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

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 98-204
Broadcast and Cable	)	
Equal Employment Opportunity	)	
Rules and Policies	)	

SECOND NOTICE OF PROPOSED RULE MAKING

Adopted: December 12, 2001 **Released: December 21, 2001**

Comment Date: 60 Days After Publication in Federal Register
Reply Comment Date: 90 Days After Publication in Federal Register

By the Commission: Chairman Powell and Commissioners Copps and Martin issuing separate statements.

I. INTRODUCTION

1. We issue this *Second Notice of Proposed Rule Making* ("*Second NPRM*") to propose, and request comments concerning, a new broadcast equal employment opportunity ("EEO") rule and policies consistent with the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, *rehearing den.* 253 F.3d 732 (D.C. Cir. 2001), *pet. for cert. filed*, MMTC v. MD/DC/DE Broadcasters Association, No. 01-639 (October 17, 2001) ("*Association*"). The Court therein found unconstitutional one of two options for achieving broad outreach provided by the broadcast EEO outreach requirements adopted in the *Report and Order in MM Docket Nos. 98-204 and 96-16*, 15 FCC Rcd 2329 (2000) ("*Report and Order*") *recon. denied* 15 FCC Rcd 22548 (2000) ("*Recon*"), and codified as Section 73.2080 of the Commission's Rules, 47 C.F.R. § 73.2080. In addition to considering a new broadcast EEO Rule, we will also consider new rules applicable to cable entities, including multichannel video program distributors ("MVPDs").[1] In the *Report and Order*, we adopted EEO requirements applicable to cable entities which were generally the same as the requirements applicable to broadcasters, except where necessary to comply with statutory requirements applicable only to cable entities.[2] Finally, we will dismiss as moot a petition for reconsideration of the *Recon* filed by Fletcher, Heald & Hildreth, P.L.C. ("FHH"). We will consider the issue raised by FHH in this *Second NPRM*.

[1] "A multichannel video programming distributor is an entity such as, but not limited to, a cable operator, a multipoint distribution service, a multichannel multipoint distribution service ["MMDS"], a direct broadcast satellite service ["DBS"], a television receive-only satellite program distributor, or a video dialtone program service provider..." 47 C.F.R. § 76.71(a). The term "cable" in this *Second NPRM* includes multichannel video programming distributors that control the programming that they distribute. 47 U.S.C. § 554(h)(1); 47 C.F.R. § 76.71(a).

[2] Cable entities and trade associations did not seek judicial review of the cable EEO rules.

II. BACKGROUND

2. We have administered regulations governing the EEO responsibilities of broadcast licensees since 1969.[3] Our responsibilities in this area were extended to cable television operators in 1984.[4] They were further codified with respect to television broadcast licensees and extended to MVPDs in 1992.[5] However, in 1998, the U.S. Court of Appeals for the District of Columbia Circuit found that the outreach provisions of the broadcast EEO Rule then in effect were unconstitutional in *Lutheran Church-Missouri Synod v. FCC*.[6]

3. In *Lutheran Church*, the Court focused on the Commission's "processing guidelines disclosing the criteria it used to select stations for in-depth EEO review when their licenses came up for renewal." 141 F.3d at 352. The Court concluded that because "[n]o rational firm – particularly one holding a government-issued license – welcomes a government audit," the processing guideline "induces an employer to hire with an eye toward meeting the numerical target." 141 F.3d at 353, 354. The Court thus concluded that the EEO regulations were unconstitutional because they "pressure – even if they do not explicitly direct or require – stations to make race-based hiring decisions." 154 F.3d at 491. The Court made clear that "[i]f the regulations merely required stations to implement racially neutral recruiting and hiring programs, the equal protection guarantee would not be implicated." 141 F.3d at 351. And it reiterated in response to the government's rehearing petition that it had not held that a regulation "encouraging broad outreach to, as opposed to the actual hiring of, a particular race would necessarily trigger strict scrutiny." 154 F.3d at 492.

4. In 1998, we issued a *Notice of Proposed Rule Making*[7] in this proceeding for the purpose of adopting EEO rules for both broadcast licensees and cable entities consistent with the Court's decision in *Lutheran Church*. In 2000, we adopted the *Report and Order* that included the EEO program requirements for broadcasters that were vacated by the Court in *Association*. Substantially the same program requirements were also applied to cable entities.

5. The revised rules adopted by the *Report and Order*, the Commission explained, required more "than merely refraining from discrimination." They also required broadcasters, cable systems and other MVPDs "to reach out in recruiting new employees beyond the confines of their circle of business and social contacts to all sectors of their communities [because] ... repeated hiring without broad outreach may unfairly exclude minority and women job candidates ...." The Commission concluded that nondiscrimination in hiring was not enough. "Outreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process."[8]

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[3] *See Nondiscrimination in Employment Practices*, 18 FCC 2d 240 (1969).

[4] *See Cable Communications Policy Act of 1984*, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

[5] *See Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, 106 Stat. 1460, 1498 (1992).

[6] 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh'g denied*, 154 F.3d 487, *pet. for reh'g en banc denied*, 154 F.3d 494 (D.C. 1998) ("*Lutheran Church*").

[7] 13 FCC Rcd 23004 (1998).

[8] *Report and Order*, para. 3, 15 FCC Rcd at 2331.

6. The revised rule contained two primary requirements – a prohibition on race or gender discrimination in hiring and a requirement that broadcasters reach out in recruiting new employees to all sectors of their communities to assure that all qualified individuals have an opportunity to apply for and be considered as job candidates. The core of the recruitment requirement was that broadcasters widely disseminate information concerning all job vacancies. The Commission concluded that this basic requirement "is essential to meaningful outreach."[9] The Commission left it largely to broadcasters' discretion how they fulfill this requirement, so long as their procedures were sufficient to ensure wide dissemination of information about all job openings to the entire community. "A broadcaster may widely disseminate job postings through any combination of methods sufficient to ensure that its recruitment efforts are inclusive."[10]

7. In addition to the basic requirement of wide dissemination of information concerning job openings, the revised rule provided broadcast licensees with two options. Under "Option A," they were required to undertake two types of supplemental recruitment measures. The first measure required licensees to provide notification of job vacancies to any recruitment organization that requested such notice from the broadcaster.[11] The second supplemental measure under Option A required broadcasters to participate in additional recruitment activities beyond the traditional recruitment that occurs in response to individual vacancies. These additional measures were to be selected from an open-ended menu of types of activities that included: job fairs, job banks, scholarship programs, in-house training programs, mentoring programs, and community events related to employment opportunities in the industry, among others.[12] Broadcasters were permitted to participate in activities other than the listed ones so long as such activities were "designed to further the goal of disseminating information about employment opportunities in broadcasting to job candidates who might otherwise be unaware of such opportunities."[13]

8. Broadcasters who selected Option A were required to maintain, but not submit routinely to the Commission, records documenting their compliance with the wide dissemination and supplemental recruitment requirements. However, they were not required to maintain any data on the race, ethnicity or gender of applicants, interviewees or individuals they hired.[14]

9. In response to commenters who urged the Commission to give them the broadest possible discretion to recruit in a manner best suited to their individual operations and local communities, the Commission adopted an "Option B" for recruitment that permitted licensees to forego the supplemental recruitment measures required under Option A "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."[15] Broadcasters who chose this option and designed their own recruitment program were required to keep "data tracking the recruitment

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[9] *Report and Order*, para. 85, 15 FCC Rcd at 2368.

[10] *Id.*

[11] *Report and Order*, para. 95-98, 15 FCC Rcd at 2371-72.

[12] *Report and Order*, para. 99-103, 15 FCC Rcd at 2372-74.

[13] *Report and Order*, para. 102, 15 FCC Rcd at 2373.

[14] *Report and Order*, para. 111-13, 116-18, 15 FCC Rcd at 2376-78.

[15] *Report and Order*, para. 104, 15 FCC Rcd at 2374.

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."[16] The Commission emphasized that "there is no requirement that the composition of applicant pools be proportionate to the composition of the local work force," but that "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."[17] The "only purpose" of collecting this data, the Commission stated, was to give the "broadcaster, the public, and the Commission more information by which to monitor the effectiveness of a station's outreach efforts so that the broadcaster can take appropriate action to modify its outreach efforts should the information indicate that they are not reaching the entire community."[18]

10. In *Association*, the D.C. Circuit rejected the broadcasters' statutory challenges to the new EEO rule and held that the rule was not arbitrary and capricious. It found, first, that the broadcasters' contention that the rule relied on the goal of promoting programming diversity – the legitimacy of which had been questioned in *Lutheran Church* – was "beside the point" because the Commission had made clear "that its primary and assertedly sufficient goal in issuing the EEO rule was to prevent invidious discrimination." 236 F.3d at 18. It found nothing arbitrary or capricious in the Commission's pursuit of that goal. Second, the court found that the broadcasters had failed to support their claim that because the new rule allegedly increased the regulatory burden imposed on stations, it was arbitrary and capricious. *Id.*

11. The court agreed in part, however, with the broadcasters' constitutional challenge to the new rule. It held that Option B of the rule was subject to strict scrutiny because those broadcasters who elected Option B were required to report the race, sex and referral source of each job applicant. The court reasoned that this requirement would pressure broadcasters to focus their recruitment efforts on minorities and women because the FCC might investigate them if their recruitment efforts attracted few or no minorities or women. It believed that this would disadvantage nonminority job candidates because they would be "less likely to receive notification of job openings solely because of their race . . ." *Id.* at 21. The court concluded that the EEO rule could not withstand strict scrutiny because, even if there were a compelling government interest in preventing discrimination – an issue the court did not resolve – the rule was not narrowly tailored to further that interest. *Id.* at 21-22. Therefore, it held that Option B was unconstitutional under the equal protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 22.

12. The court found no constitutional defect in recruitment Option A of the EEO rule. Since Option A did not require broadcasters to report the race or sex of job applicants or interviewees, and allowed them to select supplemental recruitment measures that do not "place special emphasis upon the presence of women and minorities in the target audience," it held that broadcasters were not "meaningfully pressured under Option A to recruit women and minorities." *Id.* at 19.

13. Although the court found only Option B unconstitutional, it held that Option B could not be severed from the rest of the EEO rule. The court acknowledged that the Commission had made clear its intent that the regulation be severable. It concluded, however, that the "core of the rule, by

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[16] *Id.*

[17] *Report and Order*, para. 120, 15 FCC Rcd at 2378.

[18] *Id.*

Commission design, is to provide broadcasters with two alternatives," and that the Commission had not considered the "loss of flexibility" that eliminating Option B would entail. *Id.* at 22. Thus, it reasoned that severing the unconstitutional portion of the rule "would severely distort the Commission's program and produce a rule strikingly different from any the Commission has ever considered or promulgated. . ." *Id.* at 23. Since it concluded that it could not sever the unconstitutional portion, it vacated the entire rule.

14. The Commission filed for hearing and rehearing *en banc*, arguing that Option B was not essential to achieving its goal of ensuring that broadcasters engage in broad outreach in recruiting new employees and that it had made plain its intent that Option B be severable. The court denied rehearing. 253 F.3d 732. However, it noted that the Commission was free, in a new rulemaking proceeding, to adopt other EEO measures that would "accommodate the concerns [the Commission] expressed about broadcasters' need for flexibility in general and about the burden Option A would impose upon broadcasters in small markets in particular" or to "change its goals." *Id.* at 736.[19] A petition for certiorari has been filed by one of the parties to the case, Minority Media and Telecommunications Council.

III. DISCUSSION

Summary of Proposed EEO Rules and Their Purpose

15. It is important that the Commission have EEO rules that prohibit discrimination in broadcast and cable employment and also require broadcasters and cable entities to reach out to all segments of the community in filling vacancies. To this end, the Commission proposes EEO rules that deter discrimination and achieve broad outreach in broadcast and cable practices. As we indicated in the *Report and Order*, and noted above, "[o]utreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process."[20] Broad outreach in recruitment practices will ensure fairness to all potential applicants, including all races and both genders, without infringing on the rights of any group. Further, the rules are designed to be flexible enough to avoid imposing an undue burden of the outreach requirements and to apply reasonably and effectively to broadcasters and cable entities operating in differing circumstances.

16. Accordingly, we propose new rules that incorporate the prohibition against discrimination included in the prior rules, as well as an EEO outreach program that contains the components of the program formerly known as Option A. As noted, Option A was affirmed by the Court on both statutory and constitutional grounds.[21] The following is a summary of the three-pronged outreach requirement as it relates to broadcasters:

Prong 1: widely disseminate information concerning each full-time job vacancy;

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[19] As a result of the Court's decision, the Commission suspended the effectiveness of portions of its broadcast and cable EEO rules concerning EEO outreach program requirements and the annual employment reporting requirement until further order of the Commission. *Suspension of the Broadcast and Cable Equal Employment Outreach Program Requirements*, 16 FCC Rcd 2872 (2001). The rules prohibiting discrimination in broadcast and cable employment were not suspended.

[20] *Report and Order*, para. 3, 15 FCC Rcd at 2331.

[21] The rules proposed in this *Second NPRM* are based on the same statutory authority set forth in the *Report and Order*. *See Report and Order*, para. 17-62, 15 FCC Rcd at 2335-58.

Prong 2: provide notice of each full-time job vacancy to recruitment organizations that have requested such notice; and

Prong 3: complete two (for broadcast employment units with five to ten full-time employees) or four (for employment units with more than ten full-time employees) longer-term recruitment initiatives within a two-year period including, *e.g.*: participating in at least 4 job fairs by station personnel who have substantial responsibility in making hiring decisions; hosting at least one job fair; participating in scholarship programs directed to students desiring to pursue a career in broadcasting; participating in internship programs; sponsoring at least two events in the community designed to inform the public as to employment opportunities in broadcasting.[22]

The following is a summary of recordkeeping and reporting requirements that would apply under the rules:

(a) 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, 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 (vii) the date each job was filled. As reflected in paragraph 32 below, we are requesting comments as to whether additional data, such as the recruitment sources of interviewees and/or hires, should be retained.

(b) place 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; and (iv) description of any supplemental initiatives implemented during the previous year. As reflected in paragraph 36 below, we are requesting comments as to whether additional data, such as the recruitment sources of interviewees and/or hires, should be included in the annual public file report.

(c) submit the contents of their stations' EEO public inspection file to the Commission as part of the renewal application and midway through the license term for the Commission's mid-term review for those stations subject to mid-term review. (Broadcasters would limit their submissions to cover only the last 12 months of EEO activity.)

17. The same requirements would apply to cable television entities, except as necessary to comply with statutory requirements applicable to cable. Thus, Section 634 of the Communications Act

[22] A broadcast employment unit is a station or a group of commonly owned stations in the same market that share at least one employee.

of 1934, as amended ("Communications Act")[23] requires that cable entities file reports on an annual basis containing information specified in the statute. The Commission has implemented this annual reporting requirement by FCC Forms 395-A (cable television) and 395-M (MVPDs). The Commission is also required to certify that cable employment units are in compliance with the EEO requirements on an annual basis. *See* Section 634(e)(1) of the Communications Act. Accordingly, to comply with the Prong 3 requirements, cable employment units with six to ten full-time employees would be required to undertake one recruitment initiative each year and larger employment units two recruitment initiatives per year. Cable employment units are also not subject to a renewal process at the Commission. However, pursuant to Section 634((e)(2) of the Communications Act, the Commission is required to conduct a more thorough review of each cable employment unit's EEO compliance every five years. Hence, cable entities with six or more full-time employees would submit copies of their EEO public inspection file to the Commission every five years.

Anti-Discrimination Provisions

18. The broadcast EEO Rule adopted by the Commission in the *Report and Order* includes a provision prohibiting discrimination based on race, color, religion, national origin, or sex, with the exception that religious radio broadcasters may establish religious belief or affiliation as a job qualification for station employees.[24] The anti-discrimination provision was not challenged in *Association*. Nonetheless, in rejecting the contention that the unlawful Option B could be severed from the EEO rule, the Court stated that the "entire rule" must be vacated. 236 F.2d at 23. In order to avoid any confusion arising from this language, we propose to recodify the anti-discrimination provision, which we continue to believe is an essential component of every licensee's obligation as a trustee of a valuable public resource. However, we reiterate that our anti-discrimination provisions are still in effect.[25]

19. We also propose to retain our policy of generally deferring action on individual complaints of employment discrimination against broadcasters and cable entities pending final action by the Equal Employment Opportunity Commission ("EEOC") or other government agencies and/or courts established to enforce nondiscrimination laws.[26] However, we propose to retain the discretion to take action, notwithstanding the absence of a final decision by the EEOC or other agency/court, where the facts of a particular case so warrant.[27]

Outreach Requirements

20. We previously concluded, and continue to believe, that the outreach program proposed herein will ensure broad outreach in recruitment. We also believe that it will afford broadcasters and

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[23] 47 U.S.C. § 554.

[24] *See* Section 73.2080(a). Pursuant to the *Report and Order*, religious television broadcasters may also, as a matter of policy, apply a religious condition to their employees. This is not specified in the Rule because of restrictions on the revision of the Commission's regulation of television EEO practices resulting from Section 334 of the Communications Act. *See Report and Order*, para. 149, 15 FCC Rcd at 2389.

[25] *See supra* note 19.

[26] *Report and Order*, para. 67,69, 15 FCC Rcd at 2359-61.

[27] *Report and Order*, para. 69, 15 FCC Rcd at 2360-61.

cable entities considerable flexibility in fashioning a recruitment program that is effective and suitable in their markets. Thus, under Prong 1, we leave broadcasters and cable entities free to select the number and type of recruitment sources that will achieve broad outreach in their communities. Also, with respect to the Prong 3 supplemental recruitment activities, we afford them a broad menu of activities from which to choose, including the option of designing an activity not specifically included in the menu. While we propose to adopt this outreach requirement, we nonetheless welcome proposals to improve the proposed rules, including proposals to eliminate any unnecessary burdens and to incorporate greater flexibility, consistent with the underlying goal of ensuring broad outreach. We also welcome proposals to provide relief to small broadcasters or cable entities or those in smaller markets.

21. We emphasize, however, that we do not intend to modify the rules in a way that would compromise our goal of ensuring broad and inclusive outreach in the community for virtually all full-time job vacancies. In addition, we caution commenting parties that we do not intend to modify the proposed rule in any respect that would make it vulnerable to attack on constitutional or statutory grounds. Accordingly, we urge parties to give careful consideration, and explain in their comments, how their proposals will comply with constitutional and statutory strictures, particularly those imposed by the equal protection component of the Due Process Clause of the Fifth Amendment and Sections 334 and 634 of the Communications Act.

22. Pursuant to the *Report and Order*, religious broadcasters that elected to apply a religious qualification to all of their employees were not required to comply with the broad outreach recruitment requirement or the menu options. However, they were required to make reasonable, good faith efforts to recruit widely among their co-religionists.[28] We propose to readopt this policy.

23. **Outreach Prong 1 – Recruitment for All Full-time Vacancies**. We propose to retain the requirement that broadcasters and cable entities recruit for all full-time vacancies. Our rules will continue to afford broadcasters and cable entities the flexibility to determine the number or type of recruitment sources to be utilized. The recruitment sources selected by the employment unit must be, taken as a whole, reasonably calculated to reach the entire community. We propose to define "community" as, at a minimum, the county where a station is licensed or cable employees are primarily located, or Metropolitan Statistical Area ("MSA") if the county is part of an MSA. Broadcasters and cable entities are, of course, welcome to recruit beyond those areas. We invite comment on alternative definitions of "community." We do not propose to require the use of recruitment sources that are specifically targeted at minorities, women or any other group. As with the requirements adopted by the *Report and Order*, joint recruitment efforts involving more than one employment unit will be permitted, provided that each employment unit remains responsible for achieving broad outreach.[29] Such joint efforts may involve commonly owned employment units, employment units operating through trade organizations, or independent employment units operating jointly on an *ad hoc* basis.

24. We propose to continue the policy for broadcasters and cable entities reflected in the *Report and Order* that recruitment is not required in the case of internal promotions and temporary hires. However, if an individual is hired for a temporary position after full recruitment, he or she may thereafter be promoted to full-time status in the same or substantially the same job without further recruitment.[30] On the other hand, a person hired on a temporary basis without recruitment may not be

[28] *Report and Order*, para. 149, 15 FCC Rcd at 2389.

[29] *Report and Order*, para. 88, 15 FCC Rcd at 2369.

[30] *Report and Order*, para. 109, 15 FCC Rcd at 2375.

promoted to a full-time position without full recruitment. We also propose to continue the policy concerning hires for part-time positions as reflected in the *Report and Order*. As indicated therein, broadcasters and cable entities need only substantially comply with the requirement to recruit for every part-time vacancy.[31] However, as indicated in the *Recon*, if a part-time position is filled following full recruitment, the person hired may thereafter be promoted to full-time status in the same manner as a temporary employee.[32]

25. We also recognized in the *Report and Order* that, in limited instances, circumstances might arise where recruitment would 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 or cable employees. We indicated that, in such circumstances, a vacancy could be filled without recruitment. However, we made clear that we expected such circumstances to be rare and that licensees or cable operators should elect to proceed without recruitment only in exceptional circumstances.[33] We propose to continue this policy under our new rules and apply it also to cable entities.

26. In the *Report and Order*, we concluded that the use of the internet as a recruiting tool was a promising development that should be encouraged. However, we did not find that, as of that time, internet recruitment could be relied upon, by itself, to widely disseminate job vacancy information. Although we rejected reliance on the internet as a sole method of recruitment, we nonetheless recognized the internet as a valuable recruitment resource and did not preclude reliance on the internet as one of several recruitment methods that would collectively achieve broad outreach. We indicated that we would be prepared to revisit our position in this regard at a future time.[34] We now note that more than two years have passed since the record compiled in the prior proceeding. We, therefore, request comment addressing the current situation of internet recruitment. We solicit comments as to whether the availability of the internet has expanded to the extent that it could be relied upon, by itself, to disseminate vacancy information through some or all communities. We particularly welcome comments documenting the development of the state association web sites during that period and the internet job site maintained by the Broadcast Executive Directors Association ("BEDA"). We also welcome input from individual broadcasters or cable operators concerning their experience in using the internet as a recruitment tool. In this regard, we would welcome specific information about the number of hits a broadcaster's or cable entity's web site has received on a monthly basis, the types of jobs that are routinely listed and the number of interviewees that were referred by the internet site. We also request input as to general methods of internet recruitment pertinent to broadcast and cable employment that have developed in recent years, the efficacy of these methods and how any such methods might be incorporated into an outreach requirement.

27. **Outreach Prong 2 – Notification to Community Groups**. Under the rules adopted by the *Report and Order*, we required, under Option A, that broadcasters and cable entities provide notification of full-time job vacancies to organizations involved in assisting job seekers upon request by such organizations. This requirement provides a "safety valve" to ensure that no segment of the community is inadvertently omitted from recruitment efforts. We propose to continue this requirement.

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[31] *Report and Order*, para. 110, 15 FCC Rcd at 2375-76.

[32] *Recon*, para. 67, 15 FCC Rcd at 22567.

[33] *Report and Order*, para. 89, 15 FCC Rcd at 2369; *Recon*, para. 61-63, 15 FCC Rcd at 22565-66.

[34] *Report and Order*, para. 86-87, 15 FCC Rcd at 2368-69.

We welcome comments as to how this measure worked during the eight months it was in effect under our former rules.

28. **Outreach Prong 3 – Menu Options**. Under the Rules adopted by the *Report and Order*, we required, under Option A, that broadcasters and cable entities engage in a specified number of activities selected from a menu of options, such as job fairs, community events relating to broadcast employment, internship programs, scholarships, and similar activities. These activities are designed to go beyond the normal recruitment activities directed at filling particular vacancies. They are designed to encourage outreach to persons who may not yet be aware of the opportunities available in broadcasting or cable or have not yet acquired the experience to compete for current vacancies. Such persons in the past may not have been aware of available opportunities because of word-of-mouth recruitment practices.[41] Thus, interested members of the community will not only have access to information concerning specific job vacancies but also will be encouraged to develop the knowledge and skills to pursue them. We believe that this approach remains justified and is not unduly burdensome. As noted above, under this approach, broadcasters and cable entities have great flexibility to design the types of recruitment activities best suited to their organizations and communities. We will accordingly incorporate it into our proposed rules. We welcome comments as to how these outreach activities worked during the eight months this requirement was in effect under our former rules.

29. We nonetheless request comments concerning the number of menu options required to be performed. Previously, we required broadcasters employing more than ten full-time employees to perform at least four menu options over a two-year period and broadcasters with five to ten full-time employees to perform two menu options over the two-year period. Cable entities with more than ten full-time employees were required to perform two menu options annually and cable entities with six to ten full-time employees were required to perform one menu option annually. These levels appear to remain generally reasonable. However, we note that small broadcasters or cable entities may have viewed the menu options as a burden, which may have motivated them to select Option B, which did not require the performance of menu options. We welcome comments as to the extent this may have been the case. If so, would an increase in the ten full-time employees threshold be warranted or would it be justified to increase the threshold for smaller markets where the community resources to perform the full complement of menu options may not be readily available? We also welcome comments on our proposal to continue to allow station employment units with fewer than five full-time employees, and cable employment units with fewer than six full-time employees, to be exempt altogether from the rule's requirements, with the exception of the nondiscrimination requirement.

30. The menu options adopted in the *Report and Order* included twelve specific options and one more general option designed to permit activities not specifically provided for in the first twelve: participation in at least four job fairs by station personnel who have substantial responsibility in the making of hiring decisions; hosting of at least one job fair; co-sponsoring at least one job fair with organizations in the business and professional community whose membership includes substantial participation of women and minorities; participation in at least four events sponsored by organizations representing groups present in the community interested in broadcast employment issues (including conventions, career days, workshops, and similar activities); establishment of an internship program designed to assist members of the community to acquire skills needed for broadcast employment; participation in job banks, internet programs, and other programs designed to promote outreach generally; participation in scholarship programs designed to assist students interested in pursuing a career in broadcasting; establishment of training programs designed to enable station personnel to

[41] *Report and Order*, para. 99, 15 FCC Rcd at 2372.

acquire skills that could qualify them for higher level positions; establishment of a mentoring program for station personnel; participation in at least four events or programs sponsored by educational institutions relating to career opportunities in broadcasting; sponsorship of at least two events in the community designed to inform and educate members of the public as to employment opportunities in broadcasting; listing of each upper-level category opening in a job bank or newsletter of media trade groups whose membership includes substantial participation of women and minorities; and participation in other activities designed by the station employment unit reasonably calculated to further the goal of disseminating information as to employment opportunities in broadcasting to job candidates who might otherwise be unaware of such opportunities. The specification of these menu options is necessarily general because we wish to afford maximum leeway to broadcasters and cable operators in planning their activities. We welcome comments on whether we should further refine the menu options or address any ambiguities in them.

31. We also propose to continue our policy of permitting the implementation of menu options on a joint basis where appropriate. These would include activities engaged in by commonly owned employment units owned by a single broadcast or cable company. It could also encompass activities engaged in by independently owned employment units working through a trade association or through an *ad hoc* group put together by the employment units themselves. The central point of this policy as developed under our prior rules is that, where activities are done jointly, each employment unit seeking credit must nonetheless have had some degree of participation in the activity. Thus, in the *Recon*, we indicated that broadcasters could jointly host a job fair, provided that all broadcasters claiming credit participated in a meaningful way, beyond merely lending the station's name or providing money. Similarly, we held that a corporate licensee could maintain a joint scholarship program for all of its employment units, provided that each commonly-owned employment unit was involved in at least some (not necessarily all) of the tasks involved in implementing the program, such as designing the program, soliciting prospective scholarship recipients, interviewing and selecting scholarship recipients, on-air promotion of the program, or evaluating the effectiveness of the program. Thus, an employment unit owned by a corporate licensee could not claim credit for having a scholarship program merely because its corporate parent maintained such a program without any involvement by the unit claiming credit. We also required that the number of employment units seeking credit for a scholarship program should bear a reasonable relationship to the number or type of scholarships awarded by the corporate licensee. We applied a similar policy to joint scholarships implemented by unrelated broadcasters, such as a scholarship program operated by a state broadcast association on behalf of its membership. Further, we held that corporate licensees could conduct mentoring, internship or training programs or job fairs for their individual employment units, but only those units that actually participated in the corporate activity could claim credit.[35] We propose to continue these policies. We nonetheless welcome comments concerning them and suggestions for alternate methods of providing for joint activities that involve meaningful participation by each employment unit.

32. **Recordkeeping Requirements.** Under former Option A, employment units were required to keep, but not routinely submit to the Commission records documenting the employment unit's recruiting efforts and its compliance with the supplemental recruitment measures. We believe that the justification for this documentation is self-evident. An employment unit must be able to demonstrate that it in fact took the steps required by our rules. Therefore, we propose to maintain this recordkeeping requirement. This data is valuable to us and the public to validate whether the employment unit is achieving broad outreach and for the employment unit to self-assess its recruitment efforts. We welcome comments as to whether this recordkeeping information is sufficient for these purposes. Should we also

[35] *Recon*, para. 54-60, 15 FCC Rcd at 22564-65.

require employment units to track the recruitment sources of their interviewees and/or hires? Under our former rules, we required data concerning referral sources for interviewees and hires because we believed this information was necessary in order for the employment units to ensure that they were in fact achieving broad outreach.[36] We welcome comments as to the necessity of these requirements and as to possible less burdensome alternatives that will achieve our objectives.

33. **Reporting and Enforcement Requirements.** We propose to readopt the following reporting requirements, with one significant modification pertaining to broadcasters. Because the requirements differ for broadcasters and cable entities, we will address them separately.

34. Broadcasters were required under our former rule to prepare a report concerning their EEO outreach efforts and place it in the station's public file annually on the anniversary of the licensee's renewal filing date. Under former Option A, the public file report included 1) a list of full-time vacancies filled during the preceding year; 2) the recruitment source(s) utilized for each such vacancy; 3) the recruitment source that referred the person hired for each vacancy; 4) data reflecting the total number of persons interviewed for each vacancy and the total number of interviewees referred by each recruitment source utilized; and 5) a list and brief description of supplemental recruitment activities selected from the menu options that were performed by the employment unit during the preceding year. As noted, this information was to be placed in the station's public file. It was not filed with the Commission, except as discussed below. In addition to placing the report in the public file, a broadcaster was required to place the report on its web site, if it had one.

35. Broadcasters were also required to prepare and file on the second, fourth and sixth anniversary of the date when the licensee's last renewal application was due to be filed a Statement of Compliance utilizing FCC Form 397. The form required only that the licensee certify that it had complied with the EEO Rule during the preceding two years. If the licensee could not make this certification, or was uncertain as to whether it could, it could provide an explanation. In the case of television stations and radio stations with more than ten full-time employees, the licensee also was required to file with its Statement of Compliance filed in the fourth year of its license term a copy of its most recent EEO public file report for use in conducting a mid-term review. Finally, at renewal time, broadcasters were required to file an EEO Program Report on FCC Form 396. This report was designed to provide the Commission and the public an overview of the licensee's EEO efforts. It required a certification as to compliance with the EEO Rule as well as a narrative statement as to how the station achieved broad and inclusive outreach during the preceding two years. A copy of the EEO public file report for the preceding year was also to be submitted with the Form 396. The form also solicited information as to pending discrimination complaints.

36. We propose to readopt the annual public file report requirement, including the requirement that broadcasters and cable entities place the report on their web sites if they have one. The annual public file report would include at least: (1) all full-time jobs filled during the previous year; (2) recruitment sources used to fill those vacancies; (3) address, contact person, and telephone number of each recruitment source; and (4) description of any supplemental initiatives implemented during the previous year. As indicated in paragraph 32 above, we have requested comments as to whether broadcasters and cable entities should retain information such as the recruitment sources of interviewees and/or hires. We also request comments as to whether such information should be included in the annual public file report.

36 *Report and Order*, para. 118, 15 FCC Rcd at 2378.

37. We continue to believe that the annual public file report is necessary and reasonable to ensure that EEO programs are meaningfully implemented on a continuing basis. We believe it important that broadcasters focus on their EEO obligations throughout the eight-year license terms currently applicable in the broadcast services. Thus, we seek to ensure that broadcasters do not intentionally or inadvertently ignore our EEO requirements until shortly prior to renewal time. This is particularly important in light of the frequent number of sales and consolidations that have occurred in the broadcast industry in recent years. The annual public file report is designed to ensure that each licensee, not just the licensee that holds a license at renewal time, will implement a meaningful EEO program.

38. We also believe that the annual public file report is useful as a means of facilitating public input into the EEO process. If current information is available concerning an employment unit's EEO program, members of the public will be in a position to make known any problems they may perceive in a timely manner. As a result, issues concerning an employment unit's EEO program can be expeditiously resolved, which may prevent their becoming the source of a petition to deny or Commission-initiated sanction at renewal time.

39. We further believe that the annual public file report will be useful to broadcasters by enabling them to identify and correct any problems in their programs in an expeditious manner. By monitoring the success of their EEO efforts throughout the license term, broadcasters will be able to avoid major problems at renewal time.

40. Finally, we do not believe that the annual public file report is unduly burdensome. The primary complaint arising under our former rule related to the Option B requirement that broadcasters track the ethnicity and gender of applicants. That concern is, of course, no longer pertinent because the tracking of applicants' ethnicity and gender is not included in Option A.

41. We propose to readopt the requirements pertaining to mid-term review adopted by the *Report and Order*. We are required to conduct mid-term review of television employment units with five or more full-time employees pursuant to Section 334 of the Communications Act. We also believe it appropriate to extend this requirement to radio employment units with more than ten full-time employees because review at renewal time is insufficient in light of the eight-year license terms currently applicable.[37]

42. We propose to modify the requirements pertaining to the Statement of Compliance (FCC Form 397). One purpose served by that form was to enable broadcasters to change the recruitment option that they wished to utilize every two years. This purpose is no longer pertinent because there is no longer a need to choose between options. The other purpose served by the Statement of Compliance was the certification as to compliance with the EEO Rule. However, we do not believe this purpose is of sufficient importance to require a filing every two years. Broadcasters are routinely expected to comply at all times with all Commission Rules, including the EEO Rule. Therefore, we propose to abandon the requirement that a Statement of Compliance be filed in the second and sixth years of a broadcaster's license term. We will, however, require the filing of FCC Form 397, which we will rename the "Broadcast Mid-term Report," in the fourth year of the license term by those broadcast employment units that are subject to mid-term review, i.e, television stations with five or more full-time employees and radio stations with more than ten full-time employees. As at present, the filer will certify as to its compliance with the EEO Rule and will also attach a copy of its most recent annual public file report. This information will be used as the basis for our mid-term review of the employment unit.

[37] *Report and Order*, para. 139, 15 FCC Rcd at 2386.

43. The purpose of the foregoing procedures is not to impose sanctions for minor inconsistencies with our requirements. Rather, especially in the initial stages of the implementation of our EEO requirements, we expect to rely upon guidance and advice more than sanctions to ensure achievement of our underlying goal of the continuing implementation of effective EEO programs. However, if we lack the ability to monitor the developments in the industry, we will be unable to provide the necessary guidance that will enable the industry to ensure that its efforts are consistent with our expectations. We nonetheless welcome comments from interested parties as to ways in which meaningful enforcement of our requirements could be achieved in a less burdensome manner, bearing in mind the considerations discussed above. Thus, one alternative might be to rely entirely on random audits by the Commission without requiring the filing of periodic reports. Our concern with this alternative would be that it would reduce the opportunity for participation by the public. In addressing these issues, it would be helpful if commenters could provide specificity as to any claims of burden, i.e., tell us precisely how great a burden a given requirement is perceived as creating and what other method might achieve our objective with less burden. Additionally, we welcome comments concerning other ways to provide information to the public concerning broadcasters' and cable entities' outreach programs.

44. We note in particular that, upon reconsideration, it was suggested that the requirement that a broadcaster place its EEO public file report on its web site, if it had one, was unduly burdensome because some broadcasters might experience difficulties in incorporating the EEO public file report onto their existing web sites. However, we declined to reconsider this requirement because no information was provided as to the extent of any such difficulties or the costs involved in addressing them.[38] We are willing to revisit this matter, if commenters provide documentation necessary to assess their claims of burden.

45. In the *Report and Order*, we adopted reporting requirements for cable entities that are similar in substance to the broadcast reporting requirements. However, they differed in some respects in order to comply with statutory requirements specified in Section 634 of the Communications Act. Thus, cable entities were required to file reports as to their EEO programs on an annual basis, which we must evaluate as to their compliance with our EEO rules. We are also required to investigate each cable employment unit at least once every five years. We propose to readopt the reporting and enforcement provisions adopted in the *Report and Order*, except for those relating to the former Option B. We welcome comments from cable entities as to any respects in which these procedures can be improved, consistent with the requirements of the Communications Act.

46. **Forms Relating to the EEO Outreach Requirements**. In the *Report and Order*, we adopted forms designed to implement our EEO outreach requirements. For broadcasters, these include the FCC Form 396 (EEO Program Report to be filed with renewal applications) and FCC Form 397 (biannual Statement of Compliance), which are discussed above. In addition, FCC Form 396-A (Model EEO Program Report) was to be utilized by applicants for new broadcast stations or for assignment/transfer of an existing station to provide preliminary information as to the EEO program they intended to implement. All of these forms included blocks wherein the respondent could elect between Option A and Option B. We propose to retain these forms, except for the blocks and accompanying instructions providing for an election. We invite comments as to the need for and contents of these forms. The *Report and Order* also provided for an unnumbered Initial Election Statement that was utilized by broadcasters and cable operators to declare their initial election between Option A and Option B. That form will not be continued since there is no longer any need for an election.

[38] *Recon*, para. 33, 15 FCC Rcd at 22558.

47. The *Report and Order* also adopted forms for annual reports by cable systems (FCC Form 395-A) and MVPDs (FCC Form 395-M). These reports are required in part by Section 634 of the Communications Act. They relate in part to the EEO outreach requirements.[39] They also collect data concerning the ethnicity and gender of the reporting unit's workforce that is required by statute[40] but is not related to the EEO outreach requirements, as discussed below. We propose to retain these reports except, again, we will delete references to the election between Option A and Option B from the forms and their instructions. We nonetheless welcome comments from cable entities as to any possible modifications of the forms that could be implemented consistent with the statute.

Small Employment Unit Relief

48. It has been our longstanding policy to exempt from our EEO outreach (but not nondiscrimination) rules broadcasters with fewer than five full-time employees and cable entities with fewer than six full-time employees. In the *Report and Order*, we declined to increase the exemption to ten full-time employees because such stations have an important role in providing entry level opportunities into the broadcast industry. We also felt that the reduced number of menu options required of small stations provided relief.[41] We are prepared to revisit this matter in order to consider broadcasters' and cable entities' general experience during the time the rules were in effect, and the impact of substantial consolidations within the broadcast and cable industries since the *Report and Order* was issued. Accordingly, we request comments as to whether we should increase the threshold to exempt broadcast and cable employment units of ten or fewer full-time employees from the outreach requirements. We initially request comments as to whether we could do so in the case of television licensees and cable entities in light of the requirements of Section 334 and 634 of the Communications Act. We also request comments as to the impact of the Court's decision in *Office of Communications of the United Church of Christ v. FCC*, 560 F2d. 529 (2d Cir. 1977), in which the Court rejected a similar change in the threshold for the exemption. Further, we request comments addressing the impact of increasing the exemptions, especially in terms of the number of broadcast and cable employment units that would be affected by such relief. Finally, we request parties to consider whether relief for small employment units is warranted under proposals they wish to advocate.

49. In the *Recon*, we clarified one policy that, in many cases, has the effect of providing relief to small employment units. We indicated in the *Recon* that owners with a 50 percent or greater voting control of an entity would not be counted as employees, even if they in fact held a position at the station. We propose to continue this policy, which would also apply to cable entities. This policy could assist small operators by reducing the number of full-time employees an entity would have for the purpose of assessing its eligibility for a small entity exemption or other relief. Our reason for adopting this policy was that, in the case of a controlling principal, any position will generally be an incident of ownership rather than a normal employment relationship. Thus, it is unlikely that a controlling principal could in any normal sense be hired or fired.[42] Consequently, outreach would not pertain to a position filled by an owner who maintains this level of ownership. As noted above, FHH filed a petition for reconsideration of the *Recon* urging that this policy be extended to persons holding voting control of 20 percent or more and who have in fact made a capital contribution to the company. FHH contends that

[39] *Report and Order*, para. 202-209, 15 FCC Rcd at 2407-2411.

[40] *See* Section 634(d)(3) of the Communications Act, 47 U.S.C. § 554(d)(3).

[41] *Report and Order*, para. 126, 15 FCC Rcd at 2380-81

[42] *Recon*, para. 82, 15 FCC Rcd at 22571.

positions held by such principals would also not constitute normal employment relationships. As noted, we will dismiss FHH's petition for reconsideration as moot since it relates to a former rule. We propose at least to maintain the policy established in the *Recon* (which would also apply to cable entities). We welcome comments on our policy and FHH's proposal to expand the policy.

Annual Employment Report

50. The *Report and Order* continued the Broadcast Annual Employment Report (FCC Form 395-B). This form consists of data as to the ethnicity and gender of the reporting entity's workforce. We made clear in the *Report and Order* and in the *Recon* that the collection of this data was intended only for analyzing industry trends and reporting to Congress. We indicated, and specified in rules, that the data would not be utilized for the purpose of assessing any aspect of an individual entity's compliance with the EEO rules.[43] *See* Note to Section 73.3612 of the Commission's Rules. Thus, the FCC Form 395-B is not a part of our EEO program requirement and is in fact required pursuant to a separate provision of our rules, Section 73.3612.

51. The Court in *Association* did not directly address the propriety of collecting the FCC Form 395-B data for the limited purpose for which it is intended. The Court did uphold all of the reporting requirements adopted by the Commission in the *Report and Order*, including the requirement for filing FCC Form 395-B, in the face of the broadcasters' challenge that those requirements were arbitrary and capricious. 236 F.3d at 17. In addressing the constitutionality of race and gender reporting requirements, the Court found that the requirement that licensees who elected Option B report the race and gender of applicants pressured those licensees to focus their recruiting efforts on women and minorities. Id. at 18-19. Therefore, it held that Option B was subject to strict scrutiny. Nothing in the Court's opinion, however, suggests that the collection of the FCC Form 395-B data for the limited purposes for which it is intended is subject to strict scrutiny or is unconstitutional. Furthermore, we have previously concluded that we have authority to collect the data and, indeed, are required to do so for broadcast television by Section 334 of the Communications Act.[44] Accordingly, we propose to continue the FCC Form 395-B filing requirement. Nevertheless, we welcome comment on whether we can or should revise that form. For example, can or should we allow these forms to be submitted anonymously?

52. We also propose to continue those portions of the cable forms, FCC Form 395-A and FCC Form 395-M, that require data for cable entities comparable to that required on FCC Form 395-B. As noted, this data is required by Section 634 of the Communications Act. However, we have also made clear that the data will not be utilized for the purpose of assessing any aspect of an individual entity's compliance with the EEO rules. *See* Note to Section 76.77(a) of the Commission's Rules.

IV. CONCLUSION

53. We remain committed both to prohibiting discrimination in employment and requiring broad and inclusive outreach in recruitment by broadcasters and cable entities. As we said in the *Report and Order*, it is not enough to say that one will not discriminate against those who apply for a job when not all have been given a fair opportunity to apply.[45] While we believe that the requirements proposed in this *Second NPRM* will ensure fair opportunity to all job seekers, we welcome any suggestions

[43] *Report and Order*, para. 164, 15 FCC Rcd at 2394-95; *Recon*, para.35-37, 15 FCC Rcd at 22558-59.

[44] *Report and Order*, paras. 63-64, 15 FCC Rcd at 2358

[45] *Report and Order*, para. 3, 15 FCC Rcd at 2331.

commenting parties may have to make our proposed rules more effective, more flexible or less burdensome, consistent with our purpose in this proceeding – to deter discrimination and achieve broad outreach in broadcast and cable recruitment practices. Given the years that have passed since our EEO program requirements were first struck down, and the fact that since that time we have had such requirements in place for only eight months, we need to move expeditiously to complete this proceeding and to put in place rules that effectively protect equal employment opportunity and that are sustainable in court as early as is practicable.

V. ADMINISTRATIVE MATTERS

54. Ex Parte Rules. This is a permit-but-disclose notice and comment proceeding. Ex parte presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 CFR Sections 1.1202, 1.1203, and 1.1206(a).

55. Initial Regulatory Flexibility Analysis. With respect to this *Second NPRM*, an Initial Regulatory Flexibility Analysis ("IRFA") is contained in the Appendix hereto. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an IRFA of the possible significant economic impact on small entities of the proposals contained in this *Second NPRM*. [46] Written public comments are requested on the IRFA. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the *Second NPRM*, but they must have a distinct heading designating them as responses to the IRFA.

56. Comments and Reply Comments. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before 60 days after publication of the item in the Federal Register, and reply comments on or before 90 days after publication of the item in the Federal Register. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

57. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., TW-A325, Washington, D.C. 20554.

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

58. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Wanda Hardy, 445 Twelfth Street, S.W., Room, 2-C221, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Word 97 or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number in this case, MM Docket No. 98-204), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, S.W., Room CY-B402, Washington, DC 20554.

59. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 Twelfth Street, S.W., CY-A257, Washington, D.C. 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0270, (202) 418-2555 TTY, or bcline@fcc.gov. Comments and reply comments also will be available electronically at the Commission's Disabilities Issues Task Force web site: www.fcc.gov/dtf. Comments and reply comments are available electronically in ASCII text, Word 97, and Adobe Acrobat.

60. This document is available in alternative formats (computer diskette, large print, audio cassette, and Braille). Persons who need documents in such formats may contact Brian Millin at (202) 418-7426, TTY (202) 418-7365, or bmillin@fcc.gov.

61. Initial Paperwork Reduction Act of 1995 Analysis. This *Second NPRM* contains either a proposed or modified information collection. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Second NPRM*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Second NPRM*; OMB comments are due 60 days from the date of publication of this *Second NPRM* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 Twelfth Street, S.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov and to Edward Springer, OMB Desk Officer, 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503, or via the Internet to Edward.Springer@omb.eop.gov.

62. Authority. This *Second NPRM* is issued pursuant to authority contained in Sections 1, 4(i), 4(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 634 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 554.

VI. ORDERING CLAUSES

63. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in Sections 1, 4(i), 4(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 634 of the Communications Act of 1934, as

amended, 47 U.S.C. §§ 151, 154(i), 154(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 554, this *Second Notice of Proposed Rule Making* **IS ADOPTED**.

64. **IT IS FURTHER ORDERED** that the Petition for Partial Reconsideration filed in this proceeding on December 18, 2000 by Fletcher, Heald & Hildreth, P.L.C. with respect to the *Memorandum Opinion and Order*, 15 FCC Rcd 22548 (2000) **IS DISMISSED** as moot.

65. **IT IS FURTHER ORDERED** that the Commission's Consumer Information Bureau, Reference Information Center, **SHALL SEND** a copy of this *Second Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX

INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act ("RFA"),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities by the policies and rules proposed in this *Second Notice of Proposed Rule Making ("Second NPRM")*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Second NPRM* provided above. The Commission will send a copy of the *Second NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[2] In addition, the *Second NPRM* and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rule Changes:

This *Second NPRM* requests comments concerning a new broadcast equal employment opportunity ("EEO") rule and policies consistent with the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, *rehearing den.* 253 F.3d 732 (D.C. Cir. 2001), *pet. for cert. filed*, MMTC v. MD/DC/DE Broadcasters Association, No. 01-639 (October 17, 2001) ("*Association*"). The Court therein found unconstitutional one of two options for achieving broad outreach provided by the broadcast EEO outreach requirements adopted in the *Report and Order in MM Docket Nos. 98-204 and 96-16*, 15 FCC Rcd 2329 (2000) ("*Report and Order*") *recon. denied* 15 FCC Rcd 22548 (2000), and codified as Section 73.2080 of the Commission's Rules, 47 C.F.R. § 73.2080. The Court found the option invalid because nonminority job applicants were less likely to receive notification of job openings under that recruitment option. The Court further found that the other option provided by the Rule, although not invalid, could not be severed from the one unconstitutional option and therefore it vacated the entire Rule. The outreach provisions adopted by the *Report and Order* were designed to ensure that all persons have the opportunity to participate in the broadcasting industry by requiring that broadcasters engage in broad and inclusive outreach in connection with their hiring efforts.

Because the Commission continues to believe in the importance of achieving broad and inclusive outreach and that this can be achieved in a manner consistent with the Court's decision, we are issuing this *Second NPRM* for the purpose of developing EEO rules to replace those found unlawful by the Court. In addition to considering a new broadcast EEO Rule, we will also consider new rules applicable to cable entities, including multichannel video program distributors ("MVPDs"). Thus, in the *Report and Order*, we adopted EEO requirements applicable to cable entities which were generally the same as the requirements applicable to broadcasters, except where necessary to comply with statutory requirements applicable only to cable entities. The Court in *Association* did not address our requirements applicable to cable entities. However, it remains our belief that the EEO requirements for cable entities should, to the extent possible, conform to the requirements applicable to broadcasters. The Court in *Association* did not address those aspects of our broadcast and cable EEO rules that prohibit

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

[2] *See* 5 U.S.C. § 603.

[3] *See id.*

discrimination in hiring practices and we do not believe the Court intended to invalidate such requirements. The *Second NPRM* accordingly proposes to readopt our antidiscrimination requirements.

Hence, the *Second NPRM* seeks comment on proposed EEO rules and policies for broadcast and cable entities, including multichannel video programming distributors. The rules are designed to replace existing requirements that were found to be unconstitutional in part by the Court in *Association*, or are, in light of the Court's decision, constitutionally suspect in part. Specifically, we request comment on our proposal to retain the anti-discrimination prong of our EEO rules. In addition, we request comment on proposals to require broadcasters and cable entities to establish and maintain an EEO program that would emphasize recruitment outreach; discourage entities from preferring members of any racial, ethnic, or gender group in hiring or recruitment practices; and provide administrative relief to small entities that meet proposed qualifying factors.

B. Legal Basis:

Authority for the actions proposed in this *Second NPRM* may be found in Sections 1, 4(i), 4(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 634 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 554.

C. Recording, Recordkeeping, and Other Compliance Requirements:

As noted, the purpose of this rule making is to replace our prior EEO rule that was found to be unconstitutional in part by eliminating that portion determined to be unconstitutional. Hence, this *Second NPRM* anticipates that any recording, recordkeeping and compliance requirements of the new rule will not exceed those provided for in the former rule.

Specifically, the *Second NPRM* proposes that some EEO materials be kept in the public inspection file, that all broadcasters and cable entities adhere to the EEO rules' general anti-discrimination provisions, and that broadcasters and cable entities widely disseminate information concerning job vacancies.

The *Second NPRM* also proposes that broadcasters and cable entities undertake two supplemental recruitment measures described herein. As proposed, the first supplemental recruitment measure would require broadcasters and cable entities to provide notification of full-time job vacancies to any requesting organization if the organization regularly distributes information about employment opportunities or refers job seekers to employers. Depending on the size of a station's staff, the second supplemental recruitment measure would require broadcasters to engage in at least four (for station employment units with more than ten full-time employees) or two (for station employment units with five to ten full-time employees) of the following menu options every two years: participation in at least four job fairs by station personnel who have substantial responsibility in the making of hiring decisions; hosting of at least one job fair; co-sponsoring at least one job fair with organizations in the business and professional community whose membership includes substantial participation of women and minorities; participation in at least four events sponsored by organizations representing groups present in the community interested in broadcast employment issues (including conventions, career days, workshops, and similar activities); establishment of an internship program designed to assist members of the community to acquire skills needed for broadcast employment; participation in job banks, internet programs, and other programs designed to promote outreach generally; participation in scholarship programs designed to assist students interested in pursuing a career in broadcasting; establishment of training programs designed to enable station personnel to acquire skills that

could qualify them for higher level positions; establishment of a mentoring program for station personnel; participation in at least four events or programs sponsored by educational institutions relating to career opportunities in broadcasting; sponsorship of at least two events in the community designed to inform and educate members of the public as to employment opportunities in broadcasting; listing of each upper-level category opening in a job bank or newsletter of media trade groups whose membership includes substantial participation of women and minorities; and participation in other activities designed by the station employment unit reasonably calculated to further the goal of disseminating information as to employment opportunities in broadcasting to job candidates who might otherwise be unaware of such opportunities. Cable employment units with more than ten full-time employees would engage in at least two options from the supplemental recruitment measures menu every year and cable employment units with six to ten full-time employees would engage in at least one option every year.

In addition, the *Second NPRM* proposes that broadcasters and cable entities retain records to demonstrate that they have recruited for all full-time permanent positions. Under the proposal, such recordkeeping would include: listings of all full-time vacancies filled, listings of recruitment sources, the address/contact person/telephone number of each recruitment source, dated copies of advertisements and other documentation announcing vacancies, listings of those organizations which requested notification of vacancies, the total number of interviewees for each vacancy, the date of each hire, and proof of participation in menu options. The *Second NPRM* notes that our former rule required licensees and cable entities to keep track of the referral source of all interviewees and hirees. The *Second NPRM* requests comments as to whether this information is necessary in order to validate that outreach is actually effective, or if other information should be required. The *Second NPRM* further proposes that broadcasters' records be maintained until grant of the renewal application for the term during which the hiring activity occurred. Cable entities would retain their records for a minimum of seven years.

The *Second NPRM* also proposes that stations and cable employment units place annually the following EEO records in their local public inspection file: listings of full-time vacancies filled, recruitment sources used for each vacancy during the preceding year, the address/contact person/telephone number of each recruitment source, an indication of the organizations requesting notification, the total number of persons interviewed for full-time vacancies during the preceding year, and a brief description of the menu option items undertaken during the preceding year. The *Second NPRM* asks if stations and cable employment units should track the recruitment source of all full-time hirees and/or interviewees referred by each recruitment source for a vacancy. Such information would also be updated in the local public inspection file on an annual basis. Further, under the proposal, station units are to retain the materials in their file until final action has been taken on the station's next license renewal application, and cable entities are to retain their materials for a period of five years.

Further, the *Second NPRM* proposes that most broadcasters submit the contents of their station's EEO public inspection file to the FCC as part of their renewal application and midway through the license term for the Commission's mid-term review (for those subject to mid-term review), and that cable entities with six or more full-time employees submit copies of their EEO public inspection file to the Commission every five years. However, broadcasters would limit their submissions to cover only the last 12 months of EEO activity.

Also, the *Second NPRM* proposes that broadcasters file a Broadcast Mid-Term Report (Form 397) and place a copy of the Report in the public inspection file. Broadcasters would also

continue placing a copy of Form 396 ("Broadcast EEO Program Report") in the public inspection file. However, broadcasters would no longer be required to place a copy of their station's Form 395-B ("Broadcast Station Annual Employment Report") in the public file. Cable employment units would continue placing a copy of Forms 395-A ("Cable Television Annual Employment Report") or 395-M ("Multi-Channel Video Program Distributor Annual Employment Report") in their public file.

The *Second NPRM* proposes that all broadcasters and cable entities, with the exception of small entities, comply with these recordkeeping and recording requirements. The proposed exception for small businesses would provide them with some relief of any disparate recordkeeping and reporting costs.

D. Description and Estimate of the Number of Small Entities to Which the Rules Would Apply:

1. Definition of a "Small Business"

The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules.[4] Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions.[5] The RFA, 5 U.S.C. § 601(3), generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA"). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the [SBA] and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."[6] The new rules would apply to broadcast stations and cable entities, including MVPDs.

2. Issues in Applying the Definition of a "Small Business"

As discussed below, we could not precisely apply the foregoing definition of "small business" in developing our estimates of the number of small entities to which the rules will apply. Our estimates reflect our best judgments based on the data available to us.

An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio or television station is dominant in its field of operation. Accordingly, the following estimates of small businesses to which the new rules will apply do not exclude any radio or television station from the definition of a small business on this basis and are therefore overinclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. As discussed further below, we could not fully apply this criterion, and our estimates of small businesses to which the rules may apply may be overinclusive to this extent. The SBA's general size standards are developed taking into account

[4] 5 U.S.C. § 603(b)(3).

[5] 5 U.S.C. § 601(6).

[6] 5 U.S.C. § 601(3).

these two statutory criteria. This does not preclude us from taking these factors into account in making our estimates of the numbers of small entities.

With respect to applying the revenue cap, the SBA has defined "annual receipts" specifically in 13 C.F.R § 121.104, and its calculations include an averaging process. We do not currently require submission of financial data from licensees that we could use in applying the SBA's definition of a small business. Thus, for purposes of estimating the number of small entities to which the rules apply, we are limited to considering the revenue data that are publicly available, and the revenue data on which we rely may not correspond completely with the SBA definition of annual receipts.

Under SBA criteria for determining annual receipts, if a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period for determining annual receipts, the annual receipts in determining size status include the receipts of both firms.[7] The SBA defines affiliation in 13 C.F.R. § 121.103. In this context, the SBA's definition of affiliate is analogous to our attribution rules. Generally, under the SBA's definition, concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both.[8] The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.[9] Instead of making an independent determination of whether television stations were affiliated based on SBA's definitions, we relied on the databases available to us to provide us with that information.

3. Estimates Based on Census Data

The rules to be adopted pursuant to this *Second NPRM* will apply to television and radio stations. The SBA defines a television broadcasting station that has no more than $10.5 million in annual receipts as a small business.[10] Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.[11] Included in this industry are commercial, religious, educational, and other television stations.[12] Also included are establishments primarily engaged in television broadcasting

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[7] 13 C.F.R. § 121.104(d)(1).

[8] 13 C.F.R. § 121.103(a)(1).

[9] 13 C.F.R. § 121.103(a)(2).

[10] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513120.

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

[12] *Id.; see* Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual* (1987), at 283, which describes "Television Broadcasting Stations" (SIC code 4833, now NAICS code 51312) as: "Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials."

and which produce taped television program materials.[13] Separate establishments primarily engaged in producing taped television program materials are classified under other North American Industry Classification (NAICS) numbers.[14]

There were 1,509 full-service television stations operating in the nation in 1992.[15] That number has remained fairly constant as indicated by the approximately 1,686 operating full-service television broadcasting stations in the nation as of September 2001.[16] For 1992[17] the number of television stations that produced less than $10.0 million in revenue was 1,155 establishments.[18] Thus, the proposed rules will affect approximately 1,686 television stations; approximately 77%, or 1,298 of those stations are considered small businesses.[19] These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television affiliated companies. We recognize that the proposed rules may also affect minority and women owned stations, some of which may be small entities. In August 1998, minorities owned and controlled 32 (2.6%) of 1,209 commercial television stations in the United States.[20] According to the U.S. Bureau of the Census, in 1987 women owned and controlled 27 (1.9%) of 1,342 commercial and non-commercial television stations in the United States.[21]

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[13] 1992 Census, Series UC92-S-1, at Appendix A-9.

[14] *Id.*; formerly SIC code 7812 (Motion Picture and Video Tape Production) (NAICS code 512110); formerly SIC code 7922 (Theatrical Producers and Miscellaneous Theatrical Services) (producers of live radio and television programs) (NAICS codes 512110, 512191, 512290).

[15] FCC News Release No. 31327, Jan. 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, Appendix A-9.

[16] FCC News Release, Broadcast Station Totals as of September 30, 2001 (released October 30, 2001).

[17] Census for Communications' establishments are performed every five years ending with a "2" or "7". *See* Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, note 53, III.

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

[19] We use the 77 percent figure of TV stations operating at less than $10 million for 1992 and apply it to the 2001 total of 1,686 TV stations to arrive at stations categorized as small businesses.

[20] *Minority Commercial Broadcast Ownership in the United States*, U.S. Dep't. of Commerce, National Telecommunications and Information Administration, The Minority Telecommunications Development Program ("MTDP") (August 1998). MTDP considers minority ownership as ownership of more than 50% of a broadcast corporation's stock, voting control in a broadcast partnership, or ownership of a broadcasting property as an individual proprietor. *Id.* The minority groups included in this report are Black, Hispanic, Asian, and Native American.

[21] *See* Comments of American Women in Radio and Television, Inc. in MM Docket No. 94-149 and MM Docket No. 91-140, at 4 n.4 (filed May 17, 1995), *citing* 1987 Economic Censuses, *Women-Owned Business*, WB87-1, U.S. Dep't of Commerce, Bureau of the Census, August 1990 (based on 1987 Census). After the 1987 Census report, the Census Bureau did not provide data by particular communications services (four-digit Standard Industrial Classification (SIC) Code), but rather by the general two-digit SIC Code for communications (#48). Consequently, since 1987, the U.S. Census Bureau

The proposed rule changes would also affect radio stations. The SBA defines a radio broadcasting station that has no more than $5 million in annual receipts as a small business.[22] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[23] Included in this industry are commercial, religious, educational, and other radio stations.[24] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.[25] However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another NAICS number.[26] The 1992 Census indicates that 96 percent (5,861 of 6,127) of radio station establishments produced less than $5 million in revenue in 1992.[27] Official Commission records indicate that 11,334 individual radio stations were operating in 1992.[28] As of September 2001, official Commission records indicate that 13,012 radio stations are currently operating.[29]

The rule changes would also affect small cable entities, including MVPDs. SBA has developed a definition of a small entity for cable and other pay television services, which includes all such companies generating $11 million or less in annual receipts.[30] This definition includes cable system operators, closed circuit television services, direct broadcast satellite services ("DBS"), multipoint distribution systems ("MDS"), local multipoint distribution service ("LMDS"), satellite master antenna systems, and subscription television services. According to the Bureau of the Census, there were 1,423 such cable and other pay television services generating less than $11 million in revenue that were in operation for at least one year at the end of 1992.[31] Below we discuss these services to provide a more succinct estimate of small entities.

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has not updated data on ownership of broadcast facilities by women, nor does the FCC collect such data. However, the Commission recently amended its Annual Ownership Report Form 323 to require information on the gender and race of broadcast license owners in future filings. *See 1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules and Processes, Report and Order*, MM Docket No. 98-43, 13 FCC Rcd 23,056 (1998).

[22] 13 C.F.R. § 121.201, NAICS codes 513111 and 513112.

[23] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, Appendix A-9.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] The Census Bureau counts multiple radio stations located at the same facility as one establishment. Therefore, each co-located AM/FM combination counts as one establishment.

[28] FCC News Release No. 31327, Jan. 13, 1993.

[29] FCC News Release, Broadcast Station Totals as of September 30, 2001 (released October 30, 2001).

[30] 13 C.F.R. § 121.201 (NAICS codes 513210 and 513220).

[31] 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D, SIC 4841 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

Cable Systems: The Commission has developed, with SBA's approval, its own definition of small cable system operators. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[32] Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable companies at the end of 1995.[33] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the rules proposed herein.

The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenue in the aggregate exceeds $250,000,000."[34] The Commission has determined that there are 67,700,000 subscribers in the United States.[35] Therefore, we found that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[36] Based on available data, we find that the number of cable operators serving 677,000 subscribers or less totals approximately 1,450.[37] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

MDS: MDS involves a variety of transmitters, which are used to relay programming to the home or office.[38] The Commission has defined "small entity" for purposes of the 1996 auction of MDS as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years.[39] This definition of a small entity in the context of MDS auctions has been approved by the SBA.[40] These stations were licensed prior to

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[32] 47 C.F.R. § 67.901(3). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 6393 (1995).

[33] Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[34] 47 U.S.C. § 543(m)(2).

[35] FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice DA 01-158 (January 24, 2001).

[36] 47 C.F.R. § 76.1403(b) (SIC 4833).

[37] Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[38] For purposes of this item, MDS includes the single channel Multipoint Distribution Service (MDA) and the Multichannel Multipoint Distibution Service (MMDS).

[39] 47 C.F.R. § 1.2110(a)(1).

[40] *See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and*

implementation of Section 309(j) of the Communications Act of 1934, as amended.[41] Licenses for new MDS facilities are now awarded to auction winners in Basic Trading Areas ("BTAs") and BTA-like areas.[42] The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 BTAs. Of the 67 auction winners, 61 met the definition of a small business. There are approximately 2,000 MDS/MMDS/LMDS stations currently licensed. We conclude that there are 1,595 MDS/MMDS/LMDS providers that are small businesses as deemed by the SBA and the Commission's auction rules.

LMDS: The auction of the 1,030 LMDS licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined "small entity" for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[43] An additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[44] These regulations defining "small entity" in the context of LMDS auctions have been approved by the SBA.[45] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission reauctioned 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the reauction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

DBS: Because DBS provides subscription services, it falls within the SBA-recognized definition of "Cable and Other Pay Television Services."[46] This definition provides that a small entity is one with $11.0 million or less in annual receipts.[47] Currently, there are four DBS providers, though there are only two DBS companies in operation at this time. We neither request nor collect annual revenue information for DBS services, and are unable to determine the number of DBS operators that would be considered a small business under the SBA definition.

An alternative way to classify small entities is by the number of employees. Based on available

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Implementation of Section 309(j) of the Communications Act - Competitive Bidding, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995).

[41] 47 U.S.C. § 309(j). (Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for "other telecommunications" (annual receipts of $11 million or less). *See* 13 C.F.R. § 121.201.

[42] *Id.* A BTA is the geographic area by which the MDS is licensed. *See* Rand McNally, *1992 Commercial Atlas and Marketing Guide*, 123rd Edition, pp. 36-39.

[43] *See Local Multipoint Distribution Service, Second Report and Order*, 12 FCC Rcd 12545 (1997).

[44] *Id.*

[45] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from A. Alvarez, Administrator, SBA (January 6, 1998).

[46] 13 C.F.R. § 121.201, NAICS codes 513210 and 513220.

[47] *Id.*

data, we estimate that in 1997 the total number of full-service broadcast stations with four or fewer employees was 5186, of which 340 were television stations.[48] Similarly, we estimate that in 1997, 1900 cable employment units employed fewer than six full-time employees. Also, in 1997, 296 MVPD employment units employed fewer than six full-time employees. We also estimate that in 1997, the total number of full-service broadcast stations with five to ten employees was 2145, of which 200 were television stations. Similarly, we estimate that in 1997, 322 cable employment units employed six to ten full-time employees. Also, in 1997, 65 MVPD employment units employed six to ten full-time employees.

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

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[49]

One of the alternatives that this *Second NPRM* proposes is that broadcasters with station employment units of five to ten full-time employees be provided some relief from EEO program requirements, and that station employment units of fewer than five full-time employees be exempt altogether, with the exception that all broadcasters be subject to the nondiscrimination requirement and report any employment discrimination complaints filed against them. In addition, cable employment units, including MVPD employment units, employing six to ten full-time employees would be provided some relief from the proposed EEO program requirements, and cable employment units with fewer than six full-time employees would not be required to demonstrate compliance with the proposed EEO program requirements. We consider this alternative because entities with small staffs have limited personnel and financial resources to carry out EEO requirements. Furthermore, these proposed rules streamline and clarify recordkeeping requirements, thereby benefiting all entities, including those with fewer employees. It is our belief that the proposed alternative balances the importance of deterring discrimination and achieving broad outreach in broadcast and cable employment practices against the need to maintain minimal regulatory burdens and the ease and clarity of administration.

F. Federal Rules that Overlap, Duplicate, or Conflict with the Proposed Rules:

The proposed rules do not overlap, duplicate or conflict with any other rules.

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[48] We base these estimates on a compilation performed by the Equal Employment Opportunity Staff, Mass Media Bureau, FCC.

[49] 5 U.S.C. § 603(c).

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (MM Docket No. 98-204).

I am proud that we have adopted this Notice of Proposed Rulemaking (NPRM), which looks for ways to revise the equal opportunity rules to be consistent with the holding of the D.C. Circuit in *Association*[50]. It is imperative that the Commission forge ahead to establish effective, legally sustainable rules. Today we have taken an important step towards achieving that goal.

The public benefits of individuals in our society having equal employment opportunities, based on merit rather than discriminatory factors, are so numerous they are impossible to list. I believe few would disagree with this proposition. Thus, it is only right and proper for this agency to expect its licensees to afford equal opportunities for everyone. Indeed, I believe it is our obligation to attempt to widen the circle of those Americans that benefit from the fruits spawned by those licenses. If the public interest benefit means anything at all it cannot possibly tolerate the use of a government license to discriminate against the citizens from whom the license ultimately is derived. Thus, we will remain vigilant in our pursuit of establishing rules. While this has been a challenging endeavor, it is nonetheless a noble one well worth undertaking. I am confident that we are now heading in the right direction.

In the NPRM we adopt today, we introduce a broad outreach program that is squarely race and gender neutral and, thus, not constitutionally suspect. The proposed EEO rules focus on increasing the possibility that more minorities and women get the opportunity to compete fairly for employment. No one is entitled to rewards they did not earn. No one is entitled to jobs for which they are not qualified. But, *everyone* is entitled to an equal opportunity to vie for those rewards and compete for those jobs. The proposed outreach program provides for the simple opportunity to compete for employment vacancies. All Americans, regardless of stripe, benefit when our workforce captures the rich talent of our great nation.

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[50] MD/DC/DE Broadcasters Association v FCC, 236 F.3d 13, reh'g den. 253 F. 3d 732 (D.C. Cir. 2001) pet for cert. Filed, MMTC v MD/DC/DE Broadcasters Association. No. 01-639 (October 17, 2001).

SEPARATE STATEMENT OF COMMISSIONER MICHAEL J. COPPS

In the Matter of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies

In my six months on this Commission I have often stated my strong desire to see the Commission quickly put in place effective EEO rules in the wake of the D.C. Circuit decision striking down our EEO rules for the second time. I have just as often encouraged broadcasters and cable entities to continue their efforts to reach out into the community to seek new and diverse talent as they build their workforce, and to keep the Commission apprised of their efforts in this regard.

I have been encouraged by the responses of some broadcasters and cable companies that have continued their outreach efforts in the absence of EEO rules. I hope they will pursue these endeavors as the Commission considers new EEO rules. Their actions have translated into positive results in building a workforce with more resemblance to our nation's diversity.

I have also been encouraged by my Chairman's commitment to institute a proceeding to put new rules in place by the end of the year – a commitment he fulfills with the adoption of this item today.

For those reasons, I support the Second Notice of Proposed Rulemaking we adopt today. The NPRM makes clear – if there was any confusion – that the Commission's rules prohibiting discrimination will remain in effect. In addition, I hope that this NPRM will form the basis of an extensive record that will result in strong EEO rules that I will be able to support with enthusiasm and with pride.

While I support the NPRM before us today, I do not feel that it reflects the deep and passionate commitment to a diverse workplace that America must have if it is to fulfill its potential. Our country's strength ***is*** its diversity. Diversity is not a problem to be accommodated; it is an opportunity to be developed. We will succeed in the Twenty first century not in spite of our diversity, but because of our diversity.

Diversity should be America's song, and the FCC, standing at the forefront of the great transforming forces of our generation, should be leading the choir. But this notice does not sound the trumpet and, as it was written of old, if the sound of the trumpet be uncertain, then who shall respond to the call of the battle? I know my fellow Commissioners, and I believe each of us is dedicated to the advancement of equal opportunity, here at the Commission and across the industries with which we work. But I am afraid that the reversals by the D.C. Circuit have imparted too much caution about even approaching the borders of circumscription established by the Court.

I understand full well that the decisions of the D.C. Circuit have limited the scope of any EEO rules the Commission may adopt, and I am saddened by any retreat in the area of equal employment opportunity and, indeed, in civil rights generally. But when civil rights are at stake, the stakes are high. Our responsibility is to press the cause, to push the edge of the envelope and not to be deflected by a court decision that is, in fact, being vigorously contested at this very moment.

We can do better. We can push the envelope farther than this and still be within the safe harbor of legal and judicial boundaries. The Constitution has brought us a long ways in civil rights and equal opportunity in the past half century, and I just don't believe it's out of gas yet.

Here is our challenge. Let us take this proceeding as a port of embarkation and set sail to develop a record of breadth and depth that is in consonance with the breadth and depth of this great land. I ask all of our stakeholders to help us. Lend us your experience, your insight, your creativity to help us craft rules that are first of all effective and transforming, but that will also pass the muster of the courts. A tall order? Yes – but America was built on filling tall orders. So I believe it can be done. This is the time, this is the place, to do it.

As we move to rules in this proceeding, let us search out uncharted paths to achieve equal employment opportunity. Let us reach out to all of our stakeholders -- I trust the court will let us do ***that*** – and put America's genius to work in the cause of equal opportunity. And let's do so with a sense of urgency. We have been without rules here for far too long. We need to have this Commission on record with forthright equal employment opportunity rules -- and the sooner the better.

In furtherance of that cause, I hope that the Commission will give this issue the extra attention it deserves by convening an *en banc* hearing to address our broadcast and cable EEO rules. Such a hearing would create a forum for discussion among broadcasters, cable system operators, advocates, legal scholars and, most importantly of all, concerned citizens from every corner of the country. And it would make an eloquent statement about the importance the Commission attaches to the job at hand. This discussion, in addition to the comments we receive in response to this NPRM, would form a record on which we can base strong, effective and legally sustainable equal employment opportunity rules.

For my part, I look forward in the next few months to intensive engagement on a subject that goes to the core of our national being and upon which hinges our ability to open the doors of opportunity for our fellow citizens. This is something, my friends, that we need to do and do right.

SEPARATE STATEMENT OF COMMISSIONER KEVIN J. MARTIN

Re: Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (MM Docket Nos. 98-204).

I support initiating this proceeding to craft equal employment opportunity rules that will withstand constitutional scrutiny. I believe an effective outreach program will benefit our society tremendously. Enhanced recruitment increases the probability that individuals from all backgrounds will learn about industry openings. Likewise, by expanding their recruitment sources, broadcasters and cable entities, including multi-channel video programming distributors, are more likely to find the best-qualified candidate. And when broadcasters and cable entities have a more talented workforce, we all reap the benefits.

I am, however, cognizant of the Commission's history in this area. Twice the courts have struck down this agency's EEO rules as unconstitutional and we must make sure that we give proper heed to the courts' instructions. In that regard, I would have been more cautious about reaching some of the tentative conclusions contained in the Notice we release today. I appreciate my colleagues' willingness to request comment on several issues, particularly whether we should permit entities to submit some information in their annual employment reports anonymously, in light of our commitment to look at this data only to "analyze industry trends."

I look forward to working with my colleagues and the public to design effective, constitutional rules promoting equal employment opportunity for all.