

time employees or that are located in smaller markets) or four (for employment units with more than ten full-time employees located in larger markets) longer-term recruitment initiatives within a two-year period.

The following is a summary of recordkeeping and reporting requirements:

(a) Collect, but not routinely submit to the Commission: (i) Listings of all full-time job vacancies filled by the station employment unit, identified by job title; (ii) for each such vacancy, the recruitment sources used to fill the vacancy (including, if applicable, organizations entitled to notification, which should be separately identified), identified by name, address, contact person and telephone number; (iii) dated copies of all advertisements, bulletins, letters, faxes, e-mails, or other communications announcing vacancies; and (iv) documentation necessary to demonstrate performance of the Prong 3 menu options, e.g., job fairs, mentoring programs; (v) the total number of interviewees for each vacancy and the referral source for each interviewee; and (vi) the date each job was filled and the recruitment source that referred the hiree.

(b) Place in the station public file annually a report including the following: (i) A list of all full-time vacancies filled during the preceding year, identified by job title; (ii) recruitment source(s) used to fill those vacancies (including organizations entitled to notification of vacancies pursuant to Prong 2), including the address, contact person, and telephone number of each source; (iii) a list of the recruitment sources that referred the people hired for each full-time vacancy; (iv) data reflecting the total number of persons interviewed for full-time vacancies during the preceding year and the total number of interviewees referred by each recruitment source; and (v) a list and brief description of Prong 3 menu options implemented during the preceding year.

(c) Submit the station's EEO public file report to the Commission as part of the renewal application and midway through the license term for the Commission's mid-term review for those stations subject to mid-term review (television stations with five or more full-time employees and radio stations with more than ten full-time employees). EEO public file reports for the preceding two year period will be required because broadcasters have two years in which to complete the Prong 3 menu options. Broadcasters must also post the current EEO public file report on their web site, if they have one.

10. The same requirements will apply to MVPDs, except as necessary to comply with different statutory requirements. The Commission is also required to certify that MVPD employment units are in compliance with the EEO requirements on an annual basis. To comply with the Prong 3 requirements, MVPD employment units with six to ten full-time employees and employment units located in smaller markets will be required to undertake one recruitment initiative each year and larger employment units located in larger markets two recruitment initiatives per year. MVPD employment units are not subject to a renewal process at the Commission. Pursuant to section 634(e)(2) of the Communications Act, the Commission is required to conduct a more thorough review of each cable employment unit's EEO compliance every five years. Hence, MVPDs with six or more full-time employees will submit a copy of their most recent EEO public inspection file report to the Commission every five years.

11. The Commission has implemented the MVPD annual reporting requirement under section 634 by FCC Forms 395-A (cable operators) and 395-M (other MVPDs). We will create a new Form 396-C for all MVPDs that will encompass the same information concerning the unit's EEO outreach efforts that was formerly required in FCC Forms 395-A and 395-M. The prior forms were also used to collect data concerning the race/ethnicity and gender of the unit's workforce. The form we are adopting today will not encompass such data because, as indicated below, we will defer action on the collection of workforce data.

12. We are not acting at this time on issues raised in the *2NPRM* concerning the broadcast annual employment report (FCC Form 395-B), which has in the past been used to collect data concerning the workforces of broadcast employment units, including data concerning the race/ethnicity and gender of those workforces. We are similarly not acting on a comparable form for MVPDs. The Office of Management and Budget ("OMB") adopted new standards for classifying data on race and ethnicity in 1997 that must be incorporated in any such forms beginning in 2003. We must incorporate these new standards in our future forms. In addition, a party has raised issues concerning the collection and processing of the forms. Because the employment reports are filed on September 30 of each year, the next reports would not be due earlier than September 30, 2003.

#### IV. Discussion

##### A. Statutory Authority for EEO Program Requirements and Anti-Discrimination Rules

##### 1. EEO Rules Applicable to Multichannel Video Programming Distributors

13. The Commission is explicitly authorized by section 634 of the Communications Act to adopt and enforce the MVPD EEO rules. Indeed, section 634 requires us to enforce EEO rules for MVPDs.

14. Although the Commission is required by section 634 to enforce EEO rules for the MVPD industry, Congress built into section 634 flexibility by allowing the Commission to implement MVPD EEO rules by rulemaking rather than simply prescribing MVPD EEO requirements by statute; by stating in section 634(d)(2) that the "rules shall specify the terms under which" an entity shall take the actions specified in that section; and by providing in section 634(d)(4) that the Commission may amend the MVPD EEO rules "from time to time to the extent necessary to carry out the provisions of this section." Our rulemaking authority, particularly under sections 634(d)(2) and 634(d)(4), permits us to adopt new, race-neutral outreach requirements and to revise the FCC Forms filed by MVPDs to make them consistent with our modified broadcast EEO rules.

15. Section 634(d)(2) obligates the Commission to implement the listed requirements only "to the extent possible," consistent with other conflicting requirements or limitations. The court's decision in *Association* delineates constitutional limitations with which we must reconcile the MVPD EEO rules. We believe that section 634(d)(2) permits the Commission to eliminate those provisions of the MVPD EEO rules that are similar to those struck down by the court in *Association* because it is not "possible" for the Commission to enforce a provision that a court has found unconstitutional. We modify the MVPD EEO rules in this *2R&O* to remove provisions similar to those found unconstitutional in *Association*. We also revise the forms filed by MVPDs to conform them with our modified rules.

##### 2. EEO Rules Applicable to Broadcasters

16. In 1992, Congress enacted section 334 of the Communications Act as part of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 192-385, 106 Stat. 1460 ("1992