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

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 98-204
Broadcast and Cable	)	
Equal Employment Opportunity	)	
Rules and Policies	)	
and	)	
Termination of the	)	MM Docket No. 96-16
EEO Streamlining Proceeding[1]	)	
	)	
	)	
	)	

NOTICE OF PROPOSED RULE MAKING

Adopted: November 19, 1998; **Released: November 20, 1998**

Comment Date: January 19, 1999
Reply Comment Date: February 18, 1999

By the Commission: Chairman Kennard and Commissioner Tristani issuing a joint statement; Commissioners Ness and Powell issuing separate statements; and Commissioner Furchtgott-Roth concurring and issuing a statement.

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[1] *Streamlining Broadcast EEO Rule and Policies*, MM Docket No. 96-16, 11 FCC Rcd 5154 (1996) (*Streamlining*).

I. INTRODUCTION

1. We issue this *Notice of Proposed Rule Making* (*NPRM*) to propose, and request comment concerning, a new broadcast equal employment opportunity ("EEO") rule and policies consistent with the D.C. Circuit's decision in *Lutheran Church - Missouri Synod v. FCC*.[2] In that case, the court held that the Commission's EEO program requirements, part of our broadcast EEO Rule, were unconstitutional but made clear that other requirements of this type might be constitutional. Pursuant to the remand of the court, we also invite comment on our belief that we have authority to retain the anti-discrimination provisions of our broadcast EEO Rule. In addition, we request comment on our proposal to modify our EEO rules applicable to cable entities, including multichannel video programming distributors ("MVPDs"),[3] to conform them to any new broadcast EEO Rule. We also terminate MM Docket No. 96-16, except for the petition for reconsideration filed in response to *Streamlining Broadcast EEO Rule and Policies*, 13 FCC Rcd 6322 (1998) ("*Order and Policy Statement*"), which concerned our EEO policies for religious broadcasters. Finally, we will consider several proposals originating from *Streamlining*, concerning, among other things, administrative relief for small broadcasters and how to best credit broadcasters for participation in joint recruitment efforts. As we have stated previously in connection with the Commission's EEO rules, it is our intention to limit, to the greatest extent possible, any burdens on broadcasters, particularly licensees of smaller stations and other distinctly situated broadcasters. We encourage broad participation in this extremely important proceeding.

2. Our Nation has benefitted from rules which prohibit employment discrimination and seek to ensure that everyone has an opportunity to participate in the broadcasting and cable industries. By tapping into the talents and abilities of all segments of the population, a broadcast station or cable entity increases the chances that viewers and listeners will be exposed to varying perspectives, and become familiar with a wider range of issues affecting their local community.

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[2] 141 F.3d 344 (D.C. Cir. 1998) ("*Lutheran Church*"), *rehearing denied*, September 15, 1998.

[3] A multichannel video programming distributor includes a cable operator, a multipoint distribution service, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program distributor, and a video dialtone program service provider. *See* 47 C.F.R. § 76.71(a). The term, "cable," in this *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).

3. Moreover, measures that require broad and inclusive outreach efforts and non-discriminatory practices make good business sense and benefit employers because they increase an employer's chances of obtaining the services of the most talented people. On the other hand, discriminatory conduct and the absence of such outreach efforts may result in a staff of limited resources and also decrease a broadcast station's or cable entity's ability to deliver quality and diverse programming to the public. In addition, a broadcast or cable entity's discriminatory conduct and failure to engage in strong and inclusive outreach efforts not only harms job applicants, but also harms the broadcast and cable industries generally by restricting the pool of qualified employees available to other media companies.

4. Since their implementation, the Commission's Equal Employment Opportunity ("EEO") rules have had a positive impact on increasing opportunities for minorities and women in the broadcast and cable industries. For example, in 1971, women constituted 23.3% of full-time broadcast employees and minorities 9.1%. In 1997, women constituted 41.0% of broadcast employees and minorities 20.2%.

5. Recognizing the value of our EEO requirements for the electronic media, Congress has expanded the reach of those requirements. In 1984, Congress codified EEO rules for cable operators. In 1992, Congress codified EEO requirements for broadcast television and extended those requirements to multichannel video programming distributors ("MVPDs") based on explicit findings in the 1992 Cable Act that: women and minorities are not well represented in management positions in the cable and broadcast industries, notwithstanding the Commission's EEO rules; the Nation's policy in favor of viewpoint diversity in the electronic media is furthered by greater numbers of women and minorities in these positions; and effective deterrence of discrimination requires strict enforcement of EEO rules.[4] Congress has thus endorsed the basic goals that our EEO rules were designed to achieve and enacted statutory requirements to extend their reach.

6. In light of the decision in *Lutheran Church,* the Commission in this *NPRM* proposes a new broadcast EEO Rule and modified EEO rules for cable entities, including MVPDs, that emphasize outreach in recruitment to all qualified job candidates. We believe that such rules will benefit job candidates by informing them of opportunities of which they might otherwise be unaware, benefit employers by casting the widest possible net for capable employees, and benefit the American people by enriching the programming distributed by the electronic media that play such a vital role in our society. Pursuant to the court's direction, we are also seeking comment on our authority to retain the non-discrimination rule.

II. BACKGROUND

A. EEO Rules and Policies

7. Pursuant to the EEO regulations under review in this proceeding,[5] broadcast stations[6] and cable entities, including MVPDs, may not discriminate in their employment practices based on gender, race, color,

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[4] 1992 Cable Act, Section 22(a).

[5] *See* 47 C.F.R. § 73.2080 (broadcast EEO Rule) and 47 C.F.R. § 76.71, *et. seq*. (cable EEO rules). Our cable EEO regulations were implemented pursuant to Section 634 of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), and the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). *See, also*, 47 C.F.R. §§ 21.920, 25.601, 74.996, and 100.51.

[6] The broadcast EEO Rule, 47 C.F.R. § 73.2080, covers "all licensee or permittees of commercially or noncommercially operated AM, FM, TV, or international broadcast stations." In addition, pursuant to *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5791 (1997), Digital Audio Radio Service by satellite is also covered by our Rule.

religion,[7] or national origin.[8] The rules also provide that broadcasters and cable entities must afford equal opportunity in employment to qualified persons and must establish and maintain an equal employment opportunity program designed to provide equal opportunity for minorities and women in all aspects of their employment policies and practices. The EEO review processes for broadcast stations and cable entities have been similar in that, in both cases, our primary focus has been on an entity's overall EEO efforts.

8. Prior to the *Lutheran Church* decision, broadcast stations' EEO compliance was reviewed during the license renewal process. Stations with five or more full-time employees have been required to file a complete "Equal Employment Opportunity Program Report" (Form 396) with their renewal applications.[9] This form requests recruitment, hiring and promotion data for the 12-month period prior to filing the renewal application. Licensees have also been required to file an Annual Employment Report (Form 395-B), which sets forth the station's employment by job categories.[10] When reviewing a broadcaster's EEO compliance at renewal time, our primary focus was on the licensee's overall EEO efforts. Our efforts analysis was a two-step process. The first step involved a review of the following information to determine if a station's EEO program might require further investigation: the data listed in a station's Form 396; any final determinations of employment discrimination complaints filed with government agencies and/or courts with jurisdiction over such complaints; any petitions to deny or informal objections filed against the renewal; and the results of a comparison between the composition of a station's workforce with the local labor force. If a broadcast station was found to be in compliance with our EEO rule, its license was granted, assuming there were no other impediments to renewal.

9. If our initial analysis indicated that a station's EEO efforts might have been unsatisfactory, it was subject to a second, more detailed level of analysis. This analysis usually included a request for additional information. We reviewed the station's response to our inquiry as well as relevant pleadings to determine if, among other things, the station notified sources of minority and female referrals when vacancies occurred and engaged in continuous self-assessment of its EEO program. If we found that a broadcast station had not complied with the Commission's EEO Rule, we might impose various sanctions or remedies such as admonishment, reporting conditions, short-term renewal, and/or forfeitures. In addition, we conducted mid-term EEO reviews of the employment practices of broadcast television station licensees.[11]

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[7] Under *Order and Policy Statement*, religious broadcasters are entitled to establish religious belief or affiliation as a *bona fide* occupational qualification for all station employees. However, they cannot discriminate on the basis of race, color, national origin or gender from among those who share their religious affiliation or belief.

[8] Under our cable EEO rules, cable entities also may not discriminate based on age. *See* 47 U.S.C. § 554(b); 47 C.F.R. § 76.73(a).

[9] *See* Instructions for Form 303-S, Application For Renewal of License for Commercial and Noncommercial AM, FM, TV, Translator, and LPTV [Low Power Television] Station. Applicants for broadcast construction permits, transfers of control, and assignments of licenses who anticipate employing five or more full-time employees are required to file a Broadcast Equal Employment Opportunity Model Program Report (Form 396-A). *See* Form 314 and Instructions for Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License; Form 315 and Instructions for Form 315, Application For Consent to Transfer of Control of Corporation Holding Broadcast Station Construction Permit or License.

[10] *See* 47 C.F.R. § 73.3612. *See* Form 303-S.

[11] *See* 47 U.S.C. § 334(b); 47 C.F.R. § 73.2080(d).

10. Cable employment units, including headquarters units, with six or more full-time employees are evaluated on an annual basis.[12] This review begins when a cable unit files its Annual Employment Report (Form 395-A), which requires responses to questions about the entity's EEO efforts as well as employment, hiring and promotion data.[13] In addition, cable units are subject to a more thorough review every five years with the Supplemental Investigation Sheet ("SIS").[14] The SIS requests information regarding specific recruitment efforts and job categories. The Form 395-A is reviewed using a two-step process which involves a statistical analysis of the cable unit's workforce in relation to the local labor force and a review of the unit's responses to questions regarding its EEO program. If a unit appears to be in compliance with our cable EEO rules, it is granted certification for that year. If it does not appear that the unit is engaging in sufficient efforts, additional inquiries are made. If, based on the Annual Employment Report and responses to subsequent inquiries, it is determined that the unit is not in compliance, certification is denied and we may impose various remedies or sanctions, including admonishment, reporting conditions, and/or forfeitures. Finally, we conduct on-site reviews of cable units to verify their EEO programs and ensure that employees are properly classified.

B. The *Lutheran Church* Decision

11. The *Lutheran Church* decision involved a challenge by the Lutheran Church-Missouri Synod ("Church"), which is the licensee of two radio stations, to the Commission's finding that the Church had violated the Commission's broadcast equal employment opportunity regulations by giving preferential treatment to seminarians and their spouses and by making inadequate efforts to recruit minorities for positions at its stations. In *Lutheran Church*, the court focused on the Church's facial challenge to the EEO rules based on the Equal Protection Clause. It did not address the Church's claims that the Commission's EEO rules, as applied to licensees that are religious organizations, violated the Religious Freedom Restoration Act of 1993[15] and the Free Exercise Clause of the First Amendment by interfering with the Church's ability to prefer Lutherans in hiring.

12. The court held that the portions of the Commission's regulations requiring licensees to maintain an EEO program to recruit minorities were subject to the strict scrutiny applicable to racial classifications imposed by the federal government under *Adarand Constructors, Inc. v. Peña*.[16] The court rejected the Commission's argument that its rules were not subject to strict scrutiny because they required only outreach in recruitment, not race-conscious hiring decisions. According to the court, the Commission's regulatory

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[12] *See* 47 U.S.C. § 554(d)(3); 47 C.F.R. § 76.77.

[13] Form 395-M, the Multi-Channel Video Program Distributor Annual Employment Report, is similar to the Form 395-A and covers MVPDs.

[14] *See* 47 U.S.C. § 554(e)(2); 47 C.F.R. § 76.77.

[15] 42 U.S.C. § 2000bb-1 ("RFRA").

[16] 515 U.S. 200, 115 S. Ct. 2097 (1995) ("*Adarand*"). Those portions of the Commission's regulations required broadcast licensees to: (1) disseminate the EEO program to job applicants and employees; (2) use minority and women-specific recruitment sources when general sources are not effective in generating minority applicants -- although the court did not interpret this portion of the rules that narrowly; (3) evaluate the station's employment profile and job turnover against the availability of minorities and women in its recruitment area; (4) offer promotions to minorities and women in a nondiscriminatory fashion; and (5) analyze their efforts to recruit, hire, and promote minorities and women. 47 C.F.R. § 73.2080(b), (c).

scheme, including its comparison of a station's employment profile with the relevant labor force as part of its initial analysis of a station's EEO program, "pressure[s] stations to maintain a work force that mirrors the racial breakdown of their 'metropolitan statistical area,'" and thus injects racial considerations into hiring decisions.[17] The court did not find that a station would be held in violation of the Commission's rules based solely on a statistical disparity between its employment profile and the percentage of minorities in the local work force. However, it concluded that the requirement that stations evaluate the success of their EEO programs based on those statistics, in conjunction with the Commission's use of those statistics at renewal time, induced licensees "to hire with an eye toward meeting the numerical target," and thus resulted in individuals being granted a preference because of their race.[18]

13. In order to withstand strict scrutiny, the government must show that racial classifications serve a compelling governmental interest and are narrowly tailored to further that interest.[19] The Commission had asserted that its EEO regulations were designed solely to foster diverse programming content, which the court interpreted as meaning programming that "reflects minority viewpoints or appeals to minority tastes."[20] Although the court acknowledged that the Supreme Court had found the governmental interest in diverse programming an "important" government interest in *Metro Broadcasting, Inc. v. FCC,*[21] it found it "impossible to conclude that the government's interest [in diverse programming], no matter how articulated, is a compelling one."[22]

14. Further, the court held that, even assuming that the governmental interest in diversity is compelling, the Commission's EEO rules were not narrowly tailored to further that interest. The Commission's EEO rules apply to all broadcast station employees, but the court noted that the Commission had introduced no evidence "linking low-level employees to programming content."[23] The court thus concluded that insofar as the rules apply to all station employees, they "could not pass the substantial relation prong of intermediate scrutiny, let alone the narrow tailoring prong of strict scrutiny."[24]

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[17] *Lutheran Church* at 352.

[18] *Id*. at 354.

[19] *E.g., Adarand,* 115 S. Ct. at 2117; *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989) ("*Croson*"); *Lutheran Church* at 354.

[20] *Lutheran Church* at 354.

[21] 497 U.S. 547 (1990). In its *Lutheran Church* opinion, the D. C. Circuit criticized the Supreme Court for not explaining in *Metro Broadcasting* "why it was in the government's interest to encourage the notion that minorities have racially based views," and expressed doubt "that the Constitution permits the government to take account of racially based differences, much less encourage them." *Lutheran Church* at 355.

[22] *Lutheran Church* at 355. The court also distinguished the kind of diversity at stake in *Metro Broadcasting,* which it termed "inter-station diversity," from that at issue in *Lutheran Church,* which it referred to as intra-station diversity." *Id.* It observed that pursuing a goal of fostering diversity among stations was "at least understandable," but attempting to make "a single station all things to all people makes no sense." *Id*. at 355-56.

[23] *Id*. at 356.

[24] *Id*.

15. The court thus held the Commission's broadcast "EEO program requirements" unconstitutional as applied to minorities. The court declined to evaluate the constitutionality of the EEO program requirements as applied to women, since the issue was not before it.[25] The court also did not address the Church's argument that the Commission's employment nondiscrimination requirement violated the Free Exercise Clause of the First Amendment or the RFRA. Nor did it reach the Commission's nondiscrimination rule or invalidate Section 73.2080(a)[26] of the Commission's EEO rules, explaining:

> [O]ur opinion has undermined the proposition that there is any link between broad employment regulation and the Commission's avowed interest in broadcast diversity. We think, therefore, that the appropriate course is to remand to the FCC so it can determine whether it has authority to promulgate an employment non-discrimination rule.[27]

The court thus remanded the case for the Commission to determine whether it has the jurisdiction to retain the anti-discrimination provision of Section 73.2080.[28]

16. The Commission petitioned the court for rehearing *en banc*. On September 15, 1998, the D.C. Circuit denied the petition.[29] In so doing, the court issued a supplemental decision elaborating on the *Lutheran Church* decision. The court noted that: "Because the FCC's regulations at issue here indisputably pressure -- even if they do not directly require -- stations to make race-based hiring decisions, under the logic of *Adarand*, they too must be subjected to strict scrutiny."[30] The court went on, however, to clarify that:

> This does not mean that any regulation encouraging broad outreach to, as opposed to the actual hiring of, a particular race would necessarily trigger strict scrutiny. Whether the government can encourage -- or even require -- an outreach program specifically targeted on minorities is, of course, a question we need not decide. As we concluded in our prior opinion, the Commission's regulations go far beyond any nondiscriminatory outreach program. The imposition of numerical norms based on proportional representation -- which is the core element to what are often referred to as affirmative action, set aside, or quota programs -- is the aspect of the Commission's rule that makes it impossible for us to apply any standard of review other than strict scrutiny. In other words, the regulations here must be subjected to strict scrutiny because they encourage racial preferences in hiring and as such treat people differently according to race. We of course do not claim, as Judge Tatel suggests, that all race

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[25] *Id.* at 351, n.9.

[26] Section 73.2080(a) of the Commission's Rules states: "*General EEO policy*: Equal employment opportunity in employment shall be afforded by all licensees or permittees of commercially or noncommercially operated AM, FM, TV, or international broadcast stations (as defined in this part) to all qualified persons, and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin, or sex."

[27] *Id*. at 356.

[28] *Id*. at 356-357.

[29] *Lutheran Church-Missouri Synod v. FCC*, No. 97-1116, D.C. Cir., September 15, 1998.

[30] *Id.*, slip op. at 7.

conscious measures adopted by the government must be subjected to strict scrutiny.[31]

17. In this proceeding, we propose broadcast EEO program requirements and conforming changes to our cable EEO rules. We also propose to retain the anti-discrimination prong of the EEO rules.

III. DISCUSSION

A. Constitutional and Statutory Framework

1. Constitutional Requirements

18. In this proceeding, we seek to adopt EEO outreach requirements that would be constitutional under the court's decision in *Lutheran Church*.[32] As explained below, we believe that our revised EEO program requirements, which would require licensees to inform women and members of minority groups of vacancies at the station and encourage them to apply, but would not pressure broadcasters to adopt racial preferences in hiring or other employment decisions, would be constitutional.

19. While the Commission's equal employment regulations apply to women as well as members of racial and ethnic groups,[33] the D.C. Circuit struck them down in *Lutheran Church* as applied to minorities under the strict scrutiny analysis applicable to race-based decision-making. Since a less stringent "intermediate scrutiny" analysis applies to gender-based decision-making,[34] we believe that any Commission equal employment policy we may adopt that could withstand constitutional challenge as applied to racial minorities could also withstand constitutional challenge as applied to women.

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[31] *Id.*, slip op. at 8-9. Four judges voted to rehear the case, three of whom dissented in two separate opinions from the decision not to rehear the case. Chief Judge Edwards, in an opinion with which Judge Wald concurred, would have held that there was no constitutional issue because the regulations did not encourage or oblige anyone to exercise hiring preferences but, at most, encouraged stations fairly to consider minority applications. Therefore, the Chief Judge noted that, on remand, the Commission should consider amending the regulations to add a caveat providing that nothing contained in the regulations requires an employer to grant preferential treatment based on race. Judge Silberman disagreed that such a caveat would be sufficient. Slip op. at 11. Judge Tatel, in an opinion with which Judge Wald concurred, noted that *Adarand* does not require strict scrutiny of all race-conscious government measures:

> a vast range of antidiscrimination laws, including Title VII, require public and private entities to be conscious of race not only in outreach and recruitment, but also in hiring and promotion. Surely such laws do not implicate strict scrutiny. What triggers strict scrutiny, then, is not mere race-consciousness, but rather unequal treatment based on race.

Lutheran Church-Missouri Synod v. FCC, No. 97-1116, (dissent opinions) D.C. Cir., September 15, 1998, dissent slip op. at 10. Judge Tatel added that, in his view, the EEO regulations do not mandate hiring preferences, and nothing in the record supports the assumption that the regulations even influence hiring decisions. *Id.*, dissent slip op. at 12.

[32] The court did not question the constitutionality of the non-discrimination rule.

[33] *See* 47 C.F.R. § 73.2080

[34] *See, e.g., U.S. v. Virginia*, 518 U.S. 515 (1996); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1579-80 (11th Cir. 1994); *Lamprecht v. FCC*, 958 F.2d 382, 391 (D.C. Cir. 1992).

20. In its decision denying the Commission's petition for rehearing, the court in *Lutheran Church* stated that it had applied strict scrutiny because it viewed the Commission's regulations as pressuring broadcasters to adopt racial preferences in hiring. The court stated that its decision did not mean that all race conscious measures adopted by the government must be subjected to strict scrutiny.[35] Thus, the court's supplemental opinion suggests that the Commission can develop new outreach rules that would be constitutional even if they specifically focus on minorities, as long as those rules do not pressure broadcasters to use racial preferences in hiring.

21. The Supreme Court has not addressed the question whether race-conscious recruitment programs that do not result in racial preferences in hiring implicate equal protection concerns. While *Adarand* contains broad statements suggesting that racial classifications by the government are subject to strict scrutiny,[36] the Court stated that equal protection concerns are triggered "whenever the government treats any person unequally because of his or her race."[37] Thus, *Adarand* suggests that a person must be treated unequally by the government on the basis of race to give rise to an injury cognizable under the Equal Protection Clause. Accordingly, we believe that a Commission recruitment policy that operates only to enhance the pool of candidates for a job opening will not subject anyone to unequal treatment on the basis of race and will not raise equal protection concerns.[38] We believe that a similar analysis would apply with respect to recruitment of women.

22. We note that these views are supported by precedent in the courts of appeal. For example, in *Peightal v. Metropolitan Dade County*,[39] a fire department conducted "recruiting programs to provide information and to solicit applications from young minorities and women for firefighting positions."[40] The department also held outreach programs and attended job fairs and career days at local colleges that were designed to apprise minorities and women of career opportunities. All of these measures were characterized approvingly by the Eleventh Circuit as "race-neutral" measures that the fire department had employed in an attempt to attract minorities and women before initiating the race-conscious affirmative action program under review in that case. Similarly, in *Duffy v. Wolle*,[41] the Eighth Circuit held that an employer's affirmative efforts to recruit minority and female applicants did not constitute discrimination, reasoning that white males suffer no cognizable harm in being forced to compete against a larger pool of qualified applicants.[42]

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[35] *Lutheran Church*, No. 97-1116, slip op. at 8 (D.C. Cir. September 15, 1998)

[36] *Adarand*, 115 S. Ct. at 2113 ("all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny").

[37] *Id*. at 2114 (emphasis added).

[38] Recruitment procedures that focus on minorities do take race into account. Numerous courts have, however, characterized such procedures as "race neutral." *See* cases cited in n.42, *infra*. However such procedures are characterized, the proposed rule does not raise constitutional concerns.

[39] 26 F.3d 1545 (11th Cir. 1994).

[40] *Id*. at 1557.

[41] 123 F.3d 1026 (8th Cir. 1997), *cert. denied,* 118 S.Ct. 1839 (1998).

[42] *Id*. at 1038-39. *Accord, Monterey Mechanical Co. v. Wilson,* 125 F.3d 702, 711 (9th Cir. 1997) ("non-discriminatory outreach program, requiring that advertisements for bids be distributed in such a manner as to assure

23. These precedents suggest that, to comply with the Constitution, recruitment measures must be inclusive; they must not be administered in such a way so as to exclude or deny information to qualified applicants on the basis of race or any other suspect classification.[43] Further, they should impose no greater burdens on non-minority firms than minority firms.[44] The EEO program requirements proposed herein are crafted as outreach programs that would avoid unequal treatment based on race or gender and would not pressure broadcasters to adopt racial preferences in hiring. In addition, they would not provide preferential information to minorities or impose greater burdens on non-minorities than minorities. Accordingly, we believe that they would be constitutional. We seek comment on these views.

2. Statutory Authority for EEO Program Requirements and Anti-Discrimination Rule

a. Broadcasting.

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

25. We believe there is ample statutory authority for us to retain our EEO anti-discrimination rule and, consistent with the constitutional standards established in *Lutheran Church*, to promulgate new EEO outreach requirements. First, as discussed below, we believe that Congress has ratified the Commission's authority to adopt EEO rules for broadcasters. Second, we believe that we have authority to adopt rules fostering equal employment in the broadcast industry in order to further the statutory goal of fostering minority and female ownership in the provision of commercial spectrum-based services, reflected in Section 309(j) of the Act. Finally, as previously recognized by the Supreme Court, we continue to believe that equal employment of minorities and women furthers the public interest goal of diversity of programming, both independently and by enhancing the prospects for minority and female ownership. While the governmental interest in diversity of programming was held not "compelling" in *Lutheran Church* under strict scrutiny analysis, we believe it nevertheless provides a reasonable basis for the rules proposed below, which are limited to recruitment of minorities and women and could not reasonably be viewed as pressuring broadcasters to adopt racial

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that all persons, including women-owned and minority-owned firms, have a fair opportunity to bid," are not subject to strict scrutiny as long as they impose no greater burdens on non-minority firms than minority firms); *Ensley Branch, NAACP v. Seibels,* 31 F.3d 1548, 1571 (11th Cir. 1994) (characterizing minority recruitment efforts as "race-neutral" means of increasing minority employment of the kind required prior to imposition of racial preferences to remedy past discrimination); *Billish v. City of Chicago,* 962 F.2d 1269, 1290 (7th Cir. 1992), *vacated on other grounds,* 989 F.2d 890 (7th Cir.) *(en banc), cert. denied,* 510 U.S. 908 (1993); *Coral Const. Co. v. King County,* 941 F.2d 910, 923 (9th Cir. 1991), *cert. denied,* 502 U.S. 1033 (1992); *Shuford v. Alabama,* 897 F. Supp. 1535, 1552-54 (M.D. Ala. 1995) (even if recruitment measures specifically seek out minorities or women, they are not subject to heightened scrutiny under the equal protection clause because they do not exclude anyone on the basis of race; they only expand the pool of qualified applicants.) *See also Raso v. Lago,* 135 F.3d 11, 16 (1st Cir. 1998) (strict scrutiny is applied to racial classifications by the government that are "preferentially favorable to one race or another for the distribution of benefits").

[43] *See Shuford v. Alabama,* 897 F. Supp. at 1552-1554.

[44] *See Monterey Mechanical Co. v. Wilson,* 125 F.3d at 711-12.

preferences in hiring.

i. Congressional Ratification Based on Section 334 and Other Provisions

26. The Commission has administered EEO program requirements and anti-discrimination rules for over 25 years.[45] Over that time period, Congress has repeatedly expressed awareness of the rules and has not only acquiesced in them but has referred to them approvingly, thereby confirming the Commission's view that it has statutory authority to promulgate them. Indeed, Congress codified the EEO program and non-discrimination requirements as applied to television licensees when it adopted Section 334 of the Communications Act of 1934, as amended, 47 U.S.C. § 334. Section 334, added in 1992, provides that "the Commission shall not revise:"

> (1) the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply to television broadcast station licensees and permittees; or
>
> (2) the forms used by such licensees and permittees to report pertinent employment data to the Commission.[46]

27. The Conference Report indicates that this section "codifies the Commission's equal employment opportunity rules, 47 C.F.R. 73.2080" for television licensees and permittees.[47] Thus, as applied to television licensees and permittees, the Commission not only has statutory authority to continue its EEO rules in effect, the statute requires it to do so. Of course, the statute can only be enforced to the extent that it is constitutional. But we tentatively conclude the Commission has statutory authority to continue applying to television licensees the anti-discrimination requirement, and to adopt new outreach rules that do not pressure or encourage broadcasters to adopt racial preferences in hiring.

28. Moreover, while Section 334 does not codify the Commission's EEO requirements for radio broadcast licensees, we believe Congress has ratified the Commission's authority to promulgate equal employment rules for radio as well as television licensees. Since the Commission's statutory authority to regulate radio broadcast licensees is coterminous with its authority over television broadcast licensees under Title III of the Act, we believe Section 334 recognizes the Commission's authority to promulgate equal employment regulations for all broadcasters under its broad public interest mandate.[48] Congress was clearly

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[45] For a history and review of the Commission's broadcast EEO rules and policies, see *Report* in MM Docket No. 94-34, 9 FCC Rcd 6276, 6285-94 (1994) (*Report*).

[46] 47 U.S.C. § 334(a). This section was added as part of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 192-385, 106 Stat. 1460 ("1992 Cable Act").

[47] H. R. Rep. No. 862, 102d Cong., 2d Sess. 97 (1992).

[48] *See, e.g., Bob Jones University v. U.S.*, 461 U.S. 574, 599-602 (1983) (Congressional acquiescence in IRS denial of tax exempt status to racially discriminatory schools, both through congressional inaction and approving statements in committee reports, confirmed that IRS correctly interpreted statute); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-86 (1983) (long-standing judicial construction of remedial provision of securities law was ratified by congressional decision to leave provision intact when it adopted sweeping revision of the securities law); *U.S. v. Rutherford*, 442 U.S. 544, 553-54 (1979) (FDA interpretation of scope of its statutory authority as including drugs used by terminally ill patients was entitled to substantial deference because "agency's interpretation involves issues of

aware of the equal employment opportunity requirements for radio broadcast licensees and has never indicated that the Commission lacked authority to adopt them. Indeed, the House Commerce Committee Report on the bill that proposed the provision that ultimately codified the cable EEO requirements, explicitly confirmed the Commission's authority, stating that "[i]t is well established that the Commission has the authority to regulate employment practices in the communications industry."[49] Furthermore, Section 22(g) of the 1992 Cable Act required the Commission to report to Congress on "the effectiveness of [the Commission's] procedures, regulations, policies, standards, and guidelines in promoting equality of employment opportunity and promotion opportunity, and particularly the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting the congressional policy favoring increased employment opportunity for women and minorities in positions of management authority." The Commission was required to include in that report "such legislative recommendations to improve equal employment opportunity in the broadcasting and cable industries as it deems necessary." We do not believe that Congress would have directed the Commission to review the effectiveness of its broadcast and cable EEO policies and regulations then in effect, and recommend whether further legislative action was necessary, had Congress not believed that those policies and regulations were within the Commission's lawful authority.

29. Congressional ratification as a source of statutory authority, based on Section 334 and congressional acquiescence in the Commission's long-standing EEO rules, is bolstered by several congressional revisions of the Communications Act. Those revisions include the codification in 1984 of EEO rules applicable to cable operators and the strengthening of those rules in 1992, by, among other things, adding multichannel video program distributors to the cable entities covered by those rules. In codifying EEO rules for cable entities, including multichannel video programming distributors, in Section 634 of the Act, Congress confirmed the importance of EEO rules for the electronic media generally. Indeed, Congress explicitly acknowledged the existence of the Commission's broadcast and cable EEO rules and proclaimed that vigorous enforcement of those rules was necessary. Section 22(a) of the 1992 Cable Act provides:

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

30. The 1992 Act, which extended the cable EEO rules to include all multichannel video program

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considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives," even though Congress modified the statute in other respects).

[49] H.R. Rep. No. 934, 98th Cong., 2d Sess. 84-85 (1984). *See also* H.R. Rep. No. 628, 102 Cong., 2d Sess. 111-118.

[50] 1992 Cable Act, Section 22(a) (emphasis added). *See also* H.R. Rep. No. 934, 98th Cong., 2d Sess. 84-85 (1984) ("The Committee strongly believes that equal employment opportunity requirements are particularly important in the mass media area where employment is a critical means of assuring that program service will be responsive to a public consisting of a diverse array of population groups.")

distributors, thus indicates congressional intent to impose EEO requirements on all electronic program distributors. We believe it is implausible that Congress would have intended to leave broadcast radio licensees, alone among the electronic media, free of EEO requirements. Rather, we believe that Congress assumed that the Commission's regulations covered that base and that ample statutory authority for such regulations existed. The enactment of the minority preferences in Sections 309(i) and (j)[51] further indicates continuing congressional approval of policies favoring equal opportunity in the communications industry generally. Thus, Congress has not merely acquiesced in the Commission's initiatives to assure equal opportunity for minorities and women, it has amended the Act to strengthen and expand the reach of those policies. Accordingly, we believe Section 334 and other indications of congressional approval and ratification supply one basis for the statutory authority that the D.C. Circuit questioned in *Lutheran Church*, particularly for television, but also for radio.[52]

31. We also believe that the Congressional enactments and pronouncements discussed above make it clear that the Commission has authority to adopt and enforce *both* rules prohibiting discrimination and rules requiring broadcast and cable entities to conduct outreach in recruitment. In the seminal case *NAACP v. FPC*,[53] the Supreme Court could find nothing in the Federal Power Act or Federal Gas Act indicating that "the elimination of employment discrimination was one of the purposes that Congress had in mind when it enacted [that] legislation,"[54] and thus held that the Federal Power Commission's public interest mandate did not include prohibiting discrimination. In contrast, there is abundant evidence in the Communications Act and its legislative history that the FCC's mandate *does* include a directive to eradicate discrimination by Commission broadcast licensees and cable entities. Indeed, with respect to broadcast television and cable entities, including multichannel video programming distributors, the Commission is not only authorized to ban discrimination, it is *required* by statute to do so.[55]

32. Similarly, Congress has made it clear that the Commission has authority -- and is required in the case of broadcast television and cable entities -- to impose outreach-type recruitment requirements on broadcast and cable entities. Outreach requirements have been a prominent part of the Commission's EEO rules since 1969, and were a central feature of the EEO rules codified by Congress for cable in 1984 and broadcast television and multichannel video programming distributors in 1992.[56]

33. Furthermore, we believe that Congress has endorsed recruitment requirements for two distinct purposes: fostering diverse programming by increasing the number of women and minorities in positions that have an impact on programming decisions, *and* deterring racial, ethnic, and gender discrimination. Both are set forth as express purposes of the cable EEO rule amendments enacted in 1992. As noted above, Congress stated that EEO rules both "advance[] the Nation's policy favoring diversity in the expression of views in the electronic media" and are "required in order to effectively deter racial and gender discrimination."[57] Congress

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51 47 U.S.C. § 309(i), (j). *See also* 47 U.S.C. § 151.

52 *See Lutheran Church* at 24.

53 425 U.S. 662, 670 (1976).

54 *Id.* at 670.

55 *See* 47 U.S.C. § 334, 554.

56 *See* 47 U.S.C.§ 334(a)(1) and 47 C.F.R. §73.2080(b),(c); 47 U.S.C. § 554(c), (d).

57 1992 Cable Act, Section 22(a).

plainly thought it important to increase the number of minorities and women in upper-level positions in order to further the national policy favoring the expression of diverse views and perspectives in the electronic media.[58]

34. It is also clear from the cable EEO rules codified in Section 634 of the Act that Congress intended the Commission to enforce recruitment and other EEO requirements with respect to *all* job categories, including such categories as "semiskilled operatives" and "unskilled laborers," in order to effectively deter hiring discrimination. Section 634(d)(1) required the Commission to amend its cable EEO rules, including its recruitment rules, to "promote equality of employment opportunities for females and minorities in each of the job categories itemized" in section 634(d)(3). We believe that it did so because it concluded that broad EEO rules are necessary to combat discrimination, as reflected in the Congressional findings set forth in the 1992 Cable Act. The new recruitment requirements that we propose today are intended to advance both of these Congressional purposes.[59]

35. We note that Section 334 prohibits the Commission from revising its EEO regulations and forms as applied to television stations. We believe that this provision does not prevent us from establishing new EEO outreach program provisions and forms for television licensees to the extent necessary to make those rules constitutional under *Lutheran Church*. A contrary interpretation of the statute would frustrate the clear Congressional intent that television licensees be subject to EEO requirements, since it would prevent us from establishing new EEO regulations for television stations that address the concerns raised by the court in *Lutheran Church*.

ii. Section 309(j)

36. Pursuant to Section 309(j) of the Communications Act, as amended in 1997, the Commission must award all commercial broadcast licenses for which mutually exclusive applications are filed, except those in three exempt categories,[60] by competitive bidding.[61] In implementing the competitive bidding requirements the Commission must:

> promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women . . . .[62]

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[58] *See* 1992 Cable Act, Section 22(a)(2). *See also NAACP v. FPC,* 425 U.S. at 670 n.7; Section III.A.2.a.iii *infra*.

[59] *See* Section III.B *infra*.

[60] Public safety, noncommercial broadcast, and initial digital television service licenses are exempt from the competitive bidding requirement. 47 U.S.C. § 309(j)(2).

[61] 47 U.S.C. § 309(j), as amended by Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997). The Commission also has discretion to use competitive bidding procedures for certain broadcast applications. The Commission has implemented this provision. *First Report and Order in MM Docket No. 97-234*, GC Docket No. 92-52, GN Docket No. 90-264, FCC 98-194, released August 18, 1998.

[62] 47 U.S.C. § 309(j)(3).

Further, in crafting competitive bidding regulations, the Commission must promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women," and ensure that those entities "are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures . . . ."[63] The reference to tax certificates, a preferential tax treatment available upon the sale of broadcast stations and cable systems to minorities, suggests that Congress did not intend to limit the Commission to measures directly associated with the bidding process.

37. Thus, Section 309(j) establishes a congressional policy favoring the dissemination of licenses among a wide variety of applicants, including members of minority groups and women, as part of a broad policy of fostering economic opportunity.[64] We believe that Section 309(j) provides statutory authority to implement new EEO rules because the statutory goal of fostering minority and female ownership in the provision of commercial spectrum-based services would be furthered by non-discrimination and recruitment requirements, which are designed to foster equal employment of minorities and women in the broadcast industry. Work experience in the broadcasting industry permits minorities and women to obtain the skills needed to acquire and run a broadcast station, may help them in becoming aware of ownership opportunities, and may facilitate obtaining capital, as financing sources are generally more willing to work with borrowers that have a track record in the business they seek to own and operate.

38. We have previously concluded that there is a link between the policies furthered by our EEO rules and the promotion of ownership by minorities and women.[65] Congress similarly appears to have concluded that such a link exists. In codifying the cable EEO requirements in 1984, the House Commerce Committee asserted that "a strong EEO policy is necessary to assure that there are sufficient numbers of minorities and women with professional and management level experience within the cable industry, so that there are significant numbers of minorities and women with the background and training to take advantage of existing and future cable system ownership opportunities."[66] We urge commenters to submit evidence establishing the nexus between employment opportunities for minorities and women and ownership opportunities.

iii. Public Interest Mandate to Promote Programming Diversity

39. The Commission has broad authority under the Communications Act to regulate and license

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[63] 47 U.S.C. § 309(j)(4).

[64] *See also* 47 U.S.C. § 257 (requiring the Commission to conduct a rule making proceeding to identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services" and directing the Commission to "promote the policies and purposes of this Act favoring diversity of media voices" in carrying out its Section 257 responsibilities.)

[65] *See, e.g., Report* in MM Docket No. 94-34, 9 FCC Rcd 6276, 6319 (1994) (noting that "management positions ... are often stepping stones to ownership."); *Regulatory Treatment of Mobile Services, Third Report and Order*, 9 FCC Rcd 7988, 8097 (1994) ("EEO rules for commercial mobile radio service (CMRS) providers are appropriate and necessary to achieve the statutory goal of increased ownership opportunities for minorities and women in spectrum-based services. By having EEO rules that apply to all CMRS providers, we will provide increased communications experience for minorities and women. This experience will, in turn, enable them more easily to become owners of communications enterprises.")

[66] H.R. Rep. No. 934, 98th Cong., 2d Sess. at 84-85 (1984).

broadcasters as the public convenience, interest, or necessity require. This authority is based on several provisions of the Act. For example: (1) Section 301 of the Act provides that no person can transmit radio signals in the U.S. except under a license granted by the Commission;[67] (2) Section 303 authorizes the Commission to license and regulate use of the radio spectrum "as public convenience, interest, or necessity requires," to "generally encourage the larger and more effective use of radio in the public interest," and to enact regulations to carry out the provisions of the Act;[68] (3) Section 307 directs the Commission to grant and renew station licenses "if public convenience, interest, or necessity will be served thereby;"[69] and (4) Section 309 directs the Commission to determine whether the "public interest, convenience, and necessity will be served" by the grant of applications for licenses, license modifications, or license renewals.[70]

40. Moreover, Congress amended Section 1 of the Communications Act in 1996 to make it clear that the Commission's mandate is to regulate interstate and foreign communications services so that they are "available, so far as possible, to all people of the United States, *without discrimination on the basis of race, color, religion, national origin, or sex...*"[71] We believe that this recent amendment, which applies to all entities subject to the Communications Act,[72] amplifies the Commission's general public interest mandate to ensure that broadcasting and other programming services serve the interests and needs of all sectors of the community, and indicates more specifically that such services shall be provided to all Americans without discrimination on the basis of race or any other suspect classification.

41. The Commission believes that a broadcaster can more effectively fulfill the needs of its community, *i.e.*, serve the public interest, when it maintains a program that provides equal employment opportunity to all applicants and employees regardless of race, ethnic, origin, color, or religion. Such a program furthers one of the Commission's main objectives, to promote diverse programming--programming that reflects the interests of minorities and women in the local community, as well as those of the community at large. As the

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[67] 47 U.S.C. § 301.

[68] 47 U.S.C. § 303(f), (g), and (r). The Supreme Court has held that Section 303(r) confers authority on the Commission to issue regulations codifying its view of the public interest licensing standard, so long as that view is based on consideration of permissible factors and is otherwise reasonable. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 793 (1978).

[69] 47 U.S.C. § 307(a), (b).

[70] 47 U.S.C. § 309(a). Section 310(d) imposes the same standard on the grant of assignment and transfer applications. *See* 47 U.S.C. § 310(d). The 1996 Act modified the procedures for processing broadcast renewal applications and refined the standard to be applied by the Commission in determining whether to grant renewal applications. Prior to enactment of the 1996 Act, the grant of renewal applications was controlled by the general "public interest, convenience, and necessity" standard set forth in Section 309(a). As amended in 1996, the Communications Act directs the Commission to grant a broadcast renewal application if it finds, with respect to the station at issue, that the licensee has served the public interest, convenience, and necessity; the licensee has not committed any serious violations of the Act or the FCC's rules; and the licensee has not committed a series of violations of the Act or rules that constitute a pattern of abuse. 47 U.S.C. § 309(k). The 1996 amendment thus makes it clear that the public interest standard is broader in scope than compliance with specific provisions of the Communications Act or rules.

[71] 47 U.S.C. § 151, as amended (1997) (emphasis added) (italicized clause added by the 1996 Act).

[72] H.R. Rep. 104-458, 104th Cong., 2d Sess. at 143.

Commission stated in *Streamlining*, we do not assume that minority and female employment will always result in minority and female-oriented programming. Nor do we believe that all minorities or all women share the same viewpoints. Nonetheless, we believe that, as more minorities and women are employed in the broadcast industry, it is more likely that varying perspectives will be aired and that programming will be oriented to serve more diverse interests and needs.[73]

42. The Supreme Court has recognized that the FCC has statutory authority to regulate the employment practices of its licensees as a way of fostering diversity of viewpoints in programming. Such regulation, the Court stated, "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups."[74] In addition, in *Metro Broadcasting, Inc. v. FCC*,[75] the Supreme Court held that two minority ownership policies -- the award of an "enhancement" for minority ownership in comparative proceedings for new broadcast licenses and the minority "distress sale" policy -- were substantially related to the important governmental objective of "enhancing broadcast diversity," and thus survived an intermediate level of equal protection scrutiny. Although the *Adarand* decision reversed *Metro Broadcasting* to the extent that *Metro Broadcasting* held that federal racial classifications are subject to a less rigorous standard of scrutiny than state racial classifications, it did not undermine the Court's recognition that the Commission's statutory mandate includes fostering a diversity of views in the broadcast service.[76]

43. Thus, it is well established under *NAACP v. FPC*, *Metro Broadcasting* and Supreme Court decisions that preceded them,[77] that fostering diversity of viewpoints is a goal encompassed by the Commission's public interest mandate.[78] Moreover, the minority ownership policies at issue in *Metro*

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[73] *Streamlining*, 11 FCC Rcd at 5155-5156.

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

[75] 497 U.S. 547 (1990).

[76] According to the Court: "Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission. We have observed that "the 'public interest' standard necessarily invites reference to First Amendment principles." *Metro Broadcasting* at 567, *quoting FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978) and *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973).

[77] *See, e.g., FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795-800 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

[78] *See also Community Television of Southern California v. Gottfried*, 459 U.S. 498 (1983), which held that the FCC did not abuse its discretion when it declined to impose a greater obligation to provide special programming for the hearing impaired on a noncommercial licensee than a commercial licensee, even though the Rehabilitation Act of 1973 applies to the former but not the latter. The Court stated that the FCC cannot permit licensees to ignore the needs of particular groups within the viewing public, but held that the FCC's duty to enforce this obligation derives from the Communications Act, not other federal statutes. Thus, the Supreme Court acknowledged that the Commission's public interest mandate permits and perhaps requires it to determine whether its licensees are providing diverse programming targeted at all sectors of its community.

Broadcasting withstood intermediate scrutiny because the Court found they were "substantially related" to the statutory goal of promoting diversity of information and viewpoints on the air waves.[79] Thus, the Court affirmed the FCC's judgment that there was a nexus between rules fostering minority ownership of broadcast stations and the statutory goal of fostering diversity of viewpoints. Further, in *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*,[80] the D.C. Circuit recognized the Commission's authority to enforce both "affirmative action" and anti-discrimination rules in the license renewal context to advance its public interest mandate to foster diverse programming. The court held that the Commission had abused its discretion by unconditionally renewing a broadcast license where a substantial question of fact had been raised regarding whether the licensee had engaged in employment discrimination.[81]

44. In *Lutheran Church*, the court concluded that the Commission's broadcast EEO program requirements were not narrowly tailored to advance the stated interest in diversity because the requirements applied to low-level positions that lack influence over programming. However, although we request comment on this view below, it is our belief that program content is not determined solely by the individuals at the station with authority to select programming, but may also be influenced by interaction between these individuals and other station employees, which exposes the former to views and perspectives of the latter. Moreover, we believe that low-level positions provide a way for individuals with no communications experience, including minorities and women, to enter the broadcast and cable industries, which, in turn, could lead to higher-level positions of greater responsibility that could affect program decisionmaking and/or provide the experience desired by financial institutions in prospective loan applicants for ownership of entities in the broadcast and cable industries.

45. Accordingly, we invite comment as to whether there is a nexus between minority and female employment and diverse programming as well as how employees in various positions exert influence on programming decisions. We seek evidence, particularly empirical evidence, to support commenters' assertions with respect to this issue. Moreover, we seek comment and evidence on whether employment of minorities and women in some or all positions at a broadcast station furthers the goal of diversity of programming indirectly by enhancing the prospects for minority and female ownership. As discussed above, Section 309(j) of the Communications Act, as applied to broadcasters in 1997, establishes minority and female ownership of broadcast stations as an explicit statutory policy. A nexus between equal employment in the broadcast industry and diversity of ownership would support the adoption of EEO regulations.

b. Cable Entities, Including Multichannel Video Programming Distributors.

46. The court's decision in *Lutheran Church* did not reach our EEO rules for cable entities, including multichannel video programming distributors.[82] It is our belief that ample statutory authority exists for the

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[79] 497 U.S. at 569-600. *Cf. FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 793-802 (recognizing nexus between diversity of ownership generally and diversity of viewpoints and upholding FCC's broad authority to foster diversity of ownership).

[80] 595 F.2d 621 (D.C. Cir. 1978) (en banc).

[81] *Id*. at 628, 633-35. *See also National Organization for Women, New York Chapter v. FCC*, 555 F.2d 1002, 1017-1019 (D.C. Cir. 1977); *Black Broadcasting Coalition of Richmond v. FCC*, 556 F.2d 59 (D.C. Cir. 1977) (per curiam).

[82] 47 C.F.R. §§ 76.71 *et seq*.

continued enforcement of our cable EEO rules under Section 634 of the Communications Act.[83] Indeed, that provision requires us to enforce EEO rules against cable entities. Because the *Lutheran Church* decision did not apply to cable, it could be argued that we do not have authority to modify our rules to the extent that they reflect statutory requirements. However, we believe that such modification would be prudent in this situation where certain provisions in the cable EEO rules are similar to provisions in the broadcast EEO Rule found by the D.C. Circuit Court in *Lutheran Church* to be unconstitutional under the strict scrutiny standard. We believe our actions taken in this regard are consistent with the congressional intent reflected in Section 634(d)(4) that the Commission "amend its rules from time to time to the extent necessary to carry out the provisions of this section...after notice and opportunity for comment."[84] We believe Section 634 is appropriately read as giving us authority to modify our cable rules to the extent necessary to avoid constitutional problems. In addition, we note that Section 634(d)(2) of the Communications Act indicates that the Commission shall specify the terms under which a cable entity shall, "to the extent possible" comply with certain requirements in the Act. Therefore, we believe that the Commission has authority to eliminate the provisions of the cable EEO rules that were based on this part of the Act and are similar to those found unconstitutional by the court because it is not "possible" for the Commission to impose a requirement that a court has found unconstitutional.

c. Annual Employment Reports

47. On September 30, 1998, the Commission issued a Memorandum Opinion and Order ("MO&O") suspending the requirement for television and radio broadcast licensees and permittees to file Form 395-B until further notice while it considers adoption of new EEO rules that address the concerns of the court in *Lutheran Church* and makes any appropriate changes to its data collection procedures.[85] We tentatively conclude that the *Lutheran Church* decision does not undermine our authority to require broadcasters and cable entities to submit minority and female employment information to enable us to monitor industry employment trends.

48. In 1970, the Commission adopted a rule requiring each licensee or permittee of a broadcast station with five or more full-time employees to file an annual statistical profile report (FCC Form 395).[86] The Commission indicated that these data would be useful, among other things, to show industry employment patterns and to raise appropriate questions as to the causes of such patterns.[87] Similar reporting requirements

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[83] 47 U.S.C. § 554.

[84] 47 U.S.C. § 554(d)(4) states in full: The Commission may amend such rules from time to time to the extent necessary to carry out the provisions of this section. Any such amendment shall be made after notice and opportunity for comment.

[85] FCC 98-250 (released: September 30, 1998).

[86] *See Petition for Rulemaking To Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 23 FCC 2d 430 (1970) ("*Report and Order*").

[87] *Report and Order*, 23 FCC 2d at 431.

were extended to cable system operators in 1972[88] and to MVPDs in 1993.[89]

49. Since adoption of these reporting requirements, the Commission has used these data for the preparation of the broadcast and cable trend reports. The court in *Lutheran Church* did not conclude that the Commission lacks authority to collect statistical employment data to analyze industry trends, or to prepare annual trend reports. Indeed, the Commission has broad authority to collect information and prepare reports. *See, e.g.*, 47 U.S.C. §§ 154(k) (annual report to Congress); 308(b); 403. Also, the Commission is required by statute to collect employment data for the television and cable industries. *See* 47 U.S.C. §§ 334(a)(2) and 554(d)(3)(A). We continue to believe that the data derived from these reports serve as a useful indicator of industry trends. Knowledge of these trends enables us to monitor the effectiveness of, and need for, our EEO rules generally, and to make appropriate recommendations to Congress for legislative change. We emphasize, however, that this information will not be used for screening or assessing compliance with EEO outreach requirements, which the court found in *Lutheran Church* impermissibly pressures broadcasters to adopt racial preferences in hiring. We seek comment on these views and tentative conclusions.

B. Broadcast and Cable EEO Proposals

50. We seek comment on the following issues and proposals regarding changes to the Commission's cable EEO rules and the adoption of a new broadcasting EEO Rule and also invite commenters to submit their own suggestions or proposals.

51. Although the *Lutheran Church* decision did not directly affect cable entities, the Commission's cable EEO rules contain some of the same provisions that the court invalidated in *Lutheran Church*; therefore, to avoid possible constitutional problems, we propose new EEO provisions for both broadcasters and cable entities, including multichannel video programming distributors.[90] For the reasons discussed above, the Commission believes that Section 634 of the Act does not preclude us from making rule modifications necessary to ensure compliance with constitutional requirements. The Commission's cable EEO regulations consist of 47 C.F.R. §§ 76.71 (scope of EEO application), 76.73 (general EEO policy), 76.75 (EEO program requirements), 76.77 (EEO reporting requirements), and 76.79 (EEO records available for public inspection). Our cable proposal as set forth below amends only certain provisions of Section 76.75 to ensure that our EEO program requirements for cable entities under Section 634 of the Act are constitutional. Specifically, the cable proposal amends only paragraphs (b), (c), and (f) of Section 76.75, which concern recruitment, recordkeeping and self-assessment. *See* Appendix B.

52. Our proposed cable and broadcasting EEO rules address what the court in *Lutheran Church* cited as constitutional infirmities of the current broadcast EEO Rule. The court determined that the EEO Rule was subject to strict scrutiny because it pressured "stations to grant some degree of preference to minorities in hiring" and "to maintain a workforce that mirrors the racial breakdown of their 'metropolitan statistical area'."[91]

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

[89] *See Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992, Equal Employment Opportunities*, 8 FCC Rcd 5389 (1993) (*petitions for reconsideration pending*).

[90] *See* 47 C.F.R. § 76.71 *et seq.*

[91] *Lutheran Church* at 351-52.

Accordingly, our proposed EEO rules as set forth in Appendixes A and B emphasize recruitment outreach and make clear that, while they have a continued obligation to refrain from unlawful discrimination, broadcasting and cable entities are not required in any form or manner to hire or maintain a staff that reflects the racial or other composition of the community. Specifically, the new rules remove all requirements that broadcast licensees and cable operators compare their employment profile or employee turnover with the local labor force. In addition, the Commission will no longer compare individual broadcast licensees' or cable entities' employment profiles with the local labor force, even as a screening device.

53. Some licensees have complained that the EEO Rule is too vague to be clearly understood, too complex in its requirements, and offers little guidance as to what constitutes an adequate EEO program. We seek to eliminate these perceived problems. For example, we propose to clearly describe in our rules what records of EEO efforts must be kept and to detail how an entity should analyze its EEO program.

54. We propose to retain the cable and broadcasting rules' general EEO policy/program requirements, as outlined in 47 C.F.R. §§ 76.73(b) and 73.2080 (b), respectively. These require entities to: define the responsibility of management to ensure compliance with their policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance; inform employees of their EEO program and enlist their cooperation; communicate their EEO policy and employment needs to sources of qualified applicants without regard to race, color, religion, national origin, or sex, and solicit their recruitment assistance on a continuing basis; conduct a continuing program to exclude all unlawful forms of prejudice or discrimination based upon race, color, religion, national origin, or sex from personnel policies and working conditions; and conduct a continuing review of job structure and employment practices and adopt positive recruitment, job design, and other measures to ensure equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility.

55. We also propose to retain most of the cable and broadcasting rules' specific EEO program requirements, such as requiring an entity to: disseminate its equal employment opportunity program to job applicants and employees; review seniority practices to ensure that such practices are non-discriminatory; examine rates of pay and fringe benefits for employees and eliminate any inequities based upon race or sex discrimination; offer promotions of qualified minorities and women in a nondiscriminatory fashion to positions of greater responsibility; cooperate with any labor union in the development of programs to assure qualified minority persons or women of equal opportunity for employment; include a non-discrimination clause in union agreements; and avoid the use of selection techniques or tests that have the effect of discriminating against qualified minorities or women.

56. Our proposed rules also retain the Commission's prohibition against employment discrimination. With respect to broadcasters, we propose modifying the anti-discrimination prohibition so that religious broadcasters may establish religious belief or affiliation as a *bona fide* occupational qualification for their radio station employees. This would codify our decision in *Order and Policy Statement* for radio licensees and permittees. However, due to limitations imposed by Section 334, we will continue to allow television licensees and permittees to establish religious belief or affiliation as a *bona fide* occupational qualification under our current policy rather than through a rule.[92] *See Order and Policy Statement* at 6323.

57. Our proposal also stipulates that, in addition to continuing our prior policy of reviewing broadcast stations' EEO programs at renewal time, we could also review programs at any time on a random basis through audits. Cable entities are already subject to random audits, and we would continue to review cable EEO

[92] *See* discussion in paras. 26-27, *supra*.

programs every year as part of the annual certification process.

58. We propose to modify the Rule's requirement that we conduct mid-term reviews of television stations' employment practices. Section 334(b) of the Communications Act requires the Commission to conduct mid-term reviews of such entities. This review, in accordance with the legislative history of this section of the Act,[93] consisted solely of comparing a station's employment profile with the relevant labor force.[94] As this method of review was deemed impermissible by the court in the context of our broadcast EEO outreach rules, we believe we must modify this section of our EEO rule. Therefore, like our assessment of a licensee's EEO program at renewal time, the mid-term review will now focus on a television station's efforts to comply with the proposed EEO requirements without considering how the composition of its employment profile compares with the composition of the local labor force.

59. Anti-discrimination. Our proposed rules retain the Commission's prohibition against employment discrimination. Consistent with our longstanding policy, individual complaints of employment discrimination against broadcast licensees and cable entities would be resolved in the first instance by the Equal Employment Opportunity Commission ("EEOC") or other government agencies and/or courts established to enforce nondiscrimination laws.[95] The policy set forth in the *MOU* was developed primarily because Congress intended the EEOC to be principally responsible for the resolution of individual employment discrimination disputes and efforts on our part to separately resolve such disputes would result in unnecessary duplication. Thus, we would continue to forward individual discrimination complaints received at the Commission to the EEOC for processing. We would also continue to take cognizance of any final determinations of employment discrimination. Nevertheless, we would retain the discretion to consider allegations of discrimination prior to a final determination where the facts so warrant. We would also continue to examine any allegations of patterns of discriminatory behavior.

60. We invite comment on this proposal and whether our current practice should be changed in any way. For example, should we require that the Commission be contemporaneously notified of discrimination complaints filed with the EEOC? In *Streamlining*, the Minority Media and Telecommunications Council (MMTC) and 21 other organizations ("Joint Commenters") urged the Commission to consider all evidence which might be probative of discrimination or other EEO violations. They suggested that this type of evidence could include, among other things: evidence of a licensee's misconduct at other facilities, including other commonly owned stations and headquarters; evidence from individual allegations of discrimination in exceptional cases; evidence from nonresponsive answers or omissions on Form 396, in pleadings or in responses to Commission inquiries; evidence of failure to maintain records of EEO efforts; and evidence derived from logical inferences of potential discrimination drawn from a licensee's irrational explanations to the Commission for EEO nonperformance, *e.g.*, claims that minorities prefer not to work in a particular format or that minorities and women prefer occupations outside of broadcasting.[96] We request comment on whether we should consider any of these types of evidence to be probative of discrimination and, if so, what specific pieces of evidence in each category should lead us to this determination.

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[93] *See* House Committee on Energy and Commerce, H.R. Rep. No. 102-862, 102d Cong. 2d Sess. (1992), reprinted at Cong. Rec. H8308, H 8333-8334 (daily ed. September 14, 1992).

[94] *See* 47 C.F.R. § 73.2080(d).

[95] *See Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 51 Fed. Reg. 21798 (1986) ("*MOU*").

[96] Comments filed by Joint Commenters in response to *Streamlining* at 220-82.

61. Recruitment. Effective recruitment for job vacancies is important to ensure that all qualified applicants, whether minority or non-minority, male or female, are notified of, and have an opportunity to compete on a level playing field for, job openings. Historically, women and minorities have had difficulty in finding out about, or taking advantage of, opportunities in the communications industry. Therefore, we believe that active recruitment efforts are especially essential to afford women and minorities the opportunity to learn of available vacancies and to guard against the insular effects of word-of-mouth recruiting, in which only acquaintances of current station employees learn of openings, and applicants thus tend to be drawn from the same backgrounds as current employees. Our recruitment proposals would require cable and broadcast entities to make efforts to inform all potential applicants, including minorities and women, of vacancies, but will be carefully crafted so as not to pressure or encourage broadcasters to adopt racial preferences in hiring. We propose to add language to that effect in the rule. We believe that open and effective recruitment will benefit not only prospective job applicants, but also employers, who will have the broadest pool of qualified applicants from which to fill openings in their workforces.

62. In addition, we believe that open and effective recruitment will help prevent discrimination by counteracting the potentially discriminatory effects of failure to recruit broadly. In our view, in order to prevent discrimination, it is not sufficient for a broadcaster or cable entity merely to refrain from discriminating against anyone who has applied for a job at its company, particularly when its workforce is racially and ethnically homogenous. For example, sole reliance on word-of-mouth recruiting where an employer's workforce is predominantly white male, may have the effect, whether or not intentional, of discriminating against women and members of minority groups.[97] In order to effectively deter discrimination, broadcast and cable entities must make an effort to inform all potential job candidates of openings. The Commission's recognition of this fact was reflected in its decision in 1969 to adopt a formal rule requiring broadcasters to have an equal employment opportunity program, including outreach. In that decision, the Commission noted that such a rule was needed in part because reliance on a complaint procedure alone could not resolve general patterns of discrimination developed out of indifference as much as out of outright bias.[98] Similarly, Congress stated its belief in the 1992 Cable Act that the Commission was required to enhance its EEO rules because Congress had found, among other things, that effective deterrence of discrimination requires strict enforcement of EEO rules.[99]

63. We also believe that ensuring that minorities and women are informed of, and have an opportunity to apply for, openings at broadcast stations and cable entities will result in more diverse applicant pools which, in turn, will lead to a more diverse workforce, greater diversity of programming and a greater number of minorities and women with the type of experience in the broadcast and cable industries that is seen as a prerequisite to ownership in these industries. We do not currently list a specific recruitment proposal in either Appendix A or Appendix B other than to state that broadcast and cable entities are required to recruit for every vacancy, except for those jobs that are filled by internal promotion. We anticipate that the recruitment requirement will be set forth in greater detail at the Report and Order stage of this proceeding, but we wish to solicit and consider comment from all interested parties before settling on precisely what should be required.

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[97] *See also Walton Broadcasting Inc.*, 78 FCC 2d 857, 875 (1980), *recon. denied*, 83 FCC 2d 440 (1980).

[98] *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 18 FCC 2d 240, 242 (1969).

[99] 1992 Cable Act, Section 22(a)(3).

64. One approach to recruitment would afford entities the discretion to determine how to conduct recruitment efforts as long as they can demonstrate that their efforts attract a broad cross section of qualified applicants. This approach would be similar to the Commission's previous EEO requirements in that it affords entities greater flexibility to fashion their EEO programs. On the other hand, it does not afford the specificity of other proposals. We seek comment on this proposal. In addition, we specifically seek comment on the manner in which we could enforce this requirement. What sort of information might be sought in Form 396, the Broadcast Equal Employment Opportunity Program Report, which is filed with the broadcast renewal application, and Supplemental Investigation Sheets filed every five years by other entities?

65. Some broadcasters have complained in the past that our EEO rules did not provide enough guidance regarding what steps they had to take to ensure that they were in compliance. To afford more guidance to broadcasters and cable entities, we could require them to take specific steps, such as to use a minimum number of recruiting sources, to fill each job vacancy. For example, broadcasting and cable entities could be required to recruit for all vacancies by using a certain number of national and/or local recruiting sources, *e.g.*, at least six. A specified number of the sources (*e.g.*, three) could be general recruiting sources and a specified number *(e.g.*, three) could be minority and female specific sources. We could require that at least one of the three specific sources would be minority and at least one would be female. To ensure productivity of sources, entities could be required to substitute a new minority or female specific source if its current minority/female source failed to refer any minority/female applicants for a specified number (*e.g.*, three) of consecutive vacancies. Although entities could use employee or client referrals, we would not count such referrals as one of the minimum sources. In this way, broadcasters and cable entities could not rely exclusively on inside or "word-of-mouth" referrals which may result in an employment environment open predominantly to employees and their friends, thereby possibly excluding minorities and women. This approach would afford clarity about exactly what is required to satisfy the recruitment rule. It would be rather mechanical, however, and thus may penalize an entity that does not follow the rule even where the entity's recruiting efforts attract a broad cross section of qualified applicants for consideration.

66. A variation of this approach would be to require entities to use a specific number of recruitment sources, but tailor the number of sources required to the size of the local minority labor force. For example, entities might be required to use fewer sources if their employment units were located in an area with a small minority labor force. While the approach would still give clear guidance to regulatees regarding recruitment measures that are required, it would adjust those requirements to some extent to reflect the greater EEO efforts that may be warranted of broadcasters whose stations are located in areas with a high percentage of minorities in their local labor forces. We seek comment on this proposal. How could we tailor this proposal to apply to the recruitment of women, who have a substantial presence in most, if not all, labor forces?

67. Under any of these proposals, we propose not to consider jobs filled by internal promotion as a vacancy for which recruitment would be necessary. Moreover, since we do not require parity or other measure of an entity's workforce when compared with the composition of the local labor force, recruiting efforts should be continuous, even when entities believe that they have already achieved a diverse workforce. We stress that there is no maximum, minimum, or even optimal level of diversity in employment. Our objective is to ensure that all qualified potential candidates for a position, no matter where they live or whom they know, are informed of openings.

68. We solicit comments on these and any other ways in which we can encourage entities to expand their pools of qualified applicants without creating any incentives to prefer minority and female applicants over other applicants. For example, what, if any, should be the minimum number of recruitment sources that an entity should contact? If we require that an entity contact a combination of general and minority and female specific sources, *see* para. 65, what types of sources should be considered general and what types should be

considered minority and female specific? Should we require greater recruitment efforts, *e.g.*, the contacting of more sources, from broadcasters who own a large number of stations? Should we apply our prior standard which exempted a broadcaster from filing EEO information with respect to minorities when minority group representation in its metropolitan statistical area or county constituted less than five percent in the aggregate?[100]

69. Traditionally, the review of licensee efforts to recruit and attract females and minorities has encompassed all full-time positions because, as discussed above, it is our belief that all positions may potentially influence programming. We propose to continue this policy. However, we invite comment on whether recruitment efforts should be limited to upper-level positions in view of the court's reasoning in *Lutheran Church* that employees in lower-level positions cannot influence program diversity. Should it be even more restricted, to only those positions that have a direct influence on station programming, in light of the court's reasoning?

70. Religious Broadcasters. In keeping with *Order and Policy Statement*, we believe it appropriate to codify in our rules that religious broadcasters may establish religious belief or affiliation as a *bona fide* occupational qualification for all radio station employees. We shall also consider in this proceeding the petition for reconsideration and related pleadings filed with respect to the *Order and Policy Statement* because we are proposing to codify the decision announced in *Order and Policy Statement* as part of our broadcast EEO Rule for radio station licensees and permittees. However, television station licensees and permittees will continue to be covered under *Order and Policy Statement*. With respect to television station employees, we will continue to allow religious broadcasters to establish religious belief or affiliation as a *bona fide* occupational qualification under *Order and Policy Statement*, rather than a rule, due to the limitations imposed by Section 334.

71. Religious broadcasters who establish religious affiliation as a bona fide occupational qualification for any job position would not be required to comply with specific recruitment requirements for that position, but would be expected to make reasonable good faith efforts to recruit minorities and women who are qualified on the basis of their religious affiliation. As to any position for which religious belief is not made a qualifications requirement, the licensee would be required to fill that position pursuant to recruitment requirements adopted for all broadcasters. We emphasize that when vacancies occur, religious broadcasters will still be required to make hiring decisions without discrimination on the basis of race, color, national origin or gender. Further, we propose to adopt the definition of "religious broadcaster" as outlined in *Order and Policy Statement* as part of the anti-discrimination section of the broadcast EEO rule. Accordingly, a religious broadcaster would be defined as a licensee that is, or is closely affiliated with, a church, synagogue, or other religious entity, including a subsidiary of such an entity. Should a question arise as to whether a broadcaster falls under this definition, we propose to make an individual determination based upon an evaluation of the religious entity's characteristics, including whether the entity operates on a non-profit basis, whether there is a distinct religious history, and whether the entity's articles of incorporation set forth a religious purpose. We invite comment on all aspects of our proposal.

72. Self-Assessment. We believe broadcasters and cable entities should continue to analyze their EEO programs on an ongoing basis. We request comment on how often such analysis should occur and how we should enforce it. We propose that broadcasters submit a statement in their EEO Program Report (Form 396), filed as part of their renewal applications, detailing their analysis for the 12 months prior to filing of their renewal application. Cable entities would submit the same statement with their Form 395-A Supplemental

[100] We recognize that this factor may not necessarily apply to the recruitment of women, given that women typically represent about half of the labor force of every metropolitan statistical area regardless of size.

Investigation Sheet, filed every five years with the Commission, detailing a 12 month analysis of their EEO program. Consistent with the possibility that, in the future, entities may file these forms with the Commission electronically, the forms, including EEO Program Reports, may require filers to answer a series of questions with a "yes" or "no" response. We also seek comment on the following questions. What should be the focus of the analysis? What should it include? What should it exclude? We propose that an entity be required to analyze its efforts to recruit, hire and promote in a non-discriminatory fashion and address any difficulties in implementing its EEO program. Accordingly, such analysis could include efforts to cooperate with any existing union in the development of EEO programs, to review seniority practices for non-discrimination, to assess the productivity of recruiting sources, to examine employee pay and benefits for non-discrimination, to utilize media for recruitment purposes in a manner that contains no indication of a preference for one race, ethnic origin or sex over another, and to avoid the use of discriminatory selection techniques or tests. An analysis would not include the use of employment profiles to determine the adequacy of EEO efforts. If the forms require filers to answer a series of questions requiring a "yes" or "no" response, what types of questions should be asked?

73. Recordkeeping. We propose to continue requiring broadcasters and cable entities to retain records to prove that they have made good faith efforts to broaden their applicant pools for all vacancies. Such records could include, for example, listings of recruiting sources utilized for each vacancy and the dates the vacancies were filled; dated copies of all advertisements, bulletins and letters announcing vacancies; and compilations totaling the race, ethnic origin, and gender of all applicants generated by each recruiting source according to vacancy. While recordkeeping and self-assessment are distinct concepts, we believe that recordkeeping is a vital component of self-assessment. If an entity does not keep adequate records, we believe that it cannot meaningfully assess the effectiveness of its EEO program. Further, without such records, the Commission is unable to ascertain whether an entity is making sincere efforts to recruit women and minorities into its applicant pools. Records of the race, ethnic origin, and gender of applicants are necessary so that entities can evaluate the productivity of their recruitment sources and change them, if necessary. We seek comments on these views and any other ways in which we can monitor efforts by entities to broaden their applicant pools to include qualified minorities and women without requiring or encouraging preferential hiring of any particular group of people.

74. Enforcement. We propose that enforcement occur throughout the license term as well as at renewal time for broadcasters. Since the terms of license for radio and television broadcast stations have been extended to eight years, we believe it necessary to conduct enforcement on an ongoing basis via random audits in order to ensure compliance. For cable entities, we propose to continue reviewing EEO programs every year as part of the annual certification process. Appropriate sanctions would be imposed for entities that violate the recruiting and recordkeeping requirements of our EEO rules, as discussed above. Accordingly, in keeping with the Court's reasoning in *Lutheran Church*, entities would be sanctioned for deficiencies in their recruitment and recordkeeping efforts and not for the results of their hiring decisions, subject of course to their duty to refrain from unlawful discrimination. In addition, we propose sanctions for failure to file a self-assessment statement.

75. We invite comment on this approach. Specifically, is the Commission's proposed enforcement adequate regarding recruitment of minority and female applicants and, if not, to what extent should changes be made? What should trigger enforcement review? In what manner should this review be conducted? Should the Commission look at the composition of applicant pools to evaluate the productivity of an entity's recruitment sources and whether the entity has taken action in a timely way to find replacements for unproductive sources? Should entities be required to certify that they replaced unproductive recruiting sources? If so, should we sanction those entities that make untruthful certifications and, if so, how? What level of increased enforcement would be necessary to maintain an adequate incentive for repeat violators to comply with

our EEO rules?

76. Mid-Term Review. As discussed above, because of the decision in *Lutheran Church*, we must develop another method for analyzing a television licensees' employment practices at mid-term. Therefore, we propose that television licensees submit a narrative statement, as previously described, midway through their license terms, as well as at the end of their license terms with their renewal applications. In view of the creation of new electronic application filing procedures, however, we may choose, instead of requiring a narrative submission, to create a form on which television broadcasters would provide pertinent information in a "yes" or "no" answer format.

77. Forms. In conjunction with our proposal to adopt new EEO rules, we propose to revise FCC Forms 396, 396-A, 395-A, 395-B, and 395-M. We believe that it is appropriate to eliminate all form sections concerning employment profile analysis, including comparisons with local labor force statistics and alternative labor force statistics. In addition, these new forms would no longer contain questions pertaining to the number of minority or female hires but would continue to request information concerning the total number of employees, as well as the number of minorities and women, who are employed (*e.g.*, on Form 395-B) and have been promoted (*e.g.*, on Form 396). We propose to request information concerning the total number of applicants received from each listed source, as well as the total number of minority and total number of female applicants received. If the new EEO rules focus on recruitment requirements for full-time positions, we propose to eliminate the requirement that broadcasting licensees report part-time employees on the Form 395-B, the Broadcast Station Annual Employment Report. Thus, we believe that we may delete the part-time employment grid from this form. Similarly, for this reason, we propose to require cable entities to report only full-time employees on Forms 395-A and 395-M, except for a listing of positions by job title, which is required by statute to include part-time and full-time.[101]

78. The reporting requirements must be crafted to reflect the recruitment requirements that we ultimately adopt in this proceeding. If we adopt the proposal requiring entities to contact a specific number of recruitment sources, we propose to change Form 396, the Broadcast Equal Employment Opportunity Program Report ("the EEO Program Report"), to require filers to provide a specified number of general sources and minority and female specific sources used when recruiting for each vacancy subject to the rules. The EEO Program Report would also require a licensee to certify whether it substituted a new minority or female specific source if its current minority/female source failed to refer any minority/female applicants for at least three consecutive vacancies. If we adopt the proposal allowing broadcasters the discretion to choose their own methods of recruitment as long as their applicant pools are diverse, then we would request information in Form 396 concerning the diversity of a station's applicant pools. Another change that we might make to Form 396 is to require a station with fewer than five full-time employees to report information concerning employment discrimination complaints filed against it. In keeping with the proposed new EEO requirements, the new Form 396 would require broadcasters to submit a statement detailing an analysis of their EEO programs for the 12 months prior to license expiration and may ask questions concerning what, if any, training or internship programs for minorities and/or women they have implemented. Cable entities may be required to file the same certification with their Form 395-A or 395-M Supplemental Investigation Sheet. As stated above, the questions on these revised forms may be framed in a "yes" or "no" format, consistent with electronic filing.

79. We believe we should still require broadcast and cable entities to provide annual workforce data on all positions in order to continue our monitoring of industry trends. Consequently, we propose that licensee and cable entities continue to submit annual workforce data for all jobs on Forms 395-A, 395-B, and 395-M.

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[101] *See* 47 U.S.C. § 554(d)(3)(A).

These employee statistics will not be used to assess EEO compliance. We invite comment on all aspects of the proposal to revise the FCC's EEO forms.

80. Delegated Authority. Section 0.283 of the Commission's Rules requires the Chief of the Mass Media Bureau to refer certain matters to the Commission for disposition. *See* 47 C.F.R. § 0.283. Specifically, Section 0.283(b)(1)(iii) directs all petitions to deny, informal objections and other petitions against television and radio broadcasting applications for new or modified facilities or for renewal, assignment or transfer of control to be referred to the Commission if "the applicant in question falls outside the applicable processing criteria in its employment of women and minorities." See 47 C.F.R. § 0.283(b)(1)(iii). Since use of the processing criteria, which involved a comparison of a station's employment profile with the local labor force, is inconsistent with the Lutheran Church decision (*see* discussion, para. 12 *supra*), we propose to amend this section by deleting its reference to the criteria. Accordingly, the phrase "or the applicant in question falls outside the applicable processing criteria in its employment of women and minorities" would be deleted in its entirety. *See* Appendix C. We seek comment on this proposal.

C. Proposals Incorporated From Streamlining Proceeding

81. In our pending proceeding in *Streamlining*, we sought comment regarding various proposals to streamline the Commission's EEO requirements with respect to certain broadcasters whose circumstances may justify this type of relief. These proposals included alternatives for reducing possible paperwork burdens on licensees who qualify for that relief, new incentives for the establishment of joint recruitment efforts, and revisions to the test by which stations are permitted to rely on an alternative labor force when analyzing their EEO efforts. We also sought comment on guidelines for imposing sanctions for EEO violations. As the Streamlining Proceeding concerned outreach portions of the Broadcast EEO Rule, which were declared unconstitutional by the court in *Lutheran Church*, we hereby terminate that proceeding except with respect to the pending petition for reconsideration of *Order and Policy Statement*. However, we will discuss below certain proposals originating in the streamlining proceeding that may still be viable.

82. Our review of the proposals outlined in *Streamlining* and described in comments responding to that proceeding reveals that several of the proposals are appropriate to set forth in this *NPRM*.[102] However, these proposals and responses to them were made prior to *Lutheran Church* and prior to the new proposals for changes to the EEO Rule that are presented in this *NPRM*. Therefore, in light of the change of circumstances since *Streamlining* was released and comments were filed in response, we will not incorporate the comments to *Streamlining* in this proceeding. Instead, we ask that commenters to the streamlining proceeding respond to the proposals set forth in this *NPRM*, indicating how, if at all, their opinions with respect to these proposals have changed. For example, do commenters still support or oppose these proposals and, if so, do they have the same reasons for their support or opposition? What new or additional reasons do they have for their positions concerning these proposals as a result of *Lutheran Church* and/or the new proposals presented in this *NPRM*?

[102] Although certain proposals arising from *Streamlining* are set forth and discussed in this proceeding, we believe that certain topics are rendered moot by the *Lutheran Church* decision. Labor force statistics are not proposed to be used as part of our EEO analysis. Thus, any streamlining proposals concerning this factor are moot, including changing the alternative labor force test and exempting a licensee from keeping detailed records of its EEO efforts if its employment profile meets a certain statistical employment benchmark. Finally, we believe that the forfeiture guidelines proposed in *Streamlining* are no longer viable as many of the criteria in the guidelines are no longer proposed to be used to assess a licensee's EEO program.

83. In *Streamlining*, we noted that broadcasters have expressed concerns that stations with small staffs or that are located in small markets have particular difficulty attracting and retaining minority employees because they have limited resources and difficulty competing for talent with larger stations in bigger markets.[103] We indicated there our goal of maintaining EEO requirements that are not unduly burdensome for such stations and, at the same time, ensuring an effective EEO enforcement program for the broadcast industry. We also invited comment on proposals designed to minimize undue burdens on stations generally irrespective of a station's staff or market size. We reaffirm these goals, and accordingly seek comment on several proposals to afford such relief. We note that the proposals set forth below are not intended to be exclusive. Rather, we encourage commenters to submit any other proposals that would limit undue paperwork burdens for all broadcasters while maintaining effective EEO industry oversight.

84. Small Stations. In *Streamlining*, we raised several qualifying factors that might entitle a station to receive administrative relief from EEO reporting and recordkeeping obligations, including the small staff size of a station, *e.g.*, 10 or fewer full-time employees, and the small size of the market in which a station is located. The assumption for making the former a qualifying factor for administrative relief was that stations with small staffs, such as those with 10 or fewer full-time employees, have fewer hiring opportunities and limited financial, personnel and time resources available for recruiting. The basis for making the latter a qualifying factor was that stations located in small markets may have difficulties competing for employees with stations in larger markets, which can offer higher salaries and greater career opportunities.

85. One form of administrative relief proposed in *Streamlining* was to exempt qualifying stations from EEO reporting and recordkeeping requirements, just as stations with fewer than five full-time employees were exempt under the prior EEO policy. Qualifying stations would be required to file only the first page of Form 395-B and Form 396-A, and the first two pages of Form 396, certifying that they qualify for relief. Such a change would require amending 47 C.F.R. § 73.3612, which currently requires a licensee or permittee of a broadcast station with five or more full-time employees to file an Annual Employment Report. One concern regarding this proposal is that it would reduce the amount of information that we currently collect to monitor employment trends in the broadcast industry, and thus give us an incomplete picture of those trends. We seek comment on the issue of whether stations with small staffs or stations in small markets should receive administrative relief from EEO reporting and recordkeeping requirements, and specifically on the administrative relief proposed in *Streamlining*.

86. We invite comment as to whether we can and should adopt such relief. In *Office of Communications of the United Church of Christ v. FCC*, 560 F.2d 529, 532 (2nd Cir. 1977), the court found that a Commission decision to change the employment threshold for required submission of detailed written EEO programs, from five or more full-time employees on a station's staff to 10 or more full-time employees, was arbitrary and capricious because the Commission had failed to provide a reasoned justification for departing from its prior precedent and policy. Therefore, if we decide, after reviewing the comments to this proceeding, that it is appropriate to change the EEO reporting employment threshold, we must set forth substantial justification for such a change. Accordingly, we request that commenters who favor this option provide ample evidence as to why this size station deserves this type of relief.[104] Second, unless specifically authorized by statute, an agency may not prescribe its own small business size standard unless, among other

[103] *See Report*.

[104] We note that the *NPRM*'s Initial Regulatory Flexibility Analysis also requests comment on this type of relief.

things, the proposed size standard is approved by the Small Business Administration.[105] Raising the employment threshold for EEO reporting and recordkeeping requirements may create a new definition of small business requiring approval from the Small Business Administration ("SBA") before doing so. Finally, implementation of these proposals as to television licensees and permittees may be barred by Section 334(a) of the Communications Act, which prohibits revision of EEO regulations and forms pertaining to such entities. We invite comment as to these issues.

87. Job Fairs. In *Streamlining*, we proposed that qualifying licensees be given the option of choosing to contact recruitment sources likely to refer qualified female and minority applicants for every vacancy or to commit to management-level, in-person participation in a minimum number of recruiting events every year, such as job fairs or on-campus interviewing at local schools. Licensees could also choose both options and could make their choice known on both Form 396 and Form 396-A.

88. Superduopoly. In comments filed in response to *Streamlining*, Joint Commenters proposed that the Commission declare that a superduopoly (three or more commonly owned radio stations in the same service -- AM or FM -- located in the same market) should be considered as one employment unit that would include not only all station employees but also the employees at the stations' local headquarters.[106] Joint Commenters' justification for this proposal was that, because many stations are becoming superduopolies, positions that may have been located at individual stations when they were stand alone stations, such as sales, promotion or programming, may be moved to a broadcaster's local headquarters, which were previously not regulated by the EEO Rule.[107] We note that, because of Section 334 of the Communications Act, discussed *supra*, this proposal could not be implemented for television stations.

89. Joint Commenters also proposed that superduopolies file complete 395-Bs for each of their stations and headquarters in the same market unless combined they have fewer than five full-time employees. Joint Commenters argue, among other things, that this reporting proposal would prevent a broadcaster from masking its failure to employ minorities at most stations by employing them at only one.[108] The Mass Media Bureau's current policy, as reflected in a 1994 Interpretive Ruling,[109] is that commonly owned stations located in the same market--that have at least one employee whose duties involve work for all stations equally--should report all employees of all stations on one station's form (two stations' form if an AM/FM combination is involved). In such a situation, broadcasters were instructed to indicate in the forms filed for the remaining stations that the stations' employees are reported with the employees of another station in the latter station's 395-B. This policy was developed because the data processing technology available to the Commission at that time did not allow for the employment information of more than one station to be reported on the same Form 395-B, except in cases involving an AM/FM combination. We anticipate that our data processing technology will, in the near

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[105] Section 3(a) of the Small Business Act, 15 U.S.C. § 632(a), as amended by Section 222 of the Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, § 222(b)(1), 106 Stat. 999 (1992), as further amended by the Small Business Administration Reauthorization and Amendments Act of 1994, Pub. L. No. 103-403, § 301, 108 Stat. 4187 (1994).

[106] Comments filed by Joint Commenters in response to *Streamlining* at 321-22.

[107] Comments filed by Joint Commenters in response to *Streamlining* at 95-96.

[108] Comments filed by Joint Commenters in response to *Streamlining* at 321-22.

[109] *Petition for Issuance of Interpretive Ruling Concerning FCC Form 395-B, Broadcast Annual Employment Report*, DA 94-553.

future, be able to accommodate the reporting of more than one station's information in this situation. Accordingly, we request comment on a proposal to require licensees to file one 395-B for all commonly owned stations in the same market that equally share at least one employee. We also request comment on an alternative proposal that would require licensee's to file one 395-B for all commonly owned stations in the same market even if they share no employees.

90. Joint Recruitment. In *Streamlining*, we requested comment on how best to award credit to licensees for participation in joint recruitment efforts, such as central recruitment sources, and minority training, internship and employment programs. We seek to encourage participation in these efforts because we continue to believe that, "by combining financial and personnel resources of other broadcasters or entities with resources for identifying qualified minority and female applicants, a broadcaster's administrative burdens in time and cost spent recruiting and keeping records will be substantially reduced while the effectiveness of its outreach will be increased."[110] Commenters should address how credit can be given for joint recruitment efforts under the proposals for a new EEO Rule.

91. We take this opportunity to encourage broadcasters, as well as cable entities, to voluntarily engage in these and other types of EEO efforts. For example, the Commission is familiar with two outreach programs which offer sound guidance for the type of programs broadcasters can design and in which they can participate. The Radio Advertising Bureau sponsors Radio Careers Workshops across the country which attract a significant number of applicants. Participating stations can access lists of applicants from these workshops. These lists provide information on applicants' experience, education, gender and race. The Broadcast Executive Directors Association ("BEDA") has developed a proposal for a Model Broadcast Careers Program Road Map. This program has several components including: 1) expanding education courses and experience opportunities; 2) educating stations in non-discrimination in employment and recruitment outreach; 3) recruitment outreach including posting job vacancies on web sites; and 4) promoting awareness of BEDA's Careers Program through newsletters, speakers' bureaus, career fairs and promotional announcements aired on participating stations. Examples of training and internship programs with which the Commission is familiar include a work/study program founded by the Foundation for Minority Interests in Media, Inc. and called "Media Careers for Minorities," which provides high school and college students with paid jobs in the broadcast and cable industries and college tuition, and a program sponsored by the Kaitz Foundation, which funds internships for minorities in cable. We believe that participation by broadcasters in such endeavors would provide benefits to the broadcaster independent of any potential regulatory credit that might accrue by, for example, making available to the broadcaster the largest pool of qualified applicants for a particular position.

IV. CONCLUSION

92. In this *NPRM*, we suggest and request comment on proposals to change the Commission's EEO rules and policies to be consistent with *Lutheran Church*. Pursuant to the remand of the court, we also request comment on our statutory authority to retain the anti-discrimination prong of our broadcast EEO Rule. Finally, we terminate *Streamlining*, MM Docket 96-16, except for the petition for reconsideration filed in response to *Order and Policy Statement*, which will be considered in this proceeding. We will also consider, in this *NPRM*, several proposals originating from *Streamlining*, concerning, among other things, administrative relief for small broadcasters and how to best credit broadcasters for participation in joint recruitment efforts.

V. ORDERING CLAUSES

[110] *Streamlining*, 11 FCC Rcd at 5170.

93. 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 *Notice of Proposed Rule Making* IS ADOPTED.

94. IT IS FURTHER ORDERED that MM Docket No. 96-16, *Streamlining Broadcast EEO Rule and Policies*, IS TERMINATED except with respect to the petition for reconsideration filed in response to *Order and Policy Statement*.

95. IT IS FURTHER ORDERED, That the Office of Public Affairs, Reference Operations Branch, shall send a copy of this *NPRM*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with the Regulatory Flexibility Act, *see* 5 U.S.C. § 605(b).

VI. ADMINISTRATIVE MATTERS

96. 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 January 19, 1999, and reply comments on or before February 18, 1999. 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).

97. 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 obtain 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.

98. 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. If interested parties want each Commissioner to receive a personal copy of their comments, they must file an original and nine copies. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth St., S.W.; TW-A306, Washington, D.C. 20554.

99. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554. Copies of comments and reply comments are available through the FCC's duplicating contractor: International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20037, (202) 857-3800.

100. Written comments by the public on the proposed and/or modified information collections are due on or before January 19, 1999. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the *Federal Register*. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications

Commission, Room C-1804, 445 12th St., S.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

101. Ex parte Rules. This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the rules. 47 C.F.R. § 1.1206(b), as revised. *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. *See* 47 C.F.R. § 1.1206(b)(2), as revised. Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

102. Initial Regulatory Flexibility Analysis. With respect to this *NPRM*, an Initial Regulatory Flexibility Analysis ("IRFA") is contained in Appendix D. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an IRFA of the expected impact on small entities of the proposals contained in the *NPRM*. Written public comments are requested on the IRFA. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis, we ask a number of questions in our IRFA regarding the prevalence of small businesses in the industries covered by this *NPRM*. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the *NPRM*, but they must have a distinct heading designating them as responses to the IRFA. The Office of Public Affairs, Reference Operations Division, shall send a copy of this *NPRM*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq*. (1981), as amended.

103. Initial Paperwork Reduction Act of 1995 Analysis. This *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 *NPRM*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *NPRM*; OMB comments are due 60 days from date of publication of this *NPRM* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

104. Additional Information. For additional information on this proceeding, please contact Hope Cooper, or Kathy Harvey, EEO Branch, Enforcement Division, Mass Media Bureau, at (202) 418-1450.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

BROADCAST EEO RULE

Part 73 of Title 47 of the U.S. Code of Federal Regulations, Section 73.2080, is proposed to be deleted in its entirety and replaced with the following:

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

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

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

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

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

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

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

(5) Conduct a continuing review of job structure and employment practices and adopt positive recruitment, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility.

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

(1) Recruit for every job vacancy in its operation. A job filled by an internal promotion is not considered a vacancy for which recruitment is necessary. Religious radio broadcasters who establish religious affiliation as a bona fide occupational qualification for a job position are not required to comply with these recruitment requirements with respect to that job position only, but will be expected to make reasonable, good

faith efforts to recruit minorities and women who are qualified based on their religious affiliation. Nothing in this section shall be interpreted to require a broadcaster to grant preferential treatment to any individual or group based on race, color, ethnic origin, religion, or gender.

(2) Analyze its efforts to recruit, hire and promote without discrimination on the basis of race, ethnic origin, color, religion, and gender and address any difficulties encountered in implementing its equal employment opportunity program. As part of its license renewal application, a station shall submit a statement detailing its analysis of such efforts for the 12 months prior to license expiration. Analysis should occur on an ongoing basis. A station's analysis shall include measures taken to:

(i) Disseminate its equal employment opportunity program to job applicants and employees;

(ii) Review seniority practices to ensure that such practices are non-discriminatory;

(iii) Examine rates of pay and fringe benefits for employees having the same duties, and eliminating any inequities based upon race, ethnic origin, color, religion, or sex discrimination;

(iv) Assess the productivity of recruiting sources;

(v) Utilize media for recruitment purposes in a manner that will contain no indication, either explicit or implicit, of a preference for one race, ethnic origin, color, religion or sex over another;

(vi) Offer promotions of qualified minorities and women in a nondiscriminatory fashion to positions of greater responsibility;

(vii) Where union agreements exist, cooperate with the union or unions in the development of programs to assure qualified minority persons or women of equal opportunity for employment, and include an effective non-discrimination clause in new or renegotiated union agreements; and

(viii) Avoid the use of selection techniques or tests that have the effect of discriminating against qualified minority groups or women.

(3) Retain records to prove that it has satisfied the requirements of (c)(1) and (2) above. Such recordkeeping shall include:

(i) Listings of recruiting sources utilized for each vacancy and the date the vacancy was filled;

(ii) Dated copies of all advertisements, bulletins and letters announcing vacancies; and

(iii) Compilations totaling the race, ethnic origin, and gender of all applicants generated by each recruiting source according to vacancy.

(d) *Mid-term review for television broadcast stations*. The Commission will conduct a mid-term review of the employment practices of each broadcast television station four years following the station's most recent license expiration date as specified in § 73.1020. Television licensees are required to submit a narrative statement, as described in paragraph (c)(2) of this section, four months before the date specified in the previous sentence.

(e) *Enforcement*. The Commission will review a station's EEO program at renewal time and may conduct random audits, including on-site audits, throughout the license term to enforce this Rule.

(f) *Sanctions.* The Commission may impose appropriate sanctions for any violation of this Rule.

APPENDIX B

CABLE EEO RULES

Subpart E -- Equal Employment Opportunity Requirements

Section 76.75 is proposed to be revised by amending paragraphs (b), (c) and (f), and adding paragraph (g), to read as follows:

§ 76.75 EEO Program Requirements.

* * * * *

(b) Recruit for every job vacancy in its operation. A job filled by an internal promotion is not considered a vacancy for which recruitment is necessary. Nothing in this section shall be interpreted to require a cable entity to grant preferential treatment to any individual or group based on race, ethnic origin, color, or gender.

(c) Retain records to prove that it has satisfied the requirements of (b) and (f). Such recordkeeping shall include:

(1) Listings of recruiting sources utilized for each vacancy and the date the vacancy was filled;

(2) Dated copies of all advertisements, bulletins and letters announcing vacancies; and

(3) Compilations totaling the race, ethnic origin, and gender of all applicants generated by each recruiting source according to vacancy.

* * * * *

(f) Analyze its efforts to recruit, hire, promote and use services without discrimination on the basis of race, ethnic origin, color, religion, and gender and explain any difficulties encountered in implementing its equal employment opportunity program. As part of its Form 395-A/395-M supplemental investigation, an employment unit shall submit a statement detailing its analysis of such efforts for the previous 12 months. Analysis should occur on an ongoing basis. A unit's analysis shall include measures taken to:

(1) Where union agreements exist, cooperate with the union or unions in the development of programs to assure qualified minority persons or women of equal opportunity for employment, and include an effective non-discrimination clause in new or renegotiated union agreements;

(2) Review seniority practices to ensure that such practices are non-discriminatory;

(3) Examine rates of pay and fringe benefits for employees having the same duties, and eliminating any inequities based upon race, ethnic origin, color, religion, age, or sex discrimination;

(4) Assess the productivity of recruiting sources;

(5) Utilize media for recruitment purposes in a manner that will contain no indication, either explicit or implicit, of a preference for one race, ethnic origin, color, religion, age, or sex over another; and

(6) Avoid the use of selection techniques or tests that have the effect of discriminating against qualified minority groups or women.

(g) The Commission may impose appropriate sanctions for cable entities not found to be in compliance with Sections (b), (c), or (f).

APPENDIX C

DELEGATED AUTHORITY RULE

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

§ 0.283 Authority delegated.

* * * * *

(b) * * *
(1) Petitions to deny, informal objections, and other petitions, directed against AM, FM, and TV applications for new or modified facilities, or for renewal, assignment or transfer of control, will be referred to the Commission if they:
(i) * * *
(ii) * * *
(iii) present documented allegations of failure to comply with the Commission's Equal Employment Opportunity rules and policies.

APPENDIX D

INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA),[111] 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 *Notice of Proposed Rule Making ("Notice").* 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 *Notice* provided above in paragraph 96. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. See 5 U.S.C. § 603(a). In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register. See id.

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

The D.C. Circuit court in *Lutheran Church - Missouri Synod v. FCC,*[112] held that the Commission's equal employment opportunity ("EEO") outreach requirements for broadcasters were unconstitutional and remanded to the Commission to determine whether we have authority to enforce an employment non-discrimination rule. The *Notice* seeks comment on proposed new EEO rules and policies for broadcast and cable entities, including multichannel video programming distributors ("MVPDs"), that are designed to be consistent with the *Lutheran Church* decision. We also request comment on our statutory authority to retain the anti-discrimination prong of our EEO rules. We invite comment on EEO rules which seek to ensure that broadcast stations and cable entities do not engage in discriminatory practices. In addition, our proposed rules would require broadcasters and cable entities to establish and maintain an EEO program designed to provide equal opportunity for minorities and women. Another proposal would grant administrative relief to small entities based on various criteria. One of the criteria proposed involves the number of employees at a station, *e.g.*, if a station has 10 or fewer full-time employees, it would be entitled to relief. The Commission's earlier attempt at implementing a similar proposal was declared arbitrary and capricious by the court in *Office of Communications of the United Church of Christ v. FCC*, 560 F.2d 529, 532 (2nd Cir. 1977) because the Commission had failed to provide a reasoned justification for departing from its prior precedent. Therefore, the Commission requests that commenters who favor this proposal provide ample evidence as to why this type of station deserves this type of relief. To accomplish the goals set forth above, the *Notice* proposes: (1) to initiate a new broadcasting EEO Rule and to change the Commission's cable EEO rules, that would emphasize recruitment outreach and discourage entities from preferring members of any racial, ethnic, or gender group in hiring; and (2) to permit administrative relief to small entities that meet proposed qualifying factors.

B. Legal Basis:

Authority for the actions proposed in this *Notice* 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.

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[111] 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).

[112] 141 F.3d 344 (D.C. Cir. 1998) (*"Lutheran Church"*), *rehearing denied*, September 15, 1998.

C. Recording, Recordkeeping, and Other Compliance Requirements:

The *Notice* proposes that broadcasters and cable entities be required to retain records to demonstrate that they have recruited for each hire. Such recordkeeping may include: listings of recruiting sources utilized for each vacancy; copies of all advertisements, bulletins and letters announcing vacancies; and compilations totaling the race, ethnic origin, and gender of all applicants generated by each recruiting source according to vacancy.

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.[113] Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. § 601(6). The RFA, 5 U.S.C. § 601(3), generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA"). Pursuant to 4 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."[114] The new rules would apply to broadcast stations and cable entities, including multichannel video programming distributors ("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

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[113] 5 U.S.C. § 604(a)(3).

[114] While we tentatively believe that the SBA's definition of "small business" greatly overstates the number of radio and television broadcast stations that are small businesses and is not suitable for purposes of determining the impact of the proposals on small television and radio stations, for purposes of this *Notice of Proposed Rule Making*, we utilize the SBA's definition in determining the number of small businesses to which the rules would apply. We reserve the right, however, to adopt a more suitable definition of "small business" as applied to radio and television broadcast stations or other entities subject to the rules proposed in this *Notice of Proposed Rule Making* and to consider further the issue of the number of small entities that are radio and television broadcasters or other small media entities in the future. *See Report and Order* in MM Docket No. 93-48 (*Children's Television Programming*), 11 FCC Rcd 10660, 10737-38 (1996), *citing* 5 U.S.C. § 601(3).

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 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. 13 C.F.R. § 121.104(d)(1). 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. 13 C.F.R. § 121.103(a)(1). The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. 13 C.F.R. § 121.103(a)(2). 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 proposed in this *Notice* will apply to television and radio stations. The Small Business Administration defines a television broadcasting station that has no more than $10.5 million in annual receipts as a small business.[115] Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.[116] Included in this industry are commercial, religious, educational, and other television stations. Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.[117] Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.[118]

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[115] 13 C.F.R. § 121.201, Standard Industrial Code (SIC) 4833.

[116] 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).

[117] *Id*.

[118] *Id*.; SIC 7812 (Motion Picture and Video Tape Production); SIC 7922 [Theatrical Producers and Miscellaneous Theatrical Services (producers of live radio and television programs].

There were 1,509 full-service television stations operating in the nation in 1992.[119] That number has remained fairly constant as indicated by the approximately 1,584 operating full-service television broadcasting stations in the nation as of October 1998.[120] For 1992[121] the number of television stations that produced less than $10.0 million in revenue was 1,155 establishments.[122] Thus, the proposed rules will affect approximately 1,584 television stations; approximately 77%, or 1,219 of those stations are considered small businesses.[123] 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.[124] 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.[125]

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.[126] A radio broadcasting station is an

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

[120] FCC News Release, Broadcast Station Totals as of October 30, 1998 (released November 18, 1998).

[121] 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, *supra* note 53, III.

[122] 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.

[123] We use the 77 percent figure of TV stations operating at less than $10 million for 1992 and apply it to the 1998 total of 1,584 TV stations to arrive at stations categorized as small businesses.

[124] *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.

[125] *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 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 (adopted October 22, 1998)

[126] 13 C.F.R. § 121.201, SIC 4832.

establishment primarily engaged in broadcasting aural programs by radio to the public.[127] Included in this industry are commercial, religious, educational, and other radio stations.[128] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.[129] However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another SIC number.[130] 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.[131] Official Commission records indicate that 11,334 individual radio stations were operating in 1992.[132] As of October 1998, official Commission records indicate that 12,448 radio stations are currently operating.[133]

The proposed 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.[134] This definition includes cable system operators, closed circuit television services, direct broadcast satellite services ("DBS"), multipoint distribution systems ("MDS"), 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.[135] Below we discuss these services to provide a more succinct estimate of small entities.

Cable Systems: The Commission has developed, with SBA's approval, its own definition of small cable system operators. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[136] 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.[137] Since then, some of those

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

[128] *Id.*

[129] *Id*.

[130] *Id*.

[131] 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.

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

[133] FCC News Release, Broadcast Station Totals as of October 30, 1998 (released November 18, 1998).

[134] 13 C.F.R. § 121.201 (SIC 4841).

[135] 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).

[136] 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).

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

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."[138] The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $520 million in the aggregate.[139] Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1,450.[140] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

MDS: The Commission has defined "small entity" for purposes of the auction of MDS as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years.[141] This definition of a small entity in the context of MDS auctions has been approved by the SBA.[142] The Commission completed its MDS auction in March 1996 for authorizations in 493 basic trading areas (BTAs). Of 67 winning bidders, 61 qualified as small entities.[143]

MDS also includes licensees of stations authorized prior to the auction. The SBA has developed a definition of small entities for pay television services, which includes all such companies generating $11 million or less in annual receipts.[144] This definition includes multipoint distribution systems, and thus applies to MDS licensees and wireless cable operators which did not participate in the MDS auction. Information available to us indicates that there are 832 of these licensees and operators that do not generate revenue in excess of $11 million annually. Therefore, for purposes of this IRFA, we find there are approximately 892 small MDS providers as defined by the SBA and the Commission's auction rules, and some of these providers may be subject to our amended EEO rules.

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138 47 U.S.C. § 543(m)(2).

139 47 C.F.R. § 76.1403(b) (SIC 4833)

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

141 47 C.F.R. § 21.961(b)(1).

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

143 One of these small entities, O'ahu Wireless Cable, Inc., was subsequently acquired by GTE Media Ventures, Inc., which did not qualify as a small entity for purposes of the MDS auction.

144 13 C.F.R. § 121.201.

DBS: As of October 1997, there were nine DBS licensees, some of which were not in operation. The Commission does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. Although DBS services requires a great investment of capital for operation, we acknowledge that there are several new entrants in this field that may not yet have generated $11 million in annual receipts, and therefore may be categorized as small businesses, if independently owned and operated.

An alternative way to classify small entities is by the number of employees. We estimate that the total number of full-service broadcast stations with 4 or fewer employees is 5,186.[145] Similarly, we estimate that in 1997, the total number of cable employment units with six or more full-time employees was 2,750, and that 1,900 cable employment units employed fewer than six full-time employees. Also, in 1997, the total number of other MVPDs employing six or more full-time employees was 725, and 225 such MVPDs employed less than six full-time employees.

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

This *Notice* solicits comment on a variety of alternatives discussed herein. Any significant alternatives presented in the comments will be considered. As an example, the *Notice* requests comment on whether we should grant administrative relief to stations with small staffs or in small markets. Finally, the *Notice* seeks comment on whether to raise the employment threshold for EEO reporting and recordkeeping requirements. This change may create a new definition of small business requiring approval from the SBA before doing so.

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.

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

**JOINT STATEMENT OF
FCC CHAIRMAN WILLIAM KENNARD
AND COMMISSIONER GLORIA TRISTANI**

**Re: EQUAL EMPLOYMENT OPPORTUNITY RULES AND POLICIES
(MM Docket No. 98-204, MM Docket No.96-16)**

Throughout its history, the United States has endured and overcome a host of social and economic challenges. Founded in the spirit of indomitable independence, and guided by principles of liberty, justice and equality, our nation has been challenged throughout its history to reconcile those lofty notions with some ugly political realities. From the abolition of slavery to women's suffrage, from the civil rights movement to reparations for Japanese-Americans interred during World War II, America has usually managed to find ways to do the right thing -- although not always at the right time.

Creating opportunity irrespective of race and gender in the mass media industries has not always been as American as apple pie. For too many years, minorities and women have not found opportunity in these industries -- industries that profoundly affect our culture. On the bright side, in recent years there has been significant progress.

In 1971, only 6.8 percent of upper-level broadcast jobs were held by minorities, and 6.9 percent were held by women. Recent reports indicate that minorities now hold 18.2 percent of upper level jobs and women hold 34.9 percent. Government played a significant role in this progress. Since 1969, the FCC has had rules that require broadcasters to reach out into their communities to provide equal employment opportunities.

After the Court of Appeals invalidated these rules earlier this year, several industry leaders stepped forward and pledged that they would continue to follow equal employment opportunity (EEO) principles regardless of whether legally required to do so. We commend those industry leaders who stepped forward. But there remains an essential role for government to play in ensuring that all industry participants will act to combat discrimination.

Why is this important? The mass media reflect our nation's culture, our ideals, and our aspirations, and is the vehicle by which the majority of Americans get the information upon which to make decisions and shape values. This is especially true for children, who spend an average of five hours each day in front of a television set. The notion that a medium so important and so influential in our society should not have the fullest participation of all segments of our society is simply unacceptable.

This issue is not just about jobs for historically underrepresented groups -- and the rules are not just important to minorities and women. No, the issue is whether we will ensure that the mass media reflect all of

society for the benefit of all of society. We believe that these principles are the bedrock of our democratic system of government and our way of life as a free and inclusive society.

The new EEO rules that we propose today address the concerns of the Court of Appeals. They will ensure that those entrusted with the responsibility to serve the public interest reach into their communities and create opportunity for talented men and women of all colors. These rules are essential to enable the Commission to combat discrimination in the marketplace. A licensee who has discriminated on the basis of someone's race, ethnicity or gender cannot demonstrate the character needed to be a public trustee.

We commend our fellow Commissioners, and the FCC staff, for their hard work in crafting these proposed rules to continue the important and unfinished work of ensuring equality of opportunity in a fashion that addresses the court's concerns.

Separate Statement
of
Commissioner Ness

Re: Equal Employment Opportunity Rules and Policies (MM Docket No. 98-204 and MM Docket No. 96-16)

Today we propose new rules intended to ensure that women and minorities continue to have a fair chance to be considered for employment and promotion at broadcast stations, cable systems, and other multichannel video programming distributors (MVPDs). I fully support this item but write separately to emphasize the following:

First, I reiterate my longstanding support for equal employment opportunity, as well as my view that voluntary efforts are critical if women and minorities are to be fully able to seek and obtain employment, training, and promotion in the mass media and telecommunications industries. Since I joined the Commission in 1994, I have vigorously advocated strong, but fair, enforcement of our rules. I also have encouraged broadcasters and cable operators voluntarily not only to hire, but also to train, qualified women and minorities for management. Ultimately, such steps will help open doors to senior management and, for some, ownership of media properties. Without such steps, we are destined to see a lack of diversity in the ownership and management of broadcast and cable enterprises.

Second, we have taken to heart the *Lutheran Church* **decision of the Court of Appeals for the District of Columbia and we are responding fully to the concerns of the court in that case. While I believe that, both as to its design and its application, the Commission's outreach rules complied with Constitutional standards, nonetheless, the Court has spoken. The new EEO proposals made today will not require licensees to measure their hiring record against labor force information and should not affect, in any way, their ability to hire the best qualified people. In response to the court's view that our comparison of the station's employment data against local workforce data led licensees "to hire with an eye toward meeting the numerical target," we have discontinued that comparison and have scrupulously sought to eliminate that potentiality from our new proposals.**

Finally, our EEO rules have never been -- and should not become -- the upper limit in this area. There is ample evidence that some leading broadcasters and cable operators will, indeed, take more aggressive steps on their own to enlarge their pools of qualified applicants. I was heartened that following the *Lutheran Church* **decision, several exemplary broadcasters publicly committed to continue, and expand upon, their recruitment and training efforts. These efforts work, as evidenced by the change in workforce makeup over the last 25 years. Inclusion of women and minorities in the operations of a broadcast station or cable system does make a positive difference -- a difference that strengthens not just the**

companies that they serve, but also the country at large.

SEPARATE STATEMENT OF MICHAEL K. POWELL

Re: Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of EEO Streamlining Proceeding (MM Docket Nos. 98-204 and 96-16).

I fully support this NPRM which looks for ways to revise the equal employment opportunity rules to be consistent with the holding of the D.C. Circuit in Lutheran Church.

It is important that we make such an effort. As a nation, we must be conscious of the barriers that exist for newcomers who wish for the opportunity to be full participants in the information age. If one believes, as I do, that the Constitution is not a complete bar to expanding opportunities for minorities and women, then we should not be afraid to forge ahead in search of effective, judicially sustainable tools -- no matter how difficult it might be to navigate a successful path. I wish to say a word about the basis on which I enthusiastically endorse our present effort.

Individuals that operate broadcast facilities pursuant to a license they obtain from the government (in effect from the people of the United States), must do so in the public interest. And, it is our statutory charge to ensure that they do so. The venerable public interest standard is, to my mind, vague and expansive and too often allows for excessive government intrusion, if not outright mischief. Over the years, there has been hot debate as to what the standard should encompass. I personally have often urged the adoption of guiding or limiting principles to constrain the standard's invocation. Nonetheless, of this I am sure: If the public interest 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. Discrimination is an insidious legacy that has unquestionably denied certain citizens equal opportunity to savor the fruits born by this great country. No one is entitled to rewards they did not earn. No one is entitled to jobs for which they are not qualified. But, they are entitled to an equal opportunity to vie for those rewards and to compete for those jobs. This NPRM suggests doing nothing more than that.

I recognize the genuine concern and anxiety with so-called "affirmative action" programs. To many, some of these programs have had the effect of mandating racial or gender equilibrium, under the banner of "diversity," to the detriment of able members of the majority. The courts have shared that concern and acted to curtail many of these programs. Nonetheless, I affirmatively believe that the courts and the Constitution they interpret continue to abhor discrimination and sanction minimally intrusive programs designed to vigilantly guard against it. This explains the continued viability of Title VII and the Civil Rights Acts and, I believe, explains the programs we suggest today.

Equal opportunity can only be achieved if all individuals are given an equal chance to

develop the skills and experiences necessary to compete effectively for those opportunities. I think this is why our society, and the courts, have often focused so heavily on ensuring that minorities and women get fair access to education. I am somewhat dubious of the strained proposition in this NPRM that minorities and women in low level positions measurably and directly advance our goal of program diversity. However, the probability of greater diversity in programming is advanced if there is a greater stable of senior executives and owners working in the field.

Our proposed EEO rules focus on increasing the possibility that more minorities and women get the skills and experiences they will need to fairly earn the rewards of the industry, and the qualifications they need to effectively compete for positions of influence. This, more than anything, will strengthen the probability of a more diverse medium. Moreover, and importantly in the eyes of the courts, I believe efforts that focus on greater opportunity for developing skills and experience is likely to dampen the need or the impulse to mandate diversity through structural means that the have proven so objectionable.

Concurring Statement of Commissioner Harold W. Furchtgott-Roth

In the Matter of Review of the Commission's Broadcast and Cable EEO Rules and Policies and Termination of the EEO Streamlining Proceeding, MM Docket No. 98-204, MM Docket No. 96-16

I do not oppose the issuance of a Notice of Proposed Rulemaking (NPRM) to seek comment on, among other things, the statutory authority for, and the constitutional feasibility of, employment regulations for broadcasters. For one thing, the D.C. Circuit in *Lutheran Church* expressly contemplated that we take up the question of statutory authority for our non-discrimination rule. I cannot at this time, however, support the unnecessarily broad conclusions and the underlying reasoning contained in this item, or the expansive discussion of social policy set forth in the introduction.

As I have explained in other contexts, there are many hurdles to clear on this legal track before we can adopt sound EEO rules. *See In the Matter of Suspension of Requirement for Filing of Broadcast Station Annual Employment Reports and Program Reports* (released September 29, 1998). Among them is the necessity of showing a real, not just presumed, connection between the race or gender of station employees and the "viewpoint" that is ultimately expressed on the air. Nothing in this NPRM suggests that we have any such record, and yet the NPRM concludes that the contemplated rules would indeed further the goal of creating "varying perspectives," *supra* at page 2, on the air.

In addition, while it is true that the holding in *Lutheran Church* did not address and thus does not prohibit pure recruiting rules, it is not necessarily settled law that such rules are wholly free of Equal Protection implications, as the NPRM argues. *See supra* at para. 21. At least arguably, a person is "treated unequally" within the meaning of *Adarand* if they are not recruited for a job because of their race, while others are. Certainly, the Supreme Court has never suggested that the meaning of "race-based decisionmaking" changes depending on which particular stage of the employment process -- firing, retirement, promotion, hiring, interviewing, applying, or recruiting -- is at issue. I intend carefully to review the cases in this area before reaching any conclusions.

Furthermore, at this juncture -- the giving of notice of a proposed rulemaking -- I would not reach the tentative conclusions that we have statutory authority to issue either an anti-discrimination or a recruiting rule. *See supra* at paras. 25, 31. To my mind, this is an open question, and one on which I will be very interested in receiving comment; indeed, I encourage commenters to address this question.[146] I thus reserve judgment on this question, as well as the validity of the arguments pressed in support of authority in this NPRM, until we issue a final order.

[146]To the extent one could conclude that the Commission possesses statutory jurisdiction to adopt employment regulations, I would be interested in receiving comment on how such jurisdiction could be logically limited to broadcasters *per se*, as opposed to applying to all classes of Commission licensees.

Finally, I would not reach the tentative conclusion that, notwithstanding the decision in *Lutheran Church*, the Commission may continue to require the filing of race and gender employment statistics. *See supra* at para. 47. I likewise withhold judgment on that issue.