

Back to the Future: The FCC Adopts New and Revised EEO Rules

By S. Jenell Trigg

Part 2: Reporting and FCC Filing Requirements

Part 1 of this article (February/March 2003 issue) highlighted the FCC's new EEO rules for broadcasters and revised EEO rules for cable and other multichannel video programming distributors (collectively "MVPDs"), for non-exempt employment units—those broadcast and MVPD units that have five or more, or six or more, full-time employees respectively. The EEO rules were effective on March 10, 2003.

This second and final part will review and provide suggested guidelines for implementation of the FCC's reporting, filing, and self-assessment requirements, plus review its enforcement measures. As in previous versions of the EEO rule, there are several formal FCC Forms that must be completed by all broadcasters and MVPDs, including small employment units. Small broadcasters and MVPDs must also submit all forms to the FCC but only to certify the small size exemption, with one exception for small broadcasters. Specifics are discussed below.

Annual EEO Public File Report

Broadcast and MVPD employment units are required to prepare an EEO public file report ("EEO Public File Report" or "Report") on an annual basis. The Report must also be placed in each individual unit member's public inspection file and posted on each unit member's Web site, if it maintains one. Only the most current Report must be posted on the Web site.

- For broadcasters, the Report must be placed in the public inspection file on the anniversary of the license renewal application filing date and must be retained in the file until the license renewal is granted.
- For MVPDs, the Report must be placed in the public inspection file on or before September 30 and retained in the file for five years.

There is no formal FCC form for the EEO Public File Report; units may design their own Report so long as the Report includes:

- a list of all full-time vacancies filled by the unit during the preceding year, identified by job title
- for each such vacancy, the recruitment source(s) used to fill the vacancy (including, if applicable, community organizations entitled to notification, which should be separately identified), including name, address, contact person and telephone number
- the recruitment source that referred the hiree for each full-time vacancy during the preceding year
- 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 used in connection with such vacancies
- a list and brief description of the supplemental recruitment initiatives performed under Prong 3 during the preceding year.

Submission of the EEO Public File Report to the FCC

Broadcasters are not required to submit the EEO Public File Report to the FCC, except in two instances: 1) at mid-term review; and 2) with the license renewal application. MVPDs must submit the EEO Public File Report once every five years as part of the FCC supplemental investigation process with the annual employment report (FCC Form 396-C), as required by statute.

For both services, the EEO Public File Report will be one basis for the FCC's evaluation of whether a broadcaster or MVPD is in compliance with its rules. The general public can monitor a unit's fulfillment of its EEO requirements based on the EEO Public File Report and the various FCC forms placed in the public inspection file and/or submitted to the FCC.

Therefore, broadcasters and MVPDs should take special care in the preparation of the EEO Public File Report. The information regarding referral sources for interviewees is very important given that this is the primary data that will represent to the FCC and the general public how broad a unit's recruitment efforts have been and whether such efforts have encompassed the entire community. Units should employ extra effort in the application, interview, and hiring processes to identify and confirm referral sources. For example, a checklist of sources can be provided to all interviewees or, alternatively, used by the interviewer after inquiring about the referral source.

Employment units are well advised to back up all electronic and hard copy internal recordkeeping used in preparation of the EEO Public File Report and any additional internal documentation necessary to prove compliance with the FCC's rules. Backup disks and hard copies should be maintained in a safe, secure, and waterproof location.

It is also recommended that community organizations that request vacancy notices be informed of the FCC requirement to disclose the name of the organization, address, telephone number, and contact person to the general public as part of the employment unit's EEO Public File Report. This can be done by a privacy disclosure on the station's Web site and/or at the time of request from each organization.

Mandatory FCC Filings for Broadcasters

The reports listed below must be filed with the FCC (with one exception) and placed in each station's public inspection file until the license renewal has been granted. Significantly, broadcasters no longer have to certify compliance with the rules; instead they need only certify that the reports are accurate.

Broadcast employment units that consist of multiple radio and/or television stations located in more than one state with different license renewal application dates may prepare and file one EEO Public File Report and one FCC Form 397 for the entire unit. A broadcaster's selection of the appropriate renewal date for a unit under such circumstances is subject to specific FCC criteria. For example, if the unit contains a television station, the renewal date for the television station should generally govern given statutory requirements. In this instance, the report would cover all stations in the employment unit, with no need to file a separate Mid-Term Report for the radio station(s) in the unit. You should consult your FCC counsel for specific advice based on your particular situation.

FCC Forms 397, 396, and 396-A require the employment unit to identify a contact person who will be responsible for the implementation and administration of the station's EEO program. If the name of the contact person changes during the pending license renewal, the station should immediately inform the FCC of the new contact person's name.

Broadcast Mid-Term Report (FCC Form 397). Radio station employment units with more than ten full-time employees and television station units with five or more full-time employees must undergo a mid-term review based on EEO Public File Reports for two years preceding the mid-term review (unless an earlier report does not pertain to a licensee because of a sale or transfer of control).

All broadcasters must complete the FCC Form 397; small stations are to certify that they are exempt from a mid-term review. However, submission of the Mid-Term Report to the FCC is optional for small television stations with fewer than five full-time employees and radio stations with 10 or fewer full-time employees.

Broadcast Equal Employment Opportunity Program Report (FCC Form 396). A narrative statement describing how the station achieved broad and inclusive recruitment outreach during the preceding two years must be submitted with the license renewal application. Stations that have experienced difficulties in their outreach efforts should explain. The EEO Public File Report for the license renewal filing year and the preceding year must also be included.

Broadcast Equal Employment Opportunity Model Program Report (FCC Form 396-A). To be submitted with applications for the construction of new broadcast stations or for the sale or transfer of control of existing stations. A model report requires, among other things, a proposed EEO program and a list of potential recruitment sources it will use to attract qualified job candidates.

Broadcast Annual Employment Report (FCC Form 395-B). For the time being, broadcasters are not required to prepare and file FCC Form 395-B, which is traditionally due by September 30 each year. The FCC has stated that it will address the report's workforce data requirements in a separate decision later this year but if readopted, it will only use the report to assess industry employment trends and not to evaluate an individual broadcaster's compliance with the EEO rules.

Time-Brokered Broadcast Stations

Stations subject to a time brokerage agreement have different FCC reporting requirements. If a station is subject to a time brokerage agreement, the licensee of the station is required to file FCC Forms 396 and 397, and annual EEO Public File Reports concerning only its own recruitment activities. If the broker is also the licensee of other stations in the same market, the broker must include its recruitment activity for the brokered station(s) in conjunction with the data reported in FCC Forms 396 and 397 and in the annual EEO Public File Reports filed for the broker's own station(s). If the broker owns other stations, but not in the same market as the brokered station, its recruitment activity for the brokered station should be reported with the information filed for its station that is geographically closest to the brokered station. Non-broadcast brokers are not subject to these reporting requirements but may be investigated by the FCC to ensure that the relationship with their brokered station is not designed to circumvent the EEO rules.

Mandatory FCC Filings for MVPDs

Each of the following reports must be filed with the FCC and be placed in the central office's public inspection file and at every system location with six or more employees. A headquarters employment unit file and a file containing a consolidated set of all reports that pertain to other units of a MVPD that operates multiple units shall be maintained at the central office of the headquarters employment unit.

Annual EEO Program Report (FCC Form 396-C). The FCC consolidated the previous FCC Form 395-A (cable operators) and FCC Form 395-M (other MVPDs) into one Annual EEO Program Report, which is due on or before September 30. The FCC will issue the Certification of Compliance based on this report. Cable operators must also list the communities in which they operate. The section concerning workforce data has been eliminated; however, the adoption of a new form to include workforce data is pending consideration by the FCC. Like broadcasters, the FCC pledges not to use workforce data for the purpose of assessing any aspect of an individual MVPD's compliance with the rules.

Supplemental Investigation Sheet ("SIS"). To be submitted with the FCC Form 396-C in the year in which the MVPD is subject to the five-year FCC investigation. A copy of the preceding year's EEO Public File Report must be included.

Self-Assessment

The FCC also requires broadcasters and MVPDs to conduct an internal analysis of the effectiveness of their overall EEO programs and anti-discrimination efforts on an ongoing basis. For MVPDs, age discrimination is included as part of the self-assessment process, consistent with statutory provisions. Broadcasters are prohibited from age discrimination pursuant to other federal and state laws, and should take measures to prevent such discrimination in the general course of business. If there were a final determination of a broadcaster's violation of federal or state age discrimination law by a government agency or court, the FCC would evaluate a broadcaster's qualifications to hold a license under its Character Policy guidelines during the license renewal process and it would then impose the appropriate sanctions or remedies, if any, at that time.

Broadcasters and MVPDs must analyze measures taken to:

- review seniority practices to ensure they are nondiscriminatory
- examine pay rates and fringe benefits for employees having the same duties, and eliminate any inequities based upon race, national origin, color, religion, or sex discrimination, plus age discrimination for MVPDs
- utilize media for recruitment purposes in a manner that will contain no indication, either explicit or implicit, of a preference for one race, national origin, color, religion, or sex (plus age for MVPDs) over another
- ensure that promotions to positions of greater responsibility are made in a nondiscriminatory manner
- where union agreements exist, cooperate with the union or unions in the development of programs to ensure all persons an equal opportunity for employment, regardless of race, national origin, color, religion, or sex (plus age for MVPDs), and include an effective nondiscrimination clause in new or renegotiated union agreements
- avoid the use of selection techniques or tests that have the effect of discriminating against any person based on race, national origin, color, religion, or sex for broadcasters, and for MVPDs, against minority groups or women
- disseminate its EEO program to job applicants and employees, and for a MVPD dissemination is also required to those with whom it regularly does business.

The following are specific suggestions for how to fulfill the FCC's requirement to self-assess outreach and recruitment efforts:

- Periodically review all recruitment sources (non-community groups) to determine whether the source has generated any applicants. If not, contact the source to find out why. Change the source if there continues to be no response.
- Conduct an honest evaluation whether a source is generating qualified applicants. If not, consider changing the source and/or revising the advertising copy or strategy.
- Review a general source periodically to determine whether it continues to reach all segments of the community. A review of the number of minorities and women present in applicant and interviewee pools is not required by the FCC, but may be helpful in the self-assessment process.
- Review whether the process for selecting interviewees from qualified applicants is implemented in a non-discriminatory manner. A limited or cursory interview process over time could raise discrimination issues.
- Although the FCC does not expressly require written documentation of self-assessment efforts, it may be helpful to memorialize such efforts in written form and retain all documentation in an internal file. Include the date of the self-assessment, the staff person conducting it, and findings and steps taken to address any problems identified. If no steps are taken, explain why.

FCC Enforcement

The FCC will use multiple tools to review compliance with its rules, including audits and staff inquiries. The FCC will conduct random audits each year for five percent of radio and television stations, and random audits for MVPDs in addition to the statutorily mandated investigation that occurs at least once every five years. Targeted investigations will also be conducted if there is evidence of possible violations.

The FCC's recordkeeping requirements become even more important with outreach effort-based rules since failure to maintain appropriate records could lead to other findings of non-compliance simply because there is no documentation to indicate otherwise. Other potential areas of non-compliance include, but are not limited to: 1) failure to analyze the adequacy of the various program elements in achieving broad outreach to all segments of the community; 2) failure to undertake the required Prong 3 initiatives; and 3) failure to notify organizations that are entitled to vacancy notices. In fact, sanctions and remedies may be issued for any violation of the rules. Such enforcement measures will be determined on a case-by-case basis. Broadcasters are subject to admonishments, reporting conditions, forfeitures, short-term renewals of license or designation for hearing for possible license revocation, or denial of a license. Cable systems

operate according to local franchise agreements, which are outside of the enforcement authority of the FCC. However, the FCC can deny the cable system's Certificate of Compliance. Cable antennae relay systems ("CARS") and other MVPD services that are licensed by the FCC are also subject to short-term license renewal, denial, or revocation of a license. All MVPDs are subject to admonishments, forfeitures, and reporting conditions.

At this time, it is unknown whether these rules will be subject to yet another court challenge. But until further notice, the FCC's Second Report and Order prevails. Notwithstanding the legal issues embodied in this proceeding, there are tremendous benefits to having a diverse, qualified workforce, particularly for communications businesses that rely on the support of diverse audiences. Hopefully, good-faith implementation of these rules will help broadcasters and MVPDs achieve this worthy goal.

S. Jenell Trigg is Of Counsel with the law firm of Leventhal Senter & Lerman PLLC in Washington, D.C.; strigg@ls-law.com; 202.416.1090.