

**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 )

**THIRD REPORT AND ORDER AND FOURTH  
NOTICE OF PROPOSED RULEMAKING**

**Adopted: April 19, 2004**

**Released: June 4, 2004**

**Comment Date: 21 days after publication in the Federal Register**

**Reply Comment Date: 31 days after publication in the Federal Register**

By the Commission: Chairman Powell issuing a statement; Commissioner Martin approving in part, concurring in part, and issuing a statement; Commissioners Copps and Adelstein approving in part, dissenting in part, and issuing a joint statement.

**I. BACKGROUND**

1. The *Second Notice of Proposed Rulemaking* in this proceeding<sup>1</sup> proposed and requested comment on new broadcast station and multichannel video programming distributor (MVPD) equal employment opportunity (EEO) rules and new annual employment report forms to collect data on the race, ethnicity, and gender of the workforce of broadcast and MVPD<sup>2</sup> employment units. In the *Second Report and Order and Third Notice of Proposed Rulemaking* in this proceeding, we adopted new broadcast and MVPD EEO rules, but deferred action on the issues relating to the Annual Employment Report forms.<sup>3</sup> We now address those issues and adopt revised FCC Form 395-B, the broadcast station Annual Employment Report, and FCC Form 395-A, the multichannel video programming distributor Annual Employment Report.<sup>4</sup> We also seek comment in the *Fourth Notice of Proposed Rulemaking* on the Commission's policies regarding public access to data contained in FCC Forms 395-A and 395-B.

<sup>1</sup> 16 FCC Rcd 22843 (2001) (*Second NPRM*).

<sup>2</sup> Section 634 of the Communications Act of 1934, as amended, generally applies to "cable operators." However, Section 634(h)(1) states that, "For purposes of this section, the term 'cable operator' includes any operator of any satellite master antenna television system, including a system described in section 602(7)(A) and any multichannel video programming distributor."

<sup>3</sup> *Second Report and Order and Third Notice of Proposed Rulemaking*, 17 FCC Rcd 24018 (2002), *recon. pending* (*Second Report and Order and Third NPRM*).

<sup>4</sup> The previous Form 395-A, adopted in *Report and Order in MM Docket Nos. 98-204 and 96-16*, 15 FCC Rcd 2329 (2000) (*Report and Order*), *recon. denied*, 15 FCC Rcd 22548 (2000), applied only to cable units and included an EEO program report. The *Report and Order* also provided for an almost identical Form 395-M, which applied to wireless MVPD operators. In the *Second Report and Order and Third NPRM*, we explained why there was no need to have separate forms for cable and wireless MVPD operators and we extracted the EEO program report portion of the old Forms 395-A and 395-M to form a new Form 396-C. *See id.* ¶ 178. The 395-A we adopt

2. In previously deferring action with respect to FCC Forms 395-A and 395-B, we stated that a deferral would permit us to coordinate these forms with new standards for classifying data on race, ethnicity, and job categories adopted by the Office of Management and Budget (OMB).<sup>5</sup> OMB has responsibilities under the *Paperwork Reduction Act of 1995* for coordinating data collection forms adopted by the Federal government. This deferral was also intended to provide additional time to address issues concerning the collection and processing of the forms. The Commission indicated that the data collected in the employment reports would be used to compile industry employment trend reports and reports to Congress and would not be used to determine compliance with the substantive EEO rules adopted.<sup>6</sup>

## II. DISCUSSION

3. The information provided by the annual employment reports is important in order to ascertain industry trends, report to Congress, and respond to inquiries from Congress. We note that Congress relied in part on media industry employment data in the 1992 Cable Act.<sup>7</sup> The Commission has broad authority under the Communications Act to collect information and prepare reports.<sup>8</sup> Further, as we have stated previously, collection of television broadcast and MVPD industry employment data is required by the Communications Act. Section 634(d)(3)(A) of the Communications Act requires the Commission to adopt rules requiring MVPDs with more than 5 full-time employees to “file with the Commission an annual statistical report identifying by race, sex, and job title the number of employees” in each of specifically identified full-time and part-time job categories.<sup>9</sup> Section 334(a) of the Communications Act requires the Commission to maintain EEO rules for television broadcast station licensees and provides that “except as specifically provided in this section, the Commission shall not revise--... (2) the forms used by such licensees and permittees to report pertinent employment data to the Commission.”<sup>10</sup> Section 334(b) authorizes the Commission to make nonsubstantive technical or clerical changes.<sup>11</sup> Thus, we are directed by statute to require the submission of such reports by broadcast television stations and MVPDs.<sup>12</sup> Furthermore, we have authority to require employment reports for all broadcasters and MVPDs and would exercise that authority even if not required by statute to do so.

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today applies to all MVPD units that must file the form and contains only the annual employment report portion of the old forms.

<sup>5</sup> *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58782 (1997).

<sup>6</sup> *Second Report and Order and Third Notice of Proposed Rulemaking* ¶ 17.

<sup>7</sup> *See Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, 106 Stat. 1460, 1498, Section 22(g) (1992).

<sup>8</sup> *See, e.g.*, 47 U.S.C. §§ 154(i) and (k), 303(r), 403.

<sup>9</sup> 47 U.S.C. § 554(d)(3)(A). The section specifies fifteen job categories.

<sup>10</sup> 47 U.S.C. § 334(a).

<sup>11</sup> 47 U.S.C. § 334(b).

<sup>12</sup> An April 22, 2003, filing from the National Alliance of State Broadcasters Associations (NASBA) states that “NASBA’s research has uncovered no statute mandating that the FCC now require these reports for broadcasters.” NASBA, however, does not address the requirements imposed by Section 334.

4. Thus, we will adopt the requirement that broadcast and MVPD employment units file Forms 395-B and 395-A, respectively. As explained below, the forms are being readopted and will be submitted to OMB for clearance for use in the year 2004 filing substantially in the same form as those previously used and will be revised in the future, as necessary, in coordination with OMB. The data collected in the employment reports will be used to compile industry employment trend reports and reports to Congress and will not be used to determine compliance with our EEO rules.

5. Several commenters urge the Commission to collect ethnicity and gender information in order to analyze industry employment trends. The American Federation of Television and Radio Artists acknowledges that the reporting of industry employment trends is a valuable public resource, and the Commission is the only entity with the resources necessary to maintain and disseminate data on the demographics of employment in broadcasting.<sup>13</sup> The National Organization for Women argues that the forms do not impose an undue burden on broadcasters or cable entities, and are mandated by Sections 334 and 634 of the Communications Act.<sup>14</sup> The Minority Media and Telecommunications Council asserts that no broadcaster or cable company has ever claimed that it endured a cognizable harm from the dissemination of Form 395 data.<sup>15</sup>

6. Other commenters assert that collection of Form 395-B is prohibited by the decisions of the U.S. Court of Appeals for the District of Columbia Circuit in *Lutheran Church – Missouri Synod v. FCC*,<sup>16</sup> and *MD/DC/DE Broadcasters Association v. FCC*.<sup>17</sup> The State Broadcasters Associations (StBAs), NASBA, and the National Association of Broadcasters (NAB) allege that collection and public disclosure of the data required by Form 395-B will be used to pressure broadcasters to adopt race or gender-based hiring policies in contravention of *Lutheran Church*.<sup>18</sup> If the data is collected, NAB, StBAs and Radio Licensees urge the Commission to collect 395-B data on an anonymous basis.<sup>19</sup> NAB and NASBA specifically propose a filing procedure whereby the Commission would “tear off” the station’s identifying information from the 395-B form once filing is established.<sup>20</sup> Golden Orange Broadcasting (Golden Orange) proposes that the individual data be kept confidential.<sup>21</sup> StBAs, NASBA and NAB further propose that non-FCC personnel compile the data.<sup>22</sup> NAB stresses that a third party would not be

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<sup>13</sup> American Federation of Television and Radio Artists Comments at 21.

<sup>14</sup> National Organization for Women Comments at 28-30.

<sup>15</sup> Minority Media and Telecommunications Council Comments at 122.

<sup>16</sup> 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh’g denied*, 154 F.3d 487, (D.C. Cir.) *pet. for reh’g en banc denied*, 154 F.3d 494 (D.C. Cir.) (*Lutheran Church*).

<sup>17</sup> 236 F.3d 13, *rehearing den.*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 920 (2002) (*Association*).

<sup>18</sup> StBAs Comments at 48-51; NASBA Comments at 2-4; NAB Comments at 62; StBAs October 15, 2003 Comments at 2; NAB October 7, 2003 Comments at 3; StBAs January 5, 2004 Comments.

<sup>19</sup> NAB August 4, 2003 Comments at 7; StBAs Comments at 51; Radio Licensees Comments at 5; NAB October 7, 2003 Comments at 7.

<sup>20</sup> NAB August 4, 2003 Comments at 7; NASBA August 4, 2003 Comments at 5; StBAs October 15, 2003 Comments at 2-3.

<sup>21</sup> Golden Orange Comments at 29-30.

<sup>22</sup> StBAs Comments at 51; NASBA August 4, 2003 Comments at 5; NAB August 4, 2003 Comments at 8; NAB October 7, 2003 Comments at 7.

subject to any federal statutes which might prevent the Commission from keeping the identity of the filer anonymous.<sup>23</sup> BIA Financial Network, Inc. proposes to serve as an independent third party to collect employment trend report data for the Commission.<sup>24</sup>

7. We do not agree that *Lutheran Church* invalidated the data collection process. The court focused in that decision on the Commission's previous "processing guidelines disclosing the criteria it used to select stations for in-depth EEO review when their licenses came up for renewal."<sup>25</sup> It then made clear that "[i]f the regulations merely required stations to implement racially neutral recruiting and hiring programs, the equal protection guarantee would not be implicated."<sup>26</sup> And it reiterated in response to the government's rehearing petition that it had not held that a regulation "encouraging broad outreach to, as opposed to the actual hiring of, a particular race would necessarily trigger strict scrutiny."<sup>27</sup> The court did not conclude that the Commission lacks authority to collect statistical employment data for the purpose of analyzing industry employment trends or preparing annual employment trend reports, or that collecting employment data for those purposes would unconstitutionally pressure broadcasters to adopt race or gender-based hiring policies.

8. In *Association*, the court upheld all of the reporting requirements adopted by the Commission in the 2000 *Report and Order*,<sup>28</sup> including the requirement for filing the Form 395-B, rejecting the broadcasters' argument that those requirements were an arbitrary and capricious regulatory burden.<sup>29</sup> Nothing in the court's decision suggests that collection of 395-B data for the limited purpose for which it is intended is impermissible. The Court did find that the requirement that licensees report the race and gender of applicants, in conjunction with then existing EEO rules, pressured licensees to focus their recruiting efforts on women and minorities.<sup>30</sup> Therefore, it held that such reporting was subject to strict scrutiny. Nothing in the Court's opinion, however, suggests that the collection of the FCC Form 395-B data regarding the filer's employees for the purpose of compiling trend reports and reports to Congress is by itself subject to strict scrutiny or unconstitutional.

9. Nor do we believe that the filing of annual employment reports will unconstitutionally pressure entities to adopt racial or gender preferences in hiring.<sup>31</sup> The Commission will not use the data in the reports to screen renewal applications or to assess compliance with our EEO regulations. Thus, the Commission is not compelled to compile or to hire outside parties to collect data on an anonymous or confidential basis, as suggested by StBAs, BIA Financial Network, Inc., NASBA, NAB, Radio Licensees and Golden Orange. Furthermore, the Commission must preliminarily review each Form 395-B to ensure

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<sup>23</sup> NAB August 4, 2003 Comments at 7; NAB October 7, 2003 Comments at 8.

<sup>24</sup> BIA Financial Network, Inc. August 4, 2003 Comments; StBAs October 15, 2003 Comments at 2.

<sup>25</sup> 141 F.3d at 352.

<sup>26</sup> 141 F.3d at 351.

<sup>27</sup> 154 F.3d at 492.

<sup>28</sup> 15 FCC Rcd 2329 (2000), *recon. denied*, 15 FCC Rcd 22548 (2000).

<sup>29</sup> 236 F.3d at 17.

<sup>30</sup> *Id.* at 18-19.

<sup>31</sup> NAB Comments at 62-63; StBAs Comments at 49-51; NASBA Comments at 2; NAB October 7, 2003 Comments at 4-6.

completeness and contact the filer, if necessary. If the filer's identity were unknown to the Commission's staff, it could not ensure the completeness of the data. Thereafter, the Commission may be called upon to provide trend data based on markets, size of stations, services, or other criteria that could not be reconstructed from totally anonymous forms. Thus, allowing forms to be collected so that filers would be anonymous to Commission staff could defeat or impair the Commission's data collection effort. We realize however, that some commenters believe that third party access to Form 395-B data will leave broadcast licensees vulnerable to complaints or lawsuits and induce them to change their hiring patterns to forestall such charges.<sup>32</sup> We believe that the record in this proceeding would benefit from further discussion on this issue and others relating to public access to Form 395-B and 395-A data. Accordingly, we will seek additional comment on these issues in the *Fourth Notice of Proposed Rulemaking* below.

10. Some commenters argue that broadcast stations with 100 or more employees are already required to file annual gender and racial/ethnic data with the Equal Employment Opportunity Commission (EEOC) on its "Employer Information Report EEO-1" (EEO-1), so that there is no need for the Commission to duplicate these efforts by requiring the filing of FCC Form 395-B.<sup>33</sup> These commenters contend that the 395-B is unnecessary because the Commission can obtain statistically relevant information from reviewing the EEO-1 alone. We disagree. The two forms differ in the data they collect and the EEO-1 data would not provide the information specified by Congress in Sections 334 and 634. Unlike the EEO-1, Form 395-B distinguishes between full and part-time employees and our broadcast trend reports focus on data regarding full-time employees. Therefore the Commission could not use the EEO-1 data in lieu of the 395-B data for this purpose. Further, if we obtained trend report data only from employment units with 100 or more employees, the trend report would be significantly incomplete. It would not include 6,592 employment units (79%) out of a total of 8,395 units and would exclude 136,993 full-time employees (84%) out of the 163,868 full-time employees in broadcasting working at employment units employing five or more full-time employees.<sup>34</sup> In an effort to reduce filing burdens, however, we will permit broadcasters to file only one Form 395-B for all commonly owned stations in the same market that share at least one employee. Moreover, the smallest stations (fewer than five full-time employees) are exempt from filing Form 395-B.

11. The American Cable Association (ACA), on behalf of small cable operators, requests, without further elaboration, that the Commission institute a "streamlined Form 395-A" in order to reduce administrative burdens and costs.<sup>35</sup> We reject this proposal. Our annual employment reports must follow the statutory requirements noted above and also must be submitted to OMB for review to conform to OMB standards for classifying data on race and ethnicity.<sup>36</sup>

12. Finally, as noted above, we stated in the *Second Report and Order and Third NPRM* that we would need to revise our Forms 395-A and 395-B to comply with new OMB racial classification standards. We have attempted to parallel our classification reporting with those adopted by the Equal Employment Opportunity Commission, which is in turn addressing the OMB classification issues. Our

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<sup>32</sup> *Id.*

<sup>33</sup> Radio Licensees Comments at 5; NAB Comments at 61-62; NASBA Comments at 2.

<sup>34</sup> We base these data on information compiled from 395-B forms filed in 2000.

<sup>35</sup> ACA Comments at 4.

<sup>36</sup> See Race and Ethnic Standards for Federal Statistics and Administrative Reporting, OMB Statistical Policy Directive No. 15; Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58782 (1997).

forms and reports conform to the existing EEO-1 racial and employment categories. Although the EEOC has proposed an updated EEO-1 to conform to the new OMB standards, the form has yet to be finalized.<sup>37</sup> Therefore, to avoid any unnecessary confusion that might result from the use of different classification standards, we will continue to use the racial and employment categories in the Forms 395-A and 395-B adopted in 2000, which conform to the current EEO-1, until the new EEO-1 is released. At that time, we will review the annual employment reports to see what changes are needed to comply with the new OMB standards, and whether we can conform our forms to those standards consistent with Sections 334 and 634 of the Act.<sup>38</sup> Other than deleting EEO program information, now requested in the FCC Form 396-C, as noted above,<sup>39</sup> the only change we have made at this time is to delete the request for system community information in Section II of the previous 395-A and replace it with a request for the employment unit's physical system identification number(s). This modification will reduce the paperwork burden for MVPD units.<sup>40</sup>

13. Under the annual employment report filing requirements that we adopt, broadcasters with five or more full-time employees will be required to file Form 395-B by September 30 of each year. MVPD units with six or more full-time employees will be required to file Form 395-A by September 30 of each year. We will allow, this year only, a one-time filing grace period until a date to be determined in the Commission's Order addressing the issues raised in the *Fourth Notice of Proposed Rulemaking* below. This grace period will give entities adequate time to collect the data needed to fulfill their filing requirements and will allow us to accommodate changes, if any, to the Forms 395-A and 395-B made necessary by the comments received in response to the *Fourth Notice of Proposed Rulemaking*. Regardless of what grace period deadline we ultimately set for filing the forms, they will be required to reflect any pay period from July, August, or September 2004, as provided for in the instructions to Form 395-B and § 76.77(a) of the Commission's rules, 47 C.F.R. § 76.77(a), for Form 395-A.

### III. FOURTH NOTICE OF PROPOSED RULEMAKING

14. Broadcasters have filed FCC Form 395-B, the Broadcast station Annual Employment Report, with the Commission for more than thirty years. Throughout the form's long history, the Commission has made it available to the public for inspection. Indeed, there was no exemption from the disclosure requirements of the Freedom of Information Act<sup>41</sup> that would have permitted the Commission to keep the data confidential. MVPDs have for years filed an Annual Employment Report on FCC Form 395-A, which unlike its broadcast equivalent, is required by statute to be made available for public inspection at the MVPD's central office and at every office where five or more full time employees are regularly assigned to work.<sup>42</sup> The recently enacted Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA),<sup>43</sup> allows agencies to collect information for statistical purposes under a

<sup>37</sup> See 68 Fed. Reg. 34965-6 (June 11, 2003).

<sup>38</sup> At such time as the EEOC revises its forms, we direct the staff of the Media Bureau to seek public comment in this proceeding on whether those changed standards should be used in our 395-A and 395-B forms.

<sup>39</sup> See supra text note 4.

<sup>40</sup> The public will still have access to a list identifying communities served by MVPD units by checking the FCC Media Bureau web site, [www.fcc.gov/mb/vax/registeredcuid.xls](http://www.fcc.gov/mb/vax/registeredcuid.xls)

<sup>41</sup> See 5 U.S.C. § 552.

<sup>42</sup> See 47 U.S.C. § 554 (d)(3)(B).

<sup>43</sup> Pub. L. 107-347, 116 Stat. 2962, Dec. 17, 2002, codified in note to 44 U.S.C. § 3501.

pledge of confidentiality. CIPSEA defines “statistical purpose” as the “description, estimation, or analysis of the characteristics of groups, without identifying the individuals or organizations that comprise such groups...” CIPSEA, Sec.502(9). The law defines “nonstatistical purpose” as “the use of data in identifiable form for any purpose that is not a statistical purpose, including any administrative, regulatory, law enforcement, adjudicatory, or other purpose that affects the rights, privileges, or benefits of a particular identifiable respondent...” CIPSEA, Sec. 502(5). If an agency collects information pursuant to CIPSEA under a pledge of confidentiality, it is exempt from release under the Freedom of Information Act and may not be disclosed in an identifiable form for any non-statistical purpose without the informed consent of the respondent.

15. We seek comment on whether a broadcaster’s Form 395-B is the type of material to which CIPSEA could pertain. As noted above, the data collected in the employment reports will be used to compile industry employment trend reports and report to Congress, and will not be used to determine compliance with our EEO rules. As such, this purpose appears to fall within the statutory definition of “statistical purpose.” We seek comment on what public policy goals might be advanced by making this information publicly available even if CIPSEA allows the Commission to keep it confidential. Historically, the Commission has made the information public. We seek comment on whether altering our approach would be consistent with section 334 of the Act. We also seek comment on whether altering our approach would be appropriate given the efforts of the Advisory Committee on Diversity for Communications in the Digital Age.

16. We seek comment as to whether Congress’s clear directive that MVPD operators must make Form 395-A available for public inspection at their own facilities should be read to suggest an intent that the Commission, itself, also make Form 395-A publicly available. In light of the directive in section 554(d)(3)(B) for filers to make 395-A publicly available, we seek comment on whether CIPSEA even allows the Commission to keep MVPDs’ Form 395-A confidential. In addition, does the Congressional directive that MVPDs make Form 395-A publicly available have any bearing on whether the Form 395-B should be made available to the public, as the Commission has done for more than thirty years?

17. Were the Commission to collect such information under a pledge of confidentiality, and CIPSEA were to apply, we seek comment on whether CIPSEA allows us to keep the identity of the Form 395-B filer (i.e., name, address and station) confidential while making the station’s employment data public. Finally, we seek comment on the “tear off” option proposed by NAB and NASBA<sup>44</sup> under which only the station’s identifying information would be withheld from public inspection, and what such information would be identifying.<sup>45</sup> We seek comment as to what policy objectives such an approach would further. We also seek comment as to whether use of this option would be consistent with CIPSEA or would violate the Federal Records Act.<sup>46</sup>

#### IV. PROCEDURAL MATTERS AND ORDERING CLAUSES

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

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<sup>44</sup> See note 20, *supra*.

<sup>45</sup> Although this is referred to as “tearing off” the information, given that the forms will be filed electronically, the information actually would be blocked before release.

<sup>46</sup> 44 U.S.C. §§ 2101 *et seq.*, 3101 *et seq.*, and 3301 *et seq.* See also *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993).

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

19. *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.

20. *Ex Parte Rules.* With respect to the *Fourth Notice of Proposed Rule Making (Fourth NPRM)*, this is a permit-but-disclose notice and comment proceeding. Ex parte presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 CFR Sections 1.1202, 1.1203, and 1.1206(a).

21. *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 **(21 days after publication in the Federal Register)** and reply comments on or before **(31 days after publication in the Federal Register)**. 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).*

22. Comments filed through 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 get filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto: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. 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 appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., TW-A325, Washington, D.C. 20554.

23. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Wanda Hardy, 445 Twelfth Street, S.W., Room 3-A669, Washington D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Word 97 or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number in this case, MM Docket No. 98-204), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy-Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12<sup>th</sup> Street, S.W., Room CY-B402, Washington, D.C. 20554.

24. Comments and reply comments will be available for public inspection during regular hours in the FCC Reference Center, Federal Communications Commission, 445 Twelfth Street, S.W., CY-A257, Washington, D.C. 20554, or at [www.fcc.gov/searchtools.html](http://www.fcc.gov/searchtools.html). Persons with disabilities who



need assistance in the FCC Reference Center may contact Bill Cline at (202)418-2555 TTY, or [bill.cline@fcc.gov](mailto:bill.cline@fcc.gov).

25. To request materials in accessible formats for people with disabilities (electronic files, large print, audio format and Braille), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0531 (voice), 418-7365 (tty).

26. *Initial Regulatory Flexibility Certification.* The Regulatory Flexibility Act of 1980, as amended (RFA),<sup>47</sup> requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”<sup>48</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>49</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>50</sup> A “small business concern” is one which (1) is independently owned and operated; (2) is not dominant in the field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>51</sup>

27. In the *Fourth Notice of Proposed Rulemaking*, the Commission seeks comments on the Commission’s policies regarding public access to data contained in FCC Forms 395-A and 395-B. The policy changes proposed relate exclusively to the issue of whether the Commission should make the data in these forms available for public inspection. Any change made as a result of the comments received in response to this notice will have not have a significant economic impact on a substantial number of small entities because it will not change the data collected from broadcasters or MVPDs. Therefore, we certify that the proposals in this Notice, if adopted, will not have a significant economic impact on a substantial number of small entities.

28. *Authority.* This *Fourth NPRM* is issued pursuant to 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.

29. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(k), 303(r), 334, 403, and 634 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(k), 303(r), 334, 403, and 554, this *Third Report and Order and Fourth Notice of Proposed Rulemaking* IS ADOPTED, and Part 73 and Part 76 of the Commission’s Rules ARE AMENDED as set forth in attached Appendix B.

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<sup>47</sup> See 5 U.S.C. §§ 603. The RFA, see 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>48</sup> 5 U.S.C. § 605(b).

<sup>49</sup> 5 U.S.C. § 601(6).

<sup>50</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business Concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of the Small Business Administration 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.”

<sup>51</sup> 15 U.S.C. § 632.

30. IT IS FURTHER ORDERED that the new rules and amendments set forth in Appendix B, and the information collection contained in these rules, WILL BECOME EFFECTIVE the latter of (i) 30 days after publication of the text or a summary thereof in the Federal Register or (ii) publication in the Federal Register of an announcement of OMB approval.

31. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Third Report and Order* and *Fourth Notice of Proposed Rulemaking* including the Final Regulatory Flexibility Analysis and the Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA),<sup>52</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Second Notice of Proposed Rule Making (Second NPRM)* in this proceeding.<sup>53</sup> The Commission sought written public comments on the possible significant economic impact of the proposed policies and rules on small entities in the *Second NPRM*, including comments on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>54</sup>

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

This *Third Report and Order* adopts new rules and forms for broadcasters and multi-channel video program distributors (MVPDs) that enable the Commission to collect data on the race, ethnicity and gender of the workforce of broadcast and MVPD employment units. See Section C., *infra*.

**B. Summary of Significant Issues Raised by the Public Comments in Response to the IRFA:**

One comment on annual employment reports was filed specifically in response to the IRFA. The American Cable Association (ACA) proposes that the Commission generally “streamline” FCC Form 395-A. The ACA also filed these same comments in response to the *Second NPRM*. The *Third Report and Order* considers ACA’s comments, and determines that the Commission’s annual employment reports must follow the standards issued by the Office of Management and Budget for classifying data on race and ethnicity.

**C. Recording, Recordkeeping, and Other Compliance Requirements:**

This rulemaking adopts FCC Form 395-B, the broadcast Annual Employment Report, and FCC Form 395-A, the multichannel video programming distributors (MVPD) Annual Employment Report. Forms 395-B and 395-A collect data on the ethnicity and gender of a reporting entity’s workforce. Broadcasters with five or more full-time employees will be required to file Form 395-B by September 30 of each year. MVPD units with six or more full-time employees must file Form 395-A by September 30 of each year. Broadcast entities are not required to place copies of their annual employment reports in their public file. Generally, no special skills will be necessary to comply with the requirements.<sup>55</sup>

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<sup>52</sup> 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).

<sup>53</sup> See *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policy*, 16 FCC Red 22843, 22862 (2001).

<sup>54</sup> See 5 U.S.C. § 604.

<sup>55</sup> These requirements will be codified at 47 C.F.R. § 73.3612 (broadcasting), 47 C.F.R. § 76.1702 (MVPDs) and 47 C.F.R. § 76.1802 (MVPDs).

**D. Description and Estimate of the Number of Small Entities to Which the Rules Would Apply:**

The new rules would apply to broadcast stations and MVPDs. 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 rules adopted herein.<sup>56</sup> Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions.<sup>57</sup> 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 SBA.

A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."<sup>58</sup> Nationwide, there are approximately 1.6 million small organizations.<sup>59</sup> The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."<sup>60</sup> As of 1997, there were about 87,453 governmental jurisdictions in the United States.<sup>61</sup> This number includes 39,044 county governments, municipalities, and townships; of which 37,546, (approximately 96.2 %), have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

In this context, the application of the statutory definition to television stations is of concern. 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 television station is dominant in its field of operation. Accordingly, the estimates that follow of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

The Small Business Administration defines a television broadcasting station that has no more than \$12 million in annual receipts as a small business.<sup>62</sup> Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."<sup>63</sup> According to Commission staff

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<sup>56</sup> 5 U.S.C. § 603(b)(3).

<sup>57</sup> 5 U.S.C. § 601(6).

<sup>58</sup> 5 U.S.C. § 601(4).

<sup>59</sup> Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

<sup>60</sup> 5 U.S.C. 601(5).

<sup>61</sup> U.S. Census Bureau, *Statistical Abstract of the United States:2000*, Section 9, pages 299-300, Tables 490 and 492.

<sup>62</sup> See OMB, *North American Industry Classification System: United States, 1997* at 509 (1997) (NAICS code 513120, which was changed to code 515120 in October 2002).

<sup>63</sup> OMB, *North American Industry Classification System: United States, 1997*, at 509 (1997) (NAICS code 513120, which was changed to code 51520 in October 2002). This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming

review of the BIA Publications, Inc. Master Access Television Analyzer Database as of May 16, 2003, about 814 of the 1,220 commercial television stations in the United States have revenues of \$12 million or less. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations<sup>64</sup> must be included. Our estimates, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

The SBA defines a radio broadcast entity that has \$6 million or less in annual receipts as a small business.<sup>65</sup> Business concerns included in this industry are those “primarily engaged in broadcasting aural programs by radio to the public.”<sup>66</sup> According to Commission staff review of the BIA Publications, Inc., Master Access Radio Analyzer Database, as of May 16, 2003, about 10,427 of the 10,945 commercial radio stations in the United States have revenue of \$6 million or less. We note, however, that many radio stations are affiliated with much larger corporations with much higher revenue, and that in assessing whether a business concern qualifies as small under the above definition, such business (control) affiliations<sup>67</sup> are included.<sup>68</sup> Our estimate therefore likely overstates the number of small businesses that might be affected by any changes to the ownership rules.

The *Third Report and Order* also amends EEO rules applicable to MVPDs. SBA has developed a definition of a small entity for cable and other program distribution, which includes all such companies generating \$12.5 million or less in annual receipts.<sup>69</sup> This definition includes direct broadcast satellite services (DBS), multipoint distribution systems (MDS), and local multipoint distribution service (LMDS). According to Census Bureau data for 1997, there were 1,311 firms within the industry category Cable and Other Program Distribution, total, that operated for the entire year.<sup>70</sup> Of this total, 1,180 firms had annual receipts of \$9,999,999.00 or less, and an additional 52 firms had receipts of \$10 million to \$24,999,999.00.<sup>71</sup> Below we discuss these services to provide a more succinct estimate of small entities.

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may originate in their own studios, from an affiliated network, or from external sources.” Separate census categories pertain to businesses primarily engaged in producing programming. *See id.* at 502-05, NAICS code 51210. Motion Picture and Video Production: code 512120, Motion Picture and Video Distribution, code 512191, Teleproduction and Other Post-Production Services, and code 512199, Other Motion Picture and Video Industries.

<sup>64</sup> “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 to power to control both.” 13 C.F.R. § 121.103(a)(1).

<sup>65</sup> *See* OMB, North American Industry Classification System: United States, 1997, at 509 (1997) (Radio Stations) (NAICS code 513111, which was changed to code 515112 in October 2002).

<sup>66</sup> *Id.*

<sup>67</sup> “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).

<sup>68</sup> “SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern’s size.” 13 C.F.R. § 121(a)(4).

<sup>69</sup> 13 C.F.R. § 121.201 (NAICS codes 513210 and 513220).

<sup>70</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Receipts Size of Firms Subject to Federal Income Tax: 1997,” Table 4, NAICS code 513220 (issued Oct. 2000).

<sup>71</sup> *Id.* The census data do not provide a more precise estimate.

*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.<sup>72</sup> 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.<sup>73</sup> Since then, some of those companies may have grown to serve more than 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 1,439 or fewer 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."<sup>74</sup> The Commission has determined that there are 67,700,000 subscribers in the United States.<sup>75</sup> Therefore, we found that an operator serving fewer than 677,000 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 \$250 million in the aggregate.<sup>76</sup> Based on available data, we find that the number of cable operators serving 677,000 subscribers or less totals approximately 1,450.<sup>77</sup> Since we do not request nor collect information on whether 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:* MDS involves a variety of transmitters, which are used to relay programming to the home or office.<sup>78</sup> The Commission has defined "small entity" for purposes of the 1996 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.<sup>79</sup> This definition of a small entity in the context of MDS auctions has been approved by the SBA.<sup>80</sup> These stations were licensed prior to implementation of Section 309(j) of the

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<sup>72</sup> 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).

<sup>73</sup> Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>74</sup> 47 U.S.C. § 543(m)(2).

<sup>75</sup> FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice DA 01-158 (January 24, 2001).

<sup>76</sup> 47 C.F.R. § 76.1403(b).

<sup>77</sup> Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>78</sup> For purposes of this item, MDS includes the single channel Multipoint Distribution Service (MDS) and the Multichannel Multipoint Distribution Service (MMDS).

<sup>79</sup> 47 C.F.R. § 1.2110(a)(1).

<sup>80</sup> 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).

Communications Act of 1934, as amended.<sup>81</sup> Licenses for new MDS facilities are now awarded to auction winners in Basic Trading Areas (BTAs) and BTA-like areas.<sup>82</sup> The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 BTAs. Of the 67 auction winners, 61 met the definition of a small business.

*LMDS:* The auction of the 1,030 LMDS licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined “small entity” for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>83</sup> An additional classification for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>84</sup> These regulations defining “small entity” in the context of LMDS auctions have been approved by the SBA.<sup>85</sup> There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission reaucted 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the reauction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission’s auction rules.

*DBS:* Because DBS provides subscription services, it falls within the SBA-recognized definition of “Cable and Other Program Distribution.”<sup>86</sup> This definition provides that a small entity is one with \$12.5 million or less in annual receipts.<sup>87</sup> Currently, there are nine DBS authorizations, though there are only two DBS companies in operation at this time. We neither request nor collect annual revenue information for DBS services, and are unable to determine the number of DBS operators that would be considered a small business under the SBA definition.

An alternative way to classify small entities is by the number of employees. Based on available data, we estimate that in 1997 the total number of full-service broadcast stations with four or fewer employees was 5186, of which 340 were television stations.<sup>88</sup> Similarly, we estimate that in 1997, 1900 cable employment units employed fewer than six full-time employees. Also, in 1997, 296 “MVPD” employment units employed fewer than six full-time employees.<sup>89</sup> We also estimate that in 1997, the total number of full-

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<sup>81</sup> 47 U.S.C. § 309(j). (Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard for “other telecommunications” (annual receipts of \$11 million or less). *See* 13 C.F.R. § 121.201.

<sup>82</sup> *Id.* A BTA is the geographic area by which the MDS is licensed. *See* Rand McNally, 1992 *Commercial Atlas and Marketing Guide*, 123rd Edition, pp. 36-39.

<sup>83</sup> *See Local Multipoint Distribution Service, Second Report and Order*, 12 FCC Rcd 12545 (1997).

<sup>84</sup> *Id.*

<sup>85</sup> *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from A. Alvarez, Administrator, SBA (January 6, 1998).

<sup>86</sup> 13 C.F.R. § 121.201, NAICS codes 513210 and 513220.

<sup>87</sup> *Id.*

<sup>88</sup> We base these estimates on a compilation performed by the Equal Employment Opportunity staff, Policy Division, Media Bureau, FCC.

<sup>89</sup> At that time, we considered “MVPDs” to be all multichannel video programming distributors that were not cable operators.

service broadcast stations with five to ten employees was 2145, of which 200 were television stations. Similarly, we estimate that in 1997, 322 cable employment units employed six to ten full-time employees. Also, in 1997, approximately 65 MVPD employment units employed six to ten full-time employees.<sup>90</sup>

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

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>91</sup>

This *Third Report and Order* sets forth the Commission's new annual employment reports, and considers the significant alternatives presented in the comments. We have determined that our finalized rules fulfill our public interest goals while maintaining minimal regulatory burdens and ease and clarity of administration.

The *Third Report and Order* adopts relief for small entities. Broadcasters with fewer than five full-time employees will not be required to file Form 395-B. MVPD units with fewer than six full-time employees will not be required to file Form 395-A. Thus, the EEO Rule does not impose unreasonable burdens on small broadcasters or MVPDs. We provide this relief because entities with small staffs have limited personnel and financial resources. The exceptions for small business provides them with some relief of any recordkeeping and reporting costs.

As noted, the ACA asks for a generally "streamlined" FCC Form 395-A.<sup>92</sup> As explained in the *Third Report and Order*, the Commission's annual employment reports must follow Section 634 of the Act and the standards issued by the Office of Management and Budget for classifying data on race and ethnicity.

**Report to Congress:** The Commission will send a copy of the *Third Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act, 5 U.S.C. § 801(a)(1)(A). In addition, the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *Third Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Third Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register. See 5 U.S.C. § 604(b).

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<sup>90</sup> We note that SBA has approved the EEO small business size standards discussed in the *Third Report and Order*.

<sup>91</sup> 5 U.S.C. § 603(c).

<sup>92</sup> ACA Comments and IRFA Comments.



**APPENDIX B****I. Part 73 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:**

The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, 334, 336, 403.

**Subpart H - Rules Applicable to All Broadcast Stations**

Section 73.3612 is amended to read as follows:

**§ 73.3612. Annual employment report.**

Each licensee or permittee of a commercially or noncommercially operated AM, FM, TV, Class A TV or International Broadcast station with five or more full-time employees shall file an annual employment report with the FCC on or before September 30 of each year on FCC Form 395-B.

Note to § 73.3612: Data concerning the gender, race and ethnicity of a broadcast station's workforce collected in the annual employment report will be used only for purposes of analyzing industry trends and making reports to Congress. Such data will not be used for the purpose of assessing any aspect of an individual broadcast licensee's compliance with the equal employment opportunity requirements of § 73.2080.

**II. Part 76 of Chapter 1 of the Code of Federal Regulations is amended as follows:**

The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 317, 325, 338, 339, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

**Subpart V – Reports and Filings**

Section 76.1802 is amended to read as follows:

**§ 76.1802. Annual employment report.**

Each employment unit with six or more full-time employees shall file an annual employment report on FCC Form 395-A with the Commission on or before September 30 of each year.

Note to § 76.1802: Data concerning the gender, race and ethnicity of an employment unit's workforce collected in the annual employment report will be used only for purposes of analyzing industry trends and making reports to Congress. Such data will not be used for the purpose of assessing any aspect of an individual employment unit's compliance with our EEO rules for multi-channel video program distributors.

**STATEMENT OF  
CHAIRMAN MICHAEL K. POWELL**

*Re: Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*

I am proud to support this item, which revises and re-implements annual employment reports from broadcasters and MVPDs. This data will allow the Commission to accurately identify and report industry trends and have been collected by the Commission for years. In addition, I support asking questions about recent changes in administrative law and its impact on how we collect and disseminate this data.

Finally, I would note that the Commission seeks comment on whether our approach to these forms should be altered given the efforts of the Diversity Committee for Communications in the Digital Age. I note only that several members of the Diversity Committee have asked that the Commission not invoke its name as a reason for changing some of our policies, especially prior to the completion of their vitally important work. As we move to an Order on the open questions in this proceeding, I will keep this request in mind.

**JOINT STATEMENT OF  
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN  
APPROVING IN PART AND DISSENTING IN PART**

*Re: Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Third Report and Order and Fourth Notice of Proposed Rulemaking*

We support the readoption of annual employment reporting forms. The Commission has an obligation under the Act to collect these data from broadcasters and MVPDs. The Commission uses this information to ascertain industry trends, report to Congress, and respond to inquiries from Congress, while it has made clear that it will not use these data to screen renewal applications.

We are concerned, however, that today's decision prolongs the actual filing of the data by seeking additional comment on whether we can or should modify our procedures to collect the data confidentially. We recognize that some may believe additional comment is necessary out of an abundance of caution. We believe, however, that given the fundamental importance of this information, additional comment is not needed. The Commission has never sought this information under a pledge of confidentiality. In fact, broadcasters have filed these employment forms for decades knowing that the Commission would make the information available to the public for inspection. Later, when Congress adopted requirements for MVPDs, it required that their forms be made available for public inspection at their offices. This is a strong indication of Congress's desire that these forms be publicly accessible.

We are also concerned how a change in policy to make this information confidential could affect the work of the Commission's Advisory Committee on Diversity for Communications in the Digital Age. This Committee's express purpose is to create opportunities for minorities and women to advance to managerial positions and participate in new and emerging technologies in the communications sector.

In addition, although not specifically addressed in today's Order, we also express our concern about the manner in which the Commission has implemented the EEO rules it adopted in November 2002. In that Order, the Commission emphasized its commitment to examine and act upon licensee's compliance with our EEO rules at license renewal time. The Commission stated that it would audit five percent of all licensees each year in order to monitor compliance with our rules. Yet, even as this Order is adopted, the Commission has yet to conduct a single audit. This issue takes on added importance because we are in the middle of a license renewal cycle. It now appears that the Commission is beginning some type of audit procedure. We support *full* implementation of the steps outlined in our November 2002 Order. Equal employment opportunity is an essential part of the obligation to serve the public interest. Broadcasters and multichannel video programming distributors should draw upon the strength and vibrancy that flows from the diversity of the American people.

STATEMENT OF  
COMMISSIONER KEVIN J. MARTIN  
APPROVING IN PART, CONCURRING IN PART

Re: Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies, Third Report and Order and Fourth Notice of Proposed Rulemaking

Every citizen should have the opportunity to advance professionally based on his or her own merit, regardless of race, religion, or sex. Discrimination in the workplace is anathema to this principle, and Congress has charged us with prohibiting such discrimination in the broadcast and cable industries.

I strongly support equal employment opportunity principles, and I supported our most recent attempt to craft EEO rules that would be both effective *and* constitutional. I hope we have succeeded.

Our past attempts, however, were not so successful; the courts struck them down on constitutional grounds twice. The most recent court case vacated our second attempt at an EEO rule because it determined that what was known as “Option B” created race-based classifications that did not survive strict scrutiny.<sup>1</sup> That court specifically mentioned the Annual Employment Report at issue here, which required stations to identify each employee by race and sex.<sup>2</sup> Although the court did not pass on the constitutionality of this requirement, it did vacate the entire EEO rule, including this provision.<sup>3</sup> Because the court was skeptical of race-based classifications, I have concerns with reinstating the requirement that parties classify employees in such a manner and file the information with us on a regular basis. I would have less concern if the data were supplied to us anonymously. If our goal is truly only to monitor industry trends and not to use the data (or allow others to do so) to determine EEO compliance, anonymous information would seem to fulfill that need while eliminating the constitutional concern.

I therefore am concerned that we are adopting this form without first determining whether the information may be submitted anonymously.

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<sup>1</sup> *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).

<sup>2</sup> *See* 236 F.3d at 17 (noting that “the new EEO rule” included the filing of annual reports which require stations to identify each employee by race and sex).

<sup>3</sup> *Id.* at 23 (determining that “the rule is vacated in its entirety”).