

SW., Room CY-B-402, Washington, DC 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or via e-mail qualexint@aol.com.

Synopsis of Second Report and Order

I. Introduction

1. In this *2R&O*, we adopt a new broadcast equal employment opportunity ("EEO") rule in response to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, rehearing den. 253 F.3d 732 (D.C. Cir. 2001), cert. denied, 122 S.Ct. 920 (2002) ("*Association*"). In addition, we amend our EEO rules and policies applicable to cable operators, and other multichannel video programming distributors ("MVPDs"), to conform them, as much as possible, to the broadcast EEO rule. The new broadcast EEO rule and modified EEO rules for MVPDs, adopted herein, emphasize outreach in recruitment to all qualified job candidates and ban discrimination on the basis of race, color, religion, national origin or gender. We are also issuing a *Third Notice of Proposed Rule Making* ("*3rd NPRM*") requesting comment as to the applicability of our rules with respect to part-time employees.

II. Background

2. We have administered regulations governing the EEO responsibilities of broadcast licensees since 1969, and of cable television operators since 1972. Our responsibilities in this area were codified with respect to cable television operators in 1984. They were further codified with respect to television broadcast licensees and extended to other MVPDs in 1992. In 1998, the U.S. Court of Appeals for the District of Columbia Circuit held that the Commission's EEO program requirements for broadcasters were unconstitutional in *Lutheran Church-Missouri Synod v. FCC*.

3. In 1998, we issued a *Notice of Proposed Rule Making* ("*NPRM*"), (63 FR 66104, December 1, 1998), for the purpose of adopting EEO rules for broadcast licensees and MVPDs consistent with the Court's decision in *Lutheran Church*. In 2000, we adopted new EEO program requirements for broadcasters, *Report and Order* ("*R&O*"), (65 FR 7448, February 15, 2000). Substantially the same program requirements were applied to MVPDs. The Commission explained that the new rules required more "than merely refraining from discrimination." They also required broadcasters and MVPDs "to reach out in recruiting new

employees beyond the confines of their circle of business and social contacts to all sectors of their communities [because] * * * repeated hiring without broad outreach may unfairly exclude minority and women job candidates * * *." The Commission concluded that nondiscrimination in hiring was not enough when not all potential applicants have had a fair opportunity to apply. "Outreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process."

4. The new rule contained two primary requirements—a prohibition on discrimination based on race, color, religion, national origin or gender in hiring, and a requirement that broadcasters reach out in recruiting new employees to ensure that all qualified individuals had an opportunity to apply for and be considered as job candidates. The core of the recruitment requirement was that broadcasters widely disseminate information concerning all job vacancies. The Commission concluded that this basic requirement "is essential to meaningful outreach." The Commission left it largely to broadcasters' discretion concerning how they would fulfill this requirement, so long as their procedures were sufficient to ensure wide dissemination of information about all job openings to the entire community.

5. In addition to the basic requirement of wide dissemination of information concerning job openings, the new rule provided broadcast licensees with two recruitment options. Under "Option A," they were required to undertake two types of supplemental recruitment measures. The first measure required licensees to provide notification of job vacancies to any recruitment organization that requested such notice from the broadcaster. The second supplemental measure under Option A required broadcasters to participate in additional recruitment activities beyond the traditional recruitment that occurs with individual vacancies. These additional measures were to be selected from an open-ended menu of types of activities that included: Job fairs, job banks, scholarship programs, and community events related to employment opportunities in the industry, among others. Broadcasters were permitted to comply with the supplemental requirement by participating in activities other than the listed ones so long as they were designed to disseminate information about employment opportunities to

candidates who might otherwise not learn of them. Broadcasters who selected Option A were required to maintain, but not routinely submit to the Commission, records documenting their compliance with the wide dissemination and supplemental recruitment requirements.

6. The Commission also adopted an "Option B" for recruitment that permitted licensees to forego the supplemental recruitment measures required under Option A and to design their own outreach program to suit their needs, as long as they could demonstrate that their program is inclusive, i.e., that it widely disseminated job vacancies throughout the local community. The court held, however, that Option B was unconstitutional under the equal protection component of the Due Process Clause of the Fifth Amendment. The Commission filed for hearing and rehearing *en banc*, arguing that Option B was not essential to achieving its goal of ensuring that broadcasters engage in broad outreach in recruiting new employees and that it had made plain its intent that Option B be severable. The court denied rehearing.

7. We issued the *Second Notice of Proposed Rulemaking* ("*2NPRM*"), (67 FR 1704, January 14, 2002) to request public comment on the adoption of new broadcast and MVPD EEO rules consistent with *Association*. An *En Banc* open hearing on the proposed rules was held before the full Commission on June 24, 2002. Having reviewed the suggestions contained in the comments submitted, both in writing and at the *En Banc* hearing, we are adopting new EEO rules that consist primarily of the elements of our former rules that the Court upheld as constitutional in *Association*, with modifications.

III. Summary

8. In this order, we adopt new outreach requirements applicable to broadcast and MVPDs. We are also retaining the nondiscrimination rules applicable to broadcasters and MVPDs.

9. The following is a summary of the three-pronged outreach requirement we are adopting as it relates to broadcasters:

Prong 1: Widely disseminate information concerning each full-time (30 hours or more) job vacancy, except for vacancies filled in exigent circumstances;

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

Prong 3: Complete two (for broadcast employment units with five to ten full-