Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8

REPORT AND ORDER

Adopted: August 5, 1999 Released: August 6, 1999

By the Commission: Chairman Kennard and Commissioners Ness, Powell, and Tristani issuing separate statements; Commissioner Furchtgott-Roth dissenting and issuing a statement.

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I. INTRODUCTION

1. In this *Report and Order*, we revise our local television ownership rules -- the "TV duopoly" rule and the radio-television cross-ownership or "one-to-a-market" rule -- to respond to ongoing changes in the broadcast television industry. Our action today culminates a broad- reaching examination of these and other broadcast media ownership rules first initiated by the Commission in 1991, and more recently guided by the statutory directives of the Telecommunications Act of 1996.[1] The new rules we adopt today reflect a recognition of the growth in the number and variety of media outlets in local markets, as well as the significant efficiencies and public service benefits that can be obtained from joint ownership. At the same time, our decision reflects our continuing goals of ensuring diversity and localism and guarding against undue concentration of economic power. The rules we adopt today and in our related national television ownership and broadcast attribution proceedings, being adopted simultaneously with this *Report and Order*,[2] balance these competing concerns and are intended to facilitate further development of competition in the video marketplace and to strengthen the potential of broadcasters to serve the public interest.

II. BACKGROUND

2. The television duopoly rule currently prohibits an entity from having cognizable interests in two television stations whose Grade B signal contours overlap. The Commission rarely grants permanent waivers of the duopoly rule, reserving such relief for cases with unique or highly unusual circumstances.[3]

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[1] Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[2] *See Report and Order, In the Matter of Broadcast Television National Ownership Rules, Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, MM Docket Nos. 96-222, 91-221, & 87-8, FCC 99-208 (adopted Aug. 5, 1999) ("*National TV Ownership Report and Order*"); *Report and Order, In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy*, MM Docket Nos. 94-150, 92-51, & 87-154, FCC 99-207 (adopted Aug. 5, 1999) ("*Attribution Report and Order*").

[3] For example, the FCC has permitted common ownership of television stations in New York City and Philadelphia. In addition, the Commission has granted temporary waivers of the duopoly rule, subject to fixed,

Under current policy, the time brokerage by one television station of another television station, even one in the same market, pursuant to a time brokerage or "local marketing" agreement ("LMA"),[4] is not attributable, and accordingly these relationships are not subject to our multiple ownership rules. The radio-television cross-ownership rule generally forbids joint ownership of a radio and a television station in the same local market.[5] We have presumed it is in the public interest to waive this rule in the top 25 television markets if, post-merger, at least 30 independently owned broadcast voices remain, or if the merger involves a failed station. Such waivers are available to permit ownership of up to one television, one AM, and one FM station per market. We have evaluated other waiver requests case by case, based on an analysis of five criteria (the "five factors" test).

3. This proceeding began in 1991 with the issuance of a *Notice of Inquiry* soliciting comment on whether existing television ownership rules and related policies should be revised in light of ongoing changes in the competitive market conditions facing broadcast licensees.[6] After reviewing the comments received in response to the *NOI*, the Commission issued a *Notice of Proposed Rule Making* containing a number of alternative proposals involving the national and local television ownership rules, and seeking comment on the extent and impact of LMAs in the broadcast television industry.[7]

4. In 1994, in a *Further Notice of Proposed Rule Making* in this docket, the Commission set

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near-term divestiture requirements, to facilitate mergers.

4 An LMA or time brokerage agreement is a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot announcements to support the programming. *See Further Notice of Proposed Rule Making, In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy*, MM Docket Nos. 94-150, 92-51, 87-154, 11 FCC Rcd. 19895, 19908 (1996) ("*Attribution Further Notice").*

5 Specifically, the rule forbids joint ownership of a radio and a TV station where the specified service contour of the radio station (2 mV/m for AM and 1 mV/m for FM) encompasses the entire city of license of the TV station or the Grade A contour of the TV station encompasses the entire city of license of the radio station.

6 *Notice of Inquiry, In the Matter of Review of the Policy Implications of the Changing Video Marketplace*, MM Docket No. 91-221, 6 FCC Rcd 4961 (1991) ("*NOI*").

7 *Notice of Proposed Rule Making, In the Matter of Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 91-221, 7 FCC Rcd 4111 (1992). This *NPRM* also examined the dual network rule, national ownership, and other network rules. The dual network and national ownership rules are presently under examination in the Commission's 1998 biennial review of its broadcast ownership rules. *Notice of Inquiry, In the Matter of 1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MM Docket No. 98-35, 13 FCC Rcd 11276 (1998) ("*Biennial Review NOI*").

forth a competition and diversity analysis for examining our ownership rules.[8] Based on this analysis, the Commission proposed changes to the national television ownership rule, the local television ownership rule (otherwise known as the "duopoly" rule), and the radio-television cross-ownership rule. In addition, the Commission solicited comment on whether broadcast television local marketing agreements ("LMAs") should be considered attributable for purposes of applying the ownership rules in a manner similar to radio LMAs.

5. On February 8, 1996, the Telecommunications Act of 1996 became law. Section 202 of the Act directed the Commission to make a number of significant revisions to its broadcast ownership rules.[9] Section 202 also requires us to review aspects of our local ownership rules that were the subject of the *TV Ownership Further Notice*. Specifically, Section 202 requires the Commission to: 1) conduct a rulemaking proceeding concerning the retention, modification, or elimination of the duopoly rule;[10] and 2) to extend the top 25 market/30 independent voices one-to-a-market waiver policy to the top 50 markets, "consistent with the public interest, convenience, and necessity."[11] In addition, both the Act and its legislative history contain language regarding the appropriate treatment of existing television LMAs under our ownership rules.[12] Finally, Section 202 directs the Commission to conduct a biennial review of all of its broadcast ownership rules and to repeal or modify any regulation it determines is no longer in the public interest.[13]

6. In view of the 1996 Act's directives regarding broadcast multiple ownership, the Commission in 1996 adopted a *Second Further Notice of Proposed Rule Making* in this proceeding inviting comment on

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[8] *Further Notice of Proposed Rule Making*, MM Docket Nos. 91-221 & 87-8, 10 FCC Rcd 3524 (1995) ("*TV Ownership Further Notice*").

[9] Among other things, Section 202 directed the Commission to eliminate its restriction on the number of radio stations a single entity can own or control nationally, and to increase the number of radio stations that a single entity can own or control in a local market. *See* Sections 202(a) and (b) of the 1996 Act. The Act also states that the Commission may permit an entity to exceed the revised local radio ownership limits if such ownership or control "will result in an increase in the number of radio broadcast stations in operation." Section 202(c). Section 202 also directed the Commission to eliminate the numerical cap on the number of television stations a single entity can own or control nationally, and revised upward (from 25 percent to 35 percent) the national audience reach limitation for television stations. Section 202(c)(1).

[10] Section 202(c)(2) of the 1996 Act.

[11] Section 202(d) of the 1996 Act.

[12] Section 202(g) of the 1996 Act.

[13] Section 202(h) of the 1996 Act. The Commission initiated this biennial review in March 1998. *See Biennial Review NOI*. This review covers a number of our ownership rules that were not already subject to pending proceedings. In the *Biennial Review NOI*, the Commission stated that it would take action with respect to the rules that were already subject to pending proceedings, including the TV duopoly and radio-television cross-ownership rules, independently of the biennial review proceeding. We take such action today in amending our TV duopoly and radio-television cross-ownership rules.

several issues in light of the 1996 Act.[14] We reiterated that "'our concern with diversity is most acute with respect to local ownership issues.'"[15] We further stated our belief that we should proceed with "reasonable caution" to consider the impact on industry structure made possible by the legislation and by other forces that are "changing, often in unpredictable ways, the marketplace for video programming. . . ."[16] The Commission solicited further comment in light of its review of comments previously filed in this proceeding, and invited comments on a number of specific issues pertaining to the duopoly rule, the radio-television cross-ownership rule, and the treatment of existing television LMAs in the event they are deemed attributable under any rules adopted in our attribution proceeding.

7. Our ownership rules, particularly the local ownership rules at issue in this proceeding, serve a vital public interest by promoting competition and diversity in the mass media. These are bedrock goals -- reaffirmed by Congress and the Supreme Court on numerous occasions -- in carrying out our statutory mandate of ensuring that broadcast licensees serve the "public interest, convenience, and necessity."[17] With these goals in mind, and after carefully reviewing the record in this proceeding,[18] we believe we should relax to some extent our local television ownership restrictions where the public interest benefits resulting from same-market common ownership outweigh the threat to diversity and localism. The record reflects that there has been an increase in the number and types of media outlets available to local communities. With respect to cable television, we recognize that clustering of systems in the major population centers enables cable to compete more effectively for advertising dollars.

8. Specifically, we have decided to modify our local television ownership rule as follows. First, we are relaxing our television duopoly rule by narrowing the geographic scope of the rule from the current Grade B contour approach to a "DMA" test. Thus, common ownership of two television stations will be permitted without regard to contour overlap if the stations are in separate Nielsen Designated Market Areas ("DMAs"). In addition, we will allow common ownership of two stations in the same DMA if their Grade B contours do not overlap (a continuation of our current rule), or if eight independently owned, full-power and operational television stations (commercial and noncommercial) will remain post-merger, and one of the stations is not among the top four-ranked stations in the market, based on audience share, as measured by Nielsen or by any comparable professional and accepted rating service, at the time the application is filed. We will also adopt three waiver criteria as follows. First, we will presume a waiver of the rule is in the public interest to permit common ownership of two television stations in the same market where one station is a "failed station," as supported by a showing that the station either has been off the air for at least four months

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[14] *Second Further Notice of Proposed Rule Making*, MM Docket Nos. 91-221 & 87-8, 11 FCC Rcd 21655 (1996) ("*Second Further Notice"*).

[15] 11 FCC Rcd at 21657 (quoting *TV Further Ownership Notice*, 10 FCC Rcd at 3574).

[16] 11 FCC Rcd at 21657.

[17] 47 U.S.C. § 309(k)(1). *See also infra* ¶¶ 17, 20, 21 (discussing decisional and statutory sources regarding competition and diversity).

[18] For a list parties that filed comments in response to our *Second Further Notice*, *see* Appendix C, attached.

immediately preceding the application for waiver, or is currently involved in involuntary bankruptcy or insolvency proceedings. Second, we will presume a waiver of the rule is in the public interest where one of the merging stations is a "failing" station, as supported by a showing that the station has had a low audience share and has been financially struggling during the previous several years, and that the merger will result in demonstrable public interest benefits. Third, we will presume a waiver is in the public interest where applicants can show that the combination will result in the construction and operation of an authorized but as yet "unbuilt" station, supported by a showing that the permittee has made reasonable efforts to construct. For all of these waivers, we will also require a showing that the in-market applicant is the only buyer ready, willing, and able to operate the station, and that sale to an out-of-market applicant would result in an artificially depressed price.

9. With respect to the radio-television cross-ownership rule, we are adopting a new, three-part rule that permits some degree of same-market radio and television joint ownership. We will permit a party to own a television station (or two television stations if permitted under our modified TV duopoly rule or television LMA grandfathering policy) and any of the following radio station combinations in the same market:

- up to six radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules[19]) in any market where at least 20 independent voices would remain post-merger;

- up to four radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules) in any market where at least 10 independent voices would remain post-merger; and

- one radio station (AM or FM) notwithstanding the number of independent voices in the market.

In addition, in those markets where our revised rule will allow parties to own eight outlets in the form of two TV stations and six radio stations, we will permit them to own one TV station and seven radio stations instead.

10. For purposes of the new radio-television cross-ownership rule, we will count as voices all independently owned, full-power, operational, commercial and noncommercial television stations licensed to a community in the DMA in which the TV station in question is located, and all independently owned and operational commercial and noncommercial radio stations licensed to, or with a reportable share in, the radio metro market where the TV station involved is located. In addition, we will count independently owned daily newspapers that are published in the DMA and have a circulation exceeding 5 percent in the DMA. Finally, we will count, as a single voice, wired cable service, provided cable service is generally available in the DMA. As with our revised duopoly rule, we will permit waiver of our new radio/TV cross-ownership rule where one station is a failed station. We will not, however, adopt a presumptive waiver based on a showing that one station is a failing station or that the combination will result in the construction and operation of an authorized but as yet unbuilt station. We will consider further relaxation of this rule and waiver policies as part of future biennial reviews.

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[19] For example, if the radio/TV combination at issue is in a market where our local radio ownership rules would allow a radio-only combination to own eight stations, five of which are FM and three of which are AM, the radio/TV combination could own five FM stations and one AM station.

11. We have granted a number of radio-television cross-ownership rule waivers conditioned on the outcome of this proceeding. The majority of these waivers involve radio-television combinations that will now be permissible under the revised rule we adopt today. For those that are not covered by the revised rule, as well as for those for which an application was filed on or before July 29, 1999 (the date of the "sunshine" notice for this *Report and Order*) if such application is ultimately granted by the Commission, we will allow these combinations to continue, conditioned on the outcome of the Commission's 2004 biennial review. Parties who wish the Commission to conduct this review prior to 2004 may apply for such relief, using criteria set forth below,[20] beginning one year after the date this *Report and Order* is published in the Federal Register. Any transfer of a grandfathered combination after the adoption date of this Report and Order (whether during the initial grandfathering period of after a permanent grandfathering decision has been made) must meet the radio/TV cross-ownership rule.

12. Finally, with respect to existing television LMAs, we have decided in our related attribution proceeding to attribute time brokerage of another television station for purposes of our multiple ownership rules where the brokered and brokering station are in the same market and the amount of time brokered is more than 15 percent of the brokered station's weekly broadcast hours.[21] Once attributed, however, the majority of currently existing same-market television LMAs will not violate our new TV duopoly rule going forward, because they either will be in separate DMAs, or will constitute an otherwise permissible arrangement under the new rule or related waiver policies. We will permit those LMAs that do not comply with our new duopoly rule and waiver policies to continue in full force and effect, if entered into before November 5, 1996, the grandfathering cut-off date proposed in the *Second Further Notice*. LMAs entered into on that date or thereafter must come into compliance with our new duopoly rule and/or waiver policies or terminate within two years of the adoption date of this *Report and Order*. Television LMAs entered into before November 5, 1996 will be grandfathered, conditioned on the outcome of the Commission's 2004 biennial review, at which time the Commission will reconsider their status. Parties who wish the Commission to review the status of their LMAs prior to the 2004 biennial review may apply for such relief, using the criteria specified below,[22] beginning one year after the date this *Report and Order* is published in the Federal Register. During the initial grandfathering period, the parties to the LMA may renew and/or transfer the term of LMA that remains in the five-year period.

13. We note that a number of parties have expressed concern about the fact that greater consolidation of ownership in broadcasting makes it more difficult for new entrants -- parties that own no or only a few mass media outlets -- to enter this industry. This is particularly the case for minorities and women who are underrepresented in broadcasting.[23] We share these concerns. The Commission has recognized the

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[20] *See infra* ¶ 148.

[21] *See Attribution Report and Order*, section III.C.

[22] *See infra* ¶ 148.

[23] *See, e.g.,* Letter from David Honig, Executive Director, Minority Media and Telecommunications Center, to William Caton, Acting Secretary, FCC, dated March 25, 1997; AWRT Comments.

importance of promoting new entry into the broadcast industry as a means of promoting competition and diversity. Indeed, we have adopted a "new entrant" bidding credit as part of our broadcast auction procedures for these reasons and also to comply with our statutory mandate to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[24] We will monitor the effects of the relaxation of our local TV ownership rules on new entry.

14. We are now guided in considering initiatives to encourage greater minority and women-owned mass media businesses by a 1995 Supreme Court decision that held that any federal program that uses racial or ethnic criteria as a basis for decision-making is subject to strict judicial scrutiny; to withstand this scrutiny, any such programs must now be shown to "serve a compelling governmental interest, and must be narrowly tailored to further that interest."[25] We are presently conducting studies that we believe will allow us to address this issue in the context of our broadcast licensing and ownership policies. Upon the completion of these studies, we will examine the steps we can take to expand opportunities for minorities and women to enter the broadcast industry. In the interim, we encourage broadcasters to establish incubator programs and to engage in other cooperative ventures that will boost new entry into the broadcast industry, particularly with regard to the participation of women and minorities in the mass media.

III. OVERVIEW

15. The ultimate objectives of our ownership rules are to promote diversity and to foster economic competition, while minimizing any adverse effects our pursuit of these goals has on the efficient organization of the industry. All of our broadcast cross-ownership and multiple ownership rules, including the "TV duopoly" and "one-to-a-market" rules at issue in this proceeding, are based on these "twin goals" of competition and diversity. For example, when the Commission adopted the current version of the TV duopoly rule in 1964, it stated that its multiple ownership rules "seek to promote maximum diversification of program and service viewpoints and to prevent undue concentration of economic power contrary to the public interest."[26] The Commission explained:

> The concept embodied in these rules is not complex: When two stations in the same broadcast

[24] 47 U.S.C. § 309(j)(4)(D). *See First Report and Order*, *In the Matter of Implementation of Section 309(j) of the Communications Act* -- *Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Reexamination of the Policy Statement on Comparative Broadcast Hearings, Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264, 13 FCC Rcd 15920, 15993-15996, ¶¶ 186-190 (1998) ("*Competitive Bidding First Report and Order*").

[25] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995).

[26] *Report and Order, In the Matter of Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Docket No. 14711, 45 FCC 1476, 1476-77 (1964).

> service are close enough together so that a substantial number of people can receive both, it is highly desirable to have the stations owned by different people. This objective flows logically from two basic principles underlying the multiple ownership rules. First, in a system of broadcasting based upon free competition, it is more reasonable to assume that stations owned by different people will compete with each other, for the same audience and advertisers, than stations under the control of a single person or group. Second, the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have 'an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level.'"[27]

Similarly, when the Commission adopted the one-to-a-market rule in 1970, it likewise stated that the rule has a "twofold objective: (1) [f]ostering maximum competition in broadcasting, and (2) promoting diversification of programming sources and viewpoints."[28]

16. In considering the changes we have proposed to our local television ownership rules, we must assess the costs and benefits of such modifications in light of both our diversity and competition objectives. Our multiple ownership restrictions must strike a balance between the benefits to the industry and to the public of common ownership, such as economies of scale which can result in stronger stations and improved service to the public, and the reduction in the diversity of ownership and competition in a market that may arise from consolidation of station ownership. We must also take into account marketplace developments and the increased competition broadcasters are facing from other mass media outlets.

17. Promoting Diversity. One of the most important purposes of our multiple ownership rules is to encourage diversity in the ownership of broadcast stations so as to foster a diversity of viewpoints in the material presented over the airwaves.[29] As the Supreme Court recently reaffirmed, "'it has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse

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[27] *Id.* at 1477 (citation omitted).

[28] *First Report and Order, In the Matter of Amendment of Sections 73.35, 73.240, and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Docket No. 18110, 22 FCC 2d 306, 307 (1970).

[29] We have previously observed that our ownership rules seek to foster "outlet" and "source" diversity as a means of promoting a diversity of viewpoints. *TV Ownership Further Notice*, 10 FCC Rcd. at 3549-3550, ¶ 60-61. "Outlet" diversity refers to "a variety of delivery services (*e.g.*, broadcast stations) that select and present programming directly to the public"; "source" diversity refers to "a variety of program producers and owners." *Id*. at 3549-3550, ¶ 61. Both outlet and source diversity are "integral to the ultimate goal of providing the public with a variety of viewpoints. . . . The Commission has felt that without a diversity of outlets, there would be no real viewpoint diversity -- if all programming passed through the same filter, the material and views presented to the public would not be diverse. Similarly, the Commission has felt that without diversity of sources, the variety of views would necessarily be circumscribed." *Id*. at 3550-3551, ¶ 61.

and antagonistic sources is essential to the welfare of the public.""[30] This diversity policy is consistent with, and in fact furthers, the First Amendment goal of fostering the "marketplace of ideas"[31] and encouraging "uninhibited, robust, and wide-open" debate.[32] For these reasons, the Supreme Court has stated that it has "no difficulty" in concluding that the Commission's interest in "promoting widespread dissemination of information from a multiplicity of sources" is "an important governmental interest"; indeed, the Supreme Court has stated that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[33]

18. This is especially the case with respect to broadcasting. Broadcast stations, particularly television stations, reach large audiences and are the primary source of news and entertainment programming for Americans.[34] Broadcasters consequently play a leading role in shaping democratic debate and cultural attitudes. For example, the manner and viewpoint a station uses in presenting the news can have a substantial impact on a local election. A television drama that raises controversial or important societal issues can not only be entertaining but also shape cultural attitudes about these issues in significant ways. There is consequently a vital public interest in ensuring that these influential outlets for communication are in the hands of a broad number of different owners.

19. Our concern for ensuring diversity in broadcasting is most pressing at the local level. As the Commission explained in the *TV Ownership Further Notice*, "[t]he reasons for seeking diversity on the local level are readily apparent. Monopolization [of] the means of mass communication in a locality assure the monopolist control of information received by the public and based upon which it makes elective, economic and other choices. Measures to prevent such control have taken the form of our duopoly and one-to-a-market rule and our newspaper/broadcast cross-ownership rule, all of which limit the ability of a single person or entity to control local organs of mass communications in a geographic locale."[35]

20. The strong policy of promoting diversity is distinct from our competition goal. As the Supreme Court has recognized as recently as 1997, "[f]ederal policy . . . has long favored preserving a

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[30] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (*"Turner I"*) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality opinion) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

[31] This "marketplace of ideas" metaphor was first articulated by Justice Holmes. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[32] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (Brennan, J.).

[33] *Turner I*, 512 U.S. at 663.

[34] According to a recent survey, almost 70 percent of adults said they get most of their news from television - almost twice the number that list newspapers as their main news source. *See* "America's Watching," March/April, 1997, Roper Starch Worldwide, Inc.

[35] 10 FCC Rcd. at 3559, ¶ 78.

multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation."[36] Whether or not a particular ownership combination may have anticompetitive effects in the sale of advertising time or other markets in which broadcasters compete, it may nonetheless reduce the diversity of independently owned voices in a community. Congress implicitly recognized this in amending the local radio ownership rules in the 1996 Act. Although these amendments significantly relaxed these rules, they nevertheless maintained a set of radio ownership limitations. Congress promoted diversity separate and apart from competition. Indeed, Section 202(b) of the 1996 Act, which sets forth the new limitations, is titled "Local Radio *Diversity*."[37] Moreover, in discussing the radio-television cross-ownership rule, the Conference Report to the 1996 Act noted "the potential for public interest benefits of [radio-television station combinations] *when bedrock diversity interest[s] are not threatened*," and further stated that in reviewing this rule the FCC should take into account not only the increased competition facing broadcasters but also "the need for diversity in today's radio marketplace."[38]

21. Congress has repeatedly emphasized in other contexts its concern for promoting diversity in the mass media, notwithstanding the increasingly competitive nature of virtually all communications markets.[39] For example, the 1996 Act, as stated in its preamble, seeks to establish a "pro-competitive, de-regulatory national policy framework," yet still directs the Commission, in Section 257, in identifying and eliminating market entry barriers for entrepreneurs and other small businesses in certain services, "to promote the policies and purposes of this Act favoring diversity of media voices."[40] Likewise, among the policies of the Cable Competition and Consumer Protection Act of 1992 ("1992 Cable Act") were not only to "ensure that cable television operators do not have undue market power," but also to "promote the availability to the public of a diversity of views and information."[41] The 1992 Cable Act's requirement that cable systems carry the signals of local broadcast stations also reflects Congress' efforts to advance diversity.[42] The Supreme Court has also

[36] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 194 ("*Turner II*").

[37] Pub. L. No. 104-104, 110 Stat. 56, 110 (1996) (emphasis added).

[38] S. Conf. Rep. 104-230, 104th Cong. 2d Sess. 163 (1996) (emphasis added).

[39] Michael Harrington, *A-B-C, See You Real Soon: Broadcast Media Mergers and Ensuring A "Diversity of Voices,"* 38 B.C. L. Rev. 497, 523-25 (1997) ("Congress has repeatedly expressed its intent to maintain a diversity of media viewpoints.").

[40] 47 U.S.C. § 257(b).

[41] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2(b) (1992).

[42] *See* S. Rep. No. 92, 102d Cong., 1st Sess. 58 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1191; H.R. Rep. No. 628, 102d Cong., 2d Sess. 28, 63 (1992).

The communications laws otherwise incorporate the public policy goal of diversity. *See, e.g.,* 47 U.S.C. § 309(i)(3)(A) ("The Commission shall establish rules and procedures to ensure that . . . significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase consistently recognized the strong public policy of promoting viewpoint diversity in the mass media.[43]

22. Some question whether diverse outlets and sources lead to diverse viewpoints, or whether our rules are necessary to promote diversity, suggesting that commonly owned outlets can produce diverse viewpoints equally as well as separately owned outlets. We disagree with these arguments. As the Commission stated when it adopted the newspaper/broadcast cross-ownership rule, ". . . it is unrealistic to expect true diversity from a commonly-owned newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run."[44] As the Commission explained, "[t]he significance of ownership from the standpoint of 'the widest possible dissemination of information' lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest."[45] Although the issue is not easily susceptible to empirical proof, we think intuitive logic and common sense support our belief that the identity and viewpoint of a station's owner can in fact influence the station's programming. This certainly can be seen when a station chooses to editorialize, as well in many other decisions affecting a station's news and other programming.[46]

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diversification of ownership of the media of mass communications."); 47 U.S.C.§ 521 ("The purposes of this title are to . . . assure that cable communications . . . are encouraged to provide the widest possible diversity of information sources. . . ."); 47 U.S.C. § 532(a) ("The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public. . . .); 47 U.S.C. § 548(a) ("The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market. . . .").

[43] *See, e.g., Turner II,* 520 U.S. at 189-190 (1997); *Turner I,* 512 U.S. at 662-63 (1994); *Metro Broadcasting, Inc. v. FCC* 497 U.S. 547, 566 (1990), *overruled on other grounds by Adarand*, 515 U.S. 200 (1995); *National Citizens Committee for Broadcasting v. FCC*, 436 U.S. 775, 795 (1978); *Associated Press*, 326 U.S. at 20 (1945). *Adarand* overruled *Metro Broadcasting* only to the extent it was inconsistent with the *Adarand* holding that all racial classifications are constitutional only if narrowly tailored to further compelling government interests. *Adarand*, 515 U.S. at 227. Thus, *Adarand* does not undermine either the importance of the policy goal of viewpoint diversity from a constitutional perspective, or non-race-based ownership regulation as a means to achieve that goal.

[44] *Second Report and Order, In the Matter of Amendment of Sections 73.34, 73.240 & 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM & Television Broadcast Stations*, Docket No. 18110, 50 FCC 2d 1046, 1079-1080, ¶ 111 (1975).

[45] *Id*. at 1050, ¶ 14.

[46] *See, e.g.,* Jeff Dubin & Matthew Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. Cal. L. Rev. 841 (May 1995) (concluding that increasing number of minority-owned broadcasting stations increases amount of minority-oriented programming); Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?* (June 1988) (concluding same). *See also* CME Comments at 4-8 in MM Docket No. 98-35 (describing how two broadcast owners produced new programming to promote "conservative" or "traditional" values, and explaining how owners have affected content and editorial decisions).

23. The Supreme Court has upheld the Commission's judgment that there is a positive correlation between a station's ownership and its editorial viewpoint. The Court observed in *Metro Broadcasting*, with reference to the Commission's decision adopting the newspaper/broadcast cross-ownership rule, that the link between ownership and viewpoint is logical because "'ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation. . . .'"[47] In part because of this intuitive logic, the Supreme Court, in upholding the newspaper/broadcast cross-ownership rule, stated in *National Citizens Committee for Broadcasting* that ". . . notwithstanding the inconclusiveness of the rulemaking record, the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoint. . . . In these circumstances, the Commission was entitled to rely on its judgment, based on experience, that 'it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run.'"[48]

24. We consequently believe our local television ownership rules continue to further the important public interest of promoting diversity. Of course, in attempting to foster our diversity goals through structural regulation, we endorse a content-neutral method that does not evaluate the substance of any station's editorial decisions,[49] but seek only to ensure a sufficient number of independently owned outlets to attempt to maximize the available independent viewpoints in a given local market.

25. Promoting Competition. As we stated in the *TV Ownership Further Notice*, an important part of the Commission's public interest mandate is to promote competition, because competition promotes

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47 *Metro Broadcasting*, 497 U.S. at 571 n.16 (1990) (quoting *Second Report and Order/Docket 18110*, 50 FCC 2d at 1050).

48 *National Citizens Committee for Broadcasting*, 436 U.S.at 796-797 (1978) (citing *Second Report and Order/Docket 18110*, 50 FCC 2d at 1079-1080, ¶ 111).

49 The Court has noted that the Commission's ownership rules are "content neutral." *National Citizens Committee for Broadcasting*, 436 U.S. at 801 (noting that newspaper/broadcast cross-ownership rule was "not content related"). According to the applicable test, "[a] content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189. The Supreme Court has stated that with respect to the government interest in "promoting the widespread dissemination of information from a multiplicity of sources," it has "no difficulty" in concluding that the interest "is an important governmental interest"; indeed, the Supreme Court has stated that "assuring the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner I*, 512 U.S. at 662-63. As mentioned above, *see supra* ¶ 23, the Supreme Court has likewise found that ownership regulation is an appropriate and sufficient means to achieve the Commission's interest in viewpoint diversity; as the Court has noted, any means other than ownership regulation would likely present a more difficult avenue to achieve the goal of viewpoint diversity, because "'[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.'" *National Citizens Committee for Broadcasting*, 436 U.S. at 797 (quoting lower court's opinion).

consumer welfare and the efficient use of resources.[50] Competitive markets serve the public interest because such markets generally result in lower prices, higher output, more choices for buyers, and more technological progress than markets that are less competitive.[51] To encourage competition, the Commission's structural ownership rules and policies have been aimed at precluding broadcasters from obtaining and exercising market power. We have concluded that local ownership rules serve the public interest by preventing broadcasters from "dominat[ing] television and radio markets and wield[ing] power to the detriment of small owners, advertisers, and the public interest."[52]

26. Competition is likely to be greater in markets where many separate firms vie to serve the customer than in markets where few firms serve the market.[53] In general, the intensity of price competition in a given market is directly related to the number of independent firms that compete for the patronage of consumers. A larger rather than a smaller number of firms competing in the same market usually results in lower unit price to consumers, all other things remaining the same. Conversely, as the number of firms declines from many to few, price competition is diminished, and the unit price paid by consumers may be expected to increase.

27. As both the radio and television broadcast industries consolidate to achieve operating efficiencies and improvements in the scope and quality of services available to consumers, effective constraints on the possible attenuation of price competition in broadcasting advertising markets will derive increasingly from the growing availability of substitute products and services that compete with television advertising and programming. To the extent that such competing media and programming are, or will, become effective constraints on the possible exercise of market power by incumbent television broadcasters, then concerns about the possible adverse effects of increasing concentration on competition in the television broadcasting industry will be substantially diminished.

28. Broadcasters compete in numerous markets: the markets for delivered video and audio programming, the national and local advertising markets, and geographically diverse (perhaps worldwide in scope) markets for programming.[54] In each of these markets, the Commission has taken steps to increase competition and the range of choices for consumers. For example, we have increased the number of licensed broadcast television and radio stations to benefit viewers, listeners, and advertisers. Similarly, we have facilitated the development of alternative technologies such as cable television, direct broadcast satellite

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[50] *TV Ownership Further Notice*, 10 FCC Rcd at 3532.

[51] *See* F. M. Scherer and David Ross, *Industrial Market Structure and Economic Performance*, Third Edition, Houghton Mifflin Co., Boston, 1990 at 19-28.

[52] *See, e.g., Second Report and Order, In the Matter of Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, MM Docket No. 87-7, 4 FCC Rcd 1741, 1745 (1989) (*Second Report and Order*).

[53] *See* Joseph E. Stiglitz, *Economics*, Second Edition, 1997, W. W. Norton & Company, New York at 346.

[54] *See TV Ownership Further Notice*, 10 FCC Rcd at 3535.

("DBS") service, digital audio radio satellite ("DARS") service, multichannel multipoint distribution service ("MMDS"), and open video systems ("OVS") to increase the range of choices open to advertisers, viewers and listeners. We have also adopted various rules and regulations to permit and promote the development of new networks to increase competition to long-time broadcast networks and thus increase viewer options. In each market, we have tried to increase the number and variety of suppliers to benefit customers.[55]

29. Increased Consumer Choice. Numerous commenters in this proceeding have provided evidence concerning the continued growth in the number of mass media delivery systems. For example, there are currently 11,600 cable systems passing more than 94 million homes and serving almost 65 million TV households.[56] Aside from cable, there are also a number of other multichannel delivery systems, although many are still establishing themselves in the marketplace and generally do not provide an independent source of local news and informational programming. They include: Direct Broadcast Satellite (DBS), which currently provides up to 240 channels to over 7 million subscribers; MMDS, which serves 1 million subscribers; SMATV, which has almost 1 million subscribers. In addition, over 2 million households have Home Satellite Dishes (HSD), and Open Video Systems (OVS) has 66 thousand subscribers.[57] In addition to these alternative media, there has been an increase in the number of traditional broadcast outlets since adoption of our ownership rules. Since 1970, when the radio-television cross-ownership rule was adopted, the total number of radio and television stations has increased by over 85 percent.[58] This increase is attributable largely to increased popularity of FM radio and maturation of the UHF television service. The Commission has also adopted a DTV standard, a Table of Allotments for DTV, and DTV service rules which include a timetable for construction of DTV facilities. Taken together, these actions provide the opportunity to increase the number of program services provided by broadcast television.

30. In the *TV Ownership Further Notice* and *Second Further Notice*, we requested commenters to provide us with evidence regarding the degree to which these and other alternative media serve as economic substitutes for broadcast television and radio in the program delivery, advertising, and program production markets. Although most commenters agreed that various media substitute for each other to some extent in these markets, we received no evidence quantifying intermedia substitutability.

31. We are aware of no definitive empirical studies that quantify the extent to which the various media are substitutable in local markets. The most extensive study in the record of this proceeding is provided

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[55] In the programming market, the Commission's rules and regulations have tended to increase the number of potential buyers for such programming and thus increase the demand for programming.

[56] *Broadcasting & Cable*, July 15, 1999, at 40.

[57] *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 98-102, FCC 98-335 (released Dec. 23, 1998) ("*Fifth Annual Report*"), at Appendix C, Table C-1.

[58] *See* "Record of Radio Station Growth Since Television Began" and "Record of Television Station Growth Since Television Began," *Broadcasting & Cable Yearbook 1996*, pp. B-671 and C-244, respectively. *See also* "Broadcast Station Totals as of May 31, 1999," June 18,1999.

by National Economic Research Associates, Inc. ("NERA") in support of comments filed by the Local Station Ownership Coalition ("LSOC"), and indicates that broadcast television competes in the local spot advertising market with a wide variety of media, including radio, cable, direct mail, newspapers, magazines, yellow pages, and billboards.[59] NERA's study was conducted in response to a U.S. Department of Justice request pertaining to the degree of cross-elasticity of demand between local spot advertising on television and other media. NERA analyzed the boundaries of the relevant product market for local advertising within the Cleveland DMA and the nature of competition for the purchase and sale of advertising there. For evidence on substitutability, NERA looked at information from sellers and buyers, the academic and trade press, and general trends in rates and advertising purchasers. NERA reaches two conclusions relevant to this discussion. First, because local spot television prices result from bilateral oral negotiations between advertising buyers and sellers, the data required to construct the formal statistical estimates of cross-elasticities of demand within the Cleveland DMA the Commission asked for are not available. Second, NERA believes that other information, including a survey of advertising buyers in Cleveland and a survey of the academic and trade literature, is sufficient to conclude that the relevant product market includes electronic media (radio, broadcast television, and cable television) and nonelectronic media (direct mail, newspapers, magazines, yellow pages and billboards).

32. Economists Incorporated ("Economists Inc.") also submitted an economic study in response to the *TV Ownership Further Notice*.[60] Economists Inc. contends that reliance on current antitrust enforcement standards will protect the public from the creation of market power in local advertising markets. Similar to the NERA study, Economists Inc. analyzed the boundaries of the relevant product market for local advertising and submits illustrative competitive calculations in five DMAs (New York, Cleveland, Portland, Richmond and Amarillo). Economists Inc. concludes that the product market proposed by the Commission includes broadcast stations, cable systems, radio stations, local newspapers, as well as yellow pages, outdoor and direct mail. In support of its conclusion, Economists Inc. states that there is abundant evidence of competition between different types of advertising media. As is typically the case, they assert, there are no econometric studies that demonstrate quantitatively the extent of substitution by advertisers among various types of advertising in response to changes in relative prices. It would be very difficult to conduct such a study because transaction prices for alternative media, as well as non-price terms, are negotiated for each advertising contract and are not publicly available. The practice in antitrust analysis is to rely on other types of information. Relevant advertising markets are defined with the assistance of information obtained in interviews with advertisers and executives at advertising agencies. To obtain the relevant information, Economists Inc. interviewed seven advertising agency executives and one media consultant on a confidential basis to obtain information on competition between advertising sold to local advertisers by broadcast television stations and other advertising media in a certain urban area. The individuals interviewed were at advertising agencies that spend significant sums of money on broadcast television advertising in that urban area.

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[59] *See* P. Kitt and Phillip A. Beutel, National Economic Research Associates, *An Economic Analysis of the Relevant Advertising Market(s) within Which to Assess the Likely Competitive Effects of the Proposed Time Brokerage Arrangement between WUAB Channel 43 and WOIO Channel 19 (*filed on behalf of Malrite in response to the *TV Ownership Further Notice*), July 15, 1994, at 2-3 ("*NERA Study*").

[60] *See* Economists Inc, *An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules*, May 17, 1995 ("*Economists Inc. Study*").

33. The weight of the evidence in this record supports the general conclusion that there may be some intermedia substitutability in the markets served by broadcasters. As to competitive concerns underlying our ownership rules, this evidence justifies some relaxation of our local television ownership rules, as it suggests that consumers and advertisers may have more viable alternatives to broadcast stations than they once had. The evidence, however, does not support more extensive relaxation or elimination of the rules at this time because it is insufficient to characterize generally the degree of the substitutability of different media. This is a critical issue, for many of the arguments for greater relaxation or elimination of our ownership rules are premised on the assertion that consumers and advertisers have the option of turning to a large number of nonbroadcast media. Yet there remain unresolved questions about the extent to which these alternatives are widely accessible and provide meaningful substitutes to broadcast stations. A recent econometric study finds that other advertising media are not good substitutes for radio advertising and that radio advertising probably constitutes a separate antitrust market.[61] In future biennial reviews we will ask parties to submit more evidence on the extent to which intermedia competition can be relied on to constrain anticompetitive behavior and provide additional outlets for diverse viewpoints to the public.[62]

34. Benefits of Common Ownership. Economic theory suggests, and the record in this proceeding largely confirms, that there may be certain efficiencies inherent in joint ownership and operation of television stations in the same market, and of radio-television combinations. These efficiencies can in turn lead to cost savings, which can lead to programming and other service benefits that enhance the public interest. Much of the evidence regarding the efficiencies of common ownership is anecdotal and is provided by broadcasters drawing upon their own experience in operating a same-market television LMA or a radio-television combination. The efficiencies mentioned by these broadcasters include the ability to co-locate and share the studio and office facilities of same-market stations, sharing of administrative and technical staffs, efficiencies in advertising and promotion, and efficiencies involving news gathering and sales operations.[63] Although the

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[61] *See* Robert K. Ekelund, George S. Ford, and John D. Jackson, "Is Radio Advertising a Distinct Local Market? An Empirical Analysis," 14 *Review of Industrial Organization*, 239-256 (May 1999). While the conclusions of this study should be considered tentative, the analysis is consistent with a cautious approach toward modification of our ownership rules until the efficacy of product substitutes as a constraint on the possible exercise of market power in the advertiser-supported television industry is better understood.

[62] For a discussion of those media that we will count as voices with respect to our revised duopoly and radio/TV cross-ownership rules, *see infra* ¶¶ 68-70, 111-114.

[63] Numerous parties cited cost-savings resulting from co-location and sharing of station operations between LMAed television stations in the same market. *See, e.g.,* Comments in response to the Commission's LMA Public Notice ("LMA Comments") of Pegasus Communications Corporation, River City Limited Partnership, Sinclair Broadcasting Group, Inc., LIN Television Corporation, WJZY-TV, Inc., Capitol Broadcasting, Inc., Carolina Broadcasting System, Inc., Kelly Broadcasting Company, Channel 58, Inc., Waterman Broadcasting Corp., Montclair Communications, Inc., New Mexico Broadcasting Company, Inc., Ramar Communications, Inc., RKM Media, Inc., Max Television of Syracuse, L.P., Cannell Cleveland, L.P., Whitehead Media of Florida, Inc., and MAC America Communications, Inc.

With respect to the cost savings and related programming benefits of joint operation of radio and TV greatest benefits of common ownership likely occur between stations located in the same market, efficiencies are also possible among stations located in separate markets.[64]

35. Two commenters provided estimates of the specific cost savings that may be generated by these efficiencies. According to Pegasus Communications Corporation ("Pegasus"), construction of a new stand-alone TV station costs at least $5 million, with an additional $1-2 million required for locally produced programming or news.[65] Pegasus estimates that combining a second new station with an already existing facility will reduce the fixed operating costs of the second station by up to two-thirds, cut required capital investment for the second station by as much as two-thirds, and make it possible for local news production costs to be shared by the two stations (possibly creating two news efforts where there was previously none).[66]

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stations in the same market, *see* Group W Comments in response to the *TV Ownership Further Notice* at 41-42. According to Group W, the decision to place its Boston radio/television operations under one general manager allowed it to double the number of minutes of news aired on the radio station. Similarly, Group W states that, after adding an AM/FM combination to its ownership of a television station in San Francisco, it was able to provide an additional all-news radio service in the San Francisco Bay area. Group W asserts that developing this service was substantially less difficult and time consuming in San Francisco than when Group W developed a stand-alone radio news service in another market some years previous. *See also* Communications Corporation of America, ("CCA") Comments in response to the *TV Ownership Further Notice* at 22-25. According to CCA, its radio-television combination in Lafayette, LA enabled its UHF station there to survive, and its UHF-AM combination in Mansfield, OH enabled both these stations to remain on the air.

[64] *See*, *e.g.*, Viacom, Inc. LMA Comments at 3-4 (regarding the LMA linking its station WBFS of Miami with WTVX of West Palm Beach); TV Alabama, Inc. and RKZ Television, Inc. LMA Comments (regarding LMA between WCFT in Tuscaloosa, AL and WJSU in Anniston, AL). According to TV Alabama and RKZ Television, their "enhanced coverage LMA" permits two UHF stations to provide ABC network service to three markets by maintaining a combined production studio presence that delivers simulcasted programming to Birmingham, Tuscaloosa and Anniston, Alabama in addition to production facilities in the communities of license. According to these commenters, the LMA extends the reach of the ABC service to previously underserved areas, thereby enhancing diversity.

[65] *See* Pegasus Comments at 9. According to Pegasus, to amortize the cost of construction, a broadcaster must anticipate an annual operating income of at least $750,000 (or $1 million if an investment in local news is also made). The costs of station operation are both variable (programming and sales costs) and fixed (overhead, utilities, and general and administrative expenses). Pegasus estimates that variable expenses are approximately 40-50% of station revenues. In addition, fixed costs for a stand-alone station (exclusive of news or local programming) will exceed $1-1.5 million per year (an additional $1 million if local news is offered). Therefore, for a stand-alone television station to cover its fixed costs and generate sufficient operating income, the station must generate annual revenues of $3-4 million ($5-7 million with local news), according to Pegasus.

[66] *See* Pegasus Comments at 9, 13-14. Pegasus argues that these cost savings are especially significant in smaller markets. For example, in New York Pegasus claims that a station can be profitable without exceeding 1% of total market revenues. However, in a smaller market, a stand-alone station without news would require a market share of 10% to 12.5% to justify construction (20% with news). Even smaller markets may result in minimally-profitable market shares higher than 25-30%. The cost reductions associated with common ownership would enable the creation of new stations in markets with relatively small total market revenue (as little as $18 million

ALTV asserts that co-location of facilities in a single market can produce cost savings of approximately 25%.[67] Other evidence of cost savings and efficiencies came from numerous broadcasters' descriptions of the benefits of same-market LMAs. According to many of these reports, LMAs have saved failing stations, and permitted them to invest in more expensive programming and updated facilities.

36. The cost savings of joint station ownership may contribute to programming benefits, including more news, public affairs, and other non-entertainment programming as well as enhanced entertainment programming choices for viewers and listeners. Again, the evidence in the record of such benefits was largely anecdotal and related to same-market LMAs. Examples of the benefits broadcasters claimed resulted from such arrangements include first-time presentation of local news on the brokered station, change of the brokered station format from infomercials to one with other entertainment and non-entertainment programming, acquisition by the brokered station of a network affiliation, and improved news and public affairs programming on both stations.[68] In addition to programming benefits, other possible benefits of joint station ownership include enabling a struggling station to continue to provide service to the public or returning a dark station to the air, possible activation of a new or unused radio or TV allocation, and improvement in the technical facilities of the stations, and creation of new jobs in the community.

37. Need for Relaxation of Ownership Limits. We believe the considerations we have described above warrant relaxation to some extent of our local television ownership restrictions. The record reflects that there has been an increase in the number and types of media outlets available to local communities. With respect to cable television, we recognize that clustering of systems in the major population centers enables cable

according to Pegasus), thereby promoting competition in these markets.

[67] *See* ALTV Comments at 30.

[68] Commenters provided numerous examples of the benefits of television LMAs. For example, ALTV cited two broadcasting combinations: (1) Cleveland LMA between WOIO and WUAB led to an increase in the quantity and quality of informational and entertainment programming on both stations and permitted the creation of a number of new jobs; and (2) Naples, FL LMA between WEVU and WBBH-TV permitted WEVU to provide its first local news. ALTV Comments at 17. According to A.K. Media, LMA agreement pursuant to which KCBA-TV in Monterrey-Salinas provides programming to KCCN in that community saved a failing station, permitted improvement of KCCN's signal quality, and permitted plans to increase the quantity of news and children's educational programming broadcast on the brokered station. A.K. Media Comments at 8-9. Glencairn, Ltd. provided a number of examples of the benefits of LMAs including: (1) WTTO-TV brokerage of programming on WABM-TV in Birmingham, AL pulled WABM out of bankruptcy and permitted it to air children's educational and informational programming; (2) WPGH-TV's brokerage of programming on WPTT-TV in Pittsburgh permitted WPTT to change from an exclusively home-shopping format to one that includes 20 hours/day of entertainment programming and core children's programming; (3) LMA between WLFL-TV and WRDC-TV in Durham permitted WRDC to engage a public affairs director and to improve its public affairs programming and to air children's programming. In addition, Gannett provided an example of the beneficial results of a television duopoly. According to Gannett, its temporary joint ownership of WXIA-TV in Atlanta and WMAZ-TV in Macon has permitted the Macon station to improve its news and public affairs programming, to hire a community affairs director, to apply for a license to operate a weather radar station, and to use a news helicopter to provide aerial footage of stories of local interest. Gannett Comments at 2-3.

to compete more effectively for advertising dollars. In markets with many separate licensees and a variety of other media outlets, we believe the benefits of joint ownership in certain instances outweigh the cost to diversity from permitting such combinations. There is evidence concerning the efficiencies inherent in joint ownership and operation of television stations in the same market, and of radio-television combinations. These efficiencies can lead to cost savings, which in turn can lead to programming and other service benefits that serve the public interest.

38. At the same time, we do not agree with those parties that argue for greater relaxation or elimination of the local television ownership rules due to the important competition and diversity goals at stake. As discussed above, there is insufficient evidence regarding the extent of substitutability and the availability of local programming among the different media now available to consumers. In addition, there already has been a high degree of consolidation in the broadcast industry since passage of the 1996 Act, which liberalized the radio and national television ownership rules. Over 2,100 radio stations changed hands in 1996 and again in 1997, and 1740 changed hands in 1998.[69] At the national level, the number of owners of commercial radio stations has declined by 12.1 percent from 5,133 to 4,512. This decline is primarily due to mergers between existing owners.[70]

39. At the local level, there has also been a downward trend in the number of radio station owners per market. Since passage of the 1996 Act, the average number of radio station owners across all radio metro markets declined from 14 to 11, a loss of about three owners per market. The top 10 radio metro markets experienced an average loss of 5 owners per market, from about 33 owners to about 28 owners per market. The smallest radio metro markets (markets 101-268) experienced an average loss of about two owners per market, from about 10 owners to 8 owners. Further, the top owners in each metro market generally account for an increasing share of total radio advertising revenues in these markets. For example, the top four radio owners in each metro market, on average, account for more than 91 percent of their metro market's total revenues, compared to about 83 percent in March 1996.[71] This increasing level of ownership concentration suggests that it is appropriate for us to move prudently so that we can monitor consolidation to prevent harm to competition and diversity.

40. Our decision today is an exercise in line drawing -- perennially one of the most difficult yet

[69] BIA Companies, *State of the Radio Industry 1999*, May 1999, at 127.

[70] FCC staff review of BIA database.

[71] FCC staff review of BIA database. Examples of growing concentration in the local radio marketplace include Louisville, KY, the 53rd ranked market, where three companies own or operate 18 of the 34 stations, including the top 14-rated stations, and one company now controls at least 32 percent of the radio advertising market in six of the nation's ten largest markets. Increases in national ownership concentration have also occurred in the television industry. As of April 1999, the nation's top 25 television station groups owned almost 40% of the commercial television stations in the U.S., more than twice the 17% they owned in 1995. *See Broadcasting and Cable*, April 18, 1999, at 38.

inevitable challenges facing a government agency.[72] On the one hand, we want to allow broadcasters and the public to realize additional economic efficiencies and public interest benefits generated by common ownership. On the other hand, we must ensure that diversity and competition are protected, especially in view of the vital role played by broadcast television in our society. Currently, 98 percent of the population owns a television set and thus has access to the entertainment, sports, local and national news, election results, weather advisories, access for candidates, children's educational programming, and other public interest programming it provides. Although the number of video competitors to television continues to increase, broadcast television remains the primary source of news and information for most Americans.[73]

41. Balancing these competing considerations based on the record before us, and recognizing the continuing dominant role played by broadcasting in society and the continuing importance of ensuring that diversity and competition are protected, we believe that the revisions we make today to our rules reflect the degree of relaxation warranted by the growth of alternatives to broadcast television, the demonstrated benefits of common ownership, and our objective of ensuring diversity and competition. Of course, we will monitor the effects of our changes on our competition and diversity goals, as well as ongoing changes in the media environment, and we will adjust our ownership rules as needed in the context of future biennial reviews.

IV. THE LOCAL TELEVISION OWNERSHIP RULE

A. Geographic Scope of the Rule

42. Background. Our local television ownership rule presently prohibits common ownership of two television stations whose Grade B signal contours overlap.[74] In the *TV Ownership Further Notice*, we sought comment on whether the geographic scope of the rule should be changed to Grade A signal contours or to Designated Market Areas ("DMAs").[75] Based on the comments we received, we tentatively concluded in the *Second Further Notice* that the geographic scope of the local television ownership rule should be based

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[72] Justice Holmes once observed, "[n]either are we troubled by the question where to draw the line . . . [t]hat is the question in pretty much everything worth arguing in the law." *Irwin v. Gavit*, 268 U.S. 161 (1925).

[73] *See* "America's Watching," *supra* note 34.

[74] 47 C.F.R. § 73.3555(b) ("No license for a TV broadcast station shall be granted to any party (including all parties under common control) if the grant of such license will result in overlap of the Grade B contour of that station (computed in accordance with 47 C.F.R. § 73.684) and the Grade B contour of any other TV broadcast station directly or indirectly owned, operated, or controlled by the same party.").

[75] DMAs are unique, county-based geographic areas designated by Nielsen Media Research, a television audience measurement service, based on television viewership in the counties that make up each DMA. Nielsen assigns counties to DMAs on the basis on audience viewership as recorded in diaries placed in television households. Counties are assigned to a DMA if the majority or, in the absence of a majority, the preponderance, of viewing in the county is recorded for the programming of the television stations located in that DMA. *See also infra* ¶ 48.

on a combination of DMAs and Grade A contours. We sought comment on that tentative conclusion in the *Second Further Notice*, as well as comment about possible exceptions to and waivers of the rule to permit television duopolies in certain circumstances where they would serve the public interest.

43. Comments. While a few of the broadcasters that commented on the issue of the proper geographic scope of the television duopoly rule supported the Commission's proposal to rely on a joint DMA/Grade A test,[76] the majority of broadcasters urged the Commission to define the geographic market by DMA only, without reference to Grade A signal contours.[77] Those advocating a DMA-only test argued generally that the DMA is the best single measure of the relevant geographic market for television stations because it defines the market in which stations compete for viewers, ratings, programming, and advertisers.

44. Those broadcasters that supported the Commission's tentative proposal to rely on a joint DMA/Grade A test generally concurred with other broadcasters that the DMA component of the test best reflects a station's economic market. These commenters gave different reasons for supporting the additional Grade A component of the test. ABC and NAB stated that a combined DMA/Grade A standard is appropriate since different-market stations with Grade A overlaps may in some cases compete for viewers and advertisers.[78] Two other commenters expressed the view that a DMA standard alone could lead to a level of consolidation that would threaten the Commission's diversity and competition goals.[79]

45. Two broadcasters, Jet Broadcasting Co., Inc. ("Jet") and Sunbelt Communications Company ("Sunbelt"), supported replacing the existing Grade B contour measure with a Grade A measure, without reference to DMAs. Jet argues that the Grade A contour best represents the area in which stations compete because it includes the area in which viewers can regularly expect to receive a station's signal.[80] Jet and Sunbelt raise a number of arguments against relying on DMAs for the new duopoly rule, including the fact that DMA boundaries are subject to change thereby creating some uncertainty, and that use of DMA to determine the permissibility of multiple ownership penalizes stations that are not carried on a cable system.[81]

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76 *See* Comments of NAB, ABC, AK Media, Kentuckiana, Max Media, and Post-Newsweek.

77 *See* Comments of ALTV, Benedek, CBS, Gannett, HSN, LIN, LSOC, Malrite, NBC, Pappas, Paxson, Sinclair, Viacom, and Waterman.

78 *See* ABC Comments at 3; NAB Comments at 4. NAB stated, however, that the Commission should be careful to recognize that there may be situations where two stations have overlapping Grade A contours, but in fact serve different markets.

79 *See* Post-Newsweek Comments at 4; Kentuckiana Comments at 3.

80 *See* Jet Comments at 4.

81 *See* Jet Comments at 3; Sunbelt Comments at 5-6, 9-12. In addition, Sunbelt claims that DMAs vary widely in geographic size and population. As a result, a single broadcaster could acquire six stations in Montana, which has six separate, sparsely-populated DMAs, but would be limited to only one station in more populous Utah. The difference in the size of these DMAs, and hence the impact on common ownership of stations within these

46. Finally, four commenters supported retaining the Grade B-based duopoly rule. The NTIA, Media Access Project, which filed jointly with nine other public interest groups (jointly referred to herein as "MAP *et al.*"),[82] Centennial Communications, Inc. ("Centennial") and BET Holdings, Inc. ("BET") generally argued that relaxation of the current duopoly rule would increase concentration in the television market and adversely affect diversity.[83] Centennial argued that relaxation of the duopoly rule would reduce the number of independent sources of programming to viewers and increase the advantage of group owners in bidding for programming, thus narrowing access to programs for independent stations.[84] NTIA argued that relaxation of the duopoly rule would increase the demand for television properties and impair the ability of minorities to enter the broadcast industry. NTIA cites a recent study which shows a positive relationship between minority broadcast ownership and the supply of minority-oriented programming. NTIA also argued that the Commission's DTV proceedings offer the prospect of increasing diversity by expanding the number of broadcast channels, but that relaxation of the ownership rules at this time may permit consolidation that would foreclose this opportunity. Before the duopoly rule is relaxed, NTIA believes that the Commission should study the cumulative impact of recent changes in the television market on competition and diversity.[85]

47. Discussion. After careful analysis of the record in this proceeding, we have decided to narrow the geographic scope of the television duopoly rule so as to permit common ownership of television stations provided they are in different DMAs without regard to contour overlap.[86] We will also continue to allow common ownership of stations within the same DMA as long as their Grade B contours do not overlap. We have chosen this DMA test based on our belief that, compared to the current Grade B signal contour standard, DMAs are a better measure of actual television viewing patterns, and thus serve as a good measure of the economic marketplace in which broadcasters, program suppliers and advertisers buy and sell their services and products. Changing the geographic scope of the duopoly rule will consequently more accurately define a local television market and permit mergers of stations in different markets without harming local competition and

states under our rules, is related to the location of residents of those states and not the size of their respective populations. Montana is larger than Utah and its population is widely dispersed, thereby accounting for the fact that it is divided into more than one DMA. Utah's population is more concentrated in the major urban area, Salt Lake City, and hence is treated as a single DMA.

[82] MAP filed on behalf of itself and the following groups: Black Citizens for a Fair Media, Center for Media Education, Minority Media and Telecommunications Council, National Association for Better Broadcasting, Office of Communication of the United Church of Christ, Philadelphia Lesbian and Gay Task Force, Telecommunications Research and Action Center, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights, and Women's Institute for Freedom of the Press.

[83] *See* NTIA Comments at 4-5; MAP *et al.* Comments at 11-12; Centennial Comments at 4-7; BET Comments at 1-3, 5-6.

[84] *See* Centennial Comments at 6-7.

[85] *See* NTIA Comments at 4-6.

[86] For purposes of this rule, a broadcast station is considered to be in the DMA to which Nielsen assigns it.

diversity. Moreover, we believe that the mergers that will be allowed under our new rule can lead to improved television service and viewer choice.

48. There are several benefits to defining the geographic dimensions of the local television market by reference to DMAs. Most importantly, unlike a rule relying on predicted field strength contours, DMAs reflect actual television viewing patterns and are widely used by the broadcasting and advertising industries. DMAs reflect the fact that a station's audience reach, and hence its "local market," is not necessarily coextensive with the area of its broadcast signal coverage. For example, a station's over-the-air reach can be extended by carriage on cable systems and other multichannel delivery systems, as well as through such means as satellite and translator stations.[87] In designating DMAs and compiling DMA-based ratings of television programs, Nielsen Media Research, a TV audience measuring service, collects viewing data from diaries placed in television households four times a year. Nielsen assigns counties to DMAs annually on the basis of television audience viewership as recorded in those diaries.[88] Counties are assigned to a DMA if the majority or, in the absence of a majority, the preponderance, of viewing in the county is recorded for the programming of the television stations located in that DMA.[89] Nielsen uses its DMA viewing data to compile DMA-based audience ratings for television programs. These data are used by television stations in deciding which programming should be aired, and by advertisers and stations in negotiating advertising rates.[90]

49. The Commission traditionally has employed DMAs or a similar geographic measure in other rules. Such a geographic measure is the Area of Dominant Influence ("ADI"), used by the Arbitron Company to define a television station's geographic market according to audience viewing patterns. In the past, we have used ADIs for purposes of calculating an entity's national television audience reach under our national television ownership rule. In the *National TV Ownership Report and Order* we are issuing today, we are adopting our proposal to use DMAs instead of ADIs in calculating national audience reach because Arbitron stopped updating its ADI market data in 1993. For the same reason, the Commission is now using DMAs rather than ADIs to define the market within which a broadcast television station is entitled to cable must-carry

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[87] For example, Salt Lake City television stations are located in the northeast corner of the state of Utah. However, because of extensive use of microwave and translators, the Salt Lake City DMA encompasses the entire state of Utah and portions of other states.

[88] *See Nielsen Station Index, NSI Reference Supplement 1994-1995*, at 1.

[89] *See TV Ownership Further Notice*, 10 FCC Rcd at 3540.

[90] The economic studies submitted by Economists Inc. and NERA in response to the *TV Ownership Further Notice* also employed DMAs as the relevant geographic market in local advertising and in delivered video programming markets. *See Economists Inc. Study, supra* note 60, at 14, 29-32 and Appendices B and F; *NERA Study, supra* note 59, at 2-3. *See also* Sumanth Addanki, Phillip A. Beutel, and Howard P. Kitt, NERA, *Regulating Television Station Acquisitions: An Economic Assessment of the Duopoly Rule* (filed on behalf of the Local Station Ownership Coalition), May 17, 1995, at Tab K.

or retransmission consent.[91] Commercial market measurements such as DMAs are presently used by the Commission to define markets in other contexts as well, *e.g.*, waivers of the one-to-a-market rule in the top 25 television markets.[92]

50. We recognize that we proposed in the *Second Further Notice* to supplement the DMA test with a Grade A contour standard to prohibit common ownership of stations with Grade A signal contour overlap even when they are in separate DMAs. However, after considering the comments in response to this proposal, we believe a "DMA-only" test is more appropriate. Although a station may attract some viewers who live outside its designated DMA, the preponderance of its audience will reside within its DMA. As CBS noted in its comments, local advertisers use DMA-based ratings to make their purchases of advertising time on local television stations, television networks generally have only one affiliate in each DMA, and stations target their programming to viewers inside the DMA because these are the viewers that advertisers pay to reach.[93] The record also indicates that there are a fair number of stations that lie in different DMAs and serve wholly different markets even though they may have slightly overlapping Grade A contours.[94] In addition, a DMA-only standard is more straightforward and easy to apply in terms of administering the rule. We consequently will not adopt a Grade A component in our new definition of the geographic scope of the duopoly rule.

51. This new definition will generally be less restrictive than the current Grade B signal contour test. There may be some situations, however, in which this is not the case, particularly in some geographically large DMAs west of the Mississippi River. In these situations, the DMA may be large enough that two stations situated in the DMA do not have overlapping Grade B contours. Common ownership of the two stations would be permitted under the existing rule but not under a strict application of the new DMA standard.

52. In the *Second Further Notice*, we noted our belief that there are currently few stations within the same DMA that could be commonly owned under the existing Grade B signal contour standard that are not already jointly owned. We sought comment on whether we should, if we adopted a DMA/Grade A rule, grandfather existing joint ownership combinations that conform to our current Grade B test. We also sought comment on an alternative approach of adopting a two-tiered rule under which we would permit common ownership both under the new test using DMAs and in situations where there is no Grade B overlap.

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[91] *Report and Order and Further Notice of Proposed Rule Making, In the Matter of Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules, Implementation of Section 301(d) of the Telecommunications Act of 1996, Market Determinations,* CS Docket No. 95-178, 11 FCC Rcd 6201 (1996). We have shifted our reliance on ADIs to DMAs in other contexts as well. *See, e.g., Brissette Broadcasting* 11 FCC Rcd 6319 (1996) (temporary waiver of the duopoly rule); *Media Communications Partners L.P.*, 10 FCC Rcd 8116, 8116 note 3 (1995) (waiver of the one-to-a-market rule).

[92] 47 C.F.R.§ 73.3555 Note 7.

[93] *See* CBS Comments at 39-41. CBS also noted that it grants network non-duplication protection to its affiliates only for that portion of the zone permitted by the Commission's rules that falls within the station's DMA.

[94] *See* Letter of Kurt A. Wimmer, Counsel to Benedek Broadcasting, to Magalie Roman Salas, FCC Secretary, May 21, 1999.

Commenters addressing this issue agreed with our proposal to adopt a two-tiered rule that would permit same-DMA stations with no Grade B overlap to combine.[95]

53. It is our intention in this proceeding to relax the duopoly rule consistent with our competition and diversity objectives. It is not our intention to restrict combinations that would be permitted under our present Grade B signal contour test. To avoid this result, we will continue to permit common ownership of television stations in the same DMA where there is no Grade B overlap between those stations.[96] Although such stations may compete to some extent for viewers and advertisers, we believe any harm to diversity and competition from permitting such combinations will be minimal and we wish to avoid instances in which application of our new rule would be more restrictive than our current duopoly rule. In addition, this approach avoids disrupting current ownership arrangements involving stations in the same DMA with no Grade B overlap.[97]

B. Permitting Television Duopolies in the Same Local Market

54. <u>Background</u>. In both the *TV Ownership Further Notice* and the *Second Further Notice*, we invited comment on whether, in certain situations, we should allow entities to acquire more than one television station in the same geographic market. We sought comment both on exceptions to our "one-station" local ownership rule, including the exception currently provided in our rules for television satellite stations, as well as on a number of possible waiver criteria. In the *Second Further Notice*, we outlined five specific waiver criteria for evaluation: (1) combinations involving at least one UHF station; (2) combinations involving a "failed" station; (3) applications to acquire vacant or new channel allotments; (4) combinations involving stations with a small market share or where a minimum number of voices would remain post-merger; and (5) showings of significant public interest benefits that would result from the merger. In so doing, we requested evidence of the projected benefits of television duopolies, as well as evidence regarding the relationship between ownership concentration and diversity.

55. <u>Comments</u>. Most broadcasters supported permitting same-market duopolies in some form, arguing that common ownership can produce significant efficiencies and public interest benefits. Views differed regarding the extent to which mergers should be permitted and whether they should be allowed by

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95 *See* ABC Comments at 3; CBS Comments at 43; Gannett Comments at 2-3, 7-8; GCC Comments at 3; Kentuckiana Comments at 4-5.

96 The Commission's policy has been to issue waivers of the television duopoly rule upon application showing mergers between television stations with *de minimis* Grade B contour overlap, *i.e.*, an area of overlap that encompasses less than one percent of the area and population of the Grade B contour of each station. *See, e.g., WNNE Licensee, Inc. et al.*, 13 FCC Rcd 12677 (1998); *Hubbard Broadcasting Inc,* 2 FCC Rcd 7374 (1987). This policy will continue under the new rules.

97 Our decision to permit same DMA/no Grade B overlap combinations by rule moots the need to adopt a provision grandfathering such existing ownership combinations. Under our new rule, as long as the same DMA/no Grade B overlap test is met, there is no restriction on the transfer of such combinations or the creation of new combinations.

exception to the rule, presumptive waiver, or case-by-case waiver. Many commenters favored combinations in which at least one of the parties is a UHF station.[98] Some advocated UHF/UHF combinations only, while others would also permit a UHF to combine with a VHF station.[99] A number of commenters also supported permitting VHF/VHF combinations in Hawaii, Alaska, or Puerto Rico, and in circumstances involving a failed station or vacant allotment.[100]

56. A number of other commenters opposed television duopolies on the ground they would threaten competition and diversity in local markets. Bahakel Communications ("Bahakel") and Centennial Communications, Inc. ("Centennial") expressed concern that combinations of same-market stations would increase the already considerable disadvantages faced by independently-owned stations in competing against group-owned stations in purchasing programming.[101] Post-Newsweek Stations, Inc. generally opposes same-market duopolies because of the dangers to competition and diversity, but would permit waivers in the case of a failed station or unused frequency.[102] MAP *et al.* expressed the view that while same-market duopolies may increase program diversity, they threaten viewpoint diversity, which is a more fundamental concern.[103] BET and AWRT express concern that relaxation of the television ownership rules could raise the barriers to entry for women and minorities in the broadcasting industry.[104]

57. Costs and Benefits of Broadcast TV Station Duopolies. We believe that the demonstrated benefits of same-market television station combinations support allowing the formation of such combinations in certain cases where competition and diversity will not be unduly diminished. The record in this proceeding shows that there are significant efficiencies inherent in joint ownership and operation of television stations in the same market, including efficiencies related to the co-location and sharing of studio and office facilities, the sharing of administrative and technical staff, and efficiencies in advertising and news gathering.[105] These

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98 *See, e.g.,* ALTV Comments at 24-29; A.K. Media Comments at ii; Granite Comments at 3-5; HSN Comments at 9-12.

99 Kentuckiana opposed a blanket exception to the duopoly rule for VHF/UHF or UHF/UHF combinations, but supported a failed station waiver that would answer the needs of struggling UHF stations. *See* Kentuckiana Comments at 5.

100 *See, e.g.,* LSOC Comments at 79-80; Malrite Comments at 14; Pappas Comments at 7-9; Telemundo Comments at 2. Telemundo also advocated that the Commission permit combinations involving at least one Spanish-language station in order to promote and preserve Spanish language programming.

101 *See* Bahakel Comments at 1-2; Centennial Comments at 6-7.

102 *See* Post-Newsweek Comments at 5-6.

103 *See* MAP *et al.* Comments at 8-11.

104 *See* BET Comments at 2; AWRT Comments at 1-2. AWRT supports establishment of waiver criteria for the ownership rules that would be based on a station owner's incubation of women or minority-owned stations.

105 *See supra* ¶ 34.

efficiencies can contribute to programming and other benefits such as increased news and public affairs programming and improved entertainment programming, and, in some cases, can ensure the continued survival of a struggling station.[106] In markets with many separate television licensees, the public interest benefits of common ownership can outweigh any cost to diversity and competition of permitting combinations.

58. While we conclude that the public interest would be served by permitting television duopolies in certain circumstances, we are not eliminating or relaxing the rule to the extent a number of commenters advocate given the important diversity and competition issues at stake. Television broadcasting plays a very special role in our society. It is the primary source of news and information, as well as video entertainment to most Americans,[107] and we must continue to ensure that the broadcast television industry has a diverse and competitive ownership structure. Moreover, as discussed above, because the communications industry is undergoing rapid change and increasing consolidation, significant yet measured relaxation of the television duopoly rule is appropriate to allow us to monitor the results of these sweeping changes.

59. In light of these considerations, we have decided to adopt a modification to our duopoly rule, and three waiver tests, that are targeted to promote the public interest without appreciable harm to our competition and diversity goals. In particular, as described below, we will modify the TV duopoly rule to allow common ownership of two stations in the same DMA, if eight independently owned and operating commercial and noncommercial television stations will remain in the DMA post-merger, and at least one of the stations is not among the top four-ranked stations in the market, based on audience share, as measured by Nielsen or by any comparable professional and accepted rating service, at the time the application is filed. In addition, we will presume that a waiver of the rule is in the public interest if the applicant satisfies a "failed" or "failing" station test, or involves the construction of an "unbuilt" station. We will monitor the impact that our new rules and waiver policies have on our competition and diversity goals and adjust them as appropriate, as part of future biennial reviews of our ownership rules under the 1996 Act.

1. Modification of the Rule: Eight Voice/Top Four-Ranked Station Standard

60. Background. In the *Second Further Notice*, the Commission sought comment on whether we should entertain joint ownership of stations that (1) have very small audience or advertising market shares and (2) are located in a very large market where (3) a specified minimum number of independently owned voices remain post-merger. We stated that the purpose of such a standard would be to enhance competition and diversity in the local market by allowing small stations to share costs and thereby compete more effectively. We further stated that such joint ownership could potentially serve the public interest if such stations were to use their economic savings to produce new and better-quality programming or related enhancements. Such advantages may be particularly helpful to small and independent UHF stations. We invited comment on the circumstances under which joint ownership should be permitted, and on the size of the market share we might adopt, the number and kinds of voices we should count in any minimum voice criterion, and whether we should include a market rank test.

[106] *See supra* ¶ 36.

[107] *See supra* note 34.

61. Comments. While broadcasters were generally supportive of the concept of same-market mergers, their comments on the specific criteria for them were mixed. ALTV is skeptical about reliance on market share standards. It notes that the Department of Justice already uses market share measures in its antitrust enforcement, and asserts that Commission duplication is unnecessary. ALTV also argues that market share measurement is complex and that its use could act as a disincentive to improve program quality.[108] NAB, LSOC, and other broadcasters also oppose using a test based on market share.[109]

62. ALTV is also skeptical about reliance on "minimum number of voices" standards since the number of voices is lowest in the small markets that would, in their opinion, benefit most from local station combinations. Other broadcasters echoed this concern about prohibiting mergers in smaller markets.[110] If the Commission uses a "minimum number of voices" standard, ALTV advocates that the Commission count a variety of media as voices including radio, cable, MMDS, DBS, telephone company video platforms, newspapers, magazines, video cassette rentals, and other non-broadcast information sources such as the Internet.[111] LSOC and Pappas also advocate counting all media voices in the market, both broadcast and non-broadcast.[112]

63. BET is opposed to allowing mergers based on market share, market size, or the number of voices for the same reasons that it opposes the use of a failed station waiver, *i.e.*, that it will unfairly advantage incumbents against entrants, particularly minority entrants, and harm diversity.[113] MAP *et al.* argues that a small market share/minimum number of voices policy permits elimination of competitors serving niche needs. If mergers are granted under this criterion, MAP *et al.* asks that the Commission require a specific showing about what kinds of enhanced programming will result and ensure that these promises are met.[114]

64. Discussion. After considering the record, and our competition and diversity goals, we have decided to modify the duopoly rule to permit any two television stations in the same market to merge if:

! at least eight independently owned and operating full-power commercial and noncommercial TV stations would remain post-merger in the DMA in which the communities of license of the TV stations

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108 *See* ALTV Comments at 31.

109 *See* NAB Comments at 12; LSOC Comments at 5-6; Paxson Comments at 14-19.

110 *See, e.g.*, Granite Comments at 13-17.

111 *See* ALTV Comments at 31.

112 *See* LSOC Comments at 5-6; Pappas Comments at 7-9.

113 *See* BET Comments at 5-6.

114 *See* MAP *et al*. Comments at 21-24.

in question are located,[115] *and*

- the two merging stations are not both among the top four-ranked stations in the market, as measured by audience share.[116]

If any entity acquires a duopoly under this standard, it will not later be required to divest if the number of operating television voices within the market falls below eight or if the two merged stations subsequently are both ranked among the top four stations in the market; however, a duopoly may not automatically be transferred to a new owner if the market does not satisfy the eight voice/top four-ranked standard. In such a case, the transaction must either meet one of the waiver standards enunciated below, or involve a sale to separate parties. We will not include a market rank component in our new rule because we believe such a test is unnecessary given the station rank and minimum number of stations criteria we are adopting. We adopt this "eight voice/top four-ranked station" standard as a modification of the rule as opposed to the adoption of a waiver criterion in order to fashion a bright-line test, bring certainty to the permissibility of these transactions, and expedite their consummation, given that we do not believe as a general matter that they unduly compromise our competition and diversity goals. We delegate to the Mass Media Bureau the authority to grant any application that satisfies the eight station/top four ranked station standard, and presents no new or novel issues.

65. This standard provides measured relaxation of the television duopoly rule, particularly in the larger television markets. It will allow weaker television stations in the market to combine, either with each other or with a larger station, thereby preserving and strengthening these stations and improving their ability to compete. These station combinations will allow licensees to take advantage of efficiencies and cost savings that can benefit the public, such as in allowing the stations to provide more local programming. At the same time, the station rank and voice criteria are designed to protect both our core competition and diversity concerns.

66. The "top four ranked station" component of this standard is designed to ensure that the largest stations in the market do not combine and create potential competition concerns. These stations generally have a large share of the audience and advertising market in their area, and requiring them to operate independently

115 Where there is no Nielsen DMA (e.g, Puerto Rico), parties may use data associated with a "functionally equivalent" TV market. Parties may demonstrate that a particular geographical area constitutes a functionally equivalent TV market based on viewing statistics or signal contour overlap.

116 We are aware of some unusual situations involving two stations that are within, but at the periphery of, the same DMA, and which simulcast the same programming pursuant to an attributable LMA as a means of providing full coverage to the center market. In these cases, Nielsen apparently reports the share of the simulcasting stations together, making it impossible to determine whether both of the stations are ranked among the top four in their market. Because it is very unlikely that both stations in such an arrangement would be ranked among the top four stations were they rated separately, we will not require such stations, should they seek to merge, to demonstrate compliance with the top four ranking component of the eight-voice test of our new duopoly rule. Stations in these arrangements that seek to combine ownership under the voice-test component of the new rule will still be required, however, to establish that eight separately owned broadcast voices would remain in their market after their merger.

will promote competition. In addition, our analysis has indicated that the top four-ranked stations in each market generally have a local newscast, whereas lower-ranked stations often do not have significant local news programming, given the costs involved. Permitting mergers among these two categories of stations, but not among the top four-ranked stations, will consequently pose less concern over diversity of viewpoints in local news presentation, which is at the heart of our diversity goal. Indeed, by allowing mergers between large and small stations, this prong of our new rule responds to those broadcasters who argued that the best way to improve the ability of small stations to compete is to allow them to combine with the largest stations in the market. According to these broadcasters, large stations are better positioned to provide the financial and other assistance required by many small stations to improve their technical facilities and programming to allow them to compete more effectively in the market.

67. The "eight independent voice" component of the rule provides a clear benchmark for ensuring a minimum amount of diversity in a market. The Commission has historically used voice count tests in other contexts (*i.e.*, in waiver standards for the radio-television cross-ownership rule) as a means of promoting diversity. Taking into account current marketplace conditions, the eight voice standard we adopt today strikes what we believe to be an appropriate balance between permitting stations to take advantage of the efficiencies of television duopolies while at the same time ensuring a robust level of diversity. Thus, under our new rule, at least eight independently owned and operating full-power commercial and noncommercial broadcast television stations must remain in the DMA post-merger. We will not include in our count of independently owned television stations those that are brokered pursuant to an attributable same-market LMA because a substantial portion of the programming of brokered stations is furnished by the brokering station.[117] This gives the brokering station a significant degree of influence over the brokered station's operations and programming such that it should not be counted as an independent source of viewpoint diversity; indeed, it is for this reason we have decided to attribute such TV LMAs in our attribution proceeding.[118]

68. We believe that an "eight station" test that focuses only on the number of full-power broadcast television outlets in the market is necessary for two reasons. First, we believe that broadcast television, more so than any other media, continues to have a special, pervasive impact in our society given its role as the preeminent source of news and entertainment for most Americans.[119] As the Supreme Court recently stated, "[b]roadcast television is an important source of information to many Americans. Though it is but one of many means for communication, by tradition and use for decades now it has been an essential part of the national

[117] Our decision that stations with attributable LMAs do not constitute independent separate voices applies equally to those we conclude to grandfather in Section VI below.

[118] Satellite stations will be included in our count, as they are full service stations, if they are separately owned, operated, and controlled (*i.e*., the parent station is not in the same market and the satellite is not owned by an entity that holds another voice in the market).

[119] As noted above, close to 70 percent of Americans report that television is their primary source of news - almost twice the number that rely mainly on newspapers for information. *See supra* note 34.

discourse on subjects across the whole broad spectrum of speech, thought, and expression."[120]

69. Second, as described above,[121] we are unable to reach a definitive conclusion at this time as to the extent to which other media serve as readily available substitutes for broadcast television. In the *TV Ownership Further Notice* and *Second Further Notice*, we sought information about the extent to which other media serve as substitutes for television in the advertising and delivered video programming markets, and for purposes of diversity. For example, in the *TV Ownership Further Notice,* we stated that for the purpose of competition analysis, we would tentatively consider local advertising markets to include broadcast and cable television advertising, radio advertising, and newspaper advertising.[122] For delivered video programming, we tentatively included commercial and noncommercial television stations and cable television.[123] While we expressed our inclination to tentatively include MMDS, DBS, and television delivered by telephone companies, we expressed concern about the extent to which the latter three alternatives were actually available to most Americans and sought quantitative, behavioral studies estimating the extent to which broadcast television actually faced substitutes from any and all sources in the marketplace.[124] Although we have received voluminous materials debating such substitutability, we have not received the quantitative, empirical studies that we sought in order to assess this issue in a complete and accurate fashion. Nor does there seem to be a consensus on the extent to which various media are substitutes for purposes of diversity. Thus, while we agree with those commenters who argued that different types of media, such as radio, cable television, VCRs, MMDS, and newspapers, may to some extent be substitutes for broadcast television, in the absence of the factual data we requested we have decided to exercise due caution by employing a minimum station count that includes only broadcast television stations.

70. Our "eight voice/top four ranked station" standard provides significant relaxation of the television duopoly rule while at the same time ensures that markets remain sufficiently diverse and competitive at the local level so that common ownership of two television stations in these markets does not threaten our core diversity concerns. We recognize that stations in markets with less than nine independent voices will not be able to take advantage of this standard. But we believe this is appropriate given that these markets start with fewer broadcast television outlets, and thus a lower potential for providing robust diversity to viewers in such markets. While we recognize, as several commenters argued, that smaller markets also benefit from the efficiency gains and cost savings associated with joint station ownership, it is in these small markets that consolidation of broadcast television ownership could most undermine our competition and diversity goals. Moreover, the three waiver standards we adopt today -- the failed and failing station criteria, and the unbuilt

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120 *Turner II*, 520 U.S. at 194 (1997). *See also Arkansas Educational Television Commission v. Forbes*, 118 S.Ct.1633, 1640 (1998) (noting that a majority of the population cites television as its primary source of election information).

121 *See supra* ¶¶ 30-33.

122 *See TV Ownership Further Notice*, 10 FCC Rcd at 3543.

123 *Id.* at 3538.

124 *Id.*

station test -- will, consistent with our competition and diversity goals, provide relief in a more tailored fashion for stations in smaller markets that are unable to compete effectively.

2. Waiver Criteria

a. Failed Stations

71. Background. We invited comment in the *Second Further Notice* on whether, if an applicant can show that it is the only viable suitor for a failed station, the Commission should grant the application regardless of contour overlap or DMA designations. We noted that for purposes of our one-to-a-market rule waiver standard, a "failed" station is a station that has not been operated for a substantial period of time, *e.g.*, four months, or that is involved in bankruptcy proceedings. We asked whether this standard should be used in evaluating a request to waive the television duopoly rule.

72. Comments. There was considerable support among broadcasters for a failed station waiver. These commenters argued generally that some service, even if it is duplicative of another voice in the market, is better than no service at all.[125] In contrast, BET and MAP *et al.* opposed granting a failed station waiver on the ground it would hinder the ability of new entrants, particularly minorities and women, to enter the television industry, thereby diminishing opportunities to increase diversity of broadcast ownership.[126] BET advocated awarding failed station licenses to new entrants via auction or comparative hearing.[127]

73. Discussion. We are persuaded that the public interest would be served by adopting a failed station waiver standard for our revised television duopoly rule. A station that is off the air or in involuntary bankruptcy or insolvency proceedings can contribute little, if anything, to any type of diversity in a local market. Nor does such a station constitute a viable alternative in the local advertising market. As we concluded in adopting our current failed station waiver standard for the one-to-a-market rule, the benefits to the public of joint ownership under these circumstances outweigh the costs to diversity. In fact, dark or bankrupt stations actually disserve our goal of efficient use of the spectrum because those stations are holding valuable frequencies without providing service to the public.[128] Permitting another local station to acquire a failed station will result in additional programming, perhaps an increase in diversity in the market, and more advertising time available for sale in larger quantities.

74. Although we share the concern expressed by NTIA, MMTC, BET, MAP *et al.*, and AWRT about new entry into broadcasting, the apparent decline in minority and female ownership of broadcast

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125 *See, e.g.*, Kentuckiana Comments at 3-4; Post-Newsweek Comments at 5-6; Shockley Comments at 4-5.

126 *See* BET Comments at vii, 5; MAP *et al.* Comments at 17-18.

127 *See* BET Comments at 5.

128 *See Second Report and Order,* 4 FCC Rcd at 1753.

facilities, and the need to encourage broadcast ownership diversity,[129] we are not convinced that that concern undermines our reasons for establishing a failed station waiver policy. We believe the benefit to the public of keeping a failed station on the air or returning a dark station to service is significant. We further note that the economies of scale that result from common ownership may in many circumstances be the only viable means of rejuvenating a failed station in an expeditious manner. Moreover, as discussed below, to qualify for the waiver, an applicant must demonstrate that the in-market buyer is the only reasonably available candidate willing and able to operate the station, and that selling the station to an out-of-market buyer would result in an artificially depressed price. To satisfy this element of the waiver standard, applicants will be required to give public notification that the station is for sale. Thus, minorities and women interested in purchasing a station will have an opportunity to bid. We remain very concerned about the more general problem of the decline in minority broadcast ownership and possible mechanisms to increase minority and female ownership in broadcasting,[130] but nonetheless believe our failed station waiver criteria serve the public interest. The Commission has made a number of efforts separate from this proceeding to address minority and female ownership issues, and we hope to take further steps in this area.[131]

75. We have decided to define a "failed station" for purposes of our television duopoly rule as one that has been dark for at least four months or is involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings. In addition, we will require that the waiver applicant demonstrate that the "in-market" buyer is the only reasonably available entity willing and able to operate the failed station, and that selling the station to an out-of-market buyer would result in an artificially depressed price for the station.

76. This standard is stricter than the failed station standard used in the context of our current one-to-a-market rule.[132] First, we are limiting our TV duopoly failed station waiver to stations in court-supervised *involuntary* bankruptcy and insolvency proceedings. By excluding voluntary bankruptcy and insolvency proceedings, we hope to avoid the issue of whether an owner has filed for bankruptcy or insolvency simply in

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[129] *See supra* ¶¶ 13, 56, 63, 72.

[130] *See supra* ¶ 13.

[131] We are now guided in considering initiatives to encourage greater minority and female ownership in the mass media by the Supreme Court's 1995 decision in *Adarand,* 515 U.S. 200 (1995). We are presently conducting studies that will allow us to address this issue in the context of our broadcast licensing and ownership policies. In the meantime, we have adopted measures in other proceedings designed to promote ownership opportunities for small businesses, including those owned by women and minorities. For example, as part of our recently adopted competitive bidding procedures for commercial analog broadcast services, we have adopted a "new entrant" bidding credit designed to further the goals of the designated entity provisions of Section 309(j) of the Communications Act of 1934. *See Competitive Bidding First Report and Order,* 13 FCC Rcd at 15993-15996, ¶¶ 186-190. Section 309(j) directs the Commission, in implementing competitive bidding for broadcast licenses, to ". . . disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. . . ." 47 U.S.C. § 309(j)(3). The bidding credits adopted for broadcast licenses will be provided to entities that hold no or few mass media licenses.

[132] *See* 47 C.F.R. § 73.3555 Note 7; *Second Report and Order*, 4 FCC Rcd at 1752.

order to qualify for a waiver. We will extend our failed station waiver here to apply to both insolvency and bankruptcy proceedings, as the former are a state-regulated mechanism similar to bankruptcy. Second, we are requiring applicants to make a serious attempt to sell the troubled station to an entity that would not require a waiver of our revised duopoly rule. Waiver applicants must demonstrate that the "in-market" buyer is the only reasonably available entity willing and able to operate the station, and that selling to another buyer would lead to an artificially depressed price for the station. One way to make this showing will be to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the station, and that no reasonable offer from an entity outside the market has been received.[133] We believe that a strict failed station waiver standard is warranted in view of the other steps we are taking today to relax the television duopoly rule. While there are now other limited criteria pursuant to which same-market television stations may combine, we hope to limit the special relief awarded to failed stations to those situations where this relief is clearly needed. As with our current one-to-a-market failed station waiver standard, we will be predisposed to grant applications that meet the waiver standard, but will entertain petitions to deny seeking to rebut the waiver request.

77. To qualify for a waiver under the failed station standard, we will require the waiver applicant to provide relevant documentation, *i.e.*, proof of the length of time that the station has been off the air, or proof that the station is involved in bankruptcy or insolvency proceedings. We will also require, in the case of a silent station, a statement that the failed station went dark due to financial distress, not because of other, non-financial reasons. This documentation will ensure that the waiver standard is applied only to stations facing financial difficulties.[134] We will not require the waiver applicant to demonstrate that the market will contain post-merger a minimum number of voices. As noted above, we have concluded that the benefits to the public of preventing a station from going dark or bringing a dark station back on the air cannot harm and may help diversity and competition, regardless of the number of broadcast and other voices in the local market. Any combination formed as a result of a failed station waiver may be transferred together only if the combination meets our new duopoly rule or one of our three waiver standards at the time of transfer.

b. "Failing" Stations

78. Background and Comments. The *Second Further Notice* also invited comment on whether we should adopt a failing station waiver criteria, and, if so, the appropriate definition of a failing station. Many broadcasters supported adopting a waiver policy for failing stations, contending that the Commission should not wait for a local station to go dark or bankrupt before permitting a merger.[135]

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[133] However, we wish to emphasize that waiver applicants cannot satisfy the requirement to demonstrate that there is no out-of-market buyer without making a serious, good-faith effort to attempt to sell the station. In this regard, we will not accept a statement that there was no attempt to sell the station based on opinions of appraisers or brokers that the station would be unmarketable and thus that it would be futile even to advertise the station for sale.

[134] *See Spectrum Radio, Inc.*, 12 FCC Rcd 1667, 1671 (1997).

[135] *See, e.g.,* ALTV Comments at 30; LSOC Comments at 83-84; NAB Comments at 11-12.

79. Discussion. We will adopt a "failing" station waiver standard. It will permit two stations to merge where at least one of the stations has been struggling for an extended period of time both in terms of its audience share and in its financial performance. Permitting such stations to merge should pose minimal harm to our diversity and competition goals, since their financial situation typically hampers their ability to be a viable "voice" in the market. These stations rarely have the resources to provide local news programming, and often struggle to provide significant local programming at all. Allowing a "failing" station to join with a stronger station in the market can greatly improve its ability to improve its facilities and programming operations, thus benefitting the public interest. This waiver standard may be of particular assistance to struggling stations in smaller markets that are not covered by the eight voice/top four ranked station test.

80. We agree with the commenters that argued that it makes little sense to force a station to go dark or declare bankruptcy before considering whether it should receive a waiver of the duopoly rule to permit it to merge with another station in the market. Of course, determining when a station is "failed" is a more straightforward task, since there are clear, objective criteria for identifying such a status, *i.e.*, a station is dark or in bankruptcy. A "failing" station standard, by contrast, will involve more of an individualized, case-by-case assessment to determine when a station is struggling to such an extent that permitting it to merge with another station will not undermine our competition and diversity goals and may in fact promote them.

81. With these considerations in mind, and based on the record before us, we establish the following criteria for granting waivers under a "failing" station waiver standard. We will presume such a waiver is in the public interest if the applicant satisfies *each* of these criteria:

(1) One of the merging stations has had low all-day audience share (*i.e.*, 4% or lower).

(2) The financial condition of one of the merging stations is poor. A waiver is more likely to be granted where one or both of the stations has had a negative cash flow for the previous three years. The applicant will need to submit data, such as detailed income statements and balance sheets, to demonstrate this. Commission staff will assess the reasonableness of the applicant's showing by comparing data regarding the station's expenses to industry averages.

(3) The merger will produce public interest benefits. A waiver will be granted where the applicant demonstrates that the tangible and verifiable public interest benefits of the merger outweigh any harm to competition and diversity. At the end of the stations' license terms, the owner of the merged stations must certify to the Commission that the public interest benefits of the merger are being fulfilled, including a specific, factual showing of the program-related benefits that have accrued to the public. Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing.

(4) The in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station; selling the station to an out-of-market buyer would result in an artificially depressed price. As with the showing required of failed station waiver applicants, one way to satisfy this fourth criterion will be to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the station, and that no

reasonable offer from an entity outside the market has been received.

Any combination formed as a result of a failing station waiver may be transferred together only if the combination meets our new duopoly rule or one of our three waiver standards at the time of transfer.

82. We believe these criteria provide a reasonable means of providing relief from our television duopoly rule consistent with our competition and diversity goals. If necessary we will tailor these criteria further as we gain experience in administering the "failing" station standard.

c. Unbuilt Stations

83. Background. In the *Second Further Notice*, we invited comment on whether we should entertain requests to waive the local television ownership rule to permit a local broadcast television licensee to apply for a television channel allotment that has remained vacant or unused for an extended period of time. We stated there that it may not be in the public interest to allow allotted broadcast channels to lie fallow -- particularly in markets where it might be possible to allow additional NTSC stations to come on the air without adversely affecting the DTV allotment table and the transition to digital television. Similarly, we asked whether, if it is possible to create new channel allotments in a market without interfering with nearby channels and without adversely affecting the DTV allotment table, the Commission should entertain applications by an incumbent television licensee to establish a new channel in its market.

84. Discussion. Since we adopted the *Second Further Notice*, the rationale for a vacant allotment waiver policy has become less relevant. In the *DTV Sixth Report and Order*, we eliminated vacant NTSC allotments in order to better achieve our DTV objectives of full accommodation, service replication and spectrum recovery.[136] We further stated that new television stations should be operated as DTV stations, and that there would be no need to maintain vacant NTSC allotments that were not the subject of a pending application or rule making proceeding.[137] Thus, with the licensing of new NTSC service coming to an end, we believe that the proposed rationale for a vacant allotment waiver policy has been largely vitiated because there would be few, if any, situations where that basis for a waiver would apply. As the development of DTV continues, it is possible that new channels may again become available for licensing. If so, we may reconsider this issue at that time or in the context of our biennial review of our multiple ownership rules.

85. Although we no longer find it appropriate to adopt a vacant allotment waiver standard, we

[136] *Sixth Report and Order* in MM Docket No. 87-268, *In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, 12 FCC Rcd 14588 (1997) at ¶ 112.

[137] *Id*. We stated that we would treat existing vacant allotments that are not the subject of pending NTSC proposals as deleted. In the DTV *Sixth Further Notice*, we established July 25, 1996 as the last opportunity to file petitions to add channels to the TV Table of Allotments, and we provided that we would not accept additional applications for new NTSC stations (other than applications responding to cutoff lists) after 30 days from the publication of that *Notice* (September 20, 1996). *Sixth Further Notice of Proposed Rule Making* in MM Docket No. 87-268, 11 FCC Rcd 10968 (1996).

have concluded that the public interest would be served at this time by adopting a duopoly waiver standard for "unbuilt" television stations. The unbuilt station waiver we adopt is premised on essentially the same logic as supports our failed and failing station waiver standards. A station that has gone unbuilt, like a built station that has gone dark, cannot contribute to diversity or competition. On the other hand, activation of a construction permit and construction of a station, even by the owner of another television station in the market if that is the only viable means to obtain service, increases program choice for viewers, may increase outlet diversity, and increases the amount of advertising time available for sale in the market We believe that the benefits to the public of construction and operation of such a station, even if through joint ownership, rather than allowing the channel to remain unused, outweigh any costs to diversity and competition.

86. To qualify for a duopoly waiver under this standard, we will require that applicants satisfy each of these criteria:

(1) The combination will result in the construction of an authorized but as yet unbuilt station.

(2) The permittee has made reasonable efforts to construct, and has been unable to do so.

(3) The in-market buyer is the only reasonably available candidate willing and able to acquire the construction permit and build the station and selling the construction permit to an out-of-market buyer would result in an artificially depressed price. As with the showing required of failed and failing station waiver applicants, one way to satisfy this criterion will be to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the permit, and that no reasonable offer from an entity outside the market has been received.

Any combination formed as a result of an unbuilt station waiver may be transferred together only if the combination meets our new duopoly rule or one of our three waiver standards at the time of transfer.

87. We believe our criteria for unbuilt station waivers will ensure that they will only be available in situations in which allowing purchase by an in-market buyer is consistent with our competition and diversity goals. If necessary we will tailor these criteria further as we gain experience in administering this standard.

d. UHF Combinations

88. Background and Comments. In the *Second Further Notice*, we invited comment on the extent to which the Commission should distinguish between UHF and VHF stations in applying our TV duopoly rule. A number of parties have argued that the Commission should adopt a UHF exception or waiver policy for the duopoly rule. Many broadcaster commenters in this proceeding advocated permitting UHF combinations, either by rule or waiver.[138] Other commenters disagreed, arguing that the historical disadvantage of UHF

[138] These commenters generally argued that UHF stations are at a disadvantage as compared to VHF stations because of their weaker signal strength and greater costs of operation. *See, e.g.*, Jet Comments at 4-5; ALTV Comments at 24-29; Granite Comments at 3-5. They also argued generally that permitting UHF/UHF or

stations has diminished, in part as a result of increased cable penetration and the increased competition for affiliates among major and emerging networks.[139] They also pointed out that the implementation of DTV may substantially mitigate, if not entirely eliminate, the technical handicap of UHF stations.[140]

89. After careful consideration of the comments, we have decided not to create a UHF exception or UHF waiver policy for several reasons. First, a UHF exemption or waiver policy is an overbroad means of promoting the public interest. As we noted in our *Report and Order* eliminating the prime time access rule for television networks, many UHF stations are financially successful, are network affiliates, and are part of large station groups.[141] Thus, a blanket exception or waiver for all UHF stations would unfairly benefit more powerful affiliates as well as struggling stations. Second, cable carriage compensates for many of the technical disadvantages faced by UHF stations vis-a-vis their VHF counterparts. Cable penetration is near 70 percent nationwide. Moreover, the Supreme Court's decision upholding the statutory must-carry rights of television stations removes a major source of uncertainty among UHF stations about their ability to obtain cable carriage.[142] Third, deployment of DTV should eliminate, over the next several years, many of the remaining disadvantages of UHF stations. The Commission's power limitations for DTV licensees will likely reduce the technical discrepancy of UHF and VHF stations, and the multichannel capabilities of digital transmission should enhance the ability of UHF stations to compete in the video marketplace. Fourth, licensees may continue to take advantage of the satellite station exception to the TV duopoly rule, which is designed to assist financially struggling stations that cannot operate as stand-alone full-service stations. Finally, we believe that the financial problems faced by particular UHF stations can more appropriately be addressed, at least to some extent, by the other duopoly waiver criteria we are adopting today. As discussed above, these criteria are targeted to assist stations facing financial hardships. We therefore will not create a waiver policy or exception to the TV duopoly rule based on whether a station is in the UHF or VHF band.[143]

3. Satellite Stations

UHF/VHF combinations would permit the weaker station to become a more viable competitor, thus increasing competition and diversity in the market. *See, e.g.*, Granite Comments at 6-7; HSN Comments at 9-12.

[139] *See, e.g.*, Kentuckiana Comments at 5; Post-Newsweek Comments at 4-5, MAP *et al.* Comments at 12-15. Kentuckiana notes that in many markets there is no UHF disadvantage since most or all local stations are UHF.

[140] *See* DOJ Comments at 20, n. 25; NTIA Comments at 7.

[141] *See Report and Order*, *Review of the Prime Time Access Rule*, MM Docket No. 94-123, 11 FCC Rcd 546, 595-596 (1995).

[142] *Turner I1*, 520 U.S. at 185.

[143] In addition, we note that the issue of whether UHF stations should continue to retain a "discount" for purposes of our national ownership rules is under consideration in our pending biennial review. *See Biennial Review NOI*, 13 FCC Rcd at 11284-11285, ¶¶ 25-27.

90. Background. Generally, television satellite stations retransmit all or a substantial part of the programming of a commonly-owned parent station. Satellite stations are generally exempt from our broadcast ownership restrictions. In the *Second Further Notice*, we noted that the Commission first authorized TV satellite operations in small or sparsely populated areas with insufficient economic bases to support full-service operations.[144] Later we authorized satellite stations in smaller markets already served by full-service operations but not reached by major networks. More recently, we have authorized satellite stations in larger markets where the applicant has demonstrated that the proposed satellite could not operate as a stand-alone full-service station.[145] We stated in the *Second Further Notice* that we saw no reason to alter our policy of exempting satellite stations from our local ownership rules, but invited comment on this conclusion. All the commenters that addressed this issue supported continuing the exception of satellite stations from the duopoly rule.[146]

91. Discussion. We believe that continued exception of satellite stations from the duopoly rule is appropriate. As we stated in the *Second Further Notice*, our satellite station policy rests in part on the questionable financial viability of the satellite as a stand-alone facility.[147] As such, our policy has furthered the underlying goals of our ownership restrictions by adding additional stations to local television markets where these stations otherwise would not have been established. In addition, the other criteria we use to evaluate satellite operations, including service to underserved areas, ensure that satellite operations are consistent with our goals of promoting diversity and competition.

V. RADIO-TELEVISION CROSS-OWNERSHIP RULE

92. Background. The radio-television cross-ownership rule, or the "one-to-a-market" rule, forbids joint ownership of a radio and a television station serving substantial areas in common.[148] In 1989, the Commission amended the rule to permit, on the basis of a presumptive waiver, radio-television mergers involving one television and one AM and one FM station, in the Top 25 television markets if, post-merger, at least 30 independently owned broadcast voices remain in the relevant market, or if the merger involves a failed

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144 *See Second Further Notice*, 11 FCC Rcd at 671, ¶ 36.

145 *See Report and Order, Television Satellite Stations*, 6 FCC Rcd 4212 (1991) (petition for reconsideration pending) (*"TV Satellite Stations Report and Order"*).

146 *See* ABC Comments at 5; Malrite Comments at 22; Paxson Comments at 13; SCC Comments at 3.

147 To qualify for television satellite status, the applicant must demonstrate that no alternative operator is ready and able to construct or to purchase and operate the satellite as a full-service station. This criteria is strong evidence that a stand-alone facility is not viable. The other criteria for satellite status are (1) no City Grade overlap between the parent and the satellite, and (2) the proposed satellite would provide service to an underserved area. *See TV Satellite Stations Report and Order*, 6 FCC Rcd at 4212.

148 As noted earlier, the one-to-a-market rule is triggered by encompassment of one station's city of license by a specified service contour of the other station, not by simple overlap of contours. In most cases, this will mean that the stations are fairly close to one another.

station. Our current policy also permits waivers on a case-by-case basis if the merger satisfies a group of five separate criteria.[149]

93. In the *TV Ownership Further Notice,* we proposed to eliminate the cross-ownership restriction in its entirety or replace it with an approach under which cross-ownership would be permitted where a minimum number of post-acquisition, independently owned broadcast voices remained in the relevant market. We tentatively concluded there were two alternative approaches toward modifying the rule. If radio and television stations do not compete in the same local advertising, program delivery, or diversity markets, we proposed to eliminate the rule entirely and rely on our radio and television local ownership rules to ensure competition and diversity at the local level. Under the local radio ownership rules in effect at that time, this would have permitted entities to own one AM, one FM, and one television station in even the smallest markets, and up to 2 AM, 2 FM, and one television station in larger markets. In contrast, if we concluded that radio and television did compete in some or all of the local markets, we proposed to modify the one-to-a-market rule to permit radio-television combinations in markets where there are a sufficient number of remaining independent voices to ensure sufficient diversity and competition.

94. After adoption of the *Further Notice,* Congress passed the 1996 Act, which affects the radio-television cross-ownership rule in at least two ways. First, Section 202(d) of the Act directs the Commission to extend the radio-television cross-ownership presumptive waiver policy to the top 50, rather than top 25, television markets "consistent with the public interest, convenience and necessity." Second, Section 202(b)(1) of the Act liberalized the local radio ownership rules. Now, a party may own up to 8 commercial radio stations, not more than five of which are in the same service (AM or FM), in radio markets with 45 or more commercial radio stations, up to 7 commercial radio stations, not more than 4 of which are in the same service, in radio markets with 30-44 commercial radio stations, and up to 6 commercial radio stations, not more than 4 of which are in the same service, in radio markets with 15-29 commercial radio stations. In radio markets with 14 or fewer commercial radio stations, one party can own up to 5 commercial radio stations, not more than 3 of which are in the same service, provided that no party may own, operate or control more than 50% of the stations in the market.

95. In our *Second Further Notice,* based on the statutory changes to the local radio ownership rules, we requested further comment on our radio-television cross-ownership rule proposals. First, we sought further comment on whether the rule should be eliminated based on a finding that radio and television stations do not compete in the same market. Second, even if we consider television and radio stations to be competitors, we asked if the radio-television cross-ownership rule could be eliminated because the respective radio and television ownership rules alone can be relied upon to ensure sufficient diversity and competition in the local market. We also sought to update the record on a number of specific options for modifying, but not eliminating, the rule. In this regard, and consistent with Section 202(d) of the 1996 Act, we proposed, at a

[149] These criteria include the potential public service benefits of joint operation of the facilities involved in the merger, the types of facilities involved, the number of stations already owned by the applicant, the financial situation of the station(s), and the nature of the post-merger market in light of our diversity and competition concerns. *See Second Report and Order,* 4 FCC Rcd at 1753 (1989). Not all five criteria must be met under the current waiver test.

minimum, to extend the Top 25 market/30 voice waiver policy to the Top 50 markets. However, we also invited comment on a number of options to change the rule beyond what was contemplated by Section 202(d) of the 1996 Act. For example, we asked whether the presumptive waiver policy should be extended further to any television market where the minimum number of independent voices would remain after the merger. We also invited comment on whether the presumptive waiver policy should be extended to entities that seek to own more than one FM and/or AM radio station, and whether the Commission should reduce the number of required independently owned voices that must remain after a merger. Finally, we asked whether our "five factors" test should be changed or refined to be more effective in protecting competition and diversity.

96. Comments. The commenting broadcasters, with a few exceptions, favored elimination of the one-to-a-market rule or, failing that, substantial relaxation of the rule. These broadcasters generally pointed to the large number of media, both broadcast and non-broadcast, that compete with radio and television in the local market as evidence that elimination of the rule would not adversely affect competition and diversity.[150] They also argued that allowing radio/television combinations leads to cost savings that enhance the ability of broadcasters to compete with their multichannel video competitors, and permits investment in better quality programming and facilities that improve service to the public. In addition, some broadcasters argued that in circumstances where concerns about competition exist, the Department of Justice should exercise jurisdiction to stem abuses, rather than the FCC.[151]

97. Public interest groups, joined by a few broadcasters, advocated that the one-to-a-market rule be retained. These parties argued generally that the rule is necessary to retain diversity and competition in the local market and to prevent an increase in the barriers to entry into broadcast ownership faced by minorities, women, and small businesses. Black Citizens for a Fair Media, joined in its comments by thirteen other public interest groups (BCFM *et al.*), argued that the local radio and television ownership rules alone cannot be relied upon to ensure diversity and competition in the local market, and that the radio-television cross-ownership rule is more important now to protect diversity as a result of the 1996 Act's relaxation of the radio and television ownership limits and the consolidation in the industry that has followed.[152] AWRT, BET, and MAP *et al.* urged the Commission to proceed cautiously in any effort to relax its ownership rules and to evaluate fully the increasing concentration of control in mass media ownership.[153]

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[150] *See, e.g.*, NAB Comments at 13-15; CBS Comments at 13, 18.

[151] *See* Paxson Comments at 20.

[152] *See* BCFM Comments at 2-4. BCFM filed its comments jointly with the Center for Media Education, Chinese for Affirmative Action, Communications Task Force, League of United Latin American Citizens, Minority Media Telecommunications Council, National Association for Better Broadcasting, NOW Legal Defense and Education Fund, Office of Communication of the United Church of Christ, Philadelphia Lesbian and Gay Task Force, Telecommunications Research Action Center, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights, Wider Opportunities for Women, and Women's Institute for Freedom of the Press.

[153] *See* BET Comments at i; AWRT Comments at 1-2; MAP Comments at 2. BET argues that minority-owned businesses hold only 3% of all television licenses, and that empirical studies have demonstrated a strong correlation between ownership by minority businesses and diversity of programming. BET Comments at viii.

98. With respect to the Commission's specific proposals for modifying, but not eliminating, the one-to-a-market rule, most broadcasters supported extending the presumptive waiver policy to all markets that satisfy a minimum independent voice test. Although broadcasters generally believed there is no reason to retain the one-to-a-market rule, if the rule is retained they argue that the thirty-voice presumptive waiver policy should be extended to apply to all markets regardless of market rank.[154] In addition, most broadcasters supported extending the presumptive waiver policy to permit entities to own the maximum number of stations permitted by the separate radio and television ownership limits.[155] Several commenters pointed out that television owners are now treated less favorably than radio owners for no rational reason in that a radio owner may own multiple stations up to the maximum allowed by the radio limits, while a television owner may own only one AM and one FM station in the same market, where 30 independent voices remain post-merger, without making a showing under the current five factors test. In the absence of a finding that the latter combination threatens local-market competition and diversity more than the former, these commenters argued the difference in treatment is unjustifiable.[156] Many broadcasters also supported reducing the minimum number of independent voices that must remain after a merger under the presumptive waiver policy and expanding the list of media counted as voices.[157]

99. Public interest groups, joined by a few broadcasters, generally opposed relaxing the one-to-a-market rule further than directed by Congress, citing the same diversity and competition concerns they raised in opposing elimination of the rule. BCFM also opposed expanding the definition of independently-owned voices to include media forms that are not yet widely available and do not carry local news and public affairs programming.[158]

A. Modification of the Rule

[154] *See*, *e.g*., ABC Comments at 9-10; Pappas Comments at 15; SCC Comments at 6; Sinclair Comments at 12-13.

[155] *See*, *e.g*., ABC Comments at 12-13; CBS Comments at 26; Jacor Comments at 11-12; Pappas Comments at 17; Paxson Comments at 22; Sinclair Comments at 12-13; SCC Comments at 6.

[156] *See*, *e.g*., ABC Comments at 10.

[157] *See*, *e.g*., Paxson Comments at 237 (require 20, rather than 30, independent voices under a minimum voices test and include in the independent voice analysis commercial and noncommercial radio and television stations, daily newspapers, cable television systems, and MMDS systems); CBS Comments at 28 (reduce number of voices to 20); Jacor Comments at i, 8-9 (15 voices "more than adequate" to preserve diversity and prevent accumulation of power in the local advertising market; in applying a voice test, at a minimum count all radio stations licensed or with a significant penetration within the market and every cable operator, DTH provider, and Internet provider); ABC Comments at 11 (in applying a 30 voices test, count all independently-owned daily and weekly newspapers, television stations, radio stations, and cable channels that have the capacity to act as local outlets in the market).

[158] BCFM Comments at 2-4.

100. Discussion. We have determined that the public interest would be best served at this time by relaxing the radio-television cross-ownership rule to permit same-market joint ownership of radio and television facilities up to a level that permits broadcasters and the public to realize the benefits of common ownership while not undermining our competition and diversity concerns. Our new rule consists of three parts. First, we will permit a party to own up to two television stations (provided this is permitted under our modified TV duopoly rule or TV LMA grandfathering policy) and up to six radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules) in any market where at least 20 independently owned media voices remain in the market after the combination is effected. In those markets where our revised rule will allow parties to own a total of eight outlets in the form of two TV stations and six radio stations, we will also permit them instead to own eight outlets in the form of one TV station and seven radio stations. Second, we will permit common ownership of up to two television stations and up to four radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules) in any market where at least 10 independently owned media voices remain after the combination is effected. And, third, we will permit common ownership of up to two television stations and one radio station notwithstanding the number of independent voices in the market. In determining which stations are subject to the new rule, we will use the same contour overlap standards used in our present rule.[159] We delegate to the Mass Media Bureau the authority to grant any application that satisfies the new radio/TV cross-ownership rule, and presents no new or novel issues. If a voice test is required to acquire a given combination (*i.e.*, any combination that includes more than one radio/TV combination), that combination will not later be required to be undone if the number of independent voices in the market later falls below the applicable voice test. However, a radio/TV combination may not be transferred to a new owner if the market does not satisfy the applicable voice standard at the time of sale.

101. As described below, we will eliminate our five factor case-by-case waiver standard. Waivers of our new three-part rule will be granted only in situations involving a failed station and in extraordinary circumstances in which the proponent of the waiver will face a high hurdle.[160] We will define a failed station for purposes of our new radio/TV cross-ownership rule in the same manner as that term is defined for purposes of the failed station waiver we adopt today in connection with our television duopoly rule. Any combination formed as a result of a failed station waiver may be transferred together only if the combination meets our new radio/TV cross-ownership rule or our failed station waiver standard at the time of transfer.

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[159] The current one-to-a-market rule, and the rule we adopt today, is triggered by the degree of contour overlap among the stations involved. In particular, the rule is triggered where the predicted or measured 2 mV\m contour of the AM station encompasses the entire community of license of the television station, or the Grade A contour of the television station encompasses the entire community of license of the AM station. With respect to FM stations, the relevant contour is the predicted 1 mV\m contour. *See* 47 C.F.R. § 73.3555(c)(1) & (2). The contour overlap standards determine which stations or transactions are subject to the radio-television cross-ownership rule. If application of the contour overlap standards indicates the transaction is subject to the rule, the focus shifts to the three prongs of the new rule to determine what level of ownership is permitted.

[160] *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969, *cert. denied*, 409 U.S. 1027 (1972) (noting that agency rules are presumed valid, and that "an applicant for waiver faces a high hurdle even at the starting gate").

102. Rationale for Modified Rule. We relax our radio/TV cross-ownership rule to balance our traditional diversity and competition concerns with our desire to permit broadcasters and the public to realize the benefits of radio-television common ownership. We believe that the revised rule reflects the changes in the local broadcast media marketplace. The relaxed rule recognizes the growth in the number and types of media outlets, the clustering of cable systems in major population centers, the efficiencies inherent in joint ownership and operation of both television and radio stations in the same market, as well as the public service benefits that can be obtained from joint operation. At the same time, the voice test components of the revised rule also ensure that the local market remains sufficiently diverse and competitive.

103. The new three-part rule also ensures the application of a clear, reasoned standard. One of our primary goals in this proceeding is to provide concrete guidance to applicants and the public about the permissibility of proposed transactions. This minimizes the burdens involved in complying with and enforcing our rules. It also promotes greater consistency in our decision-making. Since development of the Commission's waiver policy in 1989, the Commission has granted a significant number of waivers in order to provide broadcasters relief from the one-to-a-market rule, which prohibited any common ownership of television and radio stations in the same market. Indeed, some commenters argue that this waiver process has come to govern regulation of same-market radio-television cross-ownership, rather than the rule itself.[161] Today, we redirect our approach by amending the rule to provide a greater degree of common ownership of radio and television stations while at the same time limiting waivers of this new rule to only extraordinary circumstances. In addition, the new rule will ease administrative burdens and will provide predictability to broadcasters in structuring their business transactions.

104. A number of commenters argued that we should eliminate our radio-television cross-ownership rule entirely. We do not believe that course is appropriate at this time. We stated in the *TV Ownership Further Notice* that elimination of the rule might be warranted if we concluded that radio and television stations do not compete in the same local advertising, program delivery, or diversity markets. Although radio and television stations may or may not compete in different advertising markets,[162] we believe a radio-television cross-ownership rule continues to be necessary to promote a diversity of viewpoints in the broadcast media. The public continues to rely on both radio and television for news and information, suggesting the two media both contribute to the "marketplace of ideas" and compete in the same diversity market. As these two media do serve as substitutes at least to some degree for diversity purposes, we will retain a relaxed one-to-market rule to ensure that viewpoint diversity is adequately protected.

105. Although we decline to eliminate our radio-television cross-ownership rule, the demonstrated benefits of same-market broadcast combinations support relaxing the rule and allowing such combinations in circumstances where we find that diversity and competition remain adequately protected. The record in this proceeding demonstrates that there are significant efficiencies inherent in joint ownership and operation of broadcast stations in the same market, even when the stations are in separate services (*i.e.*, radio-TV

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161 *See, e.g.*, Spectrum Detroit Comments at 12 - 15.

162 *See supra* ¶¶ 31-33.

combinations).[163] Among other benefits, these efficiencies often lead to improved programming and can help stations in financial difficulty remain on the air. The revised radio/TV cross-ownership rule we adopt today will establish clear guidelines that will permit common ownership of radio and television stations in markets where diversity and competition are preserved.

106. We will monitor the impact on the broadcast industry of this and other changes to our ownership rules being made today, as well as the changes to the television industry associated with the conversion to digital television and the increase in the number of media outlets available to the public. In light of these observations, we will have a further opportunity to consider relaxing the radio/TV cross-ownership rule as we evaluate ongoing changes in the television and radio markets in conjunction with future biennial reviews.

107. Turning to the specifics of the first two prongs of the new rule, we will use a "voice count" approach rather than also applying a market rank restriction as with our current top 25 market, 30 voice presumptive waiver policy. In particular, the first prong of our new rule, which permits a party to own up to two television stations (provided this is permitted under our modified TV duopoly rule or TV LMA grandfathering policy) and up to six radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules) in any market with at least twenty independently owned media voices, focuses on the number of independent voices remaining in the market post-merger, rather than market rank *(e.g.*, the top 100 markets). A rule based on the number of independent voices more accurately reflects the actual level of diversity and competition in the market. As a number of commenters in this proceeding noted, a market-size restriction is unnecessary for purposes of competition and diversity as long as there are a minimum number of independent sources of news and information available to listeners, and a minimum number of alternative outlets available to advertisers.[164] Two broadcasters specifically urged us to allow TV/radio combinations as a matter of course in any market that satisfies a minimum independent voice test.[165] In addition, unlike a rule based on market rank, our revised rule will account for changes in the number of voices in a market resulting from consolidation, the addition of new voices, or the loss of any outlets. Mergers will be permitted only when the voice count is satisfied, thereby ensuring the preservation of a minimum level of diversity and competition in the market.

108. In markets where the voice count component of our revised duopoly and radio/TV cross-ownership rule would allow parties to own two TV stations and six radio stations, for a total of eight outlets, we will also permit parties to own the same total number of outlets in the form of one TV station and seven radio stations. As we have explained above, broadcast television is the single most important source of news for the majority of Americans. We therefore believe that, in markets where there is sufficient competition and diversity to justify combinations involving two *television* stations and six radio stations, broadcasters should have the flexibility to purchase an additional *radio* station instead of a second television station.

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163 *See supra* ¶¶ 34-36.

164 *See, e.g*., Paxson Comments at 23 - 24; Pappas Comments at 15-16.

165 *See* CBS Comments at 26; Jacor Comments at 7.

109. The second prong of our new rule permits a party to own up to two television stations (provided this is permitted under our modified TV duopoly rule or TV LMA grandfathering policy) and up to four radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules) in any market with at least ten independently owned media voices. This standard also focuses on the number of independent voices remaining in the market post-merger rather than market rank, and extends the benefits of common ownership to smaller markets. In this regard, our revised rule permits broadcasters and the public in these markets to realize the same benefits of common ownership we have concluded are worthwhile for the largest markets.

110. The third prong of our new rule will allow common ownership of up to two television stations (provided that is permissible under our rules or TV LMA grandfathering policy) and one radio station notwithstanding the number of independent voices in the market. Based on the record before us, we find that the service benefits and efficiencies achieved from the joint ownership and operation of a television/radio combination in local markets further the public interest and outweigh the cost to diversity in these instances.[166]

111. Applying the Voice Count Tests. We will apply the voice test under both prongs of our new radio/TV cross-ownership rule that include such a test as follows:

(1) We will count all independently owned and operating full-power commercial and noncommercial broadcast television stations licensed to a community in the DMA in which the community of license of the television station in question is located.[167]

(2) We will also count all independently owned and operating commercial and noncommercial broadcast radio stations licensed to a community within the radio metro market in which the community of license of the television station in question is located.[168] In addition, we will

[166] As noted above, Section 202(d) of the 1996 Act directed the Commission to "extend its [one-to-a-market top 25/30 voice] waiver policy to any of the top 50 markets, consistent with the public interest, convenience, and necessity." Given that we find that the public interest will be served by permitting at least one TV station (or two, if permitted by our new TV duopoly rule) to combine with one radio station in every market, regardless of market rank or voice counts, we believe that our new waiver policies satisfy Section 202(d) requirements. Indeed, staff analysis suggests that all of the top fifty markets have at least twenty voices, such that at least one combination of two TV stations and six radio stations would be permitted in these markets.

[167] We will not include in our count of voices broadcast stations that are programmed by other stations in the market pursuant to attributable local marketing or time brokerage agreements. A substantial portion of the programming of these "time brokered" or "LMAed" stations is furnished by the brokering station and cannot be deemed an independent source of viewpoint diversity; indeed, such brokering constitutes an ownership interest under our attribution rules. *See Attribution Report and Order,* section III.C.

[168] A radio market, as delineated by Arbitron, generally reflects the geographic area in which a cluster of radio stations serves a population that advertisers seek to reach. Arbitron radio markets generally correspond to Metropolitan Statistical Areas as defined by the U.S. Government Office of Management and Budget ("OMB").

count broadcast radio stations outside the radio metro market that Arbitron or another nationally-recognized audience rating service lists as having a reportable share in the metro market.[169] In areas in which there is no radio metro market, the party seeking the waiver may count the radio stations present in an area that would be the functional equivalent[170] of a radio market.

(3) We will count all independently owned daily newspapers that are published in the DMA at issue and that have a circulation exceeding 5% of the households in the DMA.[171]

(4) We will count cable systems provided cable service is generally available to television households in the DMA. For DMAs in which cable service is generally available, cable will count as a single voice for purposes of our voice analysis, regardless of the number of cable systems within the DMA, their ownership, and any overlap in service area.

112. In counting broadcast television and radio stations as "voices" we are being consistent with the voice count analysis used in our current "top 25 market/30 voice" presumptive waiver standard. That standard, however, counts radio stations licensed to the relevant *television* metropolitan market.[172] Under our

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See Bureau of the Census, *Geographic Areas Reference Manual*, November 1994, Chapter 13, pp. 1-13. Arbitron has delineated 268 radio metro markets throughout the U.S.

[169] For purposes of counting the broadcast licensees in the market, we will include only primary authorizations. Thus, we will not include low power stations, translators, or class D FM stations. We will also exclude from our count any non-operational or dark stations. We will count, however, any on-air stations operating under a construction permit. This is consistent with the method used to count independent voices for purposes of our current top 25 market/30 voices presumptive waiver standard. Satellite stations will be included in our count, as they are full service stations, if they are separately owned, operated, and controlled (*i.e*., the parent station is not in the same market and the satellite is not owned by an entity that holds another voice in the market).

[170] We believe that, in most cases, the radio voice count will be based on Arbitron radio markets. Approximately 56 percent of all commercial radio stations are located within Arbitron's 268 radio markets. Where there is no recognized Arbitron radio metro market, parties may use data associated with a "functionally equivalent" radio market. Parties may demonstrate that a geographical area such as a county or group of contiguous counties constitute a functionally equivalent radio market based on the listening statistics of the populace in the counties that make up that geographical area. Parties may also demonstrate a functionally equivalent radio market based on signal contour overlap. For purposes of demonstrating a functionally equivalent market based on signal contour overlap, we will look at contours (2 mV/m for AM stations or 1 mV/m for FM stations) that encompass the community of license of the TV station in question.

[171] Consistent with the newspaper/broadcast cross-ownership rule, to be considered "daily" a newspaper must be published four or more days per week and in the English language. *See* 47 C.F.R. § 73.3555(d), Note 6.

[172] 47 C.F.R. Section 37.3555 Note 7; *Second Report and Order*, 4 FCC Rcd at 1751. For purposes of applying our current "top 25 market/30 voice" presumptive waiver, we count full-power commercial and noncommercial television stations licensed to the relevant ADI television market as well as operating AM and FM

new rule, we will instead use the *radio* metropolitan market, and will include both radio stations licensed within the radio metro market and stations with a reportable share in that market.[173] We believe it is important to count radio stations with a reportable share in the relevant market because those stations clearly serve as a source of information and entertainment programming for the relevant market. We have chosen to use the radio metro market rather than the television metro market for counting the number of independent radio voices because the former more accurately reflect the competitive and core signal availability realities for radio service in the market. All independently owned radio stations in the radio market can be presumed to be available to residents of that market because of signal reach.[174] Radio stations outside the radio metro market may also be presumed to be available to all residents of the radio market if Arbitron, or another nationally recognized audience rating service, lists them as having a reportable audience share in the radio metro.[175] Reportable audience share information is not generally available for television metro markets. Thus, use of radio markets will ease the burden on applicants seeking approval of assignment and transfer applications, and on the Commission staff reviewing such applications.

113. As advocated by many commenters,[176] we will also include in our voice count daily newspapers and cable systems because we believe that such media are an important source of news and information on issues of local concern and compete with radio and television, at least to some extent, as

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radio stations licensed to the relevant TV metropolitan market. *See Second Report and Order*, 4 FCC Rcd at 1751.

[173] Many DMAs have more than one Arbitron metro radio market located within them. To qualify under our twenty voice count criterion, where a merger involves stations in different radio markets, the voice requirement must be met in each of those radio metro markets. For example, assume television station A and radio station B (in the same DMA) wish to merge, where station A is in radio metro market C and station B is in radio metro market D. In order to be approved under this waiver standard, the voice count requirement must be satisfied in *each* of the radio metro markets, C and D. Thus, the radio metro market with the fewer voices would control.

[174] Arbitron has delineated 268 different local geographic areas, or metros, to reflect the audiences reached by local radio stations. This delineation of a local radio market has value for buyers and sellers of radio advertising. Arbitron metros generally correspond to Metropolitan Statistical Areas as defined by OMB. Generally, a Metropolitan Statistical Area consists of one or more counties that contain a city of 50,000 or more inhabitants, or contain a Census Bureau-defined urbanized area with a total population of at least 100,000. About 56 percent of all commercial stations are licensed to communities in the 268 markets. The 268 radio markets consist of a total of about 800 counties representing about 25 percent of all counties in the U.S. More than three-fourths of the U.S. population of at least 12 years of age reside in the 268 radio markets.

[175] In determining the number of commercial radio stations in the radio metro, we will rely on the most recent audience share and home station data available at the time the application for the assignment or transfer of license is filed. In determining the number of noncommercial radio stations licensed in the radio metro market, we will rely on data contained in the most recent Commission ownership records. Similarly, we will rely on the most recent Nielsen data to determine the number of commercial television stations licensed within a DMA, and on the Commission's most recent ownership records to determine the number of noncommercial television stations in the DMA.

[176] *See*, *e.g.*, CBS Comments at 28; Paxson Comments at 23.

advertising outlets. Although we have not previously explicitly counted cable and newspapers as voices under our current top 25 market/30 voice presumptive waiver standard, we have counted these outlets in applying the case-by-case, five factor waiver standard.[177] While we will count these media outlets in applying our amended rule, we will restrict the number of newspapers we will include and limit the weight we will ascribe to cable. Specifically, we will include all independently owned daily newspapers that are published in the DMA that have a circulation exceeding 5 percent of the households in the DMA. Our intent in this regard is to include those newspapers that are widely available throughout the DMA and that provide coverage of issues of interest to a sizeable percentage of the population. Although we recognize that other publications also provide a source of diversity and competition, many of these are only targeted to particular communities and are not accessible to, or relied upon by, the population throughout the local market. We will also include wired cable television in the DMA as one voice, since cable service is generally available to households throughout the U.S. We believe it is appropriate to include at least one voice for cable, where cable passes most of the homes in the market, because there are PEG and other channels on cable systems that present local informational and public affairs programming to the public. At this time we count cable as no more than one voice since most cable subscribers have only one cable system to choose from. In addition, despite a multiplicity of channels provided by each cable system, most programming is either originated or selected by the cable system operator, who thereby ultimately controls the content of such programming. As most cable programming available to a household is controlled by a single entity, we believe cable should be counted as a single voice in applying our voice test.

114. Various parties have urged the Commission to expand the types of media included as voices for competition and diversity purposes beyond those we have decided to include. Numerous such media have been urged upon us: DBS, wireless cable, OVS, the Internet, etc. We have not adopted such expansive proposals. DBS and wireless cable generally do not currently provide local news and public affairs programming.[178] Moreover, we will not count any media that are not widely available within the community. OVS is at a very early stage of development and OVS systems have relatively few subscribers within the communities they serve.[179] In addition, at this time we believe it is premature to consider the Internet a "voice" for purposes of our new rule. Although the Internet is growing in popularity, many still do not have access to this new medium, and there is insufficient evidence in the record to support a conclusion that it should be included as a voice at this time. Finally, we do not have evidence that other media cited by some commenters (*e.g.*, direct mail, yellow pages, billboards) contribute in any substantive way to viewpoint diversity on local

[177] *See, e.g., Illinois Valley Broadcasters, Inc.*, 11 FCC Rcd 13028, 13032 (1996); *WWNE Licensee, Inc.*, 13 FCC Rcd 12677, 12691, 12695-96 (MMB 1998); *Triad Skywaves, Inc.*, 12 FCC Rcd 6102, 6107 (MMB 1997).

[178] DBS operators do have a public interest obligation to reserve between 4 and 7 percent of their channel capacity for noncommercial programming. *See Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 975-77 (D.C. Cir. 1996) (finding that this obligation, as a condition of being allowed to use a scarce public commodity, was in the public interest by assuring public access to diverse sources of information). DBS companies have commented in the past that they have a competitive disadvantage due to not being able to distribute local broadcast signals, including news programming, due to technological and copyright law obstacles. For a discussion of recent developments, see *Fifth Annual Report*, at ¶¶ 61-72.

[179] There are three operational OVS systems in the nation. Bell Atlantic operates an OVS system in Dover, New Jersey; and RCN operates OVS systems in Boston and New York. *See Fifth Annual Report*, at ¶ 117.

issues. We will have an opportunity to review our decision on this issue periodically in our biennial review process, and will revise the conclusion we have reached today if changing circumstances warrant.

B. Waiver Criteria

1. Failed Stations

115. We will continue to grant waivers of our radio-television cross-ownership rule, on a presumptive basis, in situations involving a failed station. However, we will adopt the definition of a failed station used in the context of our television duopoly failed station waiver standard. In order to qualify as "failed" a station must be dark for at least four months or involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings. In addition, we will require that the waiver applicant demonstrate that the "in market" buyer is the only reasonably available entity willing and able to operate the failed station and that selling the station to an out-of-market buyer would result in an artificially depressed price for the station. As in the past, we will require the applicant seeking the waiver to provide relevant documentation, *i.e.*, proof of the length of time that the station has been off the air, or proof that the station is involved in bankruptcy proceedings. In addition, in the case of a silent station, we will require a statement that the failed station went dark due to financial distress, not because of other, non-financial reasons. Any combination formed as a result of a failed station waiver may be transferred together only if the combination meets our radio/TV cross-ownership rule, or failed station waiver, at the time of transfer.

116. Our new waiver standard is significantly stricter than the failed station standard used in the context of our current one-to-a-market rule. As we stated in adopting our television duopoly failed station waiver, we are limiting the waiver to involuntary bankruptcy and insolvency proceedings to avoid the risk that an owner has filed for bankruptcy or insolvency simply to qualify for a waiver. We will extend the waiver to include stations in insolvency as well as bankruptcy proceedings, as the former is a state-regulated mechanism similar to bankruptcy. Finally, we are requiring that applicants make a serious effort to sell the troubled station to an out-of-market buyer in order to limit the relief afforded by the waiver to those situations in which it is clearly needed. In view of the other steps we are taking today to relax our radio/TV cross-ownership rule, we believe that it is appropriate to ensure that the relief offered by our failed station waiver is directed to stations that are clearly facing financial difficulty and that cannot be sold absent a waiver of our rule.

117. Our rationale for this waiver standard is the same as that of the failed station waiver standard we are adopting today for the television duopoly rule. We believe that the benefits to the public of joint ownership, namely preserving a bankrupt station or allowing a dark station to return to the air, do not pose costs from a diversity perspective. Once a station has been off the air for a substantial period or has become involved in involuntary bankruptcy proceedings (so that it is likely to go off the air), competition and diversity in a local market cannot be improved by forbidding joint ownership of that station with another station in the market. It is our view that two operating, commonly-owned stations serve the public better than one operational station and one nonoperational station that provides no service to the public at all. We note that Congress reached the same conclusion in the 1996 Act when it authorized an exception to the local radio ownership limits to permit an entity to exceed those limits if so doing would result in an increase in the number

of stations in operation.[180] Increasing the number of stations in a market provides additional voices to address community needs and issues and increases listeners' programming choices.

118. This waiver will not be extended to failing or unbuilt stations. Thus, evidence that a station is losing money (*i.e*., a negative cash flow) is not adequate to qualify for the waiver. We do not believe that it is necessary at this time to permit such additional waivers in view of the measured liberalization of our radio/TV cross-ownership rule and the 1996 Act's liberalization of the local radio ownership limits.

2. "Five Factors" Waiver Standard

119. Background. We invited comment in the *Second Further Notice* on whether our "five factors" case-by-case waiver standard should be changed or refined to be more effective in protecting our competition and diversity concerns. Under this standard, we make a public interest determination on a case-by-case basis currently using the following five criteria: 1) the potential public service benefits of common ownership of the facilities, such as economies of scale, cost savings, and programming benefits; 2) the types of facilities involved; 3) the number of media outlets already owned by the applicant in the relevant market; 4) any financial difficulties involving the station(s); and 5) issues pertaining to the level of diversity and competition within the affected market.

120. Comments. A number of commenters argued that our present five factors test should either be eliminated or substantially revised. For example, ABC argued that the Commission should permit an applicant for waiver under the five factors test to justify joint radio-TV ownership on the basis of economic efficiencies alone, without having to make explicit programming or public service commitments.[181] Shockley believes the showings concerning cost savings, programming and service benefits, and types of facilities should be eliminated, and consideration limited to the number of media outlets already owned in the market by the applicant, any financial difficulties, and data concerning the level of diversity, competition, and unusual geography within the market.[182] Spectrum Detroit argued that the five-factors test, as applied by the Commission, has effectively rendered the current radio-TV cross-ownership rule a nullity. It supports either eliminating the waiver standard altogether, or replacing it with a waiver provision favoring local owners, small businesses, minorities, and women.[183] BCFM supported retaining the five factors test, but requiring all waiver applicants to promise concrete public interest benefits of common ownership, which promises would be enforced by the Commission.[184]

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[180] Section 202(b)(2) of the 1996 Act.

[181] *See* ABC Comments at 13-14.

[182] See Shockley Comments at 7 -8.

[183] *See* Spectrum Detroit Comments at 24 - 26.

[184] *See* BCFM Comments at 8.

121. Discussion. In light of the modifications we are making today in the radio-television cross-ownership rule and our goals of protecting competition and diversity, we will eliminate the case-by-case, "five factors" waiver test we have previously employed. Our amended rule goes beyond the criteria pursuant to which we have delegated authority to the Commission staff to act on one-to-a-market waiver requests, most of which have been approved under the five factors standard.[185] We have revised the rule based on our recognition that the benefits of joint ownership in many circumstances outweigh the harm to diversity, and have based that conclusion in large part on an assessment of the same general criteria identified in our current five factor waiver standard. In the event that extraordinary evidence exists that a waiver of our revised rule is warranted, the Commission will consider that evidence pursuant to our general waiver authority.[186] Given the significant relaxation of our radio-TV cross-ownership rule, applicants seeking combinations that exceed the new rule will bear a substantially heavier burden than in the past in justifying joint ownership.

122. We are eliminating the five-factor waiver standard because it has been difficult to apply. After a number of years of experience in applying this test, we have come to conclude that the standard does not sufficiently protect our competition and diversity goals. We believe that our new, three-part rule, along with our failed station waiver, will be easier to administer, better protect the Commission's competition and diversity goals, and therefore further the public interest.[187]

3. Existing Conditional Waivers

123. In a number of rulings since passage of the 1996 Act, the Commission has granted, conditioned on the outcome of this proceeding, applications for waiver of the radio-television cross ownership rule where the number of radio stations exceeded the radio limits in existence prior to the Act.[188] The conditional waiver grantees are directed to file with the Commission within sixty days of publication of this *Report and Order* in the Federal Register a showing sufficient to demonstrate their compliance or non-compliance with our new rule. In situations where the revised rule is met, we delegate to the Mass Media Bureau the authority to replace the

[185] *See Louis DeArias*, 11 FCC Rcd 3662, 3667 (1996) (delegating to staff authority to rule on uncontested one-to-a-market waiver requests that involve a proposed combination of 1 TV, 2 AM, and 2 FM stations in the top 100 television markets).

[186] *See* 47 C.F.R. § 1.3. *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

[187] Any existing combination based on a five-factor waiver can be transferred together only if the combination meets our revised radio/TV cross-ownership rule or failed station waiver standard, at the time of transfer.

[188] *See, e.g., S.E. Licensee G.P.*, FCC 96-464 (released Nov. 27, 1996) (one TV, three AM, and four FM stations in Memphis); and *Stockholders of Infinity Broadcasting Corp.*, FCC 96-495 (released Dec. 26, 1996) (one TV, one AM, and five FM stations in Boston; one TV, three AM, and four FM stations in Detroit; one TV, three AM, four FM stations in San Francisco; one TV, three AM, and three FM stations in Philadelphia; one TV, three AM, and five FM stations in Chicago; one TV, two AM, and five FM stations in Los Angeles; and one TV, four AM, and three FM stations in New York City).

conditional waiver with permanent approval of the relevant assignment or transfer of license.

124. A number of the conditional waivers that have been granted will not comply with our newly revised radio-television cross ownership rule. In particular, there are approximately thirteen conditional waivers involving joint ownership of a television station and seven or more radio stations in a single market. Although the parties that received these waivers were placed on specific notice that their proposed station transactions were subject to the outcome of this rulemaking proceeding, we nonetheless will extend these conditional waivers, until the conclusion of our biennial review in 2004, during which we will review the radio/TV cross-ownership rule itself. We will also extend this grandfathering relief to any pending application for conditional waiver, if filed on or before July 29, 1999 (the date of the "sunshine" notice for this *Report and Order*), and ultimately granted by the Commission. In 2004, the Commission will review these waivers, on a case-by-case basis, as part of its biennial review and determine the appropriate treatment of them beyond that point in time. In order to qualify for permanent grandfathering relief after 2004, conditional waiver grantees will be required to demonstrate that such relief is in the public interest, based upon, to the extent applicable to radio/TV combinations, the same criteria that we will use to review the LMAs that we have concluded to grandfather for a similar period of time.[189] As is the case with the grandfathered LMAs, if conditional waiver grantees wish to establish greater certainty about the status of their waiver prior to the 2004 biennial review, they may make a showing using the 2004 biennial review criteria, beginning one year after the date that this *Report and Order* is published in the Federal Register. Any transfer of a grandfathered combination after the adoption date of this *Report and Order* (whether during the initial grandfathering period or after a permanent grandfathering decision has been made) must meet the radio/TV cross-ownership rule or waiver policy in effect at the time of transfer.

125. We believe this additional relief is appropriate. In many of these cases significant periods of time -- up to several years -- have transpired since the grant of the conditional waivers. During this time the licensees in question have invested substantial resources in their stations, upgrading their facilities and program offerings. We do not wish to unduly disrupt these investments, and the public interest benefits they created, after such a passage of time.

VI. TELEVISION LOCAL MARKETING AGREEMENTS

126. Background. A television local marketing agreement ("LMA") or time brokerage agreement is a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot announcements to support the programming.[190] Our current data indicate that there are at least 70 existing LMAs where the brokering and brokered station are in the same DMA. Most of these LMAs are in the top 50 television markets. With respect to about 90% of these same-market LMA arrangements, the brokering party is an affiliate of ABC, CBS, Fox,

[189] *See infra* ¶ 148.

[190] *TV Ownership Further Notice*, 10 FCC Rcd. at 3581. This is the definition we also use for LMAs in the context of radio. *See* 47 C.F.R. § 73.3555(a)(4)(iii).

or NBC. In addition to these "same-market" LMAs, there are at least 35 other time brokerage arrangements where the brokering and brokered stations are in different DMAs or the programming is supplied by an entity other than a television station.[191]

127. In our companion *Attribution Report and Order*,[192] we have decided to attribute time brokerage of another television station in the same market for more than fifteen percent of the brokered station's broadcast hours per week and to count LMAs that fall in this category toward the brokering licensee's ownership limits. In the *Second Further Notice*, we stated that we would decide in this proceeding how to treat existing television LMAs under any new attribution rules that we might adopt in the *Attribution* proceeding.[193] In this *Report and Order*, we adopt policies to afford "grandfather" rights to existing television LMAs according to the provisions discussed below.

128. In the *Second Further Notice*, we stated that, in the event that we found television LMAs attributable, we were inclined to extend some grandfathering relief to all television LMAs entered into before the November 5, 1996 adoption date of the *Second Further Notice* for purposes of compliance with our ownership rules. We sought comment on an approach whereby such LMAs would not be disturbed during the pendency of the original term of the LMA in the event the cognizability of the LMA would result in violation of an ownership rule. We also tentatively concluded that television LMAs entered into on or after the adoption date of the *Second Further Notice*, if they resulted in violation of any ownership rule, would not be grandfathered and would be accorded only a brief period within which to terminate.[194] We also reserved the right to invalidate an otherwise grandfathered LMA in circumstances raising particular competition and diversity concerns, such as might occur in very small markets.[195]

129. After reviewing the comments received in response to the *Second Further Notice* in this proceeding and the *Further Notice of Proposed Rule Making* in our related attribution proceeding, the Commission concluded that the commenters had not provided sufficient information on a range of important factual issues related to television LMAs. To provide a more complete record, the Commission released a

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191 In the case of many out-of-market LMAs, an entity other than a television station brokers advertising/programming time for a television station. Some companies, such as Clear Channel, Sinclair, and Paxson, serve as the broker in a number of LMAs, both in markets where the company owns another television station and in markets where the company does not own a station. FCC staff analysis of information filed by parties to television LMAs in response to *Public Notice*, DA 97-1246, "Commission Seeks Further Information Regarding Television LMAs" (June 17, 1997). ALTV and Pegasus each filed an analysis of this information and noted the positive contributions provided by television LMAs. *See* ALTV Supplemental Comments (May, 1998); Pegasus Communications Corporation Supplemental Comments (June, 1998).

192 *See Attribution Report and Order*, section III.C.

193 *See TV Ownership Second Further Notice*, 11 FCC Rcd. at 21691.

194 *Id*. at 21694.

195 *Id*. at 21693-94.

Public Notice on June 17, 1997 requesting parties to any existing television LMA to provide certain information regarding the terms and characteristics of these agreements to help us determine, *inter alia*, the number of existing television LMAs, the date of origination and duration of these arrangements, and the efficiencies or public interest benefits that may have resulted from the LMA.[196]

130. Comments. The majority of broadcasters who commented on this issue contended that our grandfathering proposal was too restrictive. For example, Sullivan, SJL, and Lockwood argued that LMAs should be permanently grandfathered.[197] Clear Channel Communications ("Clear Channel") contended that permanent grandfathering is the equitable way to treat broadcasters that, in good faith, made substantial investments in LMAs and generated substantial public interest benefits.[198] A number of broadcasters, including Pappas, Benedek, Glencairn, ALTV, LIN, and Malrite, advocated that, in addition to permanently grandfathering LMAs, we should relax the duopoly rule.[199] Several broadcasters also argued that Congress intended, under the 1996 Act, that existing LMAs would continue to exist[200] and to be transferrable and renewable.[201]

131. Broadcasters supporting adoption of our proposed general grandfathering policy included ABC, NAB, Miller Broadcasting, Inc. ("Miller"), and Montclair Communications, Inc. ("Montclair"). ABC, for example, stated that it had no objection to our proposal, provided that we limited grandfathering to the original parties to an LMA and for the original term of the agreement only.[202] NAB supported grandfathering LMAs in the event that we do not change the duopoly rule, or if the changes that we adopt would not permit some existing LMAs to be converted to ownership.[203] Miller contended that those who relied on our existing regulations ought not to be prejudiced in the process of our crafting new rules,[204] while Montclair urged that

196 *See Public Notice*, DA 97-1246, "Commission Seeks Further Information Regarding Television LMAs" (June 17, 1997) ("LMA *Public Notice*").

197 SJL Comments at 19-20, *Attribution Proceeding*, MM Docket Nos. 94-150, 92-51 and 87-154; Sullivan Comments at 4-6; Sullivan Reply Comments at 5; Lockwood Reply Comments at 4.

198 Clear Channel Reply Comments at 2. *See also* Pappas Comments at 14.

199 See, e.g., Pappas Comments at 10-14; Pappas Reply Comments at 12-14; ALTV Comments at 33-37; ALTV Reply Comments at 1-4; AK Comments at 20; Benedek Reply Comments at 7-8; Glencairn Comments at 2; LIN Comments at 20; Malrite Comments at 17-19.

200 *See* Paxson Comments at 30-36; Sinclair Comments at 4-9.

201 Pappas Comments at 13. *See also*, e.g., ALTV Comments at 35-36; Malrite Comments at 19-21; NAB Comments at 16-17.

202 ABC Comments at 15.

203 NAB Comments at 16.

204 Miller Comments at 6-7, 9. *See also* Mt. Mansfield Reply Comments at 5-6.

we not disrupt its three-year-old LMA.[205]

132. A number of commenters suggested that we adopt stricter regulations than those we proposed for television LMAs. BET and CCI advocated "sunsetting" LMAs after 24 months,[206] while Saga Communications, Inc. ("Saga") proposed terminating existing LMAs in six months, particularly in duopoly situations.[207] Jet Broadcasting Co. ("Jet") advocated that, in small television markets with four or fewer stations, LMAs that allow one-half or more of the television market's stations to be operated by a single entity, and that existed before the February 8, 1996 adoption of 1996 Act, should not be grandfathered.[208] Retlaw and the public interest group MAP *et al*. both argued that existing LMAs should not be grandfathered except in compelling circumstances and only upon a showing that the LMA serves the public interest.[209] Post-Newsweek Stations, Inc. ("PNS") also opposed grandfathering existing LMAs except on a case-by-case basis,[210] while Westwind contended that we should not grandfather LMAs at all.[211]

133. Discussion. We adopt our proposal in the *Second Further Notice* to grandfather television LMAs entered into prior to November 5, 1996, the adoption date of that *Notice*, for purposes of compliance with our ownership rules. Television LMAs entered into on or after that date will have two years from the adoption date of this *Report and Order* to come into compliance with our rules or terminate. LMAs entered into before November 5, 1996 will be grandfathered until the conclusion of our 2004 biennial review, a period of approximately five years. As part of that review, the Commission will conduct a general review of the TV duopoly rule and a case-by-case review of grandfathered LMAs, and assess the appropriateness of extending

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205 Montclair asserted that any disruption of its LMA would be detrimental to the public that is receiving improved service, as well as to the licensee's efforts to build a viable female-owned enterprise. Montclair Comments at 1-2.

206 BET and CCI proposed that grandfathering be limited to a two-year sunset provision, after which the grandfathering provisions would expire and all LMAs that were not in compliance with our ownership rules would be terminated. BET Comments at 4; BET Reply Comments at 6-7; CCI Comments at 10.

207 Saga also argued that LMAs are contrary to the public interest and should be prohibited in the future. Saga Comments at 11, *Attribution Proceeding*, MM Docket Nos. 94-150, 92-51 & 87-154.

208 Jet also advocated that such LMAs be terminated within 90 days of the effective date of the Commission's rules, and forbidden in the future. Jet Comments at 12-13; Jet Reply Comments at 14-15.

209 Retlaw also proposed requiring television LMAs to come into compliance with the new attribution standards within the shorter of one year from the adoption date of this *Report and Order*, or the termination date of the current LMA. Retlaw Reply Comments at 6-7. *See also* MAP *et al*. Comments at 27-28; MAP *et al*. Reply Comments at 22-23; McGillen Comments at 3.

210 Post-Newsweek noted that there are at least 50 LMAs in existence, with 40 of them in the top 100 markets. Post-Newsweek Comments at 7-8 in MM Docket No. 96-222, 91-221, & 87-8 (national ownership proceeding).

211 Westwind Reply Comments at 12.

the initial grandfathering period. Parties who wish the Commission to conduct this review prior to 2004 may apply for such relief, using the biennial review criteria, beginning one year after the date the *Report and Order* is published in the Federal Register. We now turn to a more detailed explanation of our decision on this issue.

134. Section 202(g) of the 1996 Act. Some commenters argue that the 1996 Act directs us to grandfather television LMAs permanently. Section 202(g) of the 1996 Act addresses the construction of Section 202 with respect to LMAs. Section 202(g) states that "[n]othing in this section shall be construed to *prohibit* the origination, continuation, or renewal of any television local marketing agreement that is *in compliance with the regulations of the Commission.*"[212] (Emphasis added.) As we stated in the *Second Further Notice*, the plain language of this provision states that Section 202 shall not be construed to prohibit any television LMA that is in compliance with the Commission's rules.[213]

135. We do not regard Section 202(g) as limiting our ability to promulgate attribution rules under Title I and Title III of the Communications Act affecting the status of television LMAs. As a result, we do not see Section 202(g) of the 1996 Act as posing a legal restraint in resolving questions raised in the *TV Ownership Further Notice* as to 1) whether television LMAs in which a broker obtains the ability to program 15% or more of a broadcast television station's weekly broadcast output should be deemed an attributable interest (which has been decided in our companion *Attribution Report and Order*);[214] and 2) whether grandfathering existing television LMAs from any applicable ownership rules that would follow from that attribution decision is appropriate.[215]

136. We recognize that the *Conference Report* states that " . . . [Section 202(g)] grandfathers LMAs currently in existence upon enactment of this legislation [*i.e.*, February 8, 1996] and allows LMAs in the future, consistent with the Commission's rules. The conferees note the positive contributions of television LMAs and this subsection assures that this legislation does not deprive the public of the benefits of existing LMAs that were otherwise in compliance with Commission regulations on the date of enactment."[216] We do not believe that this statement necessarily *requires* the Commission to extend *permanent* grandfathering rights to television LMAs that would result in a violation of our ownership rules. As one commenter stated, grandfather provisions do not necessarily involve the permanent exemption from a regulation's reach.[217] As

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212 47 U.S.C. § 202(g).

213 *TV Ownership Second Further Notice*, 11 FCC Rcd. at 21691.

214 *See Attribution Report and Order.*

215 *TV Ownership Further Notice*, 10 FCC Rcd. at 3583-84.

216 S. Conf. Rep. 104-230, 104th Cong. 2d Sess. 163, 164 (1996) ("*Conference Report*").

217 *See* Letter of G. William Ryan, Pres. & CEO of Post-Newsweek Stations, to Commissioners, March 2, 1999, at 3, *citing Wisconsin Wine & Spirit Institute v. Ley*, 416 N.W.2d 914, 919 (Wis. Ct. App. 1987) (stating that a grandfather clause may "permit[] a temporary right to do a prohibited thing); *Minnesota v. Closer Leaf Creamery Co.*, 449 U.S. 456, 468 (1981) (noting that the legislation grandfathered existing entities "at least temporarily");

we explain above, the plain language of the statute does not require us to grandfather LMAs permanently. Rather, we believe that the language of the 1996 Act gives us the discretion to adopt policies that avoid undue disruption of existing LMA arrangements while, at the same time, promote our competition and diversity goals. As Post-Newsweek Stations has stated, Section 202(g) "makes clear what the legislation was not intended to do, i.e., prohibit grandfathering; it does not address what the Commission should do. It left to the Commission to decide whether and how to regulate them, including as appropriate prohibiting them, phasing them out, grandfathering them or permitting them."[218]

137. While the Balanced Budget Act of 1997 is silent regarding television LMAs,[219] the Conference Report to this legislation states that, with respect to the Commission's current broadcast ownership proceedings, the conferees " . . . expect that the Commission will provide additional relief (*e.g.,* VHF/UHF combinations) that it finds to be in the public interest, and will implement the permanent grandfathering requirement for local marketing agreements as provided in the Telecommunications Act of 1996."[220] In light of recent Supreme Court decisions, we do not believe that we should rely upon such *post hoc* legislative history to construe Section 202(g) of the 1996 Act.[221] As Post-Newsweek Stations points out, "long-standing rules of statutory construction prohibit the Commission from relying on a passing reference to a statute made in the legislative history of an unrelated, subsequent piece of legislation."[222]

138. We consequently believe that the 1996 Act left the Commission with the discretion to adopt a grandfathering policy with respect to television LMAs that appropriately addresses the equity, competition, and diversity issues these arrangements raise. Having said that, we fully recognize the need to avoid undue disruption of television LMAs that were entered into in good faith reliance on our previous rules at the time, and that these arrangements may in fact have resulted in significant public interest benefits. We now turn to striking the appropriate balance regarding these factors.

Environmental Defense Fund v. EPA, 82 F.3d 451, 455-56 (D.C. Cir.) (analyzing a grandfather provision that temporarily exempted entities from provisions of the Clean Air Act), *amended*, 92 F.3d 1209 (D.C. Cir. 1996).

218 Letter of G. William Ryan, Pres. & CEO of Post-Newsweek Stations, to Commissioners, March 2, 1999, at 2.

219 *See* H.R. 2015, 105th Cong., 1st Sess, H6033 (1997); Pub. L.105-33 (Aug. 5, 1997).

220 H. Conf. Rep., 105th Cong. 1st Sess., 143 Cong. Rec. at H6175 (1997).

221 *See O'Gilvie v. U.S.*, 519 U.S. 79, 90 (1996), *citing United States v. Price*, 361 U.S. 304 (1960); *Higgins v. Smith*, 308 U.S. 473 (1940). *See also Reno v. Bossier,* 520 U.S. 471, 484-85 (1997).

222 Letter of G. William Ryan, Pres. & CEO of Post-Newsweek Stations, to Commissioners, March 2, 1999, at 2-3, *citing Consumer Prod. Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 n.13 (1980) (Rehnquist, J.) (stating that a "mere statement" in a subsequent committee report provides "an extremely hazardous basis for inferring the meaning of a congressional enactment"); *South Carolina v. Regan*, 465 U.S. 367, 380 n.17 (1984).

139. Grandfathering Cut-Off Date. We will adopt our proposal in the *Second Further Notice* to grandfather television LMAs entered into before the adoption date of that *Notice*, *i.e.*, November 5, 1996. It was on this date that the Commission gave clear notice that it intended to attribute television LMAs in certain circumstances, and that LMAs entered into on or after that date that violated our local television ownership rule would not be grandfathered and would be accorded only a fixed period in which to terminate.[223] A number of commenters supported this decision.[224]

140. We will not adopt the suggestion of some commenters to adopt the date of enactment of the 1996 Act as the grandfathering date, for, as we explain above, we do not interpret the statute as intending that outcome. Neither will we follow the suggestion of MAP *et al.*, to adopt, at a minimum, the December 15, 1994 adoption date of the *TV Further Ownership Notice*. That *Notice* was superseded by the *Second Further Notice*, in which we sought further comment reflecting the enactment of the 1996 Act and the full range of the grandfathering issues regarding television LMAs. We therefore believe that November 5, 1996 -- the adoption date of the Second Further Notice -- is the more equitable grandfathering date.

141. Finally, we will not designate, as suggested by Miller and Sinclair, the adoption date of this *Report and Order* as the grandfathering date for television LMAs. As we stated in the *Second Further Notice*, television LMAs entered into on or after the adoption date of that *Notice* would be entered into at the risk of the contracting parties and, if in violation of any ownership rule, would not be grandfathered and would be accorded only a limited period in which to terminate.[225] We are not persuaded that we now should designate a later date in order to grandfather such LMAs knowingly entered into in the face of the clear notice we gave in the *Second Further Notice*.

142. Treatment of LMAs Entered Into on or After November 5, 1996. LMAs that are not eligible for grandfathering relief -- *i.e.*, those LMAs entered into on or after November 5, 1996, that are attributable under the new attribution criteria and that would violate the TV duopoly rule -- will be given two years from the adoption date of this Report and Order to terminate. Even though the holders of such LMAs entered into after our grandfathering date could not have a legitimate expectation of being eligible for the grandfathering rights we adopt today, we believe that such a transition is appropriate to avoid undue disruption of existing arrangements and will allow the holders of LMAs to order their affairs. For example, the licensee of a brokered station may need time to arrange for programming to replace that provided under the LMA; a two-year transition to do this will allow the licensee to avoid disruption of its service to the public. In addition, stations with non-grandfathered LMAs could, of course, apply for a TV duopoly under our new rule or waiver criteria, just as any other station owner in the market could. Applications based on a waiver may be based on circumstances as they existed at the time just prior to the parties entering into the LMA.

223 *Second Further Notice*, 11 FCC Rcd at 21694, ¶ 89.

224 DC Comments at 7; LSOC Comments at 13; Pappas Comments at 14; Shockley Comments at 1-2; Waterman Comments at 2.

225 *Second Further Notice*, 11 FCC Rcd at 21694, ¶ 89.

143. Scope of Grandfathering Relief. We received a wide range of comments regarding what type of grandfathering relief television LMAs should receive. The majority of broadcasters generally favored grandfathering LMAs for their full terms and allowing unlimited transferability and renewability of LMAs.[226] Other parties supported shorter grandfathering terms and limiting the transferability of LMAs.[227] Still others opposed any grandfathering relief or only in limited cases.[228]

144. After examining the record in this proceeding, we believe television LMAs entered into prior to the November 5, 1996 adoption date of the *Second Further Notice* should receive significant grandfathering relief. The parties to these LMAs entered into these arrangements when there was no Commission rule or policy prohibiting them. There consequently are strong equities against requiring them to divest their interests in these LMAs and upset the settled expectations established by these plans and investments. Doing so could impose an unfair hardship on these parties.

145. In addition to these equities, the record shows that a number of television LMAs resulted in public interest benefits. ALTV submitted a study showing that LMAs helped some struggling stations complete construction of their facilities or upgrade them, allowed others to add a local newscast or other local programming to their schedule, and more generally permitted stations to take advantage of operating efficiencies to serve their viewers better.[229] We do not wish to disrupt these public interest benefits.

146. We consequently will grandfather television LMAs entered into prior to November 5, 1996, conditioned on the Commission's 2004 biennial review. During this initial grandfathering period and during the pendency of the 2004 review, these LMAs may continue in full force and effect, and may also be transferred and renewed by the parties, though the renewing parties and/or transferees take the LMAs subject to the review of the status of the LMA as part of the 2004 biennial review. At that time, the Commission will reevaluate these grandfathered television LMAs, on a case-by-case basis, to examine the competition, diversity, equities, and public interest factors they raise and to determine whether these LMAs should continue to be grandfathered. In order to qualify for permanent grandfathering relief after 2004, parties to LMAs entered into before November 5, 1996 will be required to demonstrate that such relief is in the public interest based upon the biennial review factors described below.

147. We believe that reevaluation of the LMAs is reasonable as the record shows that many parties entered into television LMAs, and made substantial investments in these arrangements, with the belief that they could be renewed or transferred.[230] If any party to an LMA wishes the Commission to determine the status of

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226 *See, e.g.,* Blade Comments at 6; Sinclair Comments at 9.

227 *See, e.g.*, Mt. Mansfield Reply Comments at 5-6; Shockley Comments at 2.

228 *See*, *e.g.*, Post-Newsweek Comments at 7-8; Westwind Reply Comments at 12.

229 ALTV Comments at 16.

230 DC Comments at 7. *See also* Malrite Comments at 19-20.

its agreement prior to the 2004 biennial review, it may request the Commission to do so at any time beginning one year after this *Report and Order* is published in the Federal Register, using the biennial review factors noted below, to demonstrate that continuation of the LMA is in the public interest. (In addition, at any time the parties to an LMA may seek, just as any other applicant, to form a duopoly or justify an LMA indefinitely under our new rule and waiver policies. A showing based on voice counts must meet our new rule at the time the showing is filed; a showing based on a waiver may be based on the circumstances existing just prior to the parties entering into the LMA.) Whether LMA holders obtain a duopoly outright or permanent grandfathering relief for arrangements that do not comply with our new TV duopoly rule and waiver policies, such relief will not be extended to any transfers subsequent to 2004; any transfer of permanently grandfathered arrangements after that time must meet our duopoly rule or waiver policies in effect at the time of transfer.

148. As part of the 2004 biennial review, the Commission will examine the following factors to assist in its review of grandfathered television LMAs:

- Public Interest Factors -- The FCC will assess the extent to which parties, by virtue of their joint operation, have achieved certain efficiencies allowing them, in turn, to produce specific and demonstrable benefits to the public. For example, the Commission may consider, among other things, the following: the extent to which broadcasters involved have fostered the regulatory goal of promoting localism, including locally-originated programming, such as news and public affairs programming; the extent to which the joint operations have made possible capital investments and technical improvements that have improved service; the extent to which the joint operations have increased the amount and investment in children's educational programming; and the extent to which the joint operations have otherwise produced specific and demonstrable benefits to the viewing public;

- DTV Conversion -- The FCC will evaluate the extent to which the same-market joint operations are on or ahead of schedule to convert to DTV and digital service. We will examine the extent to which one station has enabled the other to convert to digital operations, and whether joint operation has expedited that conversion, as well as has produced more over-the-air programming using digital transmission.

- Marketplace Conditions -- The FCC will evaluate the status of competition and diversity in the marketplace.

- Equities -- In considering the appropriateness of grandfathering beyond the initial five-year period, the FCC will take into account the capital investments the broadcasters involved have already made to improve the quality of the technical facilities of the stations involved, and weigh these equities against the competition and diversity issues involved.

149. <u>Filing Existing LMAs</u>. Those parties with existing LMAs that are attributable under our new attribution rules are directed to file a copy of the LMA with the Commission with thirty days of the publication of this Report and Order in the Federal Register.

VII. NEW APPLICATIONS

150. Applications filed pursuant to this *Report and Order* will not be accepted by the Commission until the effective date of this *Report and Order*. We realize that the rules adopted in this *Report and Order* could result in two or more applications being filed on the same day relating to stations in the same market and that due to the voice count all applications might not be able to be granted. We will address how to resolve such conflicts in a subsequent action.

VIII. CONCLUSION

151. For the reasons discussed above, we adopt this *Report and Order* revising our local television ownership rules. We intend by these revisions to improve the ability of television broadcasters to realize the efficiencies and cost savings of common station ownership, and to strengthen their potential to serve the public interest. We believe that our decision strikes the appropriate balance between common ownership and our fundamental competition and diversity concerns, and ensures that our television ownership restrictions appropriately reflect ongoing changes in the broadcast television industry.

IX. ADMINISTRATIVE MATTERS

152. *Paperwork Reduction Act of 1995 Analysis*. This *Report and Order* has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new reporting requirements on the public. Implementation of these new reporting requirements will be subject to approval by the Office of Management and Budget as prescribed in the Act. The new reporting requirements contained in this Report and Order have been submitted to OMB for emergency clearance.

153. *Regulatory Flexibility Analysis*. Pursuant to the Regulative Flexibility Act of 1980, as amended, 5 U.S.C. § 601 *et seq.*, the Commission's Final Regulatory Flexibility Analysis in this Report and Order is attached as Appendix A.

154. *Ordering Clauses*. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 4(i) & (j), 303(r), 308, 310 and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i) & (j), 303(r), 308, 310 and 403, as amended, Part 73 of the Commission's Rules, 47 C.F.R. Part 73 IS AMENDED as set forth in Appendix B below.

155. IT IS FURTHER ORDERED that, pursuant to the Contract with America Advancement Act of 1996, the amendment set forth in Appendix B SHALL BE EFFECTIVE 60 days after publication in the Federal Register.

156. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

157. IT IS FURTHER ORDERED that this proceeding is terminated.

158. *Additional Information*. For addition information concerning this proceeding, please contact Eric Bash, Mass Media Bureau, (202) 418-2130.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

As required by the Regulatory Flexibility Act (RFA),[231] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Second Further Notice of Proposed Rule Making* in this proceeding.[232] The Commission sought written public comment on the proposals in this *Notice,* including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[233]

I. Need For, and Objectives of, *Report and Order*

In February 1996, the Telecommunications Act of 1996 ("1996 Act") was signed into law. Section 202 of the 1996 Act directed the Commission to make a number of significant revisions to its broadcast media ownership rules. Section 202 also requires us to review aspects of our local ownership rules which were the subject of the *TV Ownership Further Notice* in this docket.[234] Specifically, Section 202 requires the Commission to: 1) conduct a rulemaking proceeding concerning the retention, modification, or elimination of the duopoly rule; and 2) extend the Top 25 market/30 independent voices one-to-a-market waiver policy to the Top 50 markets, "consistent with the public interest, convenience, and necessity." In view of the 1996 Act's directives regarding broadcast multiple ownership, the Commission in 1996 adopted a *Second Further Notice* in this proceeding inviting comment on several issues prompted by the 1996 Act. We seek to foster both competition and diversity in the changing video marketplace, and this *Report and Order* modifies the local ownership rules consistent with these goals.

II. Significant Issues Raised by the Public in Response to the Initial Analysis

Media Access Project, et al. ("MAP et al.") submitted the only set of comments that was filed directly in response to the IRFA contained in the *Second Further Notice*. MAP et al. argues that relaxation of the

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[231] *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).

[232] *Second Further Notice of Proposed Rulemaking, In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, MM Docket Nos. 91-221 & 87-8, 11 FCC Rcd. 21655, 21698-21703 (1996) (*Second Further Notice*).

[233] *See* 5 U.S.C. § 604.

[234] *Further Notice of Proposed Rulemaking, In the Matter of Review of the Commission's Regulations governing television Broadcasting, Television Satellite Stations, Review of Policy and Rules*, MM Docket Nos. 91-221 & 87-7, 10 FCC Rcd. 3524 (1995) (*TV Further Ownership Notice*).

Commission's multiple ownership rules will harm small businesses that own broadcast stations, which it argues are disproportionately owned by minorities, women, and new entrants into the video programming market. Specifically, MAP et al. contends that increased group ownership by large businesses will put small broadcasters at a competitive disadvantage with larger stations that can offer advertisers lower and/or greater exposure. MAP et al. also states that relaxation of the rules will drive up the cost of stations, eliminating the ability of small businesses to purchase stations.[235] Several other parties make arguments essentially similar to MAP's in their general comments (*e.g.*, small broadcasters' ability to acquire attractive programming will diminish if the local ownership rules are liberalized).[236]

Addressing the duopoly rule in particular, MAP et al. opposes a failed station waiver, because it opposes television duopolies in general. It argues that such a waiver would be anticompetitive, would not promote viewpoint diversity, and would keep out new entrants, particularly minorities and women.[237] Sunbelt asserts that grandfathering existing common ownership arrangements would deny new entrants the efficiency advantages of multiple ownership enjoyed by existing broadcasters. This, it claims, would inhibit the entrance of new voices, particularly those of women and minorities, into the market.[238]

III. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

The amended rules will affect commercial television and radio broadcast licensees, permittees, and potential licensees. MAP asserts that the estimate contained in the IRFA of the number of broadcast radio and television licensees that qualify as "small entities" is flawed.[239]

1. Definition of a "Small Business"

Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. § 601(6). The RFA, 5 U.S.C. § 601(3) 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 Small Business Administration ("SBA").

The Small Business Administration defines a television broadcasting station that has no more than

[235] MAP *et al.* IRFA Comments at 3-4.

[236] *See, e.g.,* Centennial Comments at 6; Sunbelt Comments at 1, 6-7; BET Reply Comments at 4-5.

[237] MAP *et al.* Comments at 17-18.

[238] Sunbelt Comments at 1, 6-7.

[239] MAP IRFA Comments at 2-3.

$10.5 million in annual receipts as a small business.[240] Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.[241] Included in this industry are commercial, religious, educational, and other television stations.[242] Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.[243] Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.[244]

The SBA defines a radio broadcasting station that has no more than $5 million in annual receipts as a small business.[245] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[246] Included in this industry are commercial religious, educational, and other radio stations.[247] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce ratio program materials are similarly included.[248] However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another SIC

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240 13 C.F.R. § 121.201, Standard Industrial Code (SIC) 4833 (1996).

241 Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

242 *Id*. *See* Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at 283, which describes "Television Broadcasting Stations (SIC Code 4833)" as:

> Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials.

243 Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

244 *Id*.; SIC 7812 (Motion Picture and Video Tape Production); SIC 7922 (Theatrical Producers and Miscellaneous Theatrical Services (producers of live radio and television programs).

245 13 C.F.R. § 121.201, SIC 4832.

246 Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, Appendix A-9.

247 *Id.*

248 *Id*.

number.[249]

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 Advocacy of the SBA 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."[250]

2. Issues in Applying the Definition of a "Small Business"

As discussed below, we could not precisely apply the foregoing definition of "small business" in developing our estimates of the number of small entities to which the rules will apply. Our estimates reflect our best judgments based on the data available to us.

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 radio or television station is dominant in its field of operation. Accordingly, the estimates that follow of small businesses to which the new rules will apply do not exclude any radio or television station from the definition of a small business on this basis and are therefore overinclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. As discussed further below, we could not fully apply this criterion, and our estimates of small businesses to which the rules may apply may be overinclusive to this extent. The SBA's general size standards are developed taking into account these two statutory criteria. This does not preclude us from taking these factors into account in making our estimates of the numbers of small entities.

With respect to applying the revenue cap, the SBA has defined "annual receipts" specifically in 13 C.F.R § 121.104, and its calculations include an averaging process. We do not currently require submission of financial data from licensees that we could use in applying the SBA's definition of a small business. Thus, for purposes of estimating the number of small entities to which the rules apply, we are limited to considering the revenue data that are publicly available, and the revenue data on which we rely may not correspond completely with the SBA definition of annual receipts.

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[249] *Id.*

[250] While we tentatively believe that the SBA's definition of "small business" greatly overstates the number of radio and television broadcast stations that are small businesses and is not suitable for purposes of determining the impact of the new rules on small television and radio stations, for purposes of this *Report and Order*, we utilize the SBA's definition in determining the number of small businesses to which the rules would apply, but we reserve the right to adopt a more suitable definition of "small business" as applied to radio and television broadcast stations or other entities subject to the rules adopted in this *Report and Order* and to consider further the issue of the number of small entities that are radio and television broadcasters or other small media entities in the future. *See Report and Order, Policies & Rules Concerning Children's Television Programming, Revision of Programming Policies for Television Broadcast Stations*, MM Docket No. 93-48, 11 FCC Rcd 10660, 10737-38 (1996) (citing 5 U.S.C. § 601(3).

Under SBA criteria for determining annual receipts, if a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period for determining annual receipts, the annual receipts in determining size status include the receipts of both firms. 13 C.F.R. § 121.104(d)(1). The SBA defines affiliation in 13 C.F.R. § 121.103. In this context, the SBA's definition of affiliate is analogous to our attribution rules. Generally, under the SBA's definition, 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). The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. 13 C.F.R. § 121.103(a)(2). Instead of making an independent determination of whether television stations were affiliated based on SBA's definitions, we relied on the databases available to us to provide us with that information.

3. Estimates Based on Census Data

The rules adopted in this *Report and Order* will apply to full service television and radio stations.

There were 1,509 television stations operating in the nation in 1992.[251] That number has remained fairly constant as indicated by the approximately 1,594 operating television broadcasting stations in the nation as of June 1999.[252] For 1992[253] the number of television stations that produced less than $10.0 million in revenue was 1,155 establishments.[254] Thus, the new rules will affect approximately 1,594 television stations; approximately 77%, or 1,227 of those stations are considered small businesses.[255] These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television affiliated companies.

The new rule will also affect radio stations. The 1992 Census indicates that 96 percent (5,861 of 6,127) of radio station establishments produced less than $5 million in revenue in 1992.[256] Official

[251] FCC News Release No. 31327, Jan. 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, Appendix A-9.

[252] FCC News Release, Broadcast Station Totals as of June 30, 1999 (released July 19, 1999).

[253] Census for communications establishments are performed every five years ending with a "2" or "7". *See* Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, III.

[254] The amount of $10 million was used to estimate the number of small business establishments because the relevant Census categories stopped at $9,999,999 and began at $10,000,000. No category for $10.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

[255] We use the 77 percent figure of TV stations operating at less than $10 million for 1992 and apply it to the 1999 total of 1594 TV stations to arrive at 1,227 stations categorized as small businesses.

[256] The Census Bureau counts radio stations located at the same facility as one establishment. Therefore, each co-located AM/FM combination counts as one establishment.

Commission records indicate that 11,334 individual radio stations were operating in 1992.[257] As of June 1999, official Commission records indicate that 12,560 radio stations are currently operating.[258]

IV. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The *Report and Order* imposes compliance requirements. Pursuant to the *Report and Order*, applicants will be required to file with the Commission upon the effective date of the rules showings to convert conditional waivers to permanent license grants under the new rules or waiver standards. In addition, licensees with existing local marketing agreements (LMA) that are attributable under the revised rules will be required to file a copy of the LMA with the Commission within thirty days of publication of the *Report and Order* in the Federal Register.

V. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

We believe that our revised TV duopoly rule, radio/TV cross-ownership rule, and related waiver policies strike the appropriate balance between allowing broadcast stations to realize the efficiencies of combined operations, and furthering our policy goals of competition and diversity. Both of our revised rules and their associated waiver policies allow small stations to reduce expenses through shared operations, but at the same time protect them from acquisition that could eliminate their voice, and from the exercise of undue market power.

In addition to having amended the geographic scope of our TV duopoly rule, we have also modified the rule to permit common ownership of two stations in the same DMA if at least eight independently owned and operated full power TV stations (commercial and noncommercial) will remain post-merger, and both of the stations are not in the top four-ranked stations in the DMA. The new rule ensures that small stations may combine operations, reduce expenses, and perhaps diversify programming. At the same time, both the market rank and the voice count components of the rule further our competition goal and protect small stations from their competitors. The market rank test ensures that the two largest stations cannot combine to dominate and exercise market power in the advertising and programming markets in which TV stations compete; the voice count test ensures that more than eight competitors must exist in the market before any two of them may combine to increase their market share. Both components of the new rule also further our diversity goal and preserve small stations in markets with less than eight voices.

We have revised our radio/TV cross-ownership rule to permit common ownership of one or two TV stations and up to six radio stations if twenty independent voices will remain post-merger; one or two TV stations and up to four radio stations if at least ten voices will remain post-merger; and one or two TV stations

[257] FCC News Release No. 31327, Jan. 13, 1993.

[258] FCC News Release, Broadcast Station Totals as of June 30, 1999 (released July 19, 1999).

and one radio station regardless of the number of voices that will remain post-merger. As with our amended TV duopoly rule, the modified radio/TV cross-ownership rule will allow stations, including small stations, to realize economies of scale, but at the same time ensure that no market will become concentrated to such an extent that any one or series of combinations will dominate the markets in which broadcasters compete, or monopolize the media and sources of information for their audiences.

Our TV duopoly waiver policies, based on a showing of a "failed" station, a "failing" station, and the construction of an authorized but as yet unbuilt station, and our radio/TV cross-ownership waiver policies, based on a showing of a "failed" station, likewise accommodate small stations, while protecting our competition and diversity goals. Each of these waiver policies was designed to ensure that only truly financially distressed, which are typically smaller, stations, can benefit from them. The waiver policies also ensure that more financially successful in-market stations, which are typically larger and likely would value same-market broadcast assets more highly than out-of-market stations, cannot foreclose out-of-market buyers. The in-market buyer must demonstrate that it is the only purchaser ready, willing, and able to operate the station, and that sale to an out-of-market buyer would result in an artificially depressed price.

We also believe that our grandfathering policies for conditional radio/TV cross-ownership waivers, and TV LMAs, may help small stations. For example, the record suggested that TV LMAs may have helped smaller, struggling stations to remain on or return to the air, and to diversity and expand their programming. The *Report and Order* grandfathers all LMAs entered into prior to November 5, 1996, and therefore permits them to remain in full force and effect, subject to further review in the Commission's biennial review in 2004.

For the above reasons, we believe that the Commission has taken steps not only to reduce the economic impact on small entities, but also to assist them realize the benefits of common operations, and to protect them from undue market power.

VI. Report to Congress

The Commission will send a copy of this *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of this *Report and Order*, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this *Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

APPENDIX B

RULES

Part 73 of Title 47 of the U.S. Code of Federal Regulations is amended as follows:

Part 73 RADIO BROADCAST SERVICES

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

AUTHORITY: 47 U.S.C. §§ 154, 303, 334.

2. Section 73.3555 is amended by revising paragraphs (b) and (c) and Note 7 to read as follows:

§ 73.3555 Multiple Ownership.

* * * * *

(b) *Local television multiple ownership rule.* An entity may directly or indirectly own, operate, or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research or any successor entity) only under one or more of the following conditions:

(1) the Grade B contours of the stations (as determined by § 73.684) do not overlap; or

(2) (i) at the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day (9:00 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(ii) at least 8 independently owned and operating full-power commercial and noncommercial TV stations would remain post-merger in the DMA in which the communities of license of the TV stations in question are located. In areas where there is no Nielsen DMA, count the TV stations present in an area that would be the functional equivalent of a TV market.

(c) *Radio-television cross ownership rule*. (1) This rule is triggered when:

(i) the predicted or measured 1 mV/m contour of an existing or proposed FM station (computed in accordance with § 73.313) encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the Grade A contour(s) of the TV broadcast station(s) (computed in accordance with § 73.684) encompasses the entire community of license of the FM station; or

(ii) the predicted or measured 2 mV/m groundwave contour of an existing or proposed AM station (computed in accordance with § 73.183 or § 73.386), encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the Grade A contour(s) of the TV broadcast station(s) (computed in accordance with § 73.684) encompass(es) the entire community of license of the AM station.

(2) An entity may directly or indirectly own, operate, or control up to 2 commercial TV stations (if permitted by paragraph (b) of this section, the local television multiple ownership rule) and 1 commercial radio station situated as described above in paragraph (1). An entity may not exceed these numbers, except as follows:

(i) if at least 20 independently owned media voices would remain in the market post-merger, an entity can directly or indirectly own, operate, or control up to:

{a} 2 commercial TV and 6 commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule); or

{b} 1 commercial TV and 7 commercial radio stations (to the extent that an entity would be permitted to own 2 commercial TV and 6 commercial radio stations under paragraph (c)(2)(i)(a) of this section, and to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule)

(ii) if at least 10 independently owned media voices would remain in the market post-merger, an entity can directly or indirectly own, operate, or control up to 2 commercial TV and 4 commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownershiprule).

(3) To determine how many media voices would remain in the market, count the following:

(i) TV stations: independently owned full power operating broadcast TV stations within the DMA of the TV station's (or stations') community (or communities) of license;

(ii) radio stations:

(A) {1} independently owned operating primary broadcast radio stations that are in the radio metro market (as defined by Arbitron or another nationally recognized audience rating service) of:

{a} the TV station's (or stations') community (or communities) of license; or

{b} the radio station's (or stations') community (or communities) of license; and

{2} independently owned out-of-market broadcast radio stations with a minimum share as reported by Arbitron or another nationally recognized audience rating service.

(B) When a proposed combination involves stations in different radio markets, the voice requirement must be met in each market; the radio stations of different radio metro markets may not be counted together.

(C) In areas where there is no radio metro market, count the radio stations present in an area that would be the functional equivalent of a radio market

(iii) <u>newspapers</u>: English-language newspapers that are published at least four days a week within the TV station's DMA and that have a circulation exceeding 5% of the households in the DMA; and

(iv) <u>one cable system</u>: if cable television is generally available to households in the DMA. Cable television counts as only one voice in the DMA, regardless of how many individual cable systems operate in the DMA.

* * * * *

NOTE 7: The Commission will entertain applications to waive the restrictions in subsections (b) and (c) of this section (the TV duopoly and TV-radio cross-ownership rules) on a case-by-case basis. In each case, we will require a showing that the in-market buyer is the only entity ready, willing, and able to operate the station, that sale to an out-of-market applicant would result in an artificially depressed price, and that the waiver applicant does not already directly or indirectly own, operate, or control interest in two television stations within the relevant DMA. One way to satisfy these criteria would be to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the permit, and that no reasonable offer from an entity outside the market has been received. We will entertain waiver requests as follows:

(1) if one of the broadcast stations involved is a "failed" station that has not been in operation due to financial distress for at least four consecutive months immediately prior to the application, or is a debtor in an involuntary bankruptcy or insolvency proceeding at the time of the application.

(2) for subsection (b) only, if one of the television stations involved is a "failing" station that has an all-day audience share of no more than four per cent; the station has had negative cash flow for three consecutive years immediately prior to the application; and consolidation of the two stations would result in tangible and verifiable public interest benefits that outweigh any harm to competition and diversity.

(3) for subsection (b) only, if the combination will result in the construction of an unbuilt station. The permittee of the unbuilt station must demonstrate that it has made reasonable efforts to construct but has been unable to do so.

* * * * *

APPENDIX C
COMMENTS
filed in response to *Second Further Notice*

ABC, Inc. (ABC)
AK Media Group, Inc. (AK Media)
American Women in Radio and Television, Inc. (AWRT)
Association of Local Television Stations (ALTV)
Bahakel Communications (Bahakel)
Barnstable Broadcasting, Inc. (Barnstable)
Benedek Broadcasting Corporation (Benedek)
BET Holdings, Inc. (BET)
Black Citizens for a Fair Media *et al*. (BCFM *et al.*)
Blade Communications, Inc. (Blade)
Canwest Global Communications Corp. (CanWest)
Bill Carpenter, Jr. (Carpenter)
CBS Inc. (CBS)
Centennial Communications, Inc. (Centennial)
Frances Dillard (Dillard)
Diversified Communications (Diversified)
Gannett Co., Inc. (Gannett)
Glencairn, Ltd. and WPTT, Inc. (Glencairn/WPTT)
Glenwood Communications Corporation (Glenwood)
Granite Broadcasting Corporation (Granite)
HSN, Inc. (HSN)
Jacor Communications, Inc. (Jacor)
Jet Broadcasting Co., Inc. (Jet)
Kentuckiana Broadcasting, Inc. (Kentuckiana)
LIN Television Corporation (LIN)
Local Station Ownership Coalition (LSOC)
Malrite Communications Group, Inc. (Malrite)
Max Media Properties LLC (Max Media)
Cynthia L. McGillen and James P. McGillen (McGillen)
Media Access Project *et al*. (MAP *et al.*)
Miller Broadcasting, Inc. (Miller)
Minority Media and Telecommunications Council (MMTC)
Montclair Communications, Inc. (Montclair)
National Association of Broadcasters (NAB)
National Broadcasting Company, Inc. (NBC)
National Telecommunications and Information Administration (NTIA)
Network Affiliated Stations Alliance (NASA)
Newspaper Association of America (NAA)
Pappas Stations Partnership (Pappas)

Paxson Communications Corporation (Paxson)
Pegasus Communications Corporation (Pegasus)
Post-Newsweek Stations, Inc. (Post-Newsweek)
Press Broadcasting Company, Inc. (Press)
George Reading (Reading)
Mark Roberts (Roberts)
Saga Communications, Inc. (Saga)
Shockley Communications Corporation (Shockley)
Sinclair Broadcast Group, Inc. (Sinclair)
SJL Communications, Inc. (SJL)
Spectrum Detroit, Inc. (Spectrum Detroit)
Sullivan Broadcasting Company, Inc. (Sullivan)
Sunbelt Communications Company (Sunbelt)
Telemundo Group, Inc. (Telemundo)
U.S. Department of Justice (DOJ)
U.S. Small Business Administration (SBA)
Viacom, Inc. (Viacom)
Waterman Broadcasting Corporation (Waterman)

REPLY COMMENTS
filed in response to
Second Further Notice

A. K. Media Group, Inc. (A.K. Media)
Association of Local Television Stations (ALTV)
Bahakel Communications, Ltd. (Bahakel)
BET Holdings, Inc. (BET)
Black Citizens for a Fair Media *et al.* (BCFM *et al.*)
Clear Channel Communications, Inc. (Clear Channel)
HSN, Inc. (HSN)
Jacor Communications, Inc. (Jacor)
Jet Broadcasting Co., Inc. (Jet)
LIN Television Corporation (LIN)
Lockwood Broadcasting, Inc. (Lockwood)
Local Station Ownership Coalition (LSOC)
Malrite Communications Group, Inc. (Malrite)
Media Access Project, *et al.* (MAP *et al.*)
Mt. Mansfield Television, Inc. (Mt. Mansfield)
National Broadcasting Company, Inc. (NBC)
Pappas Stations Partnership (Pappas)
Pegasus Communications Corporation (Pegasus)
Retlaw Enterprises, Inc. (Retlaw)
SJL Communications, Inc. (SJL)
Spectrum Detroit, Inc. (Spectrum Detroit)
Sullivan Broadcasting Company, Inc. (Sullivan)
Telemundo Group, Inc. (Telemundo)
Time Warner, Inc. (Time Warner)
Tribune Broadcasting Company (Tribune)
Westwind Communications, LLC (Westwind)

August 5, 1999

SEPARATE STATEMENT OF
CHAIRMAN WILLIAM E. KENNARD
AUGUST 5, 1999 MEETING

Today, we are bringing to a close proceedings that have been pending since 1991. These rule changes are long overdue. For far too long it's been a case of administration by waiver, not by rule. Parties have presented us with a variety of business arrangements and combinations, and we have not been able to set a bright line test as to what's permitted and what's not, and so the problem just keeps getting worse.

Today we are cleaning up our rules and providing the certainty that the market needs.

But more than that, we are adopting commonsense rules that recognize the dramatic changes that the media marketplace has undergone since our broadcast ownership rules were adopted 30 years ago. Back then, there were three broadcast networks; cable was still a novelty; and interactive TV meant yelling at your kids to turn it down. Now, cable systems serve almost 65 million TV households; other multi-channel video programmers -- such as Direct Broadcast Satellite -- offer hundreds of channels to viewers; since 1970, the number of radio and television stations has increased by more than 85 percent; and people are watching everything from hip-replacement surgery to the local weather on their PC's linked to the Internet. As we cross over into the next millennium, we are clearly entering a new media age.

In such an age, we need to provide broadcasters with flexibility to seize opportunities and compete in this increasingly dynamic media marketplace. These items will not only help them compete with the growing number of alternative media. They will also help preserve free local broadcast service. It is this localism that makes broadcasters so special. That is why we are taking steps, for example, to allow a television licensee to buy another station in the same market, as long as the market will continue to be served by at least eight independently-owned television stations and at least one of the merging stations is not one of the top four stations in the market. It is also why we will waive the rule in situations involving financially-troubled and unbuilt stations. In these cases, allowing a small station to combine with another station in the market -- and take advantage of shared costs and operating efficiencies -- will increase competition and outlet diversity in the local market and at times keep a station on the air that otherwise would go dark. For these same reasons, we are also relaxing our radio-television cross-ownership rule.

This is not, however, the time to completely deregulate broadcast ownership. Our ownership rules have always reflected core values of competition, diversity, and localism. The changes we are making today are tailored to grant broadcasters more flexibility while at the same time ensuring that consolidation will only occur in markets where these core values will not be undermined. Our action today thus strikes an appropriate balance, by relaxing the rules but maintaining a diversity floor.

We are also taking steps to better identify broadcasters' real ownership interests in media properties, which will make our ownership rules more meaningful and easier to apply. Our new "equity/debt plus" attribution rule, for example, will ensure that our rules take account of the ways that debt instruments can be a source of influence over a licensee. And by making LMA's attributable, our rules will prevent the use of time brokerage agreements to circumvent our ownership limits.

Many existing LMA's will meet our new television duopoly rules. But as to the others, we do not wish to upset established business relationships entered into before we made clear our proposal to attribute LMA's. We are, therefore, providing significant grandfathering relief for those LMA's entered into before November 1996, and we are allowing those entered into after that date two years to comply with our new rules. We are also providing significant grandfathering relief to parties holding conditional waivers of our radio-television cross ownership rule or with a pending application for such a waiver. These steps reflect our concern that parties' established business interests not be unduly upset, and a balance between the need to maintain a diversity floor in local markets and the recognition that in some cases LMA's have enhanced competition and outlet diversity in local markets.

That being said, I think we need to consider more broadly the role of LMAs in broadcasting. While they have no doubt produced some benefit, they represent a kind of artifice. I believe we need to consider whether the benefits of LMAs could be attained through other arrangements, such as actual joint ownership, that do not raise questions concerning the responsibility and accountability of the actual licensee of a station.

It may well be that as a result of our action today, most of these problems will fade away because LMAs will be converted into duopolies. But I will be watching what happens in this regard, because I'm concerned about the degree of control that is conferred by an LMA.

In sum, our actions today will provide broadcasters with the certainty they need to make rational business judgments in the marketplace. These items recognize the competitive realities of the new media age while honoring our nation's oldest values. For these reasons, I am pleased to bring these long-pending proceedings to a conclusion.

August 5, 1999

Separate Statement
of
Commissioner Susan Ness

Re:Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221; Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-8; Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket No. 92-51; Reexamination of the Commission's Cross-Interest Policy, MM Docket No. 87-154; Broadcast Television National Ownership Rules, MM Docket No. 96-222.

I welcome today's long-overdue revision and clarification of the Commission's broadcast ownership and attribution rules. The decision today takes its direction largely from the Telecommunications Act of 1996, in which Congress decided to allow significantly increased concentration of ownership in the broadcast marketplace. It also takes into account recent, dramatic changes in the communications marketplace, as well as insights gained from experience with our previous rules. The result is a forward-looking regime that provides increased flexibility and clarity, while still avoiding the dangers of undue concentration of ownership of vital sources of news and information.

The media landscape has changed enormously since I joined the Commission in 1994. There was the Telecommunications Act of 1996 -- which set the stage for significant consolidation of ownership, especially in radio. There is the now-significant presence of DBS, which was just being launched a few years ago but now has over 10 million subscribers. There is the continued growth of cable, with system “clustering” rapidly replacing the crazy quilt ownership patterns of the last twenty years in major metropolitan areas. The financial interest and syndication and prime time access rules are gone. TV broadcasters are beginning their conversion to digital broadcasting. The Internet is experiencing explosive growth.

These and other changes make it timely (at best!) for us to conclude our long-pending ownership and attribution proceedings.

I believe our rules and policies must be based on the present and future characteristics of broadcasting, not our perceptions of the medium as it existed 50 or even five years ago. At the same time, broadcasting remains a distinctly special service -- with unique privileges and unique responsibilities.

Broadcasting continues to be the primary source of news and information for the American public. It is free and ubiquitous. No preexisting hookup or bottleneck provider stands between speaker and listener. Diversity of media ownership is fundamental to the preservation of our democratic values.[1] The public benefits greatly from "diverse and antagonistic" voices in the broadcast marketplace. The special characteristics of broadcasting have been recognized by Congress, the courts, and this Commission.

It wasn't so long ago that broadcasters were limited to owning no more than 12 AM, 12 FM, and 12 TV stations, nationwide, with no more than two AM, two FM, and one TV station in any market. Yet today, some radio groups encompass several hundred stations, with as many as eight in a single market, and perhaps a TV station and an LMA as well.

I have long felt that our rules were susceptible to "gaming." We have been too willing to permit through the back door what we would not countenance through the front. We have been too willing to grant conditional waivers while we dithered about what the rules should be. As a consequence, we have penalized those who most diligently followed the letter and spirit of our rules, and rewarded those who "pushed the envelope" most aggressively.

Today's decision should put us on a more defensible and sustainable course. Greater clarity in the rules -- and less subjectivity -- will promote fairness among market participants. It will also provide greater certainty to investors. And it should lead to more expeditious decisions by the Commission.

I am pleased that we are eliminating the worst anomalies of the old regime. Who can explain why LMAs are considered attributable interests when they involve radio stations, but not when they involve TV? Many LMAs have produced demonstrable programming and other public interest benefits for their communities. Others have not. I welcome our decision to attribute LMAs, as well as our decision to grandfather those that were entered into before November 5, 1996 - the date when all parties were clearly on notice of our intention to move in this direction. Those that meet our going-forward rules may continue, and we are giving those that are grandfathered generous relief.

I have previously raised concerns about the potential for an investor with a 49 percent ownership interest to exert "influence" over the affairs of a broadcast licensee, even in a corporation with a single majority shareholder. I support the compromise we have reached to adopt an "equity/debt plus" concept of attribution that limits the single majority

[1] This is widely recognized. As Peter Jennings has observed, "The fewer large organizations there are owning more media – in very general terms – the potential for that being worse for the media and not better is just obvious. Because when you have a lot of media owned by a lot of people, there is an obvious opportunity for much more free expression." John Malone put it this way, "I think that what protects our free society is the fact that no one power broker can control enough of the media in any market, let alone the national market, to basically get away with compressing or slanting or distorting the news."

shareholder exemption in situations involving a major program supplier or same-market media entity. These are the entities whose incentive to influence a broadcaster weighs most heavily in favor of attribution. Our targeted approach embodied in the "equity/debt plus" concept balances our competing concerns of maximizing the precision of our attribution rules, avoiding undue disruption of the flow of capital, and establishing a bright-line test that affords certainty to those planning transactions.

There are a few narrow areas where I would have preferred to go a different way from the majority, for reasons that have less to do with ownership concentration than with concerns about fundamental fairness. I believe that we have been too lenient in grandfathering situations that were previously allowed under conditional waivers -- waivers that were supposed to expire at the outcome of these proceedings. We started down the conditional waiver path because of a desire temporarily to accommodate major acquisitions, permitting them to close without awaiting a resolution of our broadcast ownership dockets. Everyone recognized when the conditional waivers were granted that the licensee would have to conform to the new rules, with six months to divest any nonconforming properties.

This accommodation became an albatross around our necks. And now we are perpetuating the waivers, creating a special class of broadcasters who, for as long as they own the stations, can own more properties in a market than their competitors. This isn't fair. It isn't good precedent. And it undermines our credibility in considering future conditional waiver requests in other contexts.

I also would have preferred a somewhat different result with respect to our revised one-to-a-market rule. In determining compliance with the voice test, I would count only independent radio and TV voices in the market. These are the media encompassed by this cross-service rule, and I believe it makes most sense to compare the number of radio and TV voices held jointly in a market only to the number of independent radio and TV voices remaining in that market. Today's item goes further, however, and also considers as voices daily newspapers and cable TV. I disagree with the inclusion of these media in the voice count.

Once we include newspapers and cable, it becomes difficult if not impossible to validly distinguish them from other media that arguably serve as a source of competition and diversity in the market, such as MDS, the Internet, cable overbuilds, and OVS systems. Rather than make arbitrary decisions on whether to include these media as "voices," it would be far simpler and administratively easier to count only radio and TV and, if necessary, to adjust the voice count accordingly. However, as the decision was made to include newspapers and cable, I do agree with the decision to limit those newspapers counted to those published and widely circulated in the market. I also agree that, if we must count cable, it should count as only one voice.

But, despite these misgivings -- as well as a more generalized concern that we have not adequately analyzed the cumulative effect of all the changes that have occurred as a result of the 1996 Act -- I support these orders as a compromise that I believe will provide a much stronger foundation for the future. As Senators Hollings and Dorgan observed in a letter to Chairman Kennard, "It is imperative . . . that the Commission remain mindful of the careful balancing struck in [the Telecommunications Act] between updating the rules to reflect changes in the marketplace and maintaining the robust diversity of voices, localism, and competition in the broadcast industry that was evident at the time of enactment." I believe that we have done so.

August 5, 1999

SEPARATE STATEMENT OF
COMMISSIONER MICHAEL K. POWELL

Re: *Review of the Commission's Regulations Governing Television Broadcasting (MM Docket No. 91-221); and Television Satellite Stations Review of Policy and Rules (MM Docket No. 87-8)*

Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (MM Docket No. 94-150); Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; (MM Docket No. 92-51); and Reexamination of the Commission's Cross-Interest Policy (MM Docket No. 87-154).

Today I vote in favor of these orders revising the Commission's rules governing local broadcast ownership. I write separately to give greater context to my vote.

I believe that the actions we take today are both constitutional and consistent with the explicit intent of Congress to promote diversity and competition in the media marketplace. Section 257(b) of the 1996 Act explicitly instructs the Commission to "promote the policies and purposes of this Act favoring diversity of media voices." 47 U.S.C. Section 257(b). Thus, as we review our ownership rules, it is clearly the intent of Congress that we consider the implications of our rules on diversity.

I agree that diversity is very hard to define, and is at some level a visceral concept. Accordingly, we should be cautious in over-invoking it as a justification for imposing or intruding on constitutionally protected activities. Yet, not all worthy policy goals, not all important government interests, and indeed, not all compelling government interests, can be quantified or measured with precision. I do not believe the Constitution boxes out all subjective judgment in government actions. Yes, diversity is hard to define, but not more so than obscenity, privacy, or interstate commerce, areas in which the law allows government activity. What is important, is that such rules be balanced and well-reasoned. Moreover, where rules involve some degree of subjective balancing, they should be reviewed frequently to ensure they remain on keel, given changing conditions in the market. This is what I feel the Commission has failed to do over the years. But the Commission takes an important step forward today, and it should continue to review these rules at periodic intervals, as Congress instructed. 47 U.S.C. Section 202(h).

In all of the discussion about diversity and localism, I believe we lose sight of something that is unique about broadcasting, something that I believe is a substantial public benefit and something that is not so easily entangled in the web of concern about content infringement. It is the fact that broadcasting is free.

There are substantial public benefits that flow from the free broadcasting business model. It provides access by all of our citizens to news, entertainment, and information, regardless of their socio-economic class. It provides valuable information to citizens in natural disasters who cannot access their phones or cable systems because of downed lines or loss of power. It lets people in a mobile society stay connected to the outside world, as well as individuals in remote areas.

But, this free business model is quite unique and, thus, some special consideration of the challenges to it is warranted. For example, as a medium it competes against other media that have access to subscription revenue in addition to advertising dollars. Broadcasters cannot as easily repackage programming or recoup costs of purchasing high quality programming. And they have significantly less distribution capacity than most of their competitors. Therefore, it is important to ensure our rules do not unduly constrain broadcast business competitiveness and viability.

Additionally, the public value of having a diverse free medium also warrants some government attention to undue concentration. If a single media group were to monopolize a market, advertising rates would likely increase as would the desire for advertisers to place advertisements with the concentrated media group. Because advertising dollars are not infinite, it would mean other stations would suffer the effects of less advertising revenue, which is the lifeblood of a station's viability. Should such a station be crippled or fail, the public would have lost a source of programming. This could happen irrespective of how highly the public might value the station, since they cannot express their preference by paying higher rates to sustain the station. For this reason, we are justified in giving some consideration to the structure of the market for free broadcasting.

Finally, I would be remiss if I did not briefly express a few of my concerns. In the items adopted today the Commission does not grandfather LMAs that were entered into after November 1996, the date of the Further Notice of Proposed Rulemaking in these proceedings. I would have preferred to grandfather LMAs entered into after November 1996. The Commission's delay in bringing these proceedings to a close since 1996 has forced broadcasters to make business decisions regarding LMAs for over three years without knowing what the rules would be. As a result, I believe the equities lie in favor of grandfathering these arrangements.

I also would have preferred to count additional media in the voice counts. For example, where cable is subject to effective competition as a result of a cable overbuild, I would argue that there are two voices for cable in that market. I would not have required *involuntary* bankruptcy to access the failed station waiver. I do not believe that there is any real threat of a broadcaster's entering into bankruptcy voluntarily to gain the benefits of this waiver provision.

Rules, however, are by their very nature both under- and over-inclusive. The rules we adopt today are not all right, and not all wrong. But they reflect what good public policy often must be, a balanced compromise of conflicting values and judgments. And I believe that with the Orders adopted today, the Commission takes an extremely important step toward aligning our rules with the current realities of the electronic media market programming market.

August 5, 1999

STATEMENT OF COMMISSIONER GLORIA TRISTANI ON BROADCAST OWNERSHIP

In the Matters of: Review of the Commission's Regulations Governing Television Broadcasting (MM Docket No. 91-221), Television Satellite Stations Review of Policy and Rules (MM Docket No. 87-8), Broadcast Television National Ownership Rules (MM Docket No. 96-222), Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (MM Docket No. 94-150), Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry (MM Docket No. 92-51), and Reexamination of the Commission's Cross-Interest Policy (MM Docket No. 87-154).

I had two goals for these proceedings: (1) to eliminate the fictions and subterfuges that have plagued our broadcast ownership rules; and (2) to strike the appropriate balance between the potential public interest benefits and the potential harms of increased consolidation. For the most part, as discussed below, I believe we have hit the mark.

Eliminating Fictions

One of the disturbing characteristics of our broadcast ownership rules was the gap between the rules as they were written and the rules as they were enforced. For instance, duopolies were strictly prohibited under the rules, but station owners were able to use the LMA artifice to control the programming decisions of a second station in the market without that station being attributable. Similarly, our one-to-a-market rule was effectively eviscerated by a Commission waiver process that became, in practice, a rubber stamp.

Today's decisions largely put an end to these and other fictions. LMAs are now attributable. The one-to-a-market waiver process will be tightened. Debt is now recognized as a factor that can bestow influence. Eliminating these fictions often has meant relaxing the underlying substantive rule involved. But I would much rather relax the underlying rule to reflect reality than to keep a rule on the books that is meaningless. Today's decisions should not only promote respect for the Commission's rules and processes, but should also help level the playing field between Washington insiders and those outside the beltway who still believe that our rules mean what they say.

As for LMAs in particular, although the subterfuge is over and they are now attributable, this Order does not outlaw them. Nevertheless, I hope and expect that there will be few, if any, new LMAs, since their regulatory *raison d'etre* has been eliminated and the duopoly rule has been relaxed. I do not believe it is appropriate for control of a station's programming to be divorced from control of a station's license. The licensee is the one responsible for programming its station to serve the local community; that responsibility should not be delegated to a third party. The sharp drop in new radio LMAs after the Commission found them attributable gives me every reason to expect that television LMAs will suffer the same fate. If this proves incorrect, I would revisit the LMA issue.

One rule change that is expessly intended to bring our rules in line with reality is the narrowing of the duopoly rule to permit common ownership of television stations in different DMAs, regardless of contour overlap. According to the Order, DMAs "are a better measure of actual television viewing patterns" than a signal contour test, "and thus serve as a good measure of the economic marketplace in which broadcasters, program suppliers and advertisers buy and sell their services and products." I could not agree more. Indeed, I have made this very point on several occasions in the context of our local radio ownership rules, which still rely exclusively on signal contours to define the relevant "market." I look forward to changing our radio ownership rules to reflect reality as we have done for our television rules.

Unfortunately, there is one fiction that the Commission chose to retain: the single majority shareholder rule. Under this rule, as long as a single shareholder owns more than 50% of a licensee's voting stock, no other interests are attributable. That means, for example, that someone could own 49.9% of the voting stock, own the studio and transmission facilities, and provide all of the station's debt, and still be deemed unable to exert significant influence over that station's decision-making. I realize that the scope of the single majority shareholder rule has been narrowed somewhat by the adoption of the equity/debt plus rule, but the EDP rule only applies to programming suppliers and same-market media entities. The attribution rules, however, should identify *any* relationship that permits an entity to exert significant influence over another. If, for policy reasons, we wish to permit certain entities to obtain ownership interests notwithstanding their ability to influence the licensee, we should do so directly and not through the fiction of claiming that such influence does not exist. I therefore dissent from that part of the Attribution Report and Order.

Finding the Public Interest

This has been a difficult decision to reach. Making decisions about diversity is never easy. In the end, I did not agree to relax our broadcast ownership rules because I believe we have "enough" diversity or because the growth in new media outlets means that diversity is no longer a concern, but because I believe that the diversity benefits of the relaxed ownership rules we adopt today outweigh the potential harms. Let me explain this apparent paradox.

For those of us who care about diversity, the easy answer would have been to insist on a maximum number of independent owners -- the Commission's traditional proxy for maximizing the number of different "voices" in a community. And generally, I still believe that this proxy is a good one. Those television licensees who can stand alone and provide a real local voice should be required to do so. As the Order notes, it is at the local level that our diversity concerns are most acute. But I became convinced through the course of this proceeding that separate ownership -- at least in the full-power television context -- does not necessarily translate into a meaningful local "voice." That is, if a licensee's low market share does not give it the resources to originate any local programming, such as news or public affairs, the community may have an additional owner but no meaningful additional voice.

In those cases in which a licensee is unlikely to contribute to local diversity, I believe the public interest may be better served by permitting that station to combine with a stronger station in the market. With the efficiencies of consolidation, for instance, the weaker station may be able to change from running only infomercials and reruns, or simply passing through a satellite-delivered signal, to a station that is able to provide local news. Or maybe the stronger station will use the weaker station as some broadcast networks use their cable channels -- as a forum for more in-depth news pieces or to stay with breaking stories rather than returning to the network feed. Either way, it is not clear to me that the public is better off with a separate owner with no local content than with a duopoly that permits one owner to provide more and better local content.

But make no mistake: this is not an exact science. We could have drawn the line in a different place, and there may be situations in which a viable local voice is removed from the marketplace under the new rules. Overall, however, I believe that we have struck the appropriate balance and that the new rules will do more good than ill for meaningful local diversity and for serving the public interest.

DISSENTING STATEMENT OF COMM. HAROLD W. FURCHTGOTT-ROTH

In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221; and in the Matter of Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-8.

I regret that I must, for the reasons that follow, dissent from this Report & Order on local broadcast ownership regulation.

I.

The instant regulations owe their existence, in large part, to the regulatory goal of "diversity." *See supra* at paras. 15-24. I do not believe that the Commission has carried its burden of defining this traditional, and oft-invoked, policy in the context of broadcast ownership rules. This sometimes amorphously-defined goal, and the assumptions upon which it rests, have not been clearly articulated or supported by empirical facts. Instead, it seems to be based on what Ogden Nash once wrote about in *Has Anybody Seen My Noumenon*?[1] Noumenons may be fine for as bases for decisions about whether two pair might beat three of a kind, but they are no basis for federal administrative regulations.

I am afraid that all we have here, where the goal of "diversity" in broadcasting is

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[1] *Has Anybody Seen My Noumenon*?*

There is one point which I am human on,
And that's a noumenon.
On due reflection, we are apt to find
That it is noumenons that lead us to believe that just this once two
    pair will beat three of a kind.
It is noumenons which whisper to our hearts that our futures will be
    brighter than our yores,
And noumenons which encourage us to laugh off the black clouds in
    the west and go ahead and move the supper table out of
    doors.
It is noumenons which, if you have no excuse for flouting natural
    laws, they supply it,
Such as kindling the hope that you can remain trim and lissome at
    forty without the nuisance of exercise or diet,
So now I shall go out and consume a hearty lunch,
But I know I shall remain trim and lissome in spite of it, because I
    have a strong noumenon, or overwhelming hunch.

*Noumenon, *n.*, an object known only by intuition, apart from any evidence of the senses.

Selected Poetry of Ogden Nash: 650 Rhymes, Verses, Lyrics, and Poems 367 (1995).

concerned, is an "overwhelming hunch." More specifically, a hunch that more "voices" is better. But that is as specific as the Commission ever really gets. Critically, the Commission never attempts to define the baseline for measuring diversity: how much diversity is enough? how much is too little? how much is just right? It cannot be the case that pure "voice" maximation is the goal, for at some point the need for added outlets or formats or owners (or whatever the precise concern is) diminishes, as does its practical utility. Yet without a starting point from which to measure the adequacy of diversity, there is simply no way to know whether a particular level is too much, too little, or just right. *Cf. supra* at para. 24 (stating that goal is to achieve a "sufficient number of independently owned outlets" but providing no basis for the assessment of "sufficiency").

Accordingly, I fail to see any substantive basis for the selection of 8 (television only) "voices" as being the "right" number in order to protect diversity for purposes of the television duopoly rule, as opposed to a number on either the higher or lower end. Similarly, I can ascertain no record support for the choice of 20 (television, radio, cable and newspaper) "voices" as the best number for purposes of the one-to-a-market rule, as opposed to something on either side of that number. The item simply does not explain why diversity is preserved, while efficiencies achieved, at these levels. To be sure, the Commission need not necessarily be able to justify as fine a line as the choice between 8 and 9, *cf. supra* at para. 40 ("Our decision today is an exercise in line drawing"), but it ought to at least be able to articulate the reasons why 8 is generally in the ball park and why, say, 15 is not.

This, the Commission has not done. Instead, it offers truisms, stating that it has struck the right balance without explaining why this is so. *See, e..g, id.* at para. 67 ("[T]he eight voice standard we adopt today strikes what we believe to be an appropriate balance between permitting stations to take advantage of the efficiencies of television duopolies while at the same time ensuring a robust level of diversity.") The selection of these numbers thus seems arbitrary.

In addition to the lack of any benchmark for measuring diversity, the Commission has failed to define the substance of the term "diversity." Does it mean just the numerosity of outlets? Does it mean a variety of owners? Does it signify lots of formats? Or are the Commission's concerns related to variation in specific kinds of programming? Of course, if the Commission means diversity in programming, "[a]ny real content-based definition of the term may well give rise to enormous tensions with the First Amendment. *Lutheran Church v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998). Instead of refining the meaning of "diversity," this item simply quotes back the standard Commission boiler-plate on the term.
In short, the Commission never specifies a clear theory of "diversity." Thus, to my mind, "the government's formulation of the interest seems to abstract to be meaningful." *Id.*

Because the Commission has yet to adequately define the meaning of one of its chief reasons for the continued existence of these regulations, I find it difficult to support the regulations themselves.[2] We should not regulate when we lack a clear -- and clearly defensible -- understanding of our aims. Instead of simply modifying the regulations, I would have repealed them entirely.

II.

Even if the Commission had articulated a lucid definition of the "diversity" that the broadcast ownership rules are meant to achieve, I have serious doubts about the continuing validity of these rules under the First Amendment.[3] This constitutional concern also prevents me from endorsing the instant regulatory scheme, which, even as modified, imposes significant limitations on the freedom of broadcast speech.

As I have previously expressed, I question the current factual basis of the 30-year-old spectrum scarcity theory -- the predicate for the Supreme Court's decision to subject broadcast regulations to an intermediate standard of review under the First Amendment. *See* Separate Statement of Commissioner Harold Furchtgott-Roth, *In the Matter of 1998 Biennial Regulatory Review: Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Communications Act*, MM Docket (rel. March 12, 1998) (noting that "[t]he empirical basis of the "spectrum scarcity" argument has been roundly criticized by some of America's most distinguished jurists and commentators, even by former members of this Commission").

I can not say it better than did my colleague Commissioner Powell:

> [T]he time has come to reexamine First Amendment jurisprudence as it has been applied to broadcast media and bring it into line with the realities of today's communications marketplace. As far back as 1984, the Supreme Court indicated in the *League of Women Voter's* case, that it would await "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." I believe we should be getting those signal fires ready.
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> As you all know, there is a dual standard that exists today, which holds that

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[2] As for the other goal of protecting "competition," *see supra* at paras. 15-16, 25-28, I do not think these rules are warranted to achieve that end, particularly given the heavy burdens they impose on industry. Unlike the Commission, I agree with those commenters who argue that reliance on current antitrust enforcement standards -- as executed by the Department of Justice or even state attorneys general -- is adequate. *See id.* at para. 32.

[3] I do not question the Commission's statutory authority to establish cross-ownership and multiple ownership regulations. *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 793-797 (1978) (discussing *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), and *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)).

broadcasting is somehow less deserving of First Amendment protection than other mass media. This theory, which derives primarily from the Supreme Court's 1969 decision in *Red Lion Broadcasting Co. v. FCC*, has been the target of much criticism. Many scholars have pointed out that the factual assumptions underlying this case and its progeny, if they were ever true, clearly are not true today. . . . I think it useful to step back and look at how drastically the communications marketplace has changed in the time since Red Lion.

It is undeniably true that the communications industry of 1969 that served as the frame of reference for the Red Lion Court was very different from the industry that exists in 1998. Think back to 1969: telephones, by and large, were black, rotary dialed devices
that people rented from AT&T, the legendary "Ma Bell" controlling about 90% of the telephone industry in the United States. And, Mom was only concerned about telephone service -- she was not concerned about providing Internet connections that might, in turn, provide video programming to consumers.

In 1969, cable television systems reached less than 30% of the country and offered not much more than clear local broadcast signals. Nothing even remotely approximated the significant video programming source cable has become. Today, cable passes more that 97% of the households in this country, and more than 2/3 of the country subscribes to cable. Additionally, there are more than 165 national cable video networks offering a wide array of programming.

In 1969, broadcasting consisted of a handful of radio stations in any given market plus 2 or 3 television stations affiliated with one of the three major networks. Occasionally, larger markets had an independent television station too. Three major television networks held more than 90% of the market for video programming. Not so anymore. Not only has the market share of the three largest networks been eroded by cable programming, the last time I looked there were about seven "declared" national television networks working feverishly to bring new stations on the air. Obviously, things have changed a lot.

It is also true that in 1969, no one, except large corporate organizations and universities, owned a computer. In part, because computers were huge, clunky and very expensive devices. No one had ever heard of the Internet, except maybe a couple guys buried deep in the Pentagon. . . .

Most importantly, the advances in technology have been astonishing since the time of *Red Lion*. Digital convergence, rather than reinforcing the unique nature of broadcasting, has blurred the lines between all communications medium. The TV will be a computer. A computer will be a TV. Cable companies will offer phone service, and phone companies will offer video service.

Digital convergence means sameness in distribution. What one sees or hears is dependent only on the order of zeros and ones, nothing more. It will become impossible to separate "broadcast" from other services, and to continue to maintain the historic fiction of "uniqueness" of broadcasting is to see the world through Lewis Carroll's looking glass.

Even this brief overview of the marketplace makes the reasoning of *Red Lion* seem almost quaint and leads unavoidably to the simple question: Should we continue to apply the reasoning of *Red Lion* to determine the First Amendment rights of broadcasters in today's communications environment? At the very least, any responsible government official who has taken an oath to support and defend the Constitution must squarely address this important question.

The Court in *Red Lion* grounded its analysis in "the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views. .. ." How can these rationales continue to be applied today?

Above all else, scarcity -- the need to ration licenses -- stands as the single greatest justification for dual track First Amendment analysis. Yet, contrary to the Court's assertions, there is nothing unique about the scarcity of radio frequencies. They are no more scarce than any other natural resource, such as oil, timber or gas, that is an essential input to other industries. As the D.C. Circuit noted in the *TRAC* case, in at least some sense, scarcity is a "universal fact" pertaining to all economic goods, and thus cannot really explain the different treatment afforded to broadcasters. Moreover, as I mentioned, technological convergence is shattering any technical distinction between mediums. . . .

With scarcity and the uniqueness of broadcasting such demonstrably faulty premises for broadcast regulation, one is left with the undeniable conclusion that the government has been engaged for too long in willful denial in order to subvert the Constitution so that it can impose its speech preferences on the public -- exactly the sort of infringement of individual freedom the Constitution was masterfully designed to prevent.

Michael K. Powell, "Willful Denial and First Amendment Jurisprudence," Speech delivered to the Media Institute, Washington, D.C. (April 22, 1998) (www.fcc.gov.commissioners) (footnotes and citations omitted).

For the reasons expressed so well by Commissioner Powell,[4] I believe that the constitutional status of even these "modified" ownership regulations is open to substantial doubt. If spectrum is no longer scarce, then the justification for the lower standard of review afforded to broadcast regulations fades away. Notably, this Commission has *already* sent the signal that scarcity is a myth: in *Syracuse Peace Council*, 2 FCC Rcd 5050, aff'd, 867 F.2d 654, the Commission stated that "the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of [First Amendment] review for the electronic press." *Id*. at 5053. The 1985 Fairness Report, the Commission explained, had documented "an explosive growth in both the number and types of outlets providing information to the public." Id.; *see also* 1985 Fairness Report, 2 FCC 2d at 198-221 (citing data). This expert agency has repudiated spectrum scarcity as a factual matter.

If strict scrutiny applies here -- as it does in the context of the print media, the internet, and cable -- the constitutionality of these limits on broadcast speech is highly doubtful. Generally, when strict scrutiny applies to a regulation, the regulation is presumptively unconstitutional: defense of the regulation is an uphill battle. More specifically, under strict scrutiny, the government must assert a compelling, not merely an important, interest in the limitations. The D.C. Circuit has ruled that "it is impossible to

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[4] *See also Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n. 2 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc) ("[P]artly the criticism of *Red Lion* rests on the growing number of broadcast channels."); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (1995) (Edwards, C.J., dissenting) (spectrum scarcity is "indefensible notion" and "[t]oday . . . the nation enjoys a proliferation of broadcast stations, and should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum"); *id.* at 684 (Wald, J., dissenting) ("[T]echnical assumptions about the uniqueness of broadcast . . . have changed significantly in recent years."); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508 n.4 (D.C.Cir. 1986) ("Broadcast frequencies are much less scarce now than when the scarcity rationale first arose in [1943]."), *cert. denied*, 482 U.S. 919 (1987); Glen O. Robinson, The Electronic First Amendment: An Essay for the New Age, 47 Duke L. J. 899, 904 (1998) ("By the 1980s . . . the emergence of a broadband media, primarily in the form of cable television, was supplanting traditional, single-channel broadcasting and with it the foundation on which the public interest obligations had been laid. If it ever made sense to predicate regulation on the use of a scarce resource, the radio spectrum, it no longer did."); Laurence H. Winer, Public Interest Obligations and First Principles at 5 (The Media Institute 1998) ("In a digital age offering a plethora of electronic media from broadcast to cable to satellite to microwave to the Internet, the mere mention of 'scarcity' seems oddly anachronistic."); Rodney M. Smolla, Free Air Time For Candidates and the First Amendment at 5 (The Media Institute 1998) ("Scarcity no longer exists. There are now many voices and they are all being heard, through broadcast stations, cable channels, satellite television, Internet resources such as the World Wide Web and e-mail, videocassette recorders, compact disks, faxes -- through a booming, buzzing electronic bazaar of wide-open and uninhibited free expression."); J. Gregory Sidak, Foreign Investment in American Telecommunications: Free Speech at 303-04 (AEI 1997) ("On engineering grounds, the spectrum-scarcity premise . . . is untenable."); Lillian R. BeVier, Campaign Finance Reform Proposals: A First Amendment Analysis, CATO Policy Analysis, No. 282 at pp. 1, 13, 14 (September 4, 1997) ("There is no longer a factual foundation for the argument that spectrum scarcity entitles the government, in the public interest, to control the content of broadcast speech."); Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207, 221-26 (1982).

conclude that the government's interest [in diversity of programming], no matter how articulated, is a compelling one." *Lutheran Church v. FCC*, 141 F.3d at 355. In short, due to the lack of a compelling interest here, these regulations would likely fail to pass strict scrutiny review. Even if the government could come up with some other interest that qualified as "compelling," I doubt whether these regulations are narrowly tailored to any goal: they are broad, structural, prophylactic bans on ownership of outlets for speech, based on no prior evidence of actual harm or abuse resulting from common ownership.

III.

I also have particularized concerns with some of the decisions reached in this Report & Order, which I set forth below.

First, I would have provided all existing television LMAs, consistent with section 202(g) of the Telecommunications Act of 1996, greater protections in terms of "grandfathering" than does this item. *Cf. supra* at paras. 126-147. Permanent (or rather, *real*) grandfathering, rather than a temporary period of relief followed by an open-ended "pubic interest" review, would have provided more certainty to the companies involved in these private business arrangements. The question of how to treat LMAs has dragged on for far too long, and we should have resolved it cleanly, for once and for all.

Also, as a matter of equity, I would have protected all LMAs in existence as of the date of the adoption of this Report & Order, rather than November of 1996. Broadcasters who entered into LMAs before the release of our broadcast attribution item, also adopted today, did so without a final, unambiguous statement that their arrangements would be attributable for purposes of FCC ownership rules. They entered into these contracts with FCC approval and in accordance with the regulations then in effect, making substantial investments in reliance on these approvals. I would not run the risk of causing these broadcasters economic harm by forcing them to unwind their operations, in the event that they fail to comply with the new duopoly rules on a going-forward basis. Nor would I run the risk of causing harm to the viewers in their area who might lose the benfefits that these arrangements have produced.

Second, I believe that limitations on radio ownership under the one-to-a-market rule that constrict the statutory radio ownership caps in section 202(b) of the Telecommunications Act of 1996 are legally unsound. As the item acknowledges, there are instances where ownership of a television station in addition to radio stations will trigger application of the one-to-a-market rule, which may impose lower caps on radio ownership than does section 202(b). *See supra* at para. 9 & n. 19 (explaining that a party may own "up to six radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules) in any market where at least 20 independent voices would remain post-merger" but adding that "if the radio/TV combination at issue is in a market where our local radio ownership rules would allow a radio-only combination to own eight stations, five of which are FM and three of which are AM, the radio/TV combination could own five FM stations and one AM station").

Nothing in section 202(b), however, indicates that radio ownership rights are contingent on non-ownership of a television station. Section 202(b) is not phrased in the conditional; it does not say that ownership of other kinds of communications properties should adversely affect the rights established by that section. Nor are the ownership rights created there limited to "radio-*only*" combinations, as the Commission suggests; rather, the provision simply speaks of radio ownership, without reference to broadcast combinations.

The one-to-a-market rule is, of course, based on the generalized "public interest" standard, whereas the caps established in 202(b) are very specific. Regulations promulgated under the general public interest grant of authority should not trump such particularized decisions by Congress. In short, the Commission cannot by rulemaking shrink statutorily granted ownership rights.

Third, we should not "encourage" broadcasters to do anything that could not be defended, if attempted by rule or regulation, on constitutional grounds. *See supra* at para. 14 (acknowledging that at this time Commission has insufficient evidentiary support for race- and gender-based ownership rules stating that "[w]e encourage broadcasters to establish incubator programs and to engage in other cooperative ventures that will boost new entry into the broadcast industry, particularly with regard to the participation of women and minorities in the mass media"). If the Commission is not yet willing to make the case for race- and gender-based preferences (I am not sure it ever can), it should not ask broadcasters to do "voluntarily" do what would be well unconstitutional for the Commission to require. As I have observed:

> The use of voluntary standards allows administrative agencies better to skirt statutory limits on their authority, an offense to the concept of administrative agencies in possession of only those powers delegated to them by Congress. Their use can also more readily permit agencies to impose requirements violative of the Constitution. . . . Voluntary standards are tempting to regulators for technical reasons too. They allow agencies to bypass the seemingly cumbersome and time-consuming requirements of the Administrative Procedure Act, such as notice and comment.

"Voluntary Standards Are Neither," Speech by Harold W. Furchtgott-Roth Before the Media Institute (Nov. 17, 1998) (www.fcc.gov/speeches/furchtgott_roth/sphfr817.html).

Finally, I return to the Commission's overall regulatory scheme of limiting ownership based on the number of remaining "voices" in a market. In particular, I am troubled by the concept of counting "voices." The enterprise of counting "voices" in a market strikes me as akin to counting angels on the head of a pin; moreover, the notion that a "voice" does not exist until the Government says that it does is downright Orwellian.

Putting those issues aside, however, I believe that the Commission has taken an excessively narrow view of the communications outlets that qualify to be counted under its ownership rules. *See supra* at para. 69 (declining to include radio, cable television, DBS, MMDS, VCRs, and newspapers and deciding to restrict "voices" to broadcast television only for purposes of television duopoly rule); *id.* at para. 114 (declining to include DBS and the internet, among other things, for purposes of one-to-a-market rule but deciding to count one cable voice per market, regardless of existence of overbuilders, and newspapers with 5% circulation).

The most striking thing about today's decision as to which media to count as a real "voices" when assessing compliance with the voice counts (especially in the context of the duopoly rule, limited to broadcast television) is that this new list is scarcely different from the one that one might have drawn up after surveying the industry 40 years ago. Aside from the limited acknowledgement of the existence of cable television and newspapers, the Commission's list of relevant media still has not changed for decades. Today's decisions to basically limit relevant media to broadcasting implies that the opportunities for dissemination of a message have increased only slightly, if at all, in the last decades. Meanwhile, as we all know, there has been a veritable explosion in information outlets, which the Commission even documents elsewhere in the Report & Order. *See id.* at para. 37.[5] Ironically, while the Commission continues to cite the special importance of broadcasters as a justification for continued shacking of their industry, it is the broadcasters who are falling further behind in this new age of competition for viewers.[6]

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[5]The Commission even issued a report in 1991 concluding that

> economic and technological developments over the past 15 years have vastly expanded the array of video choices available to the American public. Increased time diversity, choices, and new technologies have given, and increasingly will give viewers the ability to control their television viewing. The new video marketplace is making it possible, therefore, for viewers to signal their preferences far more precisely than before, and programmers are responding by producing more targeted programming to serve the increasingly segmented market. Advertisers are adjusting their purchases pf commercial time to target the geographic and demographic groups most valuable to them. These trends will continue producing a diverse viewer-centered video marketplace. *Broadcast television will have its place in this new world but as one player among many*.

OPP Working Paper Series 26, Florence Setzer & Jonathan Levy, Broadcast Television in a Multichannel Marketplace at 172 (June 1991).

[6]*See* New York Times, "TV Networks Are Scrambling to Deal With Era of New Media," A-17 (May 17, 1999) (stating that "[f]aced with a continuing loss in audience and an explosion in technological advances, the networks

IV.

In conclusion, I believe that these structural regulations suffer from fatal general flaws. First, one of their primary raisons d'etre -- diversity -- is so vaguely defined that I find it difficult to justify the continued existence of the regulations. I also believe that the marketplace, if left to function, is more likely to produce the right mix of services for the public than this Commission. As for competition, antitrust enforcers, both state and federal, are the better equipped institutions to protect that interest. In addition, I believe the rules are constitutionally dubious. Finally, I believe existing LMAs should have been afforded more protection than they were; that the Commission has impermissibly restricted radio ownership rights granted by statute; and that its view of the media that qualify for voice-counting purposes is unrealistically constricted.

are attempting to transform themselves into far more versatile institutions" and noting that "[t]he major networks once dominated the airwaves but their hegemony has been steadily eroding") (providing viewer share percentages).