

employee of the licensee, holding a position that would be subject to recruitment, and thus should be permitted to work at the station without first requiring outside recruitment. FHH suggests that we should, as a safeguard, require that the owners have made a capital contribution. We do not find this necessary. Legitimate ownership interests may exist that do not involve a capital contribution. In the event of alleged abuse of this exception, we will consider all relevant factors, including the extent of an asserted owner's capital contribution to determine the legitimacy of a claimed ownership interest.

3. MVPD EEO Program Requirements

a. Rules and Policies

108. We will adopt substantially the same outreach program, recordkeeping and reporting requirements for MVPDs, as we have for broadcasters. The only distinctions will arise in light of the specific requirements imposed by section 634 of the Communications Act. We monitor the EEO programs pursuant to annual reports which have contained employment and program data, as required by statute. We will be creating a new form that will contain only program data. As mentioned, we are deferring consideration of a new form for MVPDs that requires employment data. Because our review of MVPD EEO compliance is an annual review pursuant to section 634, we define the Prong 3 menu options requirement for MVPDs in terms of performing two initiatives annually for those with more than ten full-time employees or one initiative annually for those with six to ten full-time employees. With respect to the definition of "community" for the purpose of determining broad outreach, we are leaving the definition of "community" for this purpose to the reasonable good faith discretion of the entity concerned. We will apply the same policy to MVPDs. MVPDs should use pertinent criteria, including the location of the system, pertinent market definitions adopted by public agencies or commercial services, and requests for notices of job vacancies from locally-based community groups. They should also consider what areas actually produce job applicants. MVPDs should engage in broad outreach throughout the entire local community from which they can reasonably expect to elicit applicants, whether or not that community is defined by its franchise area.

109. MVPD compliance with the EEO requirements is monitored pursuant to annual reports filed by MVPDs: FCC Form 395-A (for cable operators) and

FCC Form 395-M (for other MVPDs). The only substantive modification required by the new rules adopted today is the elimination of the Option A/Option B election. In addition, we will combine these forms. The two forms are virtually identical except for a section in the Form 395-A requiring cable operators to list the communities in which they operate. In view of the similarity of the two forms, we do not find any necessity for having separate forms for cable operators and other MVPDs. Both forms request information concerning the entity's EEO outreach program. In addition, both forms request information as to the gender and racial/ethnic composition of the entity's workforce, analogous to the broadcast Form 395-B. As in the broadcast context, the data concerning the entity's workforce is no longer pertinent to the administration of our EEO outreach requirements. We will adopt at this time a single form, FCC Form 396-C, which will include the portions of Forms 395-A and 395-M relating to EEO outreach, but not the portion eliciting data concerning the entity's workforce, for use by all MVPDs. We will consider the adoption of a new form for eliciting workforce data from MVPDs as part of the future *R&O* in which we will also address the broadcast Form 395-B.

C. Constitutional Issues

110. The court in *Association* upheld Option A of the EEO rule as constitutional because it found that broadcasters were not pressured to recruit minorities and women under Option A. The recruitment outreach provisions we are adopting in this *2R&O* and *3rd NPRM* are the same in all material respects as the basic requirements of Option A. In enforcing the EEO rule, the Commission will not pressure employers to favor anyone on the basis of race, ethnicity, or gender. As a race and gender neutral regulation, the EEO rule we are adopting today raises no equal protection concerns.

V. Conclusion

111. In this *2R&O*, we adopt a new broadcast EEO rule and set of policies, and we amend our MVPD EEO rules and policies. We remain committed both to prohibiting discrimination in employment and requiring broad and inclusive outreach in recruitment by broadcasters and cable entities.

VI. Procedural Matters

112. *Final Regulatory Flexibility Analysis*. As required by the Regulatory Flexibility Act ("RFA"), 5 U.S.C. 603, an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the

2NPRM. The Commission sought written public comments on the possible significant economic impact of the proposed policies and rules on small entities in the *NPRM*, including comments on the IRFA. Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 604, a Final Regulatory Flexibility Analysis ("FRFA") is contained in Appendix B.

113. *Paperwork Reduction Act of 1995 Analysis*. The actions herein have been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to, and become effective upon, approval by the Office of Management and Budget as prescribed by the Act.

VII. Final Regulatory Flexibility Analysis

114. As required by the RFA, an IRFA was incorporated into the *2NPRM* in this proceeding. The Commission sought written public comments on the possible significant economic impact of the proposed policies and rules on small entities in the *2NPRM*, including comments on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

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

115. This *2R&O* adopts new equal employment opportunity (EEO) rules and policies for broadcasters and multi-channel video program distributors (MVPDs) consistent with the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, *rehearing den.* 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 920 (2002) (*Association*). The Court therein found unconstitutional one of two options for achieving broad outreach provided by the broadcast EEO outreach requirements adopted in the *R&O*, and codified as § 73.2080 of the Commission's rules, 47 CFR 73.2080. The Court found the option invalid because it found that nonminority job applicants were less likely to receive notification of job openings under that recruitment option. The Court further found that the other option provided by the rule, although not invalid, could not be severed from the one unconstitutional option and therefore it vacated the entire rule.