines 37
1. The Proposal 38
2. Commission Discretion in Applying Proposed Guidelines 46

3. Interim Policy and Effective Date 47
IV. CONCLUSION 49
V. ADMINISTRATIVE MATTERS 50
VI. ORDERING CLAUSES 55

I. INTRODUCTION

1. We initiate this proceeding and issue this Order and Notice of Proposed Rule Making (Notice) to propose improvements and clarifications to our equal employment opportunity (EEO) requirements and to propose guidelines for imposing forfeitures for violations of those requirements. We emphasize that compliance with our EEO Rule and policies must be observed by all broadcast licensees. We are concerned, however, that our EEO requirements may unnecessarily burden broadcasters, particularly licensees of smaller stations and other distinctly situated broadcasters, and therefore propose changes to our Rule and policies to provide relief to such broadcasters. We solicit comment on these proposals.

2. We also invite comment on our proposed guidelines for imposing forfeitures for EEO violations. In our 1994 EEO Policy Statement,[1] we established non-binding guidelines for assessing forfeitures for violations of the Commission's broadcast EEO Rule. Subsequently, the U.S. Court of Appeals for the District of Columbia Circuit vacated the Forfeiture Policy Statement,[2] after which the EEO Policy Statement was patterned, because it was not put forth for notice and comment.[3] However, the court expressed no opinion on the substance of the guidelines contained in the Forfeiture Policy Statement. Given the analogous natures of our EEO Policy Statement and the Forfeiture Policy Statement, we hereby officially vacate the EEO Policy Statement. We seek comment on the EEO forfeiture guidelines proposed herein. In our view, adoption of these guidelines will provide broadcasters with a greater degree of predictability and certainty with respect to sanctions that may be imposed for violations of our EEO requirements. In addition, we anticipate that use of the guidelines will facilitate our resolution of EEO cases.

II. BACKGROUND

A. History of EEO Enforcement

3. The Commission's broadcast EEO requirements serve two objectives: to promote

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[1] Policy Statement, Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules, 9 FCC Rcd 929 (1994) (EEO Policy Statement).

[2] Policy Statement, Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), recon. denied, 7 FCC Rcd 5339 (1992), revised, 8 FCC Rcd 6215 (1993) (Forfeiture Policy Statement).

[3] United States Telephone Association v. FCC, 28 F.3d 1232 (D.C. Cir. 1994) (USTA).

programming that reflects the interests of minorities and women in the local community in addition to those of the community at large and to deter discriminatory employment practices. A basic rationale underlying the broadcast EEO Rule has been that a broadcaster can more effectively fulfill its duty to serve the needs of the entire community if it makes a good faith effort to employ qualified women and minorities. The Commission does not assume that minority and female employment will always lead to minority and female-oriented programming or to the expression of a particular minority or female viewpoint on the airwaves. We are also aware that all minorities, as well as all women, do not share the same viewpoints. Nonetheless, as more minorities and women are employed in the broadcast industry, varying perspectives are more likely to be aired. The other underlying rationale for the EEO Rule, deterence of unlawful discrimination, rests on the belief that a broadcaster that engages in unlawful discrimination cannot, by definition, fulfill the needs of the entire community.[4] We also recognize that employment discrimination in the broadcast industry inhibits our efforts to diversify media ownership by impeding opportunities for minorities and women to learn the operating and management skills necessary to become media owners and entrepreneurs.[5]

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[4] See Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 13 FCC 2d 766 (1968). See generally Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179 (1986).

[5] In 1994, minorities, specifically Blacks, Hispanics, Asians, and Native-Americans, owned and controlled 31 (2.7%) of 1,155 commercial television stations and 292 (2.9%) of 9,973 commercial radio stations in the United States. See Analysis and Compilation Of Minority-owned Commercial Broadcast Stations in the United States, The Minority Telecommunications Development Program, National Telecommunications and Information Administration, September 1994.

According to the U.S. Census Bureau, in 1987 women owned and controlled 27 (1.9%) of 1,342 commercial television stations and 394 (3.8%) of 10,244 commercial radio stations in the United States. Comments of American Women in Radio and Television, Inc., to Notice of Proposed Rulemaking in MM Docket No. 94-149 and MM Docket No. 91-140, at 4 n.4 (May 17, 1995) (citing 1987 Economic Censuses, "Women-Owned Business," WB87-1, U.S. Dep't of Commerce, Bureau of the Census, August 1990 (based on 1987 Census)).

Since 1987, the U.S. Census Bureau has not updated its data on ownership of broadcast facilities by minorities and women, nor does the FCC collect such data. However, we sought comment on whether the Annual Ownership Report Form 323 should be amended to include information on the gender and race of broadcast license owners. In re Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, Notice of Proposed Rulemaking, 10 FCC Rcd 2788, 2797 (1995).

4. The Commission implemented a formal rule against employment discrimination in 1969.[6] In response to arguments from the broadcast industry that its EEO policy could not be effectively implemented by relying solely upon individual complaints, the Commission adopted a companion requirement that stations establish, maintain and carry out a positive continuing program designed to assure equal employment opportunity in every aspect of station employment. Subsequent to 1969, the Commission added women to the minority groups already covered by the EEO Rule.[7] These core requirements have continued largely unchanged and remain in effect today. The Commission later extended these rules to cable television systems and Congress made those requirements statutory in 1984.[8] In 1992, Congress directed the Commission to bolster broadcast EEO enforcement by conducting mid-term review of broadcast television stations and endorsed the EEO Rule and forms by prohibiting the Commission from amending them as they pertain to television licensees and permittees.[9]

5. The Commission's EEO Rule was indirectly endorsed by the United States Supreme Court in NAACP v. Federal Power Commission.[10] The Court there, in striking down similar regulations enacted by the Federal Power Commission (FPC) as duplicative of Equal Employment Opportunity Commission regulations and in excess of the FPC's statutory mandate, favorably contrasted the FCC's regulations. The Court observed that the Commission's broadcast EEO rules could "be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 Et Seq., to ensure that its licensees' programming fairly reflects the tastes and

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[6] See Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 18 FCC 2d 240 (1969).

[7] See 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, 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).

[8] See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 1 et seq., 98 Stat. 2779 (1984).

[9] Cable Television Consumer Protection and Competition Act of 1992, 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"). 47 U.S.C. § 334. The 1992 Cable Act also expanded the reach of the Cable EEO provisions to make them applicable to multichannel video programming distributors. The proceeding we initiate herein is limited to EEO requirements applicable to broadcast stations. Changes to our EEO rule for cable entities are beyond the scope of this rule making.

[10] 425 U.S. 662 (1976).

viewpoints of minority groups."[11] The EEO Rule is not intended to replicate federal and state antidiscrimination laws but rather to advance the Commission's unique program diversity-related mandate.

6. The Commission reaffirmed the purpose of its EEO rules and policies as recently as 1994 in an EEO Notice of Inquiry.[12] The Commission stated that "the overriding goal underlying our EEO rules is to promote program diversity."[13] The Commission again noted that the rules enhance access by minorities and women to employment opportunities in broadcasting to ensure that broadcast programming more accurately reflects the views and interests of all members of a broadcaster's community of license.

B. Present EEO Enforcement

7. The Commission uses an efforts-based approach to assessing EEO compliance.[14] We do not require that the proportion of minorities or women employed equal their presence in the labor force or even that any certain percentage of an entity's staff be composed of minorities or women.[15] Instead, we focus on the station's equal employment opportunity program, its consistent efforts to contact sources likely to refer qualified female and minority applicants and self-analysis of its outreach program. The objective of our efforts-based

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[11] Id. at 670, n.7.

[12] See Implementation of Commission's Equal Employment Opportunity Rules, MM Docket No. 94-34, 9 FCC Rcd 2047 (1994) (EEO Notice of Inquiry).

[13] Id. at 2047.

[14] 47 C.F.R. § 73.2080. See generally 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), petition for reconsideration pending. See also 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters).

[15] See 47 C.F.R. § 73.2080; Certain Broadcast Stations Serving Communities in the State of Louisiana, 7 FCC Rcd 1503, 1505 (1992) (holding that station that did not hire minorities complied with EEO rule based on recruitment efforts); Radio Seaway, Inc., 7 FCC Rcd 5965, 5968 (1992) (holding that station that hired minorities but failed to actively recruit minorities placed "undue emphasis on meeting our processing guidelines" and therefore, imposed reporting conditions). See also Florida State Conference of NAACP v. FCC, 24 F.3d 271 (D.C. Cir. 1994) (stating that the Commission's EEO rule does not require minority employment to meet numerical goals); Certain Broadcast Stations Serving Communities in the Miami, Florida Area, 5 FCC Rcd 4893, 4894 (1990) ("failing to meet the Commission's processing guidelines does not in and of itself demonstrate the inadequacy of a licensee's EEO efforts. . . . [t]he Commission instead focuses on a station's overall efforts to recruit, hire and promote minorities").

program is to increase the pool of qualified female and minority candidates from which a licensee or regulatee can then select the best qualified applicant, without regard to gender, race or ethnic origin.

8. Broadcast licensees must 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.[16] 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 hires[17] and promotions occurring at the station. Licensees also are required to file a Broadcast Station Annual Employment Report (Form 395-B) on a yearly basis.[18] This report requests data regarding a station's workforce profile for a two-week payroll period, broken down by full and part-time status, job category, gender, and race or ethnic origin.

9. As noted above, when we review a broadcaster's compliance with our EEO Rule at renewal time, our primary focus is on the licensee's overall efforts. Our efforts evaluation is a two-step process. The first step is a review of the station's EEO program filed as part of the renewal application, including, inter alia, the recruitment sources listed, the number of minority and female referrals received, and the licensee's analysis of the effectiveness of its EEO efforts. We also review 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.

10. Also as part of the first step of our review, we compare the composition of the station's workforce, as reported in its Annual Employment Reports filed during the license

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[16] See 47 C.F.R. § 73.2080. The EEO compliance of broadcast stations is reviewed at renewal time, once every five years for television stations and once every seven years for radio stations. See 47 C.F.R. § 73.1020(a). We note that the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56, (1996), authorizes the Commission to extend these terms up to eight years. This change has yet to be implemented. In addition, pursuant to provisions adopted in the 1992 Cable Act, we also conduct mid-term reviews of broadcast television station licensees for EEO compliance. 47 C.F.R. § 73.2080(d).

[17] 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.

[18] See 47 C.F.R. § 73.3612.

term, with the relevant labor force[19] to determine whether our processing guidelines are met. The processing guidelines 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 is 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. These guidelines are used as one of several screening tools for helping determine the stations whose EEO programs might require further investigation. In no situation are a station's efforts found to be unsatisfactory or is it found to have violated the EEO Rule simply because it does not meet the processing guidelines.

11. 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. If our initial analysis indicates that a station's EEO efforts may be unsatisfactory, it is subject to a second, more detailed level of analysis. This analysis usually includes a request for additional information.[20] We review the station's response to our inquiry 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 we find that a broadcast station has not complied with the Commission's EEO Rule, we may impose a variety of remedies, such as reporting conditions, and sanctions, such as renewal for less than a full term, and/or forfeiture. Alternatively, if the facts so warrant or a substantial and material question of fact as to the basic qualifications of the licensee exists, the Commission will designate the renewal application for hearing to

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[19] Generally, the relevant labor force area for evaluating a station's employment profile is the Metropolitan Statistical Area (MSA) in which the station is located. If the station is not within an MSA, we refer to county statistics.

[20] For each job filled during the period under review (usually the last three years of the license term), the request typically asks for: the title and job classifications (based on classifications set forth in Form 395-B) of the position; the date the position was filled; the number, gender, race or ethnic origin and referral source of applicants and interviewees; whether the job was part-time or full-time; the gender and race or ethnic origin of the successful candidate; the recruitment sources contacted; and the number, race or ethnic origin, and gender of referrals received from each recruitment source. For an example of a satisfactory response to this request, see Appendix C, infra. Such a format is also ideal for recordkeeping, enabling a licensee to easily self-assess the results of its recruitment efforts. In addition, we request a list of all full-time employees, showing job title, job classification, gender and race or ethnic origin ranked from highest to lowest paid.

determine whether renewal of license should be granted or denied.[21]

12. As stated previously, in our 1994 EEO Policy Statement, we established non-binding guidelines for assessing forfeitures for violations of the Commission's broadcast EEO Rule. The EEO Policy Statement provided guidance on what circumstances may lead to such a forfeiture; established the base forfeiture amount for violation of the broadcast EEO Rule as $12,500; described upward and downward adjustment criteria and factors warranting short-term renewal; and described the circumstances that could occasion designation for hearing. Subsequently, the U.S. Court of Appeals for the District of Columbia Circuit vacated the Forfeiture Policy Statement, after which the EEO Policy Statement was patterned, because it was not put forth for notice and comment.[22] However, the court expressed no opinion on the substance of the guidelines contained in the Forfeiture Policy Statement. Given the analogous natures of our EEO Policy Statement and the Forfeiture Policy Statement, we officially vacate the EEO Policy Statement in this Notice.[23] Since the USTA decision, the Commission has employed a case-by-case or precedential analysis in its EEO decisions and we shall continue this approach until new guidelines are adopted.

C. Petition for Rule Making Regarding Impact of Adarand Constructors, Inc. v. Pena

13. In Adarand Constructors, Inc. v. Pena,[24] the U.S. Supreme Court held that all racial classifications imposed by the federal government are subject to a strict scrutiny standard of judicial review.[25] Under strict scrutiny, a racial classification imposed by the federal government must be narrowly tailored to further a compelling governmental interest.

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[21] Examples of cases where the Commission designated renewal applications for hearing include Applications of Dixie Broadcasting, Inc. For Renewal of Licenses of Stations WHOS(AM)/WDRM(FM) Decatur, Alabama, 7 FCC Rcd 5638 (1992); Application of WXBM, Inc. For Renewal of License of Station WXBM-FM Milton, Florida, 6 FCC Rcd 4782 (1991).

[22] USTA. Subsequent to the USTA decision, the Commission issued a Notice of Proposed Rule Making requesting comment from the public concerning the guidelines set forth in the Forfeiture Policy Statement. The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, 10 FCC Rcd 2945 (1995).

[23] We note that Petitions For Reconsideration and Clarification, as well as other related pleadings, were filed in response to the EEO Policy Statement. Because we are vacating the EEO Policy Statement in this Notice, these pleadings are dismissed as moot. Our proposed disposition of the cases decided using the EEO Policy Statement is discussed, infra.

[24] 115 S. Ct. 2097 (1995).

[25] Id. at 2113.

14. Haley, Bader & Potts P.L.C. filed a Petition for Rule Making, dated August 18, 1995, (Haley, Bader Petition)[26] in which it requested that the Commission initiate a rule making "to review, and as necessary, revise or rescind its rules, procedures, policies and guidelines for promoting equality of employment opportunity in the broadcast industry . . . in light of Adarand."[27] The Petitioner argues that the Commission must justify its EEO program under Adarand's two-prong strict scrutiny standard -- whether the requirements serve a compelling governmental interest and are narrowly tailored to achieve that interest.

15. Because the Commission's EEO program is an efforts-based approach that does not mandate that broadcasters employ any person on the basis of race, we conclude that Adarand does not implicate our EEO program and, therefore, the Commission's EEO program need not be evaluated under the strict scrutiny standard. Our reading of the scope of the Adarand decision is consistent with the interpretation of the case by the Department of Justice (DOJ). An analysis of the Adarand decision by DOJ states:

> Mere outreach and recruitment efforts . . . typically should not be subject to Adarand standards. Indeed, post-[Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)] cases indicate that such efforts are considered race neutral means of increasing minority opportunity. In some sense, of course, the targeting of minorities through outreach and recruitment campaigns involves race-conscious action. But the objective there is to expand the pool of applicants or bidders to include minorities, not to use race or ethnicity in the actual decision. If the government does not use racial or ethnic classifications in selecting persons from the expanded pool, Adarand ordinarily would be inapplicable.[28]

Accordingly, we disagree with the views expressed in the Haley, Bader Petition, but request comment on these views, as well as our own.

III. DISCUSSION

16. In this Notice, we seek comment on how to improve our EEO Rule and policies to afford relief to licensees and permittees of small stations and other distinctly situated

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[26] This petition will be associated with all comments and reply comments filed in response to this Notice and, like them, available for public inspection as discussed infra.

[27] Haley, Bader Petition at 1.

[28] Memorandum to All Agency General Counsels from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, United States Department of Justice, at 7 (June 28, 1995) (footnotes omitted).

broadcasters without undermining the effectiveness of the program. We note that broadcasters have expressed concerns that stations with small staffs or that are located in small markets have particular difficulty attracting and retaining minority employees because they have limited resources and difficulty competing for talent with larger stations in bigger markets.[29] We also note that parties have indicated the important role that these stations play with regard to minority applicants' initial entry into the communications industry. This Notice seeks comment on what measures, if any, should be adopted in response to these concerns and how they can be implemented. Our goal in this regard is to maintain EEO requirements that are not unduly burdensome for such stations and, at the same time, ensure an effective EEO enforcement program for the broadcast industry. More generally, we invite comment on ways to streamline the operation of the EEO Rule for all broadcasters without diminishing its effectiveness.

17. We invite comment on several specific proposals set forth below -- including several alternatives that would reduce qualifying stations' recordkeeping and filing obligations; new options for stations to establish adequate recruitment efforts, such as participation in joint recruitment programs or other cooperative efforts; and a revised test for the use of alternative labor force data by stations that believe their efforts should be judged by comparison with labor forces other than the relevant MSA. We encourage commenters to submit any other proposals that would minimize any undue paperwork burdens for all broadcasters while maintaining effective industry EEO oversight.

18. In this Notice, we also seek comment on EEO forfeiture guidelines, fashioned after those articulated in the EEO Policy Statement, which we here propose to incorporate into our rules. The proposed guidelines will provide guidance as to what circumstances may lead to the imposition of certain remedies or sanctions when a violation of the broadcast EEO Rule has occurred. In our view, adoption of these guidelines will provide broadcasters with a greater degree of predictability and certainty with respect to sanctions that may be imposed for violations of our EEO requirements. In addition, we anticipate that use of the guidelines will facilitate our resolution of EEO cases. We solicit comment on this proposal.

A. Regulatory Streamlining Proposals

19. In the EEO Notice of Inquiry, we asked if there was a way to decrease the administrative burdens our EEO Rule placed on broadcasters while maintaining the effectiveness of our broadcast EEO enforcement.[30] In response, a number of broadcasters expressed the view that the present administrative requirements, in terms of the time and

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[29] In the Matter of Implementation of Commission's Equal Employment Opportunity Rules, MM Docket No. 94-34, 9 FCC Rcd 6276, 6305 (EEO Report).

[30] EEO Notice of Inquiry, 9 FCC Rcd at 2051.

money spent recruiting and recordkeeping, were burdensome and should be reduced.[31] In this section, we set forth proposals for reducing the filing and recordkeeping requirements of stations that, based on certain criteria discussed below, may qualify for the proposed reductions. We also present several other proposals that would decrease the EEO recordkeeping requirements for all broadcasters.

20. In response to the EEO Notice of Inquiry, some broadcasters expressed concerns that their small staff size and/or operation in a small market may prevent them from attracting and retaining minority employees. In our EEO Report, we summarized the reasons cited by broadcasters for difficulties recruiting minorities, including "low salaries and availability of mostly entry level positions; competition with communications companies in larger markets and/or with larger staffs and other local employers; and limited financial, personnel, and time resources available for recruiting."[32] We stated in the EEO Report that we might consider such factors as population and staff size, as well as the percentage of minorities in the labor force, as appropriate areas to examine more fully in future enforcement actions.[33] Below, we present a range of alternatives that is not intended to be exclusive. We request comment on the following proposals as well as any additional suggestions on how we might achieve these objectives. In addition, we request comment as to when these proposals, if adopted, should take effect.

21. In our attempt to restructure our Rule and policies to provide relief to certain broadcast licensees and permittees, we must establish which category or categories of stations warrant the relief afforded under the specific proposals described herein. Accordingly, we request comment on the various qualifying factors set forth below:

a. Should a qualifying factor for relief be staff size, on the assumption that stations with small staffs have few hiring opportunities, and limited financial, personnel and time resources available for recruiting? If so, what size staff would be considered sufficient for relief -- 10 or fewer full-time employees or another grouping? In their comments, parties should address the impact any given cut-off would have on our EEO objectives considering the number of stations and employees that would be affected.[34]

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[31] EEO Report, 9 FCC Rcd at 6307.

[32] Id. at 6305.

[33] Id. at 6315.

[34] The total number of broadcast stations subject to our EEO Rule in 1994 was 13,230. According to data compiled from licensees who filed the Commission's 1994 Broadcast Annual Employment Report (FCC Form 395-B), it appears that 4,239 of these stations report

b. Should a qualifying factor be market size, because, as some have suggested, stations located in small markets may have difficulties competing for employees with stations in larger markets, which can offer higher salaries and greater career opportunities? If so, what size market should be considered sufficient to qualify for relief and how should it be measured--by population, national market ranking (Arbitron or Nielsen) or an alternative standard?

c. Should a qualifying factor be the size of the local minority labor force, on the assumption that it is difficult to attract minorities in an area with a small minority labor force. If so, what percentage of minorities in the labor force should be considered sufficient? We recognize that the concerns identified by broadcasters regarding this factor may not necessarily apply to the recruitment of women, given that women typically represent about half the labor force of every market regardless of size. We solicit comment on what effect, if any, this would have on the type of relief granted based on this factor.

22. Finally, commenters should address the possibility of adopting a standard that combines any of the above-cited factors. We also ask commenters, when justifying their positions, to provide empirical data whenever possible on the number and percentage of stations and station employees that would be affected by their proposals.

23. In the event that we decide that a certain category of stations warrants relief from EEO filing and recordkeeping requirements, there are several possible ways the Commission could provide this relief. One approach would be to require qualifying stations to file only the first page of Form 395-B and Form 396-A,[35] and the first two pages of Form 396,

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having fewer than five employees. The number of employees at those stations is unknown because those licensees are not required to complete the portions of the report regarding full and part-time status, job category, gender, and race or ethnic origin. The total number of employees in all jobs at the remaining stations is 145,645, of which 58,099 (39.9%) are women and 26,796 (18.4%) are minorities. The 1994 broadcast data further indicate that there are some 2,445 stations (18.5% of the total) which employ five to ten persons. Those stations report approximately 14,068 overall employees, including 5,261 females and 1,866 minorities. For the 1,554 stations (another 11.7% of total) which report employment of between 11 and 15 persons, a total of 13,570 employees were reported, including 5,292 females and 1,617 minorities.

[35] Form 396-A is the Broadcast Equal Employment Opportunity Model Program Report. It is a required filing for applicants for broadcast construction permits, transfers of control and assignment of licenses and requests such information as what organizations and

certifying that they meet the criteria for relief. Such stations would be exempt from EEO reporting and recordkeeping requirements as are stations with fewer than five employees under the present EEO rules.[36] Thus, they would no longer be required to provide information regarding their employment profiles, EEO program efforts and results. In addition, under this approach, we would propose to reduce or eliminate recordkeeping requirements. We emphasize that under this proposal licensees and permittees of eligible stations would still be required to comply with our EEO Rule and policies.[37] We invite comment on this approach. We specifically request comment on whether these stations would be disadvantaged by the lack of recordkeeping requirements. By what mechanism could a broadcaster, exempt from recordkeeping requirements, demonstrate its compliance with the EEO Rule in the event of a prima facie challenge by a petitioner?

24. Under a second approach, qualifying licensees would remain subject to existing reporting requirements (i.e., employment profiles, EEO efforts and results would continue to be reported), but their recruitment-related recordkeeping obligations would be modified to reflect their choice of two possible recruitment options. They would choose an option listed on their renewal application by which their EEO performance would be evaluated in the coming license term. They could pick option 1, option 2 or both. Option 1 would be to continue to contact recruitment sources likely to refer qualified minority and female applicants for every vacancy. Option 2 would be to commit to management-level, in-person participation in a minimum number of recruiting events every year, e.g., at least four, such as job fairs or on-campus interviewing at local schools. In this regard, we seek comment on what level of participation should be deemed acceptable. Qualifying events would be geared specifically to identifying qualified minority and female job applicants for current or subsequent vacancies. Using this option, the station could develop a readily accessible file of resumes, immediately available when a vacancy presented itself. However, if a station chooses this option, it must ensure that the resumes on file are current and are not merely retained for an indefinite period of time and that records are kept on the job fairs (such as location, date, sponsoring organization and station representatives attending). These options could also appear on Form 396-A to enable the various applicants, discussed in n.35, supra, to choose a recruitment strategy to employ after grant of their application. We seek comment on these proposals and possible alternatives.

25. Broadcasters have also urged the Commission to consider an alternative way for licensees to demonstrate compliance with the EEO rule involving the use of an employment benchmark. Under such an approach, for example, qualifying stations would remain subject to the EEO rule and to reporting requirements regarding their employment profile and other

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educational institutions does the applicant intend to contact when job vacancies occur to encourage the referral of qualified minorities and females.

[36] See, e.g., 47 C.F.R. § 73.3612.

[37] See, e.g., 47 C.F.R. § 73.2080.

EEO information called for as part of the renewal application but could elect not to file, submit, or retain detailed job-by-job recruitment and hiring records if their employment profile for overall and upper-level positions met certain benchmarks for most of the license term. Commenters should address the nature of an appropriate benchmark, and whether stations meeting this benchmark should be found in presumptive compliance with the EEO Rule and, in the absence of unlawful discrimination, not subject to enforcement sanctions. Licensees not electing this approach or otherwise not meeting the applicable benchmark would still be required, as they are now, to show that their EEO efforts are adequate. See paras. 8-10, supra. Although it could be argued that such an approach could act to de-emphasize the efforts-based nature of our EEO program, it is also arguable that if a station's employment profile bears a reasonable relationship to the local workforce, it is appropriate to presume that the licensee's EEO efforts are adequate.

26. Commenters should specify what public benefits may result from this approach. They should also address whether by adopting such a proposal, the Commission would be encouraging increased employment of minorities and women, or encouraging licensees to maintain a static minority and female employment profile. We note that under this approach the station would remain subject to the prohibition against unlawful discrimination without regard to its employment profile, and request comment on whether this approach would affect the Commission's ability to evaluate the merits of a petition to deny. Finally, commenters should address how many years of the license term the benchmark would have to be met for the presumption to be available.

27. While considering the Commission's proposals or alternatives, we seek comment on three additional issues. First, in the 1992 Cable Act, Congress prohibited the Commission from revising, except for necessary "nonsubstantive technical or clerical revisions," either its EEO regulations or forms (in effect on September 1, 1992) pertaining to licensees and permittee of television stations. 1992 Cable Act, Section 22 (f), 47 U.S.C. § 334. Therefore, the above-cited proposals and any alternative proposals for specific exemption proposed by the public which require the revision of EEO regulations and/or forms for television stations would require statutory change. However, we note that statutory change would not be required for the proposals if they only applied to radio stations.

28. Second, Section 3(a) of the Small Business Act, 15 U.S.C. § 632(a), as amended by Section 222 of the Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, § 222(b)(1), 106 Stat. 999 (1992), as further amended by the Small Business Administration Reauthorization and Amendments Act of 1994, Pub. L. No. 103-403, § 301, 108 Stat. 4187 (1994), provides that, unless specifically authorized by statute, an agency may not prescribe its own small business size standard unless: (a) there is an opportunity for public notice and comment on the proposed size standard; (b) it is based on the relevant criteria for manufacturing concerns (number of employees) and service providers (gross receipts averaged over a period of not less than three years) "or other appropriate factors"; and (c) the proposed size standard is approved by the Small Business

Administration Administrator. If we adopt a qualifying standard that is based on the size of the station's staff, as discussed above, we do not intend to adopt the SBA's definition of a small station because those size standards are based on an entity's gross receipts or net worth. 13 C.F.R. Section 121.601 and Section 121.802.[38] We do not presently require submission of the financial information on which the definition is based. We believe that it would be counter-productive to impose new reporting burdens as a means of alleviating EEO burdens. We also believe that the SBA definition could be overly inclusive and would dramatically reduce the number of stations subject to our EEO filing and recordkeeping requirements. Therefore, we ask for comment on this aspect of our proposal.

29. Finally, commenters should indicate whether these proposals are distinguishable from the policy set aside by the court in Office of Communications of the United Church of Christ, v. FCC. In that case, the court found that a Commission decision to change the employment threshold for required submission of detailed written EEO programs, from five or more full-time employees on a station's staff to 10 or more full-time employees on a station's staff, was arbitrary and capricious.[39] In so doing, the court found that the Commission could not adopt such a change without a rational and explicit justification for its change in policy, based on the well-established principle that an administrative agency cannot depart from its prior precedent and policy without a reasoned justification.[40] The court held, on the basis of the record presented in that proceeding, that the reasons offered by the FCC for its change in policy, which included the more effective use of scarce resources; lack of need to enforce the rule as to stations with few employees or formal personnel procedures, excessive filing burden on small stations and continued coverage of most employees under the new policy, did not meet this standard.

30. The UCC case would not foreclose our proposed change in EEO policy, provided that we justify the change, based on a complete record, in the Report and Order adopting any such change. We invite commenters to provide sufficient evidence, particularly empirical data, concerning the alleged burden imposed by our existing regulations on the types of stations described above, and any other data that would support these proposals, such as changes in broadcasting or the marketplace since the original rules were adopted.

31. The Commission seeks to reduce the administrative burdens of all broadcasters, not just broadcasters of small stations and other distinctly situated broadcasters, to the extent possible without decreasing the effectiveness of our EEO program. In furtherance of that goal, in the EEO Notice of Inquiry, we asked what the Commission could do to encourage

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[38] Other SBA programs have different size standards based on revenue. See 13 C.F.R. Section 121.802.

[39] 560 F.2d 529 (2nd Cir. 1977) (UCC).

[40] Id. at 532.

joint recruitment efforts by all broadcasters.[41] In response, broadcasters proposed that the Commission give them more credit for using joint recruitment efforts, such as those conducted under the auspices of a state broadcast association. Under this approach, broadcasters suggested that we treat such joint efforts as equivalent to individual contacts with minority and/or female sources for purposes of evaluating a broadcaster's efforts to recruit applicants if such efforts produce minority and/or female referrals.[42] In our EEO Report, we stated that we would further investigate the extent and type of joint recruitment efforts available and how the Commission could play a more positive role in encouraging such activities.[43] The following proposal would decrease broadcasters' administrative burdens by giving them credit for joint recruitment efforts and reducing their recordkeeping obligations.

32. We propose to give broadcasters credit for using the resources of a central source, such as a state broadcast association, when recruiting, provided the following: that the association has mechanisms in place for maintaining a file of current applications received as a result of contacts with a broad range of recruitment sources; that recruitment efforts by that central source are tailored to the needs of the broadcaster who uses the service by, for example, making additional recruitment contacts if sufficient applications for a particular vacancy are not on file; and that broadcasters have access to the association's records of recruitment contacts and applicant flow. This last condition is an essential element in reducing the resources a broadcaster must expend to maintain adequate EEO records. As stated previously, although we do not have specific EEO recordkeeping requirements in our EEO Rule, we have made clear in case precedent that stations are expected to keep records that allow them to identify the number, gender, and race or ethnic origin of all applicants and interviewees for each position as well as to identify the recruitment sources contacted. Without such records, the Commission is unable to ascertain whether a station is making efforts to recruit women and minorities as required by our Rule, nor can the station meaningfully assess the effectiveness of its EEO program. However, if a licensee used the resources of a central recruitment source as discussed supra, then the licensee could provide evidence of its EEO recruitment efforts, as well as its assessment of its EEO efforts, by utilizing the records maintained by that central source.

33. We emphasize, however, that broadcasters participating in such efforts would not be relieved of their recruitment and self-assessment requirements set forth in our EEO Rule. They would remain individually responsible for ensuring that they have an adequate pool of minorities and women for all vacancies. Thus, if the broadcast association or other cooperative employment bank did not refer a diverse pool of applicants in any particular case, broadcasters would be responsible for seeking out more productive sources unless all

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[41] EEO Notice of Inquiry, 9 FCC Rcd at 2050.

[42] EEO Report, 9 FCC Rcd at 6306-6307.

[43] Id. at 6315.

viable sources had already been contacted by the association. If all such sources had been contacted by the association, a broadcaster should be prepared to so demonstrate in case of inquiry by the Commission and challenge by other parties. We invite comment on the standard, if any, by which this assessment could be made. The type of recruitment credit given will depend on the type of central source used. For example, whenever vacancies occur at a station, if it uses a state broadcast association that always contacts a broad range of recruitment sources, the station would receive credit for contacting all those sources.

34. We also propose to encourage broadcasters' participation in other joint recruitment efforts such as minority training, internship, and employment programs by giving them credit for participation in such programs. We note, for example, that the Foundation for Minority Interests in Media, Inc., headquartered in New York City, New York, administers a nationwide program, "Media Careers for Minorities," for aspiring broadcasters. The program, which is funded largely by the broadcast and cable industries, provides high school and college students paid jobs and college tuition. Another example, suggested by Ralph Gabbard, President of Gray Communications Systems, Inc.,[44] would be for the National Association of Broadcasters to create a similar program that would provide job placement for minority communications students. A third example might be based on a program such as that of the Kaitz Foundation, which funds internships for minorities in cable. Ideally, by combining financial and personnel resources with other broadcasters or entities with resources to identify qualified minority and female applicants, a broadcaster's administrative burdens in time and cost spent recruiting and keeping records will be substantially reduced while the effectiveness of its outreach will be increased. We seek comment on this proposal and how best to award credit for participation in such efforts.

35. Finally, we seek comment on our test for granting a licensee's request to have its EEO record evaluated by reference to an alternative labor force. In certain circumstances, we will agree to use an alternative labor force when analyzing a station's EEO record if the licensee can demonstrate that the use of such data is appropriate. Currently, such a request will be granted if a broadcaster is able to demonstrate the following three circumstances: (1) the distance of the station from the areas with significant minority population is great; (2) commuting from those areas to the station is difficult (such difficulties may be based on distance but may also be based on other factors such as lack of public transportation); and (3) recruitment efforts directed at the MSA minority labor force have been fruitless. Applications of Buckley Broadcasting Corporation, 9 FCC Rcd 2099, 2101 (1994). We note that some have argued that the Commission's current standard for permitting alternative labor force data is not appropriate in evaluating compliance with the Commission's EEO Rule. As a result, we seek comment as to the viability of this standard, the burden of proof that it requires, particularly under prong three, and suggestions as to alternative standards. For

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[44] Letter from Ralph W. Gabbard, President, Gray Communications Systems, Inc., to Mr. Reed Hundt, Chairman, Federal Communications Commission, dated December 28, 1995.

example, under prong one, should we permit a station to demonstrate that its signal contour (as defined in our rules for the type of station) does not cover a significant population area within its MSA, as an alternative to distance? If so, what contour should be used when evaluating this alternative? For example, for television, should it be the principal city grade, grade A, or grade B contour? For FM radio stations, should it be the principal community contour or the protected service contour? For AM radio stations, should it be based on its signal coverage during the day or during the night, which are often radically different? In addition, should prong two be revised to read "commuting from those areas to the station is unlikely because of transportation difficulties or because the station's past recruitment efforts show that prospective employees are unwilling to commute from those areas?"

36. We seek comment on the effective date of the proposals cited in Section III(A) of this Notice, and consider whether their effective date should be related to broadcast stations' renewal cycles, the publication date of the Report and Order adopting them, or some alternative criteria.

B. EEO Forfeiture Guidelines

37. With this Notice, we invite comment on our proposed EEO forfeiture guidelines for broadcast stations and whether we should incorporate these guidelines into our rules, as a note to Section 1.80, and on the effective date of any new guidelines adopted.[45]

1. The Proposal

38. The proposed EEO forfeiture guidelines on which we invite comment are fashioned after those adopted in the EEO Policy Statement. We continue to believe that the EEO Policy Statement provided valuable guidance as to when the imposition of remedies and sanctions was appropriate and the amount of forfeiture that should be imposed, without binding the Commission or its staff to a rigid set of rules that were required to be applied even where the result was unwarranted under the circumstances. However, in light of the court's decision in USTA, we have decided to ask for comment on this proposal. In our view, adoption of these guidelines will provide broadcasters with a greater degree of predictability and certainty with respect to the sanctions that we envision imposing for violations of our EEO requirements. In addition, we anticipate that use of the guidelines will facilitate our resolution of EEO cases. We solicit comment on this proposal. We also recognize that adoption of any of the proposals described supra could require a corresponding adjustment to the forfeiture guidelines. We invite comment on the nature of any such adjustments.

39. Our proposed amendment to Section 1.80 of the Commission's Rules, attached in Appendix A, contains non-binding guidelines for assessing forfeitures for violations of the

[45] 47 C.F.R. § 1.80. The proposed guidelines are attached hereto as Appendix A.

Commission's broadcast EEO Rule. These guidelines establish the base forfeiture amount for violation of the broadcast EEO Rule as $12,500 and indicate that "[f]ailure to recruit for at least 66% of all vacancies for the period under review so as to attract an adequate pool of minority and female applicants" may lead to the imposition of a $12,500 forfeiture as well as reporting conditions. The proposed guidelines also indicate that an upward adjustment in the forfeiture amount may be warranted in the following enumerated circumstances:

> (1) when a licensee has failed "to recruit for at least 33% of all vacancies reported for the period under review so as to attract an adequate pool of minority and female applicants " ("Failure to Recruit");
>
> (2) when a licensee has a "large or substantial number of hiring opportunities that did not translate into an adequate pool of minority and female applicants" ("Many Hires");
>
> (3) when a "[l]arge pool of minorities in the relevant labor force did not translate into an adequate pool of minority applicants" ("Large Minority Labor Force");
>
> (4) when the station had a prior EEO violation that resulted in a previous sanction or remedy[46] (if the previous sanction included a short-term renewal, the renewal will be designated for hearing and a possible forfeiture of $250,000 may be imposed); or
>
> (5) when the licensee has committed EEO violations with respect to both minorities and women ("Dual EEO Violation").

40. Under the proposed guidelines, a short-term renewal would be imposed under the following circumstances. First, a short-term renewal would be warranted where there has been a Failure to Recruit if the percentage of vacancies for which the station has failed to recruit, as described in Section I(A) of Appendix A, falls below 33% for the period being reviewed and additional factors, such as the use and productivity of recruiting sources, the use and productivity of minority-specific sources and evidence of self-assessment, are absent or particularly inadequate.[47] Second, a short-term renewal would be imposed if we find that a combination of two or more of the following circumstances exist: a Failure to Recruit, Many Hires, and Large Minority Labor Force. Third, a short-term renewal would be imposed where the station committed EEO violations that resulted in the Commission's

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[46] A reminder, admonishment or caution given to the licensee by the Commission regarding a certain aspect or aspects of the licensee's EEO program in the previous license term would not be considered a prior EEO violation for purposes of these guidelines.

[47] As noted above, a Failure to Recruit, not accompanied by aggravating factors, is by itself grounds for an upward adjustment in the forfeiture imposed.

imposition of reporting conditions and forfeiture in the most recent prior license term. Fourth, a short-term renewal would be imposed for a Dual EEO Violation. We seek comment on these proposals, as well as whether a substantially higher forfeiture amount than set forth in the proposed guidelines, in lieu of a short-term renewal plus forfeiture, would provide a similar incentive to comply with the Commission's EEO Rule. We also seek comment on the level of increased forfeiture that would be necessary to maintain adequate incentive.

41. The proposed guidelines also include the factors that may result in a downward adjustment of the forfeiture amount and, under certain circumstances, may result in presumptive non-issuance of a short-term renewal. These factors include:

(1) where there are few hiring opportunities, defined as five or fewer hiring opportunities during the period under review; or ten or fewer hiring opportunities, where the average full-time staff during the period under review exceeds 50 employees;

(2) where minorities constitute less than 6% of the relevant labor force;[48]

(3) where the licensee has demonstrated an inability to pay; or

(4) where the station is a stand-alone[49] station located in an Arbitron or Nielsen ranked market of 200 or above.

42. Definitions. In addition, we specifically invite comment on our definitions and clarifications of terms used in the proposed EEO forfeiture guidelines.[50] As noted above, under our proposed guidelines, a $12,500 forfeiture (accompanied by reporting conditions) may be imposed for "failure to recruit for at least 66% of all vacancies during the period under review so as to attract an adequate pool of minority and female applicants." (emphasis added). We also stated that "[e]vidence of this violation will include (1) inadequate recordkeeping and/or (2) inadequate self-assessment..." (emphasis added). We seek comment on the following definitions or clarifications of the underscored terms as they would

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[48] We note that, depending on the qualifying factor or factors and relief adopted, discussed supra, this downward adjustment might need to be modified.

[49] For purposes of these guidelines, the Commission defines stand-alone station as a station that is not part of an AM/FM combination and whose licensee owns no other stations in the same market.

[50] In comments to the Commission's EEO Notice of Inquiry, as well as in Petitions for Reconsideration and/or Requests for Clarification of the EEO Policy Statement, broadcasters suggested to us that we provide clarification of certain terms used in the EEO Policy Statement.

be applied in the proposed guidelines if adopted.

43. The phrase, "to recruit ... so as to attract," female and minority applicants involves a combination of actions set forth in our EEO Rule. These actions include: contacting minority organizations, organizations for women and other likely sources of minority and female job applicants whenever job vacancies are available; and evaluating employment profile and job turnover against the availability of minorities and females in a station's recruitment area.[51] We would also consider whether the station revised its list of recruitment sources if existing sources proved unproductive. What constitutes an "adequate pool" will vary from station to station, depending on factors such as the applicable labor force, staff size, number of hiring opportunities, applicant and interview pool assessment, self-assessment, and employment profiles. We emphasize that an adequate pool is a diverse pool and the adequacy of a pool will be based in part on how well the station's applicant pools reflect the availability of females and minorities in the relevant labor force.

44. Historically, we have permitted stations to choose how to define an "applicant," provided the station consistently employed the same definition. We request comment on whether we should adopt a uniform definition of applicant, such as an individual who applies and meets the stated minimum qualifications for a position. We propose that "vacancies" refer only to full-time positions[52] and be evaluated both for overall and upper-level positions. However, we seek comment on whether part-time vacancies should also be considered and, if so, what weight should they be given. The "period under review" is usually the last three years of the license term or however long the present licensee has owned the station, whichever is less.

45. Although we do not have specific EEO recordkeeping requirements in our EEO Rule, we have made clear in case precedent that stations are expected to keep records that allow them to identify the number, gender, and race or national origin of all applicants and interviewees for each position as well as to identify the recruitment sources contacted. Without such records, the Commission is unable to ascertain whether a station is making efforts to recruit women and minorities as required by our Rule. Under the proposed forfeiture guidelines, a station's recordkeeping would be considered inadequate if it did not contain complete applicant flow and recruitment records of its full-time vacancies. While recordkeeping and self-assessment are distinct concepts, recordkeeping is an important component of self-assessment. If a station does not keep adequate records, it cannot meaningfully assess the effectiveness of its EEO program. "Inadequate self-assessment"

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[51] See 47 C.F.R. § 73.2080.

[52] As the Commission stated in the EEO Notice of Inquiry, "[t]he Commission's primary enforcement policies focus on minorities and women employed on a full-time basis." Id. at 2050. Therefore, for purposes of the proposed guidelines, vacancies refer to full-time positions only. We define a full-time employee as any employee that works 30 or more hours a week.

under the proposed guidelines is determined on a case-by-case basis, taking into consideration such factors as the number of hiring opportunities at a station, the completeness of its applicant flow and recruitment records, its frequency of contact for specific vacancies with recruitment sources likely to refer qualified minority and female applicants, and whether the station revised or failed to revise its recruitment source list if sources proved unproductive. As stated previously, the Commission normally requests recruitment and hiring information for the last three years of the license term.

2. Commission Discretion in Applying Proposed Guidelines

46. We wish to make clear that, under our proposal, we would retain the discretion to determine whether application of the proposed guidelines would be appropriate in particular cases. We continue to believe that every decision regarding imposition of a forfeiture must ultimately be based on the particular circumstances of the case at issue, taking into account the statutory factors, including: "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[53] Thus, the Commission would retain discretion to depart from the guidelines when appropriate. Moreover, it is not our intent that the guidelines be read to require that a forfeiture be issued in any particular case. The Commission would retain discretion not to issue a forfeiture in particular circumstances or to reduce or increase a forfeiture.

3. Interim Policy and Effective Date

47. During the pendency of this rule making, until the effective date of any rules adopted herein, we will continue to make forfeiture decisions by relying on case precedent, as was our practice prior to adoption of our EEO Policy Statement and as has been our practice since issuance of the USTA decision. We intend to start applying whatever guidelines are ultimately adopted in this rule making to EEO forfeiture proceedings initiated after the effective date of the guidelines. An EEO forfeiture proceeding is "initiated" by the release of an order imposing a Notice of Apparent Liability for forfeiture on a licensee for violation of our EEO Rule. In our view, the proposed forfeiture guidelines would not impose a new standard of conduct, a concern expressed by some broadcasters. The present EEO Rule requires licensees and permittees to recruit so as to attract minorities and women for every vacancy.[54] The guidelines simply set forth what level of noncompliance may lead to a forfeiture and/or other sanctions and remedies and the amount of forfeiture that may be imposed. We are evaluating broadcasters' conduct under standards that have long been in place.

48. In response to USTA, the Commission received Petitions For Declaratory Ruling

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[53] 47 U.S.C. § 503(b)(2)(D).

[54] 47 C.F.R. § 73.2080(c)(2).

and similar pleadings requesting that the Commission withdraw the EEO Policy Statement and vacate all Commission decisions imposing forfeitures based on the EEO Policy Statement. As stated previously, we hereby vacate the EEO Policy Statement. Vacating the EEO Policy Statement will cause the Commission to reconsider any decisions that were decided in reliance on the EEO Policy Statement, see, e.g., Applications of Eagle Radio, Inc., 9 FCC Rcd 836 (1994), and are still before the Commission due to, for example, pending Petitions for Reconsideration and/or Requests for Mitigation of Forfeiture filed by the licensee. However, the Commission will revisit these decisions only in order to reassess the forfeiture amounts and reconsider short-term renewals imposed, and we will do so by relying on case precedent, not on any new guidelines that may be adopted. Vacating the EEO Policy Statement does not alter the Commission's prior findings of EEO violations. Therefore, we find that vacating our previous decisions based on the EEO Policy Statement is not warranted. We therefore grant the above-cited requests in part by vacating the EEO Policy Statement and deny them in part by declining to vacate the decisions, as to the findings of EEO violations, that were decided in reliance on the EEO Policy Statement.

IV. CONCLUSION

49. In this Notice, we wish to consider whether there may be ways to minimize any undue paperwork burdens on broadcasters without reducing the effectiveness of our EEO Rule and policies, and request comment on the specific proposals presented in this Notice to accomplish this goal. We also welcome any alternative proposals that might achieve the same purpose. In addition, we vacate the Commission's EEO Policy Statement and propose to adopt, as a note to Section 1.80 of the Commission's Rules, guidelines for assessing forfeitures imposed for violations of the broadcast EEO Rule. In our view, adoption of these guidelines will provide broadcasters with a greater degree of predictability and certainty with respect to the sanctions which we envision imposing for violations of our EEO requirements. In addition, we anticipate that use of the guidelines will facilitate our resolution of EEO cases. We solicit comment on this proposal.

V. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

50. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this Notice, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act. Pub. L.

No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq. (1981).

B. Ex Parte

51. This is a non-restricted notice and comment rule making proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's Rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

C. Initial Paperwork Reduction Act of 1995 Analysis

52. This Notice contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this NPRM; OMB comments are due 60 days from date of publication of this NPRM in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

D. Comment Dates

53. Pursuant to the applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before April 30, 1996, and reply comments on or before May 30 , 1996. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554.

54. Written comments by the public on the proposed and/or modified information collections are due April 30, 1996. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing

comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

VI. ORDERING CLAUSES

55. Accordingly, **IT IS ORDERED** that the EEO Policy Statement **IS VACATED**.

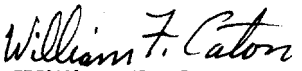
56. **IT IS FURTHER ORDERED** that the Petitions For Declaratory Ruling and other pleadings filed requesting withdrawal of the EEO Policy Statement and vacation of all orders decided under its authority **ARE GRANTED IN PART AND DENIED IN PART**.

57. **IT IS FURTHER ORDERED** that the Petitions For Reconsideration and Requests for Clarification filed in response to the EEO Policy Statement **ARE DISMISSED.**

58. This Order and Notice of Proposed Rule Making is issued under the authority contained in Sections 4(i), 303(r), and 503(b) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 303(r), 503(b).

59. For further information on this proceeding, contact Hope G. Cooper, Esquire, Mass Media Bureau, at (202) 418-1450.

FEDERAL COMMUNICATIONS COMMISSION



William F. Caton
Acting Secretary