

“de-regulated” in this area; the court decisions that have invalidated various aspects of our EEO rules have been premised on specific legal defects found in our programs, not on a finding that nondiscrimination rules or outreach requirements are unnecessary.

32. First, our concern is not limited to intentional discrimination. It is not based on Constitutional provisions or on Title VII, but on the public interest standard in the Communications Act. In adopting the Cable Television Consumer Protection and Competition Act of 1992 (“Cable Act”), Congress expressly found in pertinent part: “Rigorous enforcement of equal employment opportunity rules and regulations is required in order to effectively deter racial and gender discrimination.” Congress has made it clear that the public interest standard is sufficiently broad to cover not only intentional discrimination, but also discrimination that may arise as a result of practices and policies that are not intentionally discriminatory. Further, our policy is not limited to imposing sanctions in response to specific past discrimination; it is also intended to deter discrimination in the first instance. Our policy is designed to prevent both intentional and unintentional discriminatory practices in the broadcast and MVPD industries, and to ensure equal opportunity in employment practices, including recruitment.

33. Second, it is not necessary to find that the broadcast industry “as a whole” has engaged in discrimination in order to justify regulations to prevent discrimination. We do not suspect that the entire broadcast industry, or even most of it, engages in intentional or unintentional discrimination.

34. Third, although we commend the broadcast associations for the various activities detailed in their comments, they do not demonstrate that an EEO rule is unnecessary.

35. Some broadcasters support the adoption of an EEO rule. Our proposed EEO requirements also are generally supported by the MVPD industry.

36. Discrimination may be easy to hide and difficult to prove. Allegations of discrimination may never be fully litigated because a violator will elect to settle any litigation before it reaches the stage of a final judgment. It is thus impossible to quantify reliably the extent of actual discrimination that exists today.

37. Many of the opponents of our EEO program cite language from the *2R&O* that “[o]utreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and

ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process.” These parties contend that the broadcast workforce is not homogeneous and that it does not employ insular recruitment and hiring practices to replicate itself. The cited language was intended to explain why outreach in recruitment as well as a ban on discrimination is necessary to deter discrimination. We did not intend to suggest that every broadcast station has a homogeneous workforce. We recognize that in many significant respects the industry has become more diverse over the past decades. We attribute this in large measure to the fact that the industry has been subject to our various EEO requirements since 1969.

38. We accordingly conclude that adoption of new outreach rules for broadcast and MVPDs is supported by the record in this case. The evidence in this proceeding demonstrates an ongoing need to deter discrimination and ensure equal employment opportunity in the broadcasting and MVPD industries. Moreover, Congress has made clear its intention that we should enact EEO rules for the broadcast and MVPD industries.

39. Finally, as noted, our primary goal in adopting EEO program requirements is to ensure broad outreach in recruitment for broadcast and MVPD employment vacancies. We seek to do so in a manner that affords some flexibility to affected industries. The regulations we are adopting today provide sufficient flexibility. Entities will have broad discretion as to the type of recruitment sources they will use, the number of recruitment sources they will use, and the Prong 3 menu options they will implement. We are also providing that entities in smaller markets may implement fewer menu options than those in larger markets.

#### ii. *EEO Program and Related Provisions*

40. In the *2NPRM*, we proposed a three-prong EEO program requirement designed to ensure equal opportunity to all potential applicants, including all races and both genders, without infringing on the rights of any group. The rules were further designed to be flexible enough to avoid imposing an undue burden and to apply reasonably and effectively to broadcasters and MVPDs in differing circumstances. Based on our review of the comments, reply comments and other presentations filed in this proceeding, we adopt the proposed program, with some modifications.

41. *Outreach Prong 1—Recruitment for All Full-time Vacancies.* We will

adopt the requirement that broadcasters recruit for all full-time vacancies, except in exigent circumstances. Recruitment for substantially all vacancies using sources designed to achieve broad outreach is necessary to ensure that all segments of the population have an equal opportunity to compete for broadcast (and MVPD) employment and that no segment is subjected to intentional or unintentional discrimination.

42. The effectiveness of our requirements in the past does not justify eliminating them now. Nor can we justify such a conclusion based on recent outreach efforts by the broadcast industry commendable, given that this has been an area under high scrutiny for some time. We can draw no inference from these facts; therefore, regarding the likely behavior of licensees in the absence of any current or proposed EEO program. Second, our requirements provide sufficient flexibility to design recruitment programs appropriate for different positions and circumstances.

43. In the *2NPRM*, we recognized that there might be occasional exigent circumstances in which recruitment may not be feasible. We cited as an example the need to replace immediately an employee who departs without notice and whose duties cannot be fulfilled, even briefly, by other station employees. We stated in the *R&O* that we could not anticipate every circumstance which might justify filling a position without recruitment and indicated that we would rely on the good faith discretion of broadcasters. We nonetheless cautioned that we expected nonrecruited vacancies to be rare relative to the number of vacancies for which recruitment is conducted, because our rule generally requires recruitment for every vacancy. We will incorporate this approach in our new rules.

44. The requirement that broadcasters recruit for every full-time vacancy, unless exigent circumstances exist, will become a component of our rule. Recruitment for only some openings could leave the most desirable positions open to a limited number of potential applicants, possibly excluding significant segments of the community. We will require that broadcasters develop and use for each vacancy a recruitment source or list of recruitment sources (which may be freely modified as circumstances warrant) sufficient to ensure wide dissemination of information about the opening. We will not dictate the number or type of sources that a broadcaster must use. If, however, the source or sources used cannot reasonably be expected,