

**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.¹ That court specifically mentioned the Annual Employment Report at issue here, which required stations to identify each employee by race and sex.² Although the court did not pass on the constitutionality of this requirement, it did vacate the entire EEO rule, including this provision.³ 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.

¹ *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).

² *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).

³ *Id.* at 23 (determining that "the rule is vacated in its entirety").