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

1. Anti-Discrimination Provisions

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

66. Several commenters directly support our retention of the prohibition against employment discrimination.[137] Other commenters, without addressing the issue directly, demonstrate their support for a nondiscrimination requirement implicitly through their comments and proposals.[138] We conclude that we should retain our prohibition against employment discrimination. As discussed above, the Commission has statutory authority to prohibit discrimination by broadcasters and cable entities and, in the case of broadcast television licensees and permittees and cable entities, is *required* to do so.[139] Moreover, we believe that a finding that a broadcaster has engaged in employment discrimination would raise a serious question as to its character qualifications to be a Commission licensee and to fulfill its statutory obligation to provide broadcast service "to all people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex..."[140] We would have no confidence that an entity that has discriminated against job applicants or employees based on race, ethnicity, or gender would serve the needs and interests of its entire community of license in a nondiscriminatory fashion.

67. We also agree with those commenters who state that we should generally defer action on individual discrimination complaints against broadcasters and cable entities pending final action by the EEOC or a court of competent jurisdiction, consistent with the policy articulated in *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 51 Fed. Reg. 21798 (1986) ("*MOU*").[141] As we noted in the *NPRM*, the policy

[136] NPRM, 13 FCC Rcd at 23025 (para. 59).

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

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

[139] 47 U.S.C. §§ 334 and 554

[140] 47 U.S.C. § 151.

[141] NAB Comments at 15; 46 Named StBAs Comments at 30; Curators Comments at 8; S&B Comments at 25;

set forth in the MOU was developed primarily because Congress intended the EEOC to be principally responsible for the resolution of employment discrimination disputes and efforts on our part to separately resolve such disputes would result in unnecessary duplication. Furthermore, as several commenters observe, the EEOC has substantial expertise in adjudicating employment discrimination complaints.[142] Thus, we will continue to forward individual discrimination complaints received at the Commission to the EEOC for processing. In addition, we will continue to take cognizance of any final determinations of employment discrimination in licensing decisions.

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

69. Nevertheless, we retain the discretion to consider allegations of discrimination prior to a final determination by the EEOC or a court where the facts so warrant. However, we do not intend to routinely exercise our discretion to consider allegations of discrimination before an EEOC or court decision. We disagree with commenters who suggest that the FCC's EEO rules and policies substantially duplicate the work of the EEOC.[146] While the EEOC and the FCC share as a common goal the elimination of discriminatory employment policies and practices at broadcast stations and cable systems,[147] the primary functions of the two agencies are different. Whereas the EEOC reviews

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Delta Radio Comments at ii; Fisher Reply Comments at 12.

[142] 46 Named StBAs Comments at 31-32; Curators Comments at 8-9.

[143] MMTC Comments at 324-25.

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

[145] *Id.* at 327.

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

[147] *MOU*, 151 Fed. Reg. at 21799

discrimination complaints for the purpose of providing relief to victims of discrimination, either individually or as a group, and deterring future discrimination, the FCC's principal concern in reviewing discrimination allegations is the fitness of broadcasters and cable entities to fulfill their obligations under the Communications Act.

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

71. We requested comment in the *NPRM* on a proposal set forth by MMTC and 21 other organizations ("Joint Commenters") in *Streamlining* that the Commission consider all evidence which might be probative of discrimination or other EEO violations.[150] The Joint Commenters suggested that this type of evidence could include, among other things: evidence of a broadcaster's misconduct at commonly owned stations and headquarters units; evidence from individual allegations of discrimination in exceptional cases; evidence from nonresponsive answers or omissions on Form 396, in pleadings or in responses to Commission inquiries; evidence of failure to maintain records of EEO efforts; and evidence derived from logical inferences of potential discrimination drawn from a broadcaster's irrational explanations to the Commission for EEO nonperformance, such as claims that minorities prefer not to work in a particular format or that minorities and women prefer occupations outside of broadcasting. We invited comment on whether we should consider any of these types of evidence to be probative of discrimination. In its comments, MMTC sets forth a comprehensive proposal for a "zero tolerance policy" for discrimination and urges that the Commission consider these types of evidence to be probative of discrimination as one aspect of this zero tolerance policy.[151] Two other commenters agree that these types of evidence should be considered to be probative of discrimination.[152]

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[148] MMTC Comments at 251.

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

[150] *NPRM*, 13 FCC Rcd at 23026 (para. 60).

[151] *See* MMTC Comments at 275-305.

[152] NOW Comments at 43; Gerri L. Gagnon Reply Comments at 2 (Associate Producer for Vermont Public Television).

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

73. MMTC also proposes as part of its zero tolerance policy for discrimination that the Commission expressly prohibit broadcasters from using compulsory binding arbitration agreements[153] and establish clear and fair conditions governing broadcasters' use of voluntary binding arbitration agreements.[154] Additionally, MMTC proposes that the Commission take steps to bar the practice of selling a broadcast station using procedures that exclude minority buyers.[155] MMTC further suggests that, if a broadcaster uses an expressly racist or sexist appeal in seeking the business of advertisers, the Commission should investigate to determine whether the broadcaster has created a hostile working environment for minorities or women.[156] While these racist practices are repugnant and may be, in certain circumstances, inconsistent with our *Character Policy Statement*,[157] we will not separately address these matters in this rule making because they are beyond the scope of this proceeding, which was initiated to revise the EEO rules in light of the court's decision in *Lutheran Church*.

74. One commenter complains that the Commission's broadcast EEO Rule should be expanded to prohibit discrimination based on disability.[158] Both Congress and this Commission have sought to ensure that persons with disabilities share in the benefits that modern communications services

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

[154] *Id.* at 252.

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

[156] *Id.* at 307.

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

[158] Doreen Vincent Comments at 1 (video producer).

and products have to offer.[159] We note that employment discrimination based on disability is prohibited by the Americans with Disabilities Act of 1990.[160] Further, the rule changes we adopt today should assist all potential applicants, including those who are disabled, in obtaining information concerning openings at broadcast stations and cable entities. We believe, however, that the specific proposal raised in this context is beyond the scope of this proceeding.

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

2. Broadcast EEO Program Requirements

a. Rules and Policies

i. EEO Program and Related Provisions

76. Recruitment. In the *NPRM*, we stated our belief that effective recruitment is important because women and minorities have historically experienced difficulties in finding out about, or taking advantage of, employment opportunities in the communications industry. We nonetheless recognized that the issue as to the specific recruitment techniques to be utilized was a matter that would benefit from public input. Accordingly, we requested comment on whether we should adopt a rule imposing detailed requirements or whether we should afford flexibility in recruitment techniques.[161]

77. Based on our review of the Comments as discussed below, we are convinced that a meaningful program of recruitment involving broad outreach is essential to ensure equal employment. We also conclude that it is desirable to accord broadcasters flexibility in designing outreach programs that are tailored to the needs of their station and community. Moreover, we believe that the objective of ensuring that minority and female applicants have the opportunity to apply for positions in the broadcast industry may be achieved without a specific requirement that broadcasters in every situation use recruitment methods that specifically target those groups. Outreach that is truly broad and inclusive will necessarily reach minorities and females, as well as other segments of the community that in the past

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

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

[161] *See NPRM*, 13 FCC Rcd at 23027-28 (paras. 63-65).

may have been deprived of the opportunity to compete for broadcast employment. Therefore, we will give broadcasters discretion to determine what combination of recruitment sources will yield broad and inclusive outreach. While targeted sources can enhance the effectiveness of recruitment efforts, stations will be allowed to determine whether, when and how to use them to meet their individual circumstances. However, we will reassess these conclusions and the effectiveness of this approach as we gain experience in applying our new EEO rule.

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

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

OPTION A

Supplemental Recruitment Measures:

(i) notice of openings to qualifying organizations that request such notice (*see* paras. 95, 96, 97); and

(ii) two (for employment units with five to ten full-time employees) or four (for larger employment units)[163] longer-term recruitment initiatives within a two-year period including, *e.g.*: participation in at least 4 job fairs by station personnel who have substantial responsibility in making hiring decisions; hosting at least one job fair; co-sponsoring job fairs with women's and minority groups in the business and professional community; participation in scholarship programs directed to students desiring to pursue a career in broadcasting; sponsorship of at least two events in the community designed to inform the public as to employment opportunities in broadcasting (*see* paras. 99, 100, 101, 102, 103)

Recordkeeping

(i) collection, but not routine submission to the Commission of: (i) listings of all full-time jobs filled, identified by job title; (ii) the recruitment sources used to fill each vacancy, including any organizations which requested notification; (iii) the address, contact person and telephone number of each recruitment source used to fill each position; (iv) dated copies of all advertisements, letters, e-mails, faxes, etc. used to fill each vacancy; (v) documentation necessary to demonstrate performance of supplemental outreach initiatives, *e.g.*, job fairs, mentoring programs; (vi) the total number of interviewees for each vacancy and the referral

[162] Except where noted below, cable entities must comply with the same EEO program requirements as set forth in this paragraph.

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

source for each interviewee; (vii) the date each job was filled and the recruitment source that referred the hiree (*see* paras. 115, 116, 117, 118)

(ii) placement in the station public file annually a report including the following: (i) all full-time jobs filled during the previous year; (ii) recruitment sources used to fill those vacancies; (iii) address, contact person and telephone number of each recruitment source; (iv) recruitment source for each hiree; (v) recruitment source for each interviewee; and (vi) description of any supplemental initiatives implemented during the previous year (*see* para. 123)

or

OPTION B

Alternative Recruitment Program:

(i) design its own broad and inclusive outreach program; and

(ii) demonstrate that it is widely disseminating information concerning job vacancies by analyzing the recruitment sources, race, ethnicity and gender of the applicants attracted by its recruitment efforts (*see* para. 104)

Recordkeeping

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

(ii) place in the station's public file annually a report containing the following: (i) all full-time jobs filled during the previous year; (ii) recruitment sources used to fill those vacancies; (iii) address, contact person and telephone number of each recruitment source; and (iv) recruitment source, race, gender and national origin for each applicant (*see* para. 123)

79. There is substantial support among the commenters that broad recruitment outreach is preferable to word-of-mouth recruitment, even though there is disagreement about the specific proposals set forth in the *NPRM*. MMTC contends that outreach in recruitment is the core of any meaningful EEO program.[164] Although NAB contends that the proposed rules are unduly burdensome, it advances an alternate proposal designed to provide employment information to a broad range of applicants.[165]

[164] MMTC Comments at 220.

[165] NAB Comments at 5.

Similarly, 46 Named StBAs expresses reservations concerning many aspects of the EEO program proposed in the *NPRM*, but supports the goal of broad outreach and the desirability of avoiding exclusive reliance on word-of-mouth recruitment. It proposes an alternative based on a model outreach program developed by the Broadcast Executive Directors Association ("BEDA").[166] Even commenters who oppose the adoption of any rule nonetheless urge that the Commission remain available to assist broadcasters in their efforts to broaden their recruitment outreach.[167] In sum, the record before us confirms our view that broad outreach efforts to ensure that all segments of the population, including minorities and women, are aware of broadcast employment opportunities are of crucial importance to the goals established by Congress of deterring unlawful discrimination and fostering diversity of programming.

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

81. NAB proposes three options for complying with Commission EEO requirements. First, NAB suggests that compliance with Office of Federal Contract Compliance Programs ("OFCCP") requirements should suffice as compliance with the Commission's Rule (although NAB states that there may be constitutional problems with the OFCCP requirements). As a second alternative, NAB proposes that broadcasters could achieve compliance by participating in a Broadcast Career Program operated by their State Broadcast Association ("StBA"). This refers to the model plan developed by BEDA, which is discussed below in connection with the proposal of 46 Named StBAs. In both cases, NAB proposes that we require only that broadcasters certify every two years that they have complied with the OFCCP or BEDA programs. The third alternative proposed by NAB is a flexible outreach program developed by the licensee. The proposal would allow broadcasters to choose from a "menu" of six general (*i.e.*, not related to a specific job vacancy) and nine specific outreach efforts. The general outreach efforts would include sponsorship of, or participation in, job fairs, scholarship, mentoring and intern programs, and training programs for existing employees. The specific outreach efforts would include standard recruitment methods (such as placing newspaper or magazine advertisements, making on-air job announcements, etc.) and such methods as posting job notices on internet web pages. Under NAB's proposal, a licensee would achieve compliance by utilizing two general outreach initiatives, or one general and two specific outreach initiatives, or four specific outreach initiatives.[168]

82. The proposal of 46 Named StBAs is premised on a model program developed by BEDA. The program itself consists of suggestions or "highways" that StBAs might use in maximizing EEO outreach, including outreach activities by the StBA itself and activities of the StBA to assist individual broadcasters in maximizing their outreach. Thus, the program suggests that a StBA could develop relationships with educational institutions in its state in order to encourage and assist students who may

[166] 46 Named StBAs Comments at 3-5.

[167] HBP Comments at 28-29; S&B Comments at 23-25.

[168] NAB Comments at Appendix C.

wish to pursue careers in broadcasting; sponsor internships, mentoring programs, fellowships, apprenticeships, and training programs, and assist broadcasters who wish to implement similar initiatives; provide information and assistance concerning recruitment resources and methods; take steps to encourage broadcaster participation in the StBA program and increase public awareness of the program; and conduct surveys to evaluate the effectiveness of the program. The key element of the program, according to 46 Named StBAs, is the maintenance by BEDA and StBAs of web sites for the posting of job vacancy information. Commenters have pointed out that many StBAs, as well as NAB, maintain similar employment web pages. Internet usage has increased and internet access is available from 73.3% of public libraries, 46 Named StBAs asserts. Accordingly, it urges that broadcasters should be deemed to be in compliance with our rules if they post at least 67% of their vacancies on the BEDA web site or a web site maintained by a StBA. Recruitment should not be required for all vacancies, 46 Named StBAs contends, because there are some instances where there is good reason not to post a particular vacancy.[169]

83. AWRT suggests a recruitment program based on a "menu" approach. AWRT suggests a menu of 12 recruitment methods, including listing individual vacancies in various recruitment sources, and such additional techniques as job fairs, training and networking programs, and participation in media trade groups oriented to minorities and females.[170] AWRT proposes that broadcasters with more than 10 employees be required to utilize eight of the 12 methods, while broadcasters with fewer than 10 employees only be required to utilize five of the recruitment methods.[171]

84. MMTC contends that recruitment should include the use of sources targeted to minority and female job applicants. Accordingly, it does not oppose the option noted in the *NPRM* of requiring that recruitment include at least three such targeted sources. Nonetheless, it suggests that a better approach would be to require that broadcasters fax or e-mail notifications to virtually all local and several non-local sources of job applicants. MMTC argues that this would eliminate concern as to whether sufficient minority or female organizations had been contacted. It nonetheless recognizes that a problem could arise if claims were made that a broadcaster had failed to contact particular local organizations. It accordingly proposes that the Rule should specify a minimum number of organizations a broadcaster would be required to contact, ranging from 10 to 50, based on the size of the market.[172]

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[169] 46 Named StBAs Comments at 26.

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

[171] AWRT Comments at 4-5.

[172] MMTC Comments at 221-23.

MMTC also urges that non-traditional means of recruitment should be required as a supplement to recruitment conducted when a vacancy occurs. Thus, MMTC states that, contrary to its expectations, its research has led it to conclude that job fairs can be an effective means of recruitment, at least for entry-level positions. It also cites recruitment through job banks, the internet, and participation in trade events sponsored by minority and female groups as having "promise." It nonetheless argues that such activities must be conducted in a meaningful way, and that no credit should be given for activities that are insubstantial or constitute a sham.[173]

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

86. We have carefully considered BEDA's proposal that an entity should be able to satisfy its outreach obligation fully by posting job vacancies on the BEDA or state association website. Internet-based job banks such as the BEDA model hold great promise for dramatically increasing the ability of prospective applicants to gain access to information about job vacancies, not just in their community but across the state and even the country. We commend BEDA for developing this new mechanism and encourage broadcasters to use these or similar websites to help them in their recruitment efforts. It is premature, however, to conclude that web posting is sufficient to ensure wide dissemination to all segments of the community. First, the BEDA job bank web site and those of state broadcast associations are still developing. As far as we can determine, most state broadcast associations do not yet in fact have internet job banks, and those that do post only a limited number of vacancies from local broadcast stations. Second, in view of their newness these websites are not well known as a repository of job advertisements for prospective applicants. Most significantly, however, access to computers is not universal and this digital divide affects minorities and those living in rural areas to a greater extent than other segments of the population.[174] We have established the E-Rate program to provide greater access to

[173] MMTC Comments at 230-33.

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

the internet in our schools and libraries. But we are not convinced that access via the public library is a widespread mechanism for prospective applicants to conduct a job search. Accordingly, we cannot now recognize such internet job banks as presumptively sufficient to achieve broad outreach. We think it preferable to consider the internet as one of several recruiting mechanisms.

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

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

89. We recognize that there may be occasional exigent circumstances where recruitment may not be feasible. For instance, there may be a legitimate need to replace immediately an employee who departs without notice and whose duties cannot be fulfilled, even briefly, by other station employees. We nonetheless do not believe that broadcasters should be excused from recruitment for any specified percent of vacancies, as some commenters advocate. Rather, hiring without recruitment should occur only in exceptional circumstances. We cannot anticipate every circumstance which might justify filling a position without recruitment. We will rely upon the good faith discretion of broadcasters. However, we expect nonrecruited vacancies to be rare relative to the number of vacancies for which recruitment is conducted, because our Rule generally requires recruitment for every vacancy.

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

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lower incomes and educational levels, certain minorities, and those in rural areas or central cities.

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

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

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

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

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[175] *NPRM*, 13 FCC Rcd at 23021-22 (para. 44),

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

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

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

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

notification requirement will place minimal burdens on broadcasters. However, if experience proves otherwise, especially with respect to burdens on small broadcasters, we can revisit this requirement.

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

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

100. We will accord broadcasters discretion as to how they implement this aspect of our Rule. We are impressed by the "menu" approach suggested by several commenters. We agree that the effectiveness of particular supplemental recruitment measures will necessarily vary based on the circumstances at each station. To establish inflexible requirements regarding such measures could impose inappropriate requirements in some cases. We will accordingly incorporate in our EEO Rule a menu of options for supplemental recruitment initiatives, which will enable broadcasters to select the approaches that they believe will be most effective in their situations.

101. The first three menu options include participation in at least four job fairs by station personnel who have substantial responsibility in the making of hiring decisions; hosting at least one job fair; or co-sponsoring at least one job fair with an organization in the business and professional community whose membership includes substantial participation of women and minorities. We believe that job fairs are a useful method to reach a broad range of individuals who are interested in employment in the industry. The fourth option is participation in at least four activities sponsored by community groups active in broadcast employment issues, including conventions, career days, workshops and

[177] *See Report*, 9 FCC Rcd at 6319.

similar activities. Such participation will enable broadcasters to establish relationships with groups in the community that might otherwise be overlooked. The fifth option is the establishment of an internship program designed to assist members of the community to acquire skills needed for broadcast employment. Such an endeavor would serve the goal of broad outreach by increasing the number of qualified potential employees not only for one broadcaster, but for all broadcasters in the area. The sixth option is participation in general (as opposed to vacancy-specific) outreach efforts by such means as job banks or internet programs such as those described in the model program developed by BEDA. While such sources may be used as recruitment sources when specific vacancies occur, they can also be useful even when there is no specific vacancy to elicit interest from persons who may later be considered for a specific position. The seventh option is participation in scholarship programs directed to students desiring to pursue a career in broadcasting. The benefit of this outreach is that it attracts students, including minorities and females, toward careers in broadcasting, ultimately increasing the number of qualified potential employees. The eighth and ninth options are, respectively, the establishment of training and mentoring programs designed to enable station personnel to acquire skills that could qualify them for higher level positions. These options would not be satisfied by ordinary training required for employees to perform their current positions. These options are rather intended to increase employee skills so they can qualify for higher positions.

102. The tenth option is participation in at least four events or programs relating to career opportunities in broadcasting sponsored by educational institutions. Such participation again serves the purpose of increasing the universe of potential employees from which broadcasters attract job applicants. For instance, the BEDA program contends that it is important that educational institutions perceive broadcasting as a rewarding career for their students and offer courses and experiences that will be helpful to students who may choose a career in broadcasting.[178] The eleventh option includes sponsorship of at least two events in the community designed to inform the public as to employment opportunities in broadcasting. We believe that such activities can serve to increase public awareness of the opportunities available in broadcasting. The twelfth option is the only one related to regular recruitment efforts. It would entail listing each upper-level opening in a job bank or newsletter of a media trade group whose membership includes substantial participation of women and minorities. Finally, the thirteenth option includes participation in activities other than the twelve listed options that the licensee has designed to further the goal of disseminating information about employment opportunities in broadcasting to job candidates who might otherwise be unaware of such opportunities. This will provide flexibility for worthwhile initiatives that broadcasters may develop but that are not strictly within the scope of the menu options we have specified. While we are not requiring that broadcasters use particular recruitment sources, we encourage broadcasters to use an array of sources that furthers the goal of broad outreach.

103. For broadcasters who elect to utilize the supplemental recruitment measures, we will expect station employment units with more than ten full-time employees to implement four of these options every two years. For example, a broadcaster could fulfill this requirement by, during a two-year period, hosting one job fair, establishing an internship program, participating in a scholarship program, and co-sponsoring one job fair with an organization in the business and professional community whose membership includes substantial participation of minorities and women. For reasons discussed below, station employment units with five to 10 full-time employees should implement two of the options every

[178] 46 Named StBAs Comments at Exhibit 1, p. 2.

two years. The pertinent two-year period will be that preceding the filing of Statements of Compliance (Form 397) or Broadcast EEO Program Reports (Form 396), discussed below.[179] We will not specify in detail what steps should be taken to implement each option because we wish to accord broadcasters maximum flexibility and opportunity to experiment. While each broadcaster will be responsible for implementing the menu options it selects, joint recruitment efforts may be used in connection with some of the menu options, including participation in job banks and internet programs.

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

105. While we are affording broadcasters the option of either employing supplemental recruitment measures to ensure broad outreach or verifying broad outreach using applicant pool data, we believe that, having selected an option, a broadcaster should use the selected option for a sufficient period of time so that it, the public, and the Commission can meaningfully assess the success of the broadcaster's efforts. As will be discussed below, as part of our enforcement process, we are requiring broadcasters to file Statements of Compliance every two years. We will permit a broadcaster to select a different option at the time it files its Statement of Compliance. Thereafter, the broadcaster should adhere to the option selected for at least the two-year period until the filing of its next Statement of Compliance.

106. Initially, we will require that broadcasters file with the Commission and place in their public file a statement as to their election between the two approaches (supplemental recruitment measures or alternative recruitment program) designed to ensure broad recruitment outreach within forty-five days of the effective date of the new rules. This will ensure that both the Commission and the public are aware of the approach the broadcaster intends to implement. In order to facilitate the initial election, we are preparing a form to be utilized for the initial election. Any broadcaster that does not

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

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

receive a copy of the form by mail may obtain one from the Commission. A broadcaster may change its initial election when its first Statement of Compliance is due, even if that is less than the ordinary two-year period. Thereafter, as noted, a broadcaster will be expected to adhere to its election until the filing of its next Statement of Compliance. However, if there is a sale of the station subject to Commission approval pursuant to FCC Form 314 or FCC Form 315, the buyer may select a different option than that employed by the seller, even though it is within the two-year period. Copies of the initial election statements will be on file in the Commission's Public Reference Room. In the future, we intend to make information regarding a broadcaster's election electronically available on our web site.

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

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

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

110. Questions were also raised as to the status of part-time employees, interns and former employees. Under our former EEO Rule, we expected broadcasters to recruit for part-time positions but did not focus on part-time hires in our review of EEO programs.[182] We see no reason to depart from this

[181] *See NPRM*, 13 FCC Rcd at 23028 (para. 67)

[182] *See, e.g., WFSQ (FM)*, 7 FCC Rcd 6045, 6046 (1992); *Enterprise Media of Toledo, L.P.*, 12 FCC Rcd

policy, which serves to minimize burdens on broadcasters, especially smaller broadcasters. We will include a provision in our Rule clarifying that, in the case of part-time hires, broadcasters need only substantially comply with the requirement to recruit for every vacancy. With respect to interns, we would expect that they would ordinarily constitute temporary hires or non-employee volunteers. They would thus not be subject to our recruitment requirements.[183] However, a decision to employ them permanently would be a hire subject to recruitment. Finally, no good reason has been cited for exempting hires involving former employees from recruitment requirements. Thus, we will expect recruitment for those hires.

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

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

113. Our purpose in proposing the collection and evaluation of applicant pool data, including the race, ethnicity, gender, and referral source of applicants, was to ensure that broadcasters are engaging in meaningful outreach and to provide a basis upon which broadcasters can evaluate their efforts. However, we have no desire to impose data collection and recordkeeping requirements on broadcasters that may be unnecessary for purposes of accomplishing the goals of our EEO rules. We believe that our goal of ensuring that broadcasters engage in broad outreach so that all qualified job candidates are informed of employment opportunities in the industry can be accomplished through compliance with the core obligation to recruit widely for job vacancies coupled with the use of the supplemental recruitment measures, without requiring the collection or reporting to the Commission of applicant pool data. Therefore, broadcasters who elect to utilize the supplemental recruitment measures we have adopted will

3920, 3923-24 (1997).

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

[184] *NPRM*, 13 FCC Rcd at 23029-30 (paras. 72-73).

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

not be required to maintain data concerning the recruitment source, race, ethnicity, and gender of their applicants to comply with this rule. However, if a broadcaster wishes to avail itself of the option of dispensing with the supplemental recruitment measures and designing its own program, we do not think it is unreasonable to require it to collect applicant pool data demonstrating that its outreach efforts are inclusive. We note that our decision in this regard is not intended to relieve broadcasters of recordkeeping requirements imposed under other federal and state laws.

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

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

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

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

involved. Our purpose in adopting this requirement is to ensure that the activities engaged in by broadcasters are consistent in furthering the intent of our Rule.

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

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

120. We also emphasize that, in the case of those broadcasters who utilize applicant pool data, there is no requirement that the composition of applicant pools be proportionate to the composition of the local work force. However, few or no females or minorities in a broadcaster's applicant pools may be one indication (and only one indication) that the station's outreach efforts are not reaching the entire community. The representation of females and minorities in applicant pools is only one factor that we will look at in determining whether a broadcaster's outreach program is inclusive. We may ultimately determine that outreach efforts are reasonably designed to reach the entire community, even if few females or minorities actually apply for openings. Conversely, the fact that a sizeable number of females or minorities have applied for openings will not necessarily establish the inclusiveness of the station's efforts. Also, we recognize that an employer cannot control who applies for jobs. The only purpose of the data collection is to give the broadcaster, the public, and the Commission more information by which to monitor the effectiveness of a station's outreach efforts so that the broadcaster can take appropriate

[186] MMTC Comments at 247.

action to modify its outreach efforts should the information indicate that they are not reaching the entire community.

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

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

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

[187] We recognize that, in some years, the licensee may not have implemented any outreach initiatives because they are required to be completed over a two-year period. If a broadcaster has deferred its initiatives to the second year, it may indicate "none" in the EEO public file report for the first year, accompanied by an appropriate explanation.

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

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

126. While we believe that small market stations should be granted some relief from EEO requirements because of difficulties those stations have competing for employees with stations in larger markets, we believe that such relief is already built into the new broadcast EEO Rule, which affords flexibility to tailor EEO programs to a station's particular circumstances, including market size.[191] For

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

[189] *NPRM*, 13 FCC Rcd at 23032 (para. 84).

[190] *Id.* at 23033 (para. 86).

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

instance, stations in small markets may find that they need fewer recruitment sources to achieve broad outreach than might be the case in larger markets. Also, because stations in smaller markets are likely to attract fewer applicants, they may find the Alternative Recruitment Program a less burdensome method of assessing the effectiveness of their outreach. In contrast, we believe that small staff stations warrant some additional relief from the EEO Rule adopted in this *Report and Order* because, as argued by some commenters, such stations have limited personnel and financial resources to carry out those requirements.[192] In particular, we believe stations that are part of employment units with five to ten employees, the smallest staff stations subject to our EEO program requirements, would encounter these difficulties to such an extent that additional relief for these stations from EEO program requirements is warranted. However, we agree with other commenters who contend that a total exemption from the EEO Rule for stations with five to ten full-time employees would be ill-advised given these stations' important role in providing entry-level opportunities into the broadcast industry.[193] Furthermore, we believe that a total exemption for these stations is no longer necessary given, as already discussed, the more flexible EEO requirements for broadcast stations adopted in this *Report and Order*. Therefore, similar to an approach suggested by AWRT,[194] we will require stations that are part of an employment unit with five to ten full-time employees which elect to employ the supplemental recruitment measures to select only two options from the second supplemental recruitment measure menu during each two-year period, rather than the four required of larger stations. Moreover, as discussed below, broadcasters may elect to forego the supplemental recruitment measures entirely and simply collect applicant flow data demonstrating that their recruitment efforts are inclusive. This may be less burdensome to many small broadcasters, which, in our experience, tend to have relatively few vacancies. Also, as discussed below, although we are extending mid-term review procedures required by Section 334 of the Communications Act for television stations to radio stations, we will exempt radio stations that are part of an employment unit with five to ten employees from this requirement.[195] Given their small staffs and relatively few vacancies, we do not believe it would be a productive use of scarce Commission resources to conduct mid-term reviews of small radio stations' EEO practices.

127. Qualifying stations will be expected to meet all other EEO requirements, including, *e.g.*, filing Statements of Compliance and Forms 396 and 395-B. We emphasize that a station will not qualify for this relief if it shares one or more employees with one or more commonly owned stations in the same market and their combined staffs total more than ten full-time employees. Stations in such a situation are considered one employment unit and are required to report all of their employees on one Annual Employment Report, as described below. We will continue to follow our policy of not requiring station employment units with fewer than five full-time employees to demonstrate compliance with EEO program requirements.

128. Our decision today is consistent with the *UCC* decision. That case held that when the Commission changes the criteria for application of existing regulatory requirements, it must articulate a

[192] *See, e.g.*, VAB/NCAB Comments at 15; S&B Comments at 21.

[193] *See, e.g.*, AFTRA Comments at 4-5 of Attachment; NOW Reply Comments at 35-36.

[194] AWRT Comments at 4.

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

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

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

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

131. In the *NPRM*,[201] we discussed the option of requiring that the number of recruitment sources be tailored to the size of the local minority labor force. In light of the flexible recruitment

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[196] 560 F.2d 529, 532-533.

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

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

[199] *See* Section 73.2080(c)(4), as set forth in Appendix C hereto.

[200] *See* Section 73.2080(c)(1), as set forth in Appendix C hereto.

program we are adopting, we find it unnecessary to adopt this proposal. We also asked whether we should continue our prior practice of not requiring the filing of EEO recruitment information concerning minorities in markets where the minority labor force is less than five percent.[202] We conclude that this practice is no longer justified because our EEO Rule emphasizes broad and inclusive outreach rather than recruitment methods that specifically target minority and female applicants. Accordingly, we will discontinue this practice.

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

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

134. Enforcement. Some broadcast representatives argue that a mandatory EEO program is unnecessary,[207] that it is duplicative of the EEOC,[208] or that it is too vague a standard to enforce.[209]

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[201] *NPRM*, 13 FCC Rcd at 23028 (para. 66).

[202] *Id.* at 23028 (para. 68).

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

[204] *See* 41 C.F.R. §§ 60-1.4 and 60-1.5.

[205] *See* 41 C.F.R. § 60-1.40 and Part 60-2.

[206] *See* 41 C.F.R. § 60-1.20.

[207] S&B Comments at 23.

However, many commenters assert that the best way to ensure that broadcasters implement viable EEO practices in their recruitment programs is for the Commission to enforce mandatory EEO provisions.[210] MMTC argues that, in the past, voluntary efforts to integrate public schools and businesses failed and statutes were necessary to prevent discrimination.[211] MMTC also maintains that, before the Commission adopted its EEO Rule, the broadcast industry had 40 years to provide equal opportunity voluntarily but failed to do so and that the industry commenters to the *NPRM* could have voluntarily implemented many of their proposals over the last 30 years since the EEO Rule was adopted but have not done so.[212] In addition, MMTC asserts that enforcement of mandatory provisions will not prevent any broadcaster from implementing a voluntary program that carries out steps that go beyond Commission EEO requirements.[213] As part of its proposal for a "zero tolerance policy," MMTC urges that we should more carefully identify habitual EEO violators, broaden and improve the effectiveness of our inquiry procedures, and not wait eight years until renewal time to assess EEO compliance.[214] In order to ensure that licensees will comply with the requirements of the EEO Rule, we believe that certain enforcement provisions are necessary and we outline them below.

135. NAB proposes that stations be required to certify compliance with the Commission's EEO Rule every two years and to maintain documentation that proves they have properly certified their compliance.[215] NAB also suggests that licensees should make the supporting documentation available to the Commission for its review but that the public file should contain only the compliance certification and no supporting documentation.[216] AWRT suggests that broadcasters should evaluate their EEO programs at least every two years and should file a report at least every four years that covers at a minimum the previous year's EEO efforts.[217] AWRT states that, by requiring reports at least every four years, broadcasters would be filing EEO efforts reports at mid-term and at the time they file for renewal.[218] Our new requirements for a Statement of Compliance and for radio station mid-term reviews,

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[208] TAB Comments to *Streamlining* at ii.

[209] HBP Comments at 7.

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

[211] MMTC Comments at 31.

[212] MMTC Reply Comments at 32.

[213] MMTC Comments at 36.

[214] MMTC Comments at 278.

[215] NAB Comments at ii; NAB Reply Comments at 14.

[216] NAB Comments at iii.

[217] AWRT Comments at 9.

[218] *Id.*

described below, incorporate aspects of both of these proposals, as well as MMTC's "zero tolerance" policy.

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

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

138. In the *NPRM*, we requested comment on a new standard for mid-term review of television licensees' employment practices.[220] The previous mid-term review standard required a station to compare its employment profile with the applicable labor force, a practice that we are discontinuing in response to the *Lutheran Church* decision. We disagree with NAB's argument that Congress is the appropriate entity to determine the new standard for mid-term review.[221] Section 334 of the Communications Act states that the Commission shall "require a mid-term review of television broadcast station licensees' employment practices...." Congress left the standard of review for mid-term reviews to the Commission's discretion and the Commission fashioned the previous mid-term review standard. Therefore, the Commission is required by statute to conduct mid-term reviews and to fashion an

[219] MMTC Comments at 333.

[220] *NPRM*, 13 FCC Rcd at 23030 (para. 76).

[221] NAB Comments at 29.

appropriate review standard, and we have the authority to change the standard of review without first seeking Congressional approval. Although several commenters made suggestions regarding the mid-term review,[222] we believe that the process that we have selected is the most appropriate, providing us with ample information to assess a licensee's EEO program, while not being overly burdensome to licensees.

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

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

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

142. If a station is subject to a time brokerage agreement, the licensee's Statement of Compliance, Form 396 and EEO public file report will include data concerning only its own recruitment efforts for full-time positions and not the efforts of the broker. If a licensee is a broker of another station or stations, however, its recruitment activity concerning full-time positions at the brokered station(s) should be included in the data on which the licensee-broker's own Statement of Compliance, Form 396 and EEO public file report are based concerning its own station. If a licensee-broker owns more than one

[222] NAB Comments at 29; AWRT Comments at 3-5.

[223] MMTC Comments at 38, n.72.

station, it shall include its recruitment activity concerning full-time positions at the brokered station in the Statements of Compliance, Forms 396 and EEO public file reports for its own station that is most closely affiliated with, and in the same market as, the brokered station. If a licensee-broker does not own a station in the same market as the brokered station, then it shall include such information in the Statements of Compliance, Forms 396 and EEO public file reports for its own station that is geographically closest to the brokered station.

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

144. The Statement of Compliance, EEO Public File Report and Form 396 should be based on recruitment efforts documented in items contained in a station's own records. The Commission's broadcast public file rules, 47 C.F.R. §§ 73.3526 and 73.3527, will be amended to require licensees to maintain copies of their most recent Statement of Compliance. Also, each year on the anniversary of the date a licensee is due to file its renewal application(s), it must place in its public file a copy of its EEO public file report. In addition, a station should retain any records necessary to document its recruitment efforts, depending on the approach the station has chosen, even though the records will not be required to be placed in the public file or filed with the Commission on a regular basis.[224] As part of an inquiry, the Commission may request information from the licensee in addition to that contained in the public file, as described below. These records could include copies of letters notifying sources of job openings, copies of the station's job listings in newspapers or on web sites, and, if applicable, copies of requests by

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

community organizations that they be notified of openings and copies of notices sent to them, information verifying participation at job fairs, and other similar types of outreach information.

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

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

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

[226] We anticipate that the number of random/inquiries will not exceed five percent of employment units annually.

[227] MMTC Comments at 278.

case-by-case basis. Sanctions will be greater in cases involving recidivism or continuous EEO non-compliance, and, based on the facts of each case, could raise a question of intentional discrimination. In sum, as suggested in MMTC's zero tolerance policy, we intend to carefully monitor compliance with our EEO Rule to uncover attempts to evade our requirements or egregious violations that may suggest discrimination.

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

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

ii. Religious Broadcasters

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

[228] *NPRM*, 13 FCC Rcd at 23028 (para. 70).

[229] *Id.* at 23029 (para. 71).

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

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

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

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

154. In response to comments filed by the Church State Council of Seventh Day Adventists (Adventists), the religious liberty and public policy arm of the Adventist Church in a five-state western

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[230] Id.

[231] Id.

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

region, and the American Center for Law and Justice (ACLJ), we clarify that religious broadcasters are not required to demonstrate the validity of a religious qualification as applied to each vacancy at their stations.[233] As we indicated in the *NPRM*, religious broadcasters may use religious belief or affiliation as a qualification for all vacancies, unless they themselves determine otherwise.[234] It is the licensee that makes this determination.

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

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

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[233] ACLJ Comments at 13-17 (legal and educational organization which preserves religious freedom).

[234] *NPRM*, 13 FCC Rcd at 23028-29 (paras. 70-71).

[235] ACLJ Comments at 11-12.

[236] *Id.* at 12, *citing Lutheran Church* (citation omitted).

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

[238] 42 U.S.C. § 2000bb-1.

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

[240] *Order and Policy Statement*, 13 FCC Rcd at 6324.

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

RFRA is unconstitutional as applied to state action, but has not yet reached the issue of constitutionality with respect to federal action, as is the case here.[242]

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

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

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

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[242] *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

[243] NRB Comments at 5-6.

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

[245] Americans United Reply Comments at 3-6.

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

[247] *See Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 341 (1987).

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

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

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

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

iii. Delegated Authority

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

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

[250] CLS Comments at 28; NRB at 6; CBC Comments at 3. UCC also concurs with NRB. *See* UCC Reply Comments at 24-25.

[251] *NPRM*, 13 FCC Rcd at 23029 (para. 71).

[252] Id.

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

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

[255] *See* 47 C.F.R. § 0.283

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

b. Forms

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

164. We hereby reinstate the requirement that licensees file Form 395-B to enable the Commission to monitor industry trends and report to Congress. We believe that it is particularly

[256] 47 C.F.R. § 0.283(b)(1)(iii).

[257] 47 C.F.R. § 0.283(b)(1)(iii) and (c)(3), respectively.

[258] *See Suspension Order*, supra.

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

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

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

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

[260] *See* H.R. Rep. No. 628, 102d Cong., 2d Sess. 111 (1992).

[261] 1992 Cable Act, Section 22(g).

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

[263] 47 C.F.R. §§ 73.3526(d)(7) and 73.3527(e)(7).

[264] *See* NAB Comments at 16; 46 Named StBAs Comments at 29; Evening Post Comments at 22.

[265] Fisher Reply Comments at 12.

part of an employment unit with five or more full-time employees filed the EEO-1, either voluntarily or because they were already required to do so, the data collected could not be compared to the employment data gathered for past Commission trend reports. OMB encourages us to "adopt procedures . . . that also could better utilize information collected via other mechanisms (such as other EEOC collections where possible)."[266] For the reasons discussed, we do not find the EEOC's collection mechanism compatible with our information needs and we are aware of no other similar data collection mechanisms. OMB also urges that we explore the use of surveys and other statistical sampling mechanisms to monitor industry trends, instead of requiring annual reports.[267] We have considered such alternatives. However, we use the data collected not only to monitor trends in the entire industry, but also to monitor trends in various subgroups, such as particular markets and services. These subgroups would likely be too small to generate useful results by surveys or sampling mechanisms. We note that we have provided relief to broadcasters in this area by, as discussed below, requiring broadcasters to file only one Form 395-B for all commonly owned stations in the same market that share at least one employee.

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

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

[266] OMB Comments at 2.

[267] *Id.*

[268] Oxley/Hall Comments at 1-2; TAB Comments at 8.

[269] Oxley/Hall Comments at 1-2.

[270] TAB Comments at 8-9.

[271] *See* 13 FCC Rcd 23056 (1998).

[272] Race and Ethnic Standards for Federal Statistics and Administrative Reporting, OMB Statistical Policy Directive No. 15.

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

395-A, and 395-M in the near future. For the time being, however, filers should continue to use the classifications defined in the current forms.

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

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

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

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

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[274] *NPRM*, 13 FCC Rcd at 23034 (para. 89).

[275] MMTC Comments at 185, n.316.

[276] *NPRM*, 13 FCC Rcd at 23034 (para. 89).

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

[278] The Commission suspended the Form 396 filing requirement in *Suspension Order*. 13 FCC Rcd at 21998.

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

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

175. MMTC recommends several changes to the Form 396.[281] Specifically, MMTC suggests that: the form should request three years of data; headquarters data should be reported; the form should require licensees to identify a top management official responsible for EEO implementation; the terms applicant and interviewee should be carefully defined; recruitment data should be broken down by race,

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

[280] *See, e.g.*, NAB Comments at 14; 46 Named StBAs at 26.

[281] MMTC Comments at 243-62.

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

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

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

178. The Commission hereby reinstates the requirement that a construction permit, assignment, or transfer applicant that proposes to be part of an employment unit that will employ five or more full-time employees file a "Model EEO Program" (Form 396-A), as part of its construction permit, assignment, or transfer application.[282] We have revised Form 396-A to conform with the EEO

[282] In *Suspension Order,* we suspended the requirement that applicants file this form. 13 FCC Rcd at 21998.

requirements that we adopt in this *Report and Order*. Among other things, the new Form 396-A will have revised instructions and questions in Section IV to clarify that recruitment measures should be broad and inclusive. In addition, to accord broadcasters flexibility in fashioning their EEO programs, the Form 396-A will no longer ask applicants to list certain categories of proposed recruitment sources in Section IV, but will instead allow applicants to propose the recruitment contacts that they believe will achieve wide dissemination and be productive in generating qualified applicants whenever vacancies occur. Applicants will also be required to identify in Section V of Form 396-A whether they elect to utilize the supplemental recruitment measures or to use the alternative recruitment program, in accordance with the discussion above.

3. Cable EEO Program Requirements

a. Rules and Policies for EEO Program

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

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

181. Regarding recruitment, commenters agree that broad and inclusive recruitment is necessary to ensure that all qualified applicants, including minorities and women, are informed of, and have an opportunity to compete on a level playing field for, job openings in the cable industry.[285] Commenters generally favor a flexible approach to recruitment for cable entities over one mandating the use of a minimum number of minority and female recruitment sources, whether or not tied to the size of the local minority labor force.[286] Commenters maintain that giving cable entities flexibility to fashion

[283] *NPRM*, 13 FCC Rcd at 23023-24 (para. 51).

[284] NCTA Comments at 3; Camrory Comments at 2-3; CRB Comments at 2; Ameritech New Media, Inc. (Ameritech) Comments at 1.

[285] *See* NCTA Comments at 4-5; TCI Comments at 10-11; CRB Comments at 5; Camrory Comments at 3.

[286] NCTA Comments at 5-11; NCTA Reply Comments at 4-5; TCI Comments at 10-13; Small Cable Business