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

In the Matter of	)	
	)	
Broadcast Television National Ownership Rules	)	MM Docket No. 96-222
	)	
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: Commissioners Ness and Tristani issuing separate statements.

1. On November 7, 1996, the Commission released a Notice of Proposed Rule Making ("Notice") in this proceeding, seeking comment on how to calculate a broadcast television station group owner's aggregate national audience reach for the purposes of determining compliance with the national broadcast television multiple ownership rule which limits that reach to 35%.[1] Based on the record before us,[2] we conclude that the public interest would be served by counting a market only once when calculating an entity's national ownership reach, even if that entity has an attributable interest in more than one television station in that market. As specific applications of this policy, we are: (1) narrowing the application of the "satellite exemption," under which we disregard satellite station ownership in measuring aggregate national ownership; (2) not incorporating same-market local marketing agreements ("LMAs") into the calculation of the brokering station's national audience reach; and (3) replacing our use of Arbitron's Areas of Dominant Influence ("ADIs") to define geographic television markets with the use of Nielsen's Designated Market Areas ("DMAs").[3] As we indicated in the Notice, the issue of whether we should eliminate or modify the "UHF discount," by which UHF stations are attributed with only 50% of the audience within their market for

[1] Notice of Proposed Rule Making in MM Docket Nos. 87-8, 91-221, and 96-222, 11 FCC Rcd 19949 (1996).

[2] We also adopt today companion Reports and Orders in our television local ownership proceeding, Report and Order in MM Docket Nos. 91-221 & 87-8, FCC 99-209 (adopted August 5, 1999) ("TV Local Ownership Order") and in our attribution proceeding, Report and Order in MM Docket Nos. 94-150, 92-51, & 87-154, FCC 99-207 (adopted August 5, 1999) ("Attribution R&O"). We have incorporated the Comments and Reply Comments filed in these proceedings into the record of this proceeding, to the extent that they deal with issues incorporated into this proceeding. See Public Notice DA 97-507 (released March 10, 1997). When we refer to Comments and Reply Comments filed in other proceedings, we will identify the proceedings in which they were filed.

[3] We define DMAs in more detail at ¶ 31, below.

purposes of the national rule, will be addressed in the biennial review of our broadcast ownership rules that was initiated in 1998.[4]

BACKGROUND

2. Pursuant to Section 202(c)(1) of the Telecommunications Act of 1996 (the "1996 Act"),[5] the Commission amended its national broadcast television ownership rule.[6] Before passage of the 1996 Act, the Commission generally prohibited entities from having an attributable interest in more than 12 broadcast television stations. Further, the Commission generally prohibited an entity from having an attributable interest in a station if it would result in that entity's having an attributable interest in television stations with an aggregate national audience reach exceeding 25%. However, pursuant to Section 202(c)(1) of the 1996 Act, the Commission eliminated the 12-station cap and raised the 25% aggregate national audience reach limit to 35%.

3. Pursuant to Section 73.3555(e)(2)(i) of the Commission's Rules, a station's audience reach is defined as consisting of the total number of television households within the television market for that station.[7] The television market, in turn, is currently defined as the Area of Dominant Influence (ADI) used by Arbitron, a commercial audience-rating service, to analyze broadcast television station competition.[8] For purposes of calculating this aggregate audience reach under the rules, UHF stations are attributed with only 50% of the audience within their ADI (the UHF discount),[9] a policy that is under careful review in the biennial ownership review. In addition, satellite stations generally are not counted at all in the national audience reach calculation (the satellite exemption).[10] Neither the 1996 Act nor our Order implementing its national television ownership provisions addressed how to measure a licensee's national audience reach, thus leaving undisturbed the process prescribed earlier in connection with the 25% limit. In light of the modified national ownership rule and the new competitive and regulatory structure of the video marketplace brought about by the 1996 Act, we initiated this proceeding to update the record on measuring national television audience reach for purposes of the new national ownership limit.

DISCUSSION

The Satellite Exemption

---

[4] Notice at 19954-56. We sought comment on this issue in the Notice of Inquiry in MM Docket No. 98-35, 13 FCC Rcd 11276, 11284-85 (1998) ("1998 Biennial Review").

[5] Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996).

[6] Order, 11 FCC Rcd 12374 (1996). See 47 C.F.R. § 73.3555(e) (setting forth the amended rule).

[7] 47 C.F.R. § 73.3555(e)(2)(i).

[8] Id.

[9] Id.

[10] 47 C.F.R. § 73.3555(e)(2)(ii).

4. Background. A television satellite is a full-power terrestrial broadcast station authorized under Part 73 of the Commission's Rules to retransmit all or part of the programming of another station (most commonly the parent station). Satellite stations are operated by the same party that operates the parent station. The Commission does not authorize satellite operation unless it is demonstrated that the frequency would likely go unused otherwise. As a result, satellite stations typically operate in areas that are likely to provide television broadcasters relatively little opportunity for growth and profit when compared with larger markets. Pursuant to 47 C.F.R. § 73.3555, Note 5, the Commission's multiple ownership rules do not apply to satellite stations.[11] The Commission exempted TV satellites from the national multiple ownership rules when it adopted the 12-station cap and the 25% audience reach limitation.[12] The Commission believed that this would encourage the provision of television service to smaller communities.[13] It also noted that satellite stations and stations operating primarily as satellites were already exempt from the Commission's duopoly rule because they generally did not originate programming.[14] In 1991, in a proceeding addressing the Commission's overall regulation of satellite stations, we abolished the 5% "limit" on the amount of local programming that a satellite could originate, which we had used as a benchmark for determining whether a station was still a satellite.[15] Because satellites were no longer limited as to the amount of local programming they could originate, we also sought comment on whether to continue to exempt satellites from the national ownership rule.[16] In light of the changes in the national ownership rule effected by the 1996 Act, we proposed in the Notice in this proceeding to retain the satellite exemption for satellites operating within the same television market as their parent stations since reach is measured on a market-by-market basis, but to eliminate the exemption when the satellite and its parent operate in separate television markets.

Same-Market Satellites

---

[11] In the TV Local Ownership Order we are adopting today, we reaffirm that the public interest will be served by our continuing to exempt satellites from the local ownership rules. TV Local Ownership Order at ¶¶ 90-91.

[12] Memorandum Opinion and Order in Gen. Docket No. 83-1009, 100 FCC 2d 74, 79 (1985) (1985 TV Ownership Reconsideration).

[13] Id. at 80.

[14] Id. at 90, n. 43.

[15] Report and Order in MM Docket No. 87-8, 6 FCC Rcd 4212 (1991) (TV Satellite R&O) (recon. pending). A Petition for Reconsideration and Petition for Partial Stay or Alternative Relief of the 1991 TV Satellite R&O were filed by the Media Access Project ("MAP") challenging the Commission's determination to permit satellites to be operated without regard to local content. In its comments in this proceeding, MAP acknowledges that the Commission's proposal regarding inter-market satellite stations would ameliorate many of the concerns raised in the pending Petition for Reconsideration of the 1991 decision. However, MAP still seeks to have the Commission address various issues raised in its petition, including its assertion that the Commission cannot lawfully justify the benefits of satellite status in the name of assisting localities lacking adequate service by authorizing broadcast of programming which may be imported--in its entirety--from hundreds or thousands of miles away. MAP's comments also note that another outstanding issue raised in its Petition for Reconsideration that would not be resolved by the instant proceeding is the request for declaratory relief confirming the applicability of the Children's Television Act of 1990 to satellite TV stations. MAP Comments at 15-16. These issues are beyond the scope of the instant proceeding.

[16] Second Further Notice of Proposed Rulemaking in MM Docket 87-8, 6 FCC Rcd 5010 (1991).

5. Background. In the Notice, we noted that the national multiple ownership rule, as amended by the 1996 Act, is concerned with a station's potential audience rather than with its actual viewership. The Notice also stated that we are not concerned with the specific number of television stations owned by a group owner, since the 1996 Act eliminated the numerical limitations on station ownership formerly in the rule; rather, the national television ownership rule now focuses solely on national audience reach. We tentatively concluded that if a licensee acquires a satellite television station in a market within which it already operates a station, it has not extended its audience reach in that television market for purposes of the national audience reach limit; the television households in that market are already counted, given the existence of the licensee's parent station. Accordingly, we proposed to retain the exemption for satellites operating in the same market as their parents.[17]

6. Comments. Several commenters addressing the issue support the Commission's proposal not to double-count households in markets where the licensee has both a parent and a satellite station. ABC, Inc. ("ABC") and the National Association of Broadcasters ("NAB") argue that the national ownership rule is intended to limit *national*, not local, concentration, and multiple station holdings in one market do not add to national reach. As a result, they state, double-counting would not serve the purpose of the national ownership rule.[18] CBS Inc. ("CBS") and Paxson Communications Corporation ("Paxson") believe that double-counting would be inconsistent with the purpose of having satellites--to facilitate the use of spectrum that would otherwise go unused and to serve communities where few over-the-air stations are available.[19]

7. BET Enterprises, Inc. ("BET") supports the idea that same-market satellites should not be counted, because they serve the same audience as their parent stations.[20] However, it argues that the grant of an additional digital television ("DTV") channel to satellite stations, as well as their parents, will increase the power of the licensee to such an extent that the market should nevertheless be counted twice.[21] It states that incumbent broadcasters' market power will increase sufficiently to create insurmountable entry barriers against competing stations.[22]

8. In contrast, Time Warner, Inc. ("Time Warner") asserts that the Commission should double-count a market with a commonly owned parent-satellite combination, at least until the issue can be resolved in the 1998 biennial review of all of the Commission's broadcast ownership rules. At the time, Time Warner described several factors it argued were essential to an adequate analysis of this issue including: the effect of the Supreme Court's decision regarding the constitutionality of the Commission's mandatory cable carriage

---

[17] Notice at 19958.

[18] ABC Comments at 4; NAB Comments at 2.

[19] CBS Comments at 3-5; Paxson Comments at 38.

[20] BET Comments at 2.

[21] Subsequent to the filing of Comments and Reply Comments in this proceeding, the Commission granted initial DTV licenses to all existing licensees and permittees, with no exceptions made for satellite stations. Fifth Report and Order in MM Docket No. 87-268, 12 FCC Rcd 12809 (1997); recon. granted in part and denied in part, 13 FCC Rcd 6860 (1998); further recon. granted in part and denied in part, 14 FCC Rcd 1348 (1998).

[22] BET Comments at 3; BET Reply Comments at 2-3.

rules;[23] the nature of the final DTV service rules, including any modified public interest requirements the Commission might impose;[24] the precise nature of the changes in the duopoly rule; the direction of policies on broadcast-cable cross-ownership;[25] and the direction of policies on the UHF discount.[26]

9. Viacom, Inc. ("Viacom") supports repeal of the satellite exemption, regardless of whether the satellite and parent are in the same markets. It notes that the Commission calculates the number of viewers within the station's reach, rather than the number of people who actually watch the program, because it is the station's *potential* audience that is relevant. According to Viacom, audiences' tastes are splintered, and there is never a time when all people within a DMA are watching the same station. Consequently, it claims that when a broadcaster owns or controls two stations in a market, its reach increases as though it had entered a totally separate market and had new capacity to broadcast to an increased population.[27]

10. Discussion. We believe that, overall, the record supports the continuation of the satellite exemption for same-market satellites for the reasons set forth in the Notice. We agree with those commenters who observe that the national ownership rule is concerned with competition and diversity on a national scale, and that dual station ownership in one market does not add to national reach, and does not affect competition and diversity on a national basis. Also, even if a licensee increases the total number of its viewers by acquiring a second station in the market, the relevant measurement is of audience reach, not of actual viewership. As ABC and NAB observe, acquiring a second station in a market does not increase a licensee's potential audience reach.

11. Concerns such as those expressed by BET about local domination by incumbent broadcasters involve competition and diversity on a local, not a national, scale and are not the focus of the national ownership rule. For the reasons noted in ¶ 13, the grant of an additional DTV channel to existing broadcasters does not warrant the double-counting of their television markets. Nor do we believe it necessary to incorporate this issue in our biennial review as suggested by Time Warner. We find that those issues cited by Time Warner at the time it filed comments are largely irrelevant to our decision to retain the satellite exemption for same-market satellite stations.

12. We disagree with Viacom's assertion that a broadcaster enhances its capacity to reach a larger population by having an interest in a second station in the market, such that the market should be counted twice for purposes of the national ownership rule. Regardless of a station's actual viewership, a licensee is attributed with the entire television market within which it is located for the purposes of the national ownership rule. If the licensee increases its actual viewership by acquiring a second station in that market,

---

[23] Subsequent to the filing of Comments and Reply Comments in this proceeding, the Supreme Court upheld the constitutionality of the must-carry rules. See Turner Broadcasting System v. FCC, 117 S.Ct. 1174 (1997).

[24] The Commission has announced its intention to consider and collect views on the public interest obligations of broadcasters in the digital world in a separate proceeding.

[25] See 76 C.F.R. § 501(a).

[26] Time Warner Reply Comments at 1-3. Time Warner applies this argument to all instances of commonly-attributable stations within a market, regardless of satellite status.

[27] Viacom Comments at 3.

that does not affect our audience reach calculation: the count already includes the broadcaster's new viewers even before the second station was acquired.

13. We note that this reasoning applies to other situations. Although in this proceeding we discuss it in detail only in the context of satellites and LMAs, the concept is equally applicable to any situation in which an entity has an attributable interest in more than one station in a television market. For example, when two stations in a market are commonly owned by virtue of the local television ownership rule,[28] that market's audience reach will be counted only once when calculating the group station owner's national aggregate audience reach. For the same reason, the grant of DTV licenses to existing licensees will not affect the calculation of their national market reach.

14. Accordingly, we are amending Section 73.3555(e)(2)(ii) of our rules to clarify that we shall not double-count individual markets. In practice, this means that we are retaining the satellite exemption for those satellites that operate in the same television market as their parent stations. Counting the audience twice in such a situation would serve only to distort our calculation of how many potential viewers a group owner is able to reach nationwide.

Separate-Market Satellites

15. Background. In the Notice, we noted that when a parent station operates a satellite in another market, its over-the-air audience reach is expanded into another market by the audience reach of the satellite station. While the satellite exemption may have encouraged the operation of satellite stations in the past, we stated that the need for any such incentive may have been greatly reduced by the elimination of the 12-station limit. Absent the satellite exemption, under the restraints of the former 12-station rule, group owners would have been far less willing to acquire outside-market satellite stations that would have reduced their opportunities to obtain additional stations up to the 12-station limit. The exemption removed the disincentive to satellite operation that this would otherwise have caused. Under the modified national ownership rule, however, there is no limit on the absolute number of stations. Also, because a satellite generally serves a sparsely populated area that is underserved, we tentatively concluded that the population of the entire market in which the satellite is located should add relatively little to a group owner's aggregate national audience reach. Given these factors, and because operation of a satellite station in a market separate from its parent increases the licensee's audience reach, we proposed to eliminate the exemption for satellite stations operating in separate markets from their parents.[29]

16. Comments. Most commenters addressing this issue support including separate-market satellite stations in the calculation of aggregate national audience reach.[30] BET notes that satellites are now allowed to originate a significant quantity of local programming and extend it to a new audience. It argues that not to count such stations would "squeeze out" entrepreneurs and new entrants by enabling large group owners

---

[28] See TV Local Ownership Order at ¶¶ 60-87 (setting forth the conditions under which common ownership of two television stations in a market will be permissible).

[29] Notice at 19959.

[30] E.g., Viacom Comments at 3-4.

to transfer costs among stations and eliminate competition from small operators.[31] BET urges particular concern for such new entrants, arguing that the competitive strength of incumbent licensees and the power of their voices will be enhanced by the Commission's providing each one of them with an additional DTV channel.[32]

17. Media Access Project, et al. ("MAP")[33] argues that separate-market satellites offer no benefits to their communities of license, but instead merely serve as a vehicle for broadcasters with no connection to a community to extend their ownership reach without attribution. According to MAP, continued exclusion of those stations from national audience reach calculations would only encourage warehousing and speculation in spectrum with no regard to the needs of the public.[34] MAP further notes that any remaining disincentive to satellite operation exists only for those few broadcasters that are very close to the 35% national audience reach cap. According to MAP, broadcasters not approaching the limit would still be eligible, and likely willing, to operate satellite stations. In this regard, MAP asserts that retaining the exemption for separate-market satellites would sacrifice localism and the proper operation of the national ownership rules simply to appease a handful of the largest TV broadcasters.[35]

18. NAB also supports counting separate-market satellites. However, it proposes that the Commission waive the market's inclusion where the satellite serves only a small part of its market. Otherwise, NAB claims, attributing the satellite would inaccurately count viewers that the station could not possibly reach.[36] BET opposes such a waiver policy.[37]

19. Opposing the Commission's proposal, CBS and Paxson state that, although the repeal of the 12-station cap may have mitigated the disincentive to operate satellite stations, it will still exist without an exemption. CBS and Paxson argue that repealing the exemption would needlessly discourage the operation of satellites by group owners and, because satellite status is granted to a station only if the applicant can demonstrate that the frequency would likely go unused otherwise, it might in some situations lead to a loss of television service in communities where few over-the-air stations are available.[38] It is large group owners, according to Paxson, who are more likely to have the resources, experience, and incentive to assume the risks and costs of satellite station operation.[39]

31 BET Comments at 2-3.

32 BET Reply Comments at iv-v, 2-3.

33 MAP filed comments jointly with the Institute for Public Representation.

34 MAP Comments at 15-17; MAP Reply Comments at 23-24.

35 MAP Reply Comments at 25.

36 NAB Comments at 2-3.

37 BET Reply Comments at 2.

38 CBS Comments at 4-7; Paxson Comments at 38.

39 Paxson Comments at 38.

20. Discussion. We conclude that the satellite exemption is no longer warranted for satellite stations operating in separate markets from their parent stations. Unlike same-market satellites, when a parent station operates a satellite in another market, the licensee's over-the-air audience reach is expanded into another market by the audience reach of the satellite station. Consequently, we shall treat separate-market satellites as we do other television stations, and we shall include them when calculating a group station owner's national aggregate audience reach.

21. We believe that the benefits of inclusion of these stations, including a more accurate reflection of actual audience reach, outweigh any potential costs. The 1996 Act's elimination of the restriction on the absolute number of television stations that may be commonly owned has substantially reduced the disincentive to satellite operation. We note that even one of the parties arguing in favor of retaining the exemption acknowledges the reduced disincentive.[40] Commenters favoring retention of the exemption for separate-market satellites have not demonstrated that the operation of a satellite station would generally put licensees over or so close to the 35% national aggregate audience reach limit as to dissuade them from operating the station at all. We agree with MAP that counting separate-market satellite stations would affect only the very few number of broadcasters extremely close to the 35% limit, and that a substantial number of broadcasters, including most group owners, would remain eligible to operate the satellite without approaching the 35% audience reach limit.

22. We also decline to adopt the waiver policy suggested by NAB regarding stations with small signal coverage areas. The rationale for such a waiver policy would have to be extended to cover all stations, not just satellite stations. Also, NAB overlooks the existence of cable carriage, which sometimes allows broadcasters to serve areas beyond their signal reach. As we discuss in detail in the TV Local Ownership Order, a station is considered to operate within a particular television market because it generally serves at least a measurable portion of the whole market.

23. Finally, adoption of NAB's proposal would undercut one of the major advantages of counting all of the viewers in a market: its predictability and ease of application. Because we use a bright line test to define a station's audience reach, all group owners can calculate with certainty their current aggregate national audience reach, as well as how much it would change upon the acquisition of new stations. Were we to conduct a case-by-case review of each station based on its particular circumstances and viewing patterns, licensees would be unsure whether a contemplated acquisition might put them over the 35% limit. Such uncertainty could disrupt group owners' short-term and long-term economic planning, which would not serve the public interest. Furthermore, such a case-by-case review would burden the Commission's scarce resources.

Local Marketing Agreements

24. Background. The issue of double-counting also arises when a broadcast television licensee programs another television station in the same market through a local marketing agreement. An LMA generally involves the sale by a licensee of discrete blocks of time to a broker who then supplies the programming to fill that time and sells the commercial spot announcements to support it.[41] Such agreements may enable

---

[40] CBS Comments at 6.

[41] See TV Ownership Further Notice at 3581-82; Report and Order in MM Docket 91-140, 7 FCC Rcd 2755, 2784 (1992) (Revision of Radio Rules and Policies).

separately owned stations to function cooperatively via joint advertising, shared technical facilities (including shared production facilities), and joint programming arrangements.[42] In the Notice, we requested comment addressing whether to include stations operated under local marketing agreements when calculating an entity's national audience reach.[43]

25. When a licensee of one television station operates as a broker of another station in the same television market pursuant to an LMA, it reaches the same audience twice, through two different television stations. In the Notice, we noted that while we might determine that LMAs should be attributable for the purposes of the local ownership rules, they must be analyzed differently in the context of the national ownership rule. Because the national television ownership rule now focuses solely on national audience reach, we tentatively concluded in the Notice that we should not count the TV households in the market twice for purposes of measuring the brokering licensee's national audience reach.[44]

26. Comments. ABC, CBS, and NAB support the Commission's proposal. As they did in the context of same-market satellite stations, they argue that the national ownership rule is concerned with competition and diversity on a national scale, and that dual station influence or control in one market does not add to national reach.[45] Paxson also supports the proposal, stating that the contractual terms of all local marketing agreements ensure that the licensee will retain ultimate control over the station.[46]

27. Disagreeing, MAP asserts that LMAs give the brokering station editorial control, so that the Commission should conclude that LMAs held by a group owner increase the number of viewers nationwide that the owner reaches.[47] As it did in the context of satellite stations, Time Warner suggests that the Commission count LMAs at least until the 1998 biennial review, when it will be able to analyze better the effects of the Supreme Court's must-carry decision, the DTV rules, and changes in various Commission ownership rules and policies.[48] Viacom states that brokered stations should be attributed to the broker, again claiming that it is irrelevant for the purposes of determining national audience reach whether the stations are in the same market.[49]

28. Discussion. In our companion Attribution R&O, we determine that same-market LMAs are attributable to the brokering station for the purposes of administering the local ownership rules when the

---

[42] Id.

[43] Notice at 19959-60. We address the attribution and permissibility of LMAs under our local ownership rules in the companion attribution and local ownership Report and Orders being adopted today. See TV Local Ownership Order at ¶¶ 133-148; Attribution R&O at ¶¶ 83-99.

[44] Notice at 19960.

[45] ABC Comments at 4; CBS Comments at 2, 7-8; NAB Comments at 2.

[46] Paxson Comments at 39.

[47] MAP Attribution Comments at 21-22.

[48] See ¶ 8, above.

[49] See ¶ 9, above.

brokering station programs more than 15% of the brokered station's weekly broadcast hours.[50] However, as we concluded above in the context of same-market satellite stations, the national ownership rule limits audience reach on a national scale, and dual station influence or control in one market does not add to national audience reach. This is merely a specific application of our new general rule of not double-counting markets. The record indicates no additional factors warranting a different analysis. For these reasons, we find that same-market LMAs shall not be included in the brokering station's national aggregate audience reach calculation.

29. We note that when the brokering station is located in a different market than the brokered or programmed station, the issue of double-counting does not arise. We address the attribution of separate-market LMAs (and other program-supply contracts) in the Attribution proceeding. As discussed in the Attribution R&O, under our new equity/debt plus rule, we will attribute the interest of a program supplier in a station where it: (1) provides more than 15% of the station's weekly programming; and (2) it holds more than 33% of the licensee's total assets.[51] Attribution R&O at ¶¶ 36, 55-60. Such an attributable interest will count towards the 35% national reach limit since the brokered and brokering stations are in different markets; in this situation, the same market is not being doubly counted.

Market Definition

30. Background. The definition of the relevant television market is critical to evaluating compliance with the national ownership rule because the number of television households in each market in which an entity's stations are located is used to calculate that entity's national audience reach. The definition of the market for this purpose has remained unchanged since 1985, when the Commission first adopted a national audience cap:[52]

> [n]ational audience reach means the total number of television households in the Arbitron Area of Dominant Influence (ADI) markets in which the relevant stations are located divided by the total national television households as measured by ADI data at the time of a grant, transfer or assignment of a license. . . . Where the relevant application forms require a showing with respect to audience reach and the application relates to an area where Arbitron ADI market data are unavailable, then the applicant shall make a showing as to the number of television households in its market. Upon such a showing, the Commission shall make a determination as to the appropriate audience reach to be attributed to the applicant.[53]

31. We observed in the Notice that Arbitron no longer updates its county-by-county determinations of each broadcast station's ADI. Accordingly, we proposed to use Designated Market Areas (DMAs) as compiled by A.C. Nielsen Media Research -- another commercial ratings service -- where we previously

---

[50] Attribution R&O at ¶¶ 83-89.

[51] If either prong of this test is not satisfied, the inter-market LMA is not attributable and therefore will not be counted towards the 35% national reach limit.

[52] 1985 TV Ownership Reconsideration.

[53] 47 C.F.R. § 73.3555(e)(2)(i).

relied on ADIs, noting that they are analytically similar.[54] Nielsen uses the term DMA to define a unique geographic area based on the TV viewing habits of its residents. In designating DMAs, Nielsen Media Research 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.[55] 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.[56]

32. We noted that in some instances the use of DMAs instead of ADIs might lead to small variations in the audience reach calculation of some stations, because in some instances Arbitron and Nielsen define markets somewhat differently. For example, we noted that Hagerstown, Maryland, constitutes its own Arbitron ADI, while it is part of the Washington, DC DMA established by Nielsen. The Notice asked commenters to address our assessment that these variations would have only a minor effect on the calculation of licensees' national ownership reach.[57]

33. Comments. All commenters addressing this issue support the proposal to use DMAs.[58] Paxson asserts that DMAs have replaced ADIs for both business and regulatory purposes.[59] ABC notes the Commission's use of DMAs in the context of must-carry, citing the Commission's statement that Nielsen DMAs "represent the actual market areas in which broadcasters acquire programming and sell advertising."[60]

34. Discussion. We will adopt our proposal to utilize DMAs in place of ADIs for the purposes of measuring national aggregate audience reach. Because Arbitron no longer updates its county-by-county market definitions, they are static and have become less reliable over time as market conditions change. The record indicates widespread support for use of DMAs in place of ADIs. It is the market definition that we use in the context of cable must-carry and retransmission consent.[61] Finally, no commenter expressed concern over the variations in some market definitions between Nielsen and Arbitron. Accordingly, we conclude that the public interest will be served by our using DMAs to calculate aggregate national audience reach.

---

[54] Notice at 19960-62.

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

[56] See TV Local Ownership Order at ¶ 48.

[57] Under the example used, if an entity were to acquire a station in Hagerstown, it would be attributed with 1.97% of the U.S. population in calculating its national audience reach using DMAs, because Hagerstown is in the Washington, DC DMA (1.97% of the U.S. population). However, because Hagerstown is ranked by Arbitron as its own ADI, it accounts for only 0.05% of the U.S. population -- a difference of 1.92%. See Notice at 19962, n. 65.

[58] E.g., BET Comments at 4-5; CBS Comments at 1; NAB Comments at 1-2; Viacom Comments at 3-4.

[59] Paxson Comments at 37.

[60] ABC Comments at 2-3, citing Report and Order and Further Notice of Proposed Rule Making in CS Docket No. 95-178, 11 FCC Rcd 6201, 6220 (1996) (Must-Carry Market Definition R&O), recon. denied, 64 Fed. Reg. 33788 (June 24, 1999).

[61] See Must-Carry Market Definition R&O.

CONCLUSION

35. This Report and Order reforms how we calculate audience reach for purposes of the national television ownership rule in response to changes in the broadcast television marketplace and changes in the underlying rule itself required by the 1996 Act. The changes that we make are relatively minor, and we are retaining those rules that continue to serve the public interest. We also conclude that same-market local marketing agreements (LMAs) shall not be included in the brokering station's national aggregate audience reach calculation. The change we make to the satellite exemption and our decision to use DMAs rather than ADIs will take effect thirty days after publication of this Report and Order in the Federal Register. We see no need to adopt any transition policy to implement these relatively minor changes, which should not result in any existing group television station owner's exceeding the 35% national aggregate audience reach cap set forth in the national television ownership rule.

ADMINISTRATIVE MATTERS

Final Paperwork Reduction Act of 1995 Analysis

36. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1995 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure or record retention requirements. These rules will not increase or decrease burden hours imposed on the public.

Regulatory Flexibility Analysis

37. Pursuant to the Regulatory 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 B.

Ordering Clauses

38. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 303(r), 47 U.S.C. §§ 154(i) and 303(r), Part 73 of the Commission's Rules is amended as set forth in Appendix A, below.

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

40. 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.

41. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

Additional Information

42. For additional information concerning this proceeding, please contact Paul Gordon, Mass Media Bureau, (202) 418-2130.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

RULE CHANGES

Part 73 of Title 47 of the U.S. Code of Federal Regulations is amended to read 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, 336

2. Section 73.3555 is amended by revising paragraph (e)(2) and Note 5 to read as follows:

§ 73.3555 Multiple ownership.

* * * * *

(e) * * *

(2) * * *

(i) *National audience reach* means the total number of television households in the Nielsen Designated Market Area (DMA) markets in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.

(ii) No market shall be counted more than once in making this calculation.

* * * * *

NOTE 5: Paragraphs (a) through (d) of this section will not be applied to cases involving television stations that are "satellite" operations. * * *

* * * * *

APPENDIX B

FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA),[62] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rule Making in this proceeding.[63] The Commission sought written public comment on the proposals in the Notice, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[64]

I. Need For and Objectives of the National TV Ownership R&O:

The Report and Order modifies the method by which the Commission determines a group television station owner's national aggregate audience reach for compliance with the national television ownership rule. The modifications are necessary to reflect changes in the underlying national ownership limit adopted pursuant to the Telecommunications Act of 1996.

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

No comments were received specifically in response to the IRFA contained in the Notice of Proposed Rule Making. However, some comments addressed issues relating to small businesses and businesses controlled by minorities and women, some of which may be small entities. Several commenters made general assertions that broadcast station ownership has consolidated since passage of the 1996 Act, and that the Commission should take businesses controlled by minorities and women into account in all of our pending broadcast ownership proceedings.[65] CBS argued that the ownership rules were not designed to foster minority ownership in the broadcast industry, and that this goal should be pursued by other means.[66]

Turning to the specific rules that are the subject of this rule making proceeding, BET argued that if both a parent and a same-market satellite are allocated a second 6 MHz for DTV purposes, then the satellite station audience should be counted towards the 35% national ownership cap because the licensee of such a station will have increased its broadcasting power at least fourfold. It claims that incumbent broadcasters' market power will increase sufficiently to create insurmountable entry barriers against competing stations.[67]

---

[62] 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).

[63] 11 FCC Rcd 19949, 19963-67.

[64] See 5 U.S.C. § 604.

[65] BET Comments at 1-2; BET Reply Comments at iii-vi; Post-Newsweek Comments at 9; Cook Inlet Region, Inc. Comments at 1-2.

[66] CBS Comments at 9.

[67] BET Comments at 3.

However, the Report and Order concludes that such concerns involve competition and diversity on a local, not a national, scale and are not the focus of the national ownership rule.

BET asserted that retention of the satellite exemption for separate-market satellites would "squeeze out" entrepreneurs and new entrants by enabling large group owners to transfer costs among stations and eliminate competition from small operators.[68] However, the Report and Order adopts a rule whereby such separate-market satellite stations shall be attributed for the purposes of the national ownership rule.

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

The amended rules will affect entities that have attributable interests in numerous full power commercial television stations reaching a substantial portion of the national viewing public. These multiple station owners are not likely to be small businesses.

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), generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA"). According to the SBA's regulations, entities engaged in television broadcasting Standard Industrial Classification ("SIC") Code 4833 -- Television Broadcasting Stations, may have a maximum of $10.5 million in annual receipts in order to qualify as a small business concern.[69] This standard also applies in determining whether an entity is a small business for purposes of the RFA.

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." While we tentatively believe that the foregoing 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, and auxiliary services, we did not propose an alternative definition in the IRFA. Accordingly, for purposes of this *Report and Order,* we utilize the SBA's definition in determining the number of small businesses to which the rules apply, but we reserve the right to adopt a more suitable definition of "small business" as applied to radio and television broadcast stations and to consider further the

---

[68] Id. at 2-3.

[69] This revenue cap appears to apply to noncommercial educational television stations, as well as to commercial television stations. *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.

issue of the number of small entities that are radio and television broadcasters in the future. Further, in this FRFA, we will identify the different classes of small television stations that may be impacted by the rules adopted in this *Report and Order*.

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 television or radio station is dominant in its field of operation. Accordingly, the following estimates of small businesses to which the new rules will apply do not exclude any television or radio 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. We attempted to factor in this element by looking at revenue statistics for owners of television stations. However, 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.

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 radio and television stations were affiliated based on SBA's definitions, we relied on the data bases available to us to provide us with that information.

3. Estimates Based on Census Data

The rules amended by this *Report and Order* will apply to full power commercial broadcast television licensees, permittees, and potential licensees.

There were 1,509 television stations operating in the nation in 1992.[70] That number has remained fairly constant as indicated by the approximately 1,594 operating television broadcasting stations in the nation as of June, 1999.[71] For 1992[72] the number of television stations that produced less than $10.0 million in revenue was 1,155 establishments.[73]

Thus, the rule changes will affect approximately 1,594 television stations, approximately 77% (or 1,227) of which are considered small businesses.[74] 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.

We recognize that the rule changes may also affect minority and women-owned stations, some of which may be small entities. In 1995, minorities owned and controlled 37 (3.0 percent) of 1,221 commercial television stations in the United States.[75] According to the U.S. Bureau of the Census, in 1987 women owned and controlled 27 (1.9 percent) of 1,342 commercial and non-commercial television stations in the United States.[76]

---

[70] FCC News Release No. 31327, Jan. 13, 1993; 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).

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

[72] 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, *supra*, note 31.

[73] 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.

[74] 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 1,594 TV stations to arrive at 1,227 stations categorized as small businesses.

[75] *Minority Commercial Broadcast Ownership in the United States*, U.S. Department of Commerce, National Telecommunications and Information Administration, The Minority Telecommunications Development Program ("MTDP") (April 1996). MTDP considers minority ownership as ownership of more than 50 percent of a broadcast corporation's stock, voting control in a broadcast partnership, or ownership of a broadcasting property as an individual proprietor. *Id*. The minority groups included in this report are Black, Hispanic, Asian, and Native American.

[76] *See* Comments of American Women in Radio and Television, Inc. in MM Docket No 94-149 and MM Docket No. 91-140, at 4, n. 4 (filed May 17, 1995), citing Economic Censuses, *Women-Owned Business*, WB87-1, U.S. Department of Commerce, Bureau of the Census, August 1990 (based on 1987 Census). After the 1987 Census report, the Census Bureau did not provide data by particular communications services (four-digit Standard Industrial Classification (SIC) Code), but rather by the general two-digit SIC Code for communications (#48). Consequently, since 1987, the U.S. Census Bureau has not updated data on ownership of broadcast facilities by women, nor does the FCC collect such data. However, we sought comment on whether the Annual Ownership Report Form 323 should be amended to include information on the gender and race of broadcast license owners. *Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, Notice of Proposed Rulemaking*, 10 FCC Rcd 2788, 2797 (1995).

IV. Projected Compliance Requirements of the Rule:

No new recording, recordkeeping or other compliance requirements are adopted.

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

The modified rules would apply to full power broadcast television licensees, permittees, and potential licensees. No entity that is near the 35% national aggregate audience reach limit can be classified as a "small entity." As a result, the counting methodology adopted in this Report and Order will not have a direct effect on any small entity.

We have decided not to double-count LMAs or commonly owned stations in the same market for the purpose of calculating a licensee's national audience reach. See ¶¶ 10-14, 28, above. We also eliminate the satellite exemption for licensees that operate a satellite station in a separate market from the parent station. See ¶¶ 20-23, above. In addition, we have decided to use A.C. Nielsen's Designated Market Areas (DMAs) rather than Arbitron's Areas of Dominant Influence to calculate national audience reach. A.C. Nielsen, like Arbitron, is another commercial ratings service. They are analytically similar. See ¶ 34, above. In each of these cases, we have determined that to do otherwise would not be consistent with the objective of the national television ownership rule as modified by the 1996 Act: to promote competition and diversity on a national level by limiting an entity's national audience reach. We expect that such additional competition and diversity will benefit commercial television entities, including small entities.

Report to Congress

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

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 ownrship 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 been21too 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 shareholder exemption in situations involving a major program supplier or same-market media entity. These

[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."

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

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.