

**FEDERAL COMMUNICATIONS COMMISSION****47 CFR Part 73**

[MB Docket Nos. 14–50, 09–182, 07–294, and 04–256; FCC 16–107]

**2014 Quadrennial Regulatory Review**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document retains the broadcast ownership rules with minor modifications in compliance with section 202(h) of the Telecommunications Act of 1996 which requires the Commission to review its broadcast ownership rules quadrennially to review these rules to determine whether they are necessary in the public interest as a result of competition. In addition, this document adopts an eligible entity definition pursuant to the remand of the Commission's 2008 *Diversity Order* by the U.S. Court of Appeals for the Third Circuit. This document also readopts the Television Joint Sales Agreement (JSA) Attribution Rule, which was vacated on procedural grounds by the Third Circuit. Lastly, this document adopts a definition of Shared Service Agreements (SSAs) and requires commercial television stations to disclose those SSAs by placing the agreements in each station's online public inspection file.

**DATES:** Effective December 1, 2016, except for the amendment to § 73.3526, which contains information collection requirements that are not effective until approved by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of these changes. A separate notice will be published in the **Federal Register** soliciting public and agency comments on the information collections and establishing a deadline for accepting such comments.

**FOR FURTHER INFORMATION CONTACT:** Benjamin Arden, Industry Analysis Division, Media Bureau, FCC, (202) 418–2605. For additional information concerning the PRA information collection requirements contained in the *Second Report and Order*, contact Cathy Williams at (202) 418–2918, or via the Internet at [PRA@fcc.gov](mailto:PRA@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This *Second Report and Order*, in MB Docket Nos. 14–50, 09–182, 07–294, and 04–256; FCC 16–107, was adopted on August 10, 2016, and released on August 25, 2016. The complete text of

this document is available electronically via the search function on the FCC's Electronic Document Management System (EDOCS) Web page at [https://apps.fcc.gov/edocs\\_public/](https://apps.fcc.gov/edocs_public/). The complete document is available for inspection and copying during normal business hours in the FCC Reference Information Center, 445 12th Street SW., Room CY–A257, Washington, DC 20554. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

**Synopsis****I. Introduction**

1. The Commission brings to a close the 2010 and 2014 Quadrennial Review proceedings with this *Second Report and Order (Order)*. In this *Order*, the Commission maintains strong media ownership rules and adopts rules that will help to promote diversity and transparency in local television markets. The *Order* readopts the Television JSA Attribution Rule, which was vacated on procedural grounds by the Third Circuit. Also, pursuant to the Third Circuit's remand in *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) (*Prometheus II*), of certain aspects of the Commission's 2008 *Diversity Order* (73 FR 28361, May 16, 2008, FCC 07–217, rel. March 5, 2008), the *Order* also reinstates the revenue-based eligible entity standard, as well as the associated measures to promote the Commission's goal of encouraging small business participation in the broadcast industry, which will cultivate innovation and enhance viewpoint diversity. Finally, the *Order* adopts a definition of SSAs and requires commercial television stations to disclose those SSAs by placing the agreements in each station's online public inspection file.

**II. Background**

2. The media ownership rules subject to this quadrennial review are the local television ownership rule, the local radio ownership rule, the newspaper/broadcast cross-ownership rule, the radio/television cross-ownership rule, and the dual network rule. Congress requires the Commission to review these rules every four years to determine whether they are necessary in the public interest as the result of competition and to repeal or modify any regulation the Commission determines to be no longer in the public interest. The Third Circuit

has instructed in *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (*Prometheus I*) that necessary in the public interest is a plain public interest standard under which necessary means convenient, useful, or helpful, not essential or indispensable. The court also concluded that the Commission is required to take a fresh look at its regulations periodically to ensure that they remain 'necessary in the public interest. No presumption in favor of repealing or modifying the ownership rules exists. Rather, the Commission has the discretion to make the rule more or less stringent. This 2014 Quadrennial Review will focus on identifying a reasoned basis for retaining, repealing, or modifying each rule consistent with the public interest.

3. *Policy Goals.* The Commission continues to find that the longstanding policy goals of competition, localism, and diversity represent the appropriate framework within which to evaluate the Commission's media ownership rules. Accordingly, the Commission rejects suggestions in the record that the Commission should adopt any additional or different policy goals. While those proposals generally represent worthwhile pursuits, the Commission does not believe that they can be meaningfully promoted through the structural ownership rules and/or are outside the Commission's statutory authority.

**III. Media Ownership Rules****A. Local Television Ownership Rule****1. Introduction**

4. The current Local Television Ownership Rule allows an entity to own two television stations in the same Nielsen Designated Market Area (DMA) only if no Grade B contour overlap between the commonly owned stations exists, or at least one of the commonly owned stations is not ranked among the top-four stations in the market (top-four prohibition) and at least eight independently owned television stations remain in the DMA after ownership of the two stations is combined (eight-voices test). Based on the record that was compiled for the 2010 and 2014 Quadrennial Review proceedings, the Commission finds that the current Local Television Ownership Rule, with a limited contour modification, remains necessary in the public interest.

5. Under the revised Local Television Ownership Rule, an entity may own up to two television stations in the same DMA if: (1) The digital NLSCs of the stations (as determined by § 73.622(e) of the Commission's rules) do not overlap;

or (2) at least one of the stations is not ranked among the top-four stations in the market and at least eight independently owned television stations would remain in the DMA following the combination. In calculating the number of stations that would remain post-transaction, only those stations whose digital NLSCs overlap with the digital NLSC of at least one of the stations in the proposed combination will be considered.

## 2. Discussion

6. *Market.* The Commission finds that the record supports its conclusion from the *FNPRM* (79 FR 29010, May 20, 2014, FCC 14–28, rel. Apr. 14, 2014) that non-broadcast video offerings still do not serve as meaningful substitutes for local broadcast television. Accordingly, the Commission's analysis regarding the Local Television Ownership Rule must continue to focus on promoting competition among broadcast television stations in local television viewing markets. Competition within a local market motivates a broadcast television station to invest in better programming and to provide programming tailored to the needs and interests of the local community to gain market share. Community-tailored programming, which includes local news and public interest programming, is largely limited to broadcast television as online video and cable network programming is largely national in scope. By thus strengthening its position in the local market, a television broadcaster also strengthens its ability to compete for advertising revenue and retransmission consent fees, an increasingly important source of revenue for many stations. As a result, viewers in the local market benefit from such competition among numerous strong rivals in the form of higher quality programming.

7. While the Commission recognizes the popularity of video programming delivered via MVPDs, the Internet, and mobile devices, it finds that competition from such video programming providers remains of limited relevance for the purposes of analysis. Video programming delivered by MVPDs such as cable and DBS is generally uniform across all markets, as is online video programming content. Unlike local broadcast stations, such programming providers are not likely to make programming decisions based on conditions or preferences in local markets. No commenter in this proceeding offered evidence of non-broadcast video programmers modifying their programming decisions based on the competitive conditions in a particular local market. This strengthens

the Commission's determination that, while non-broadcast video programming may offer consumers additional programming options in general, they do not serve as a meaningful substitute in local markets due to their national focus. Unlike broadcast television stations, national programmers are not responsive to the specific needs and interests of local markets, and as the Commission has previously stated, competition among local rivals most benefits consumers and serves the public interest.

8. In addition, the Commission finds that broadcast television's strong position in the local advertising market supports the Commission's view that non-broadcast video programming distributors are not meaningful substitutes in local television markets. The current data do not support the claim that advertisers no longer distinguish local broadcast television from non-broadcast sources of video programming when choosing how to allocate spending for local advertising, as advertising revenues for broadcast television stations remain strong and are projected to grow through 2019. While advertising revenues on cable, satellite, and digital platforms have risen, those gains do not appear to be at the expense of broadcast television stations. The Commission finds that broadcast television continues to play a significant role in the local advertising market, particularly when it comes to political advertising. Broadcast stations receive considerable revenue from political advertising every other year, which further highlights broadcast television's unparalleled value to advertisers for reaching local markets.

9. With regard to an economic study submitted by the National Association of Broadcasters, the Commission does not find the study relevant or informative in this proceeding for multiple reasons. First, the Commission finds significant issues with the statistical methods employed within the study and with the interpretation of those results. In addition, the study critiques the local broadcast television market relied on by the Department of Justice (DOJ) in its merger reviews pursuant to Section 7 of the Clayton Act—which focuses solely on the impact of the transaction in the local advertising market—and not the market definition relied on by the Commission for analyzing its Local Television Ownership Rule pursuant to Section 202(h), as discussed herein. While the Commission's market definition for purposes of the Local Television Ownership Rule is similar to the market definition used by DOJ when evaluating

broadcast television mergers, in that the scope of the Commission's rule is limited to broadcasters, DOJ focuses on competition for advertising, whereas the Commission's rule is premised on multiple factors, including audience share. Therefore, the Commission finds that the study does not inform the current proceeding.

10. The Commission concludes that broadcast television stations continue to play a unique and vital role in local communities that is not meaningfully duplicated by non-broadcast sources of video programming. In addition to providing viewers with the majority of the most popular programming on television, broadcast television stations remain the primary source of local news and public interest programming. Accordingly, the Commission concludes that, for purposes of determining whether the Local Television Rule remains necessary in the public interest, the relevant product market is the delivery of local broadcast television service.

11. *Contour Overlap/Grandfathering Existing Ownership Combinations.* Consistent with the tentative conclusions in the *FNPRM*, the Commission declines to adopt the DMA-only approach. Instead, the Commission will retain the existing DMA and contour overlap approach but replace the analog Grade B contour with the digital NLSC, which the Commission has treated as the functional equivalent of the Grade B contour in previous proceedings. By contrast, there is no digital counterpart to a station's analog city grade contour, which is an aspect of the Commission's satellite station inquiry. Accordingly, consistent with case law developed after the digital transition, the Commission continues to evaluate all future requests for new or continued satellite status on an ad hoc basis. The Commission finds that this modified approach accurately reflects current digital service areas while minimizing any potential disruptive impact. In addition, consistent with previous Commission decisions, the Commission finds that retaining the DMA and contour overlap approach serves the public interest by promoting local television service in rural areas. That is, such an approach continues to allow station owners in rural areas to build or purchase an additional station in remote portions of the DMA, so long as no digital NLSC overlap exists.

12. The Commission confirms that the digital NLSC is an accurate measure of a station's current service area and thus is an appropriate standard. The Local Television Ownership Rule must take into account the current digital service

area of a station. Thus, the Commission continues to define the geographic dimensions of the local television market by referring to DMAs under the adopted modified rule but replaces the analog Grade B contour with the digital NLSC, with the effect that within a DMA an entity may own or operate two stations in a market if the digital NLSCs of those stations do not overlap. The Commission previously determined that the DMA is the most appropriate definition of the geographic dimensions of the local television market, and it does not disturb that finding. The approach adopted in this *Order* is consistent with the approach under the prior Local Television Ownership Rule. Where digital NLSC overlap exists, the combination will be permitted only if it satisfies the top-four prohibition and the eight-voices test.

13. The Commission also adopts the proposal to grandfather existing ownership combinations that would exceed the numerical limits by virtue of the revised contour approach instead of requiring divestiture. Under these circumstances, the Commission does not believe that compulsory divestiture is appropriate. In the Local Radio Ownership Rule section, the Commission confirms the disruptive impact of compulsory divestitures but determine that divestitures would be appropriate if it tightened the local radio ownership limits. In adopting the digital NLSC standard, the Commission is not reducing the number of stations that can be commonly owned by all licensees; rather, it is adopting a technical change that may result in a small number of station combinations no longer complying with the criteria necessary to permit such common ownership. Accordingly, compulsory divestiture is not appropriate in these circumstances. The Commission continues to believe that the disruption to the marketplace and hardship for individual owners resulting from forced divestiture of stations would outweigh any benefits of forced divestiture to its policy goals, including promoting ownership diversity. Furthermore, the Commission notes that the replacing the Grade B contour with the digital NLSC—given the similarity in the contours—effectively maintains the status quo for most, if not all, owners of duopolies formed as a result of the previous Grade B contour overlap provision.

14. However, the Commission concludes that where grandfathered combinations are sold, the ownership rule governing television stations in effect at the time of the sale must be complied with. If the digital NLSC of

two stations in the same DMA overlap, then the stations serve the same area, even if there was no Grade B contour overlap before the digital transition. Accordingly, requiring that a grandfathered combination be brought into compliance with the new standard at the time of sale is consistent with the Commission's rationale for adopting the digital NLSC-based standard and does not cause hardship by requiring premature divestiture. Consistent with Commission precedent, the Commission finds that the public interest would not be served by allowing grandfathered combinations to be freely transferable in perpetuity where a combination does not comply with the ownership rules at the time of transfer or assignment. Under the adopted approach, the Commission continues to allow grandfathered combinations to survive *pro forma* changes in ownership and involuntary changes of ownership due to death or legal disability of the licensee.

15. *Numerical Limits.* The Commission concludes that the local television marketplace has not changed sufficiently to justify tightening the current numerical limits of the rule and returning to a single-license television rule. The record data demonstrate that the duopolies permitted subject to the restrictions of the current rule have created tangible public interest benefits for viewers in local television markets that offset any potential harms that are associated with common ownership. Such benefits include substantial operating efficiencies, which potentially allow a local broadcast station to invest more resources in news or other public interest programming that meets the needs of its local community.

16. Likewise, the Commission does not find that there have been sufficient changes in the local television marketplace to justify ownership of a third in-market station. Growing competition from non-broadcast alternatives and the economic efficiencies of owning multiple stations are cited generally as the reasons why the Commission should permit ownership of more than two stations. As with the decision to define the relevant product market as broadcast television, the Commission concludes that it is not appropriate to consider competition from non-broadcast sources in evaluating whether the rule remains necessary. Despite the aforementioned benefits that duopolies can create, excessive consolidation remains likely to threaten the Commission's competition and diversity goals by jeopardizing small and mid-sized broadcasters. Without significant

evidence of the public interest benefits that could result from the ownership of three stations in a local market that are not already available from the ownership of two stations, the Commission does not believe that adequate justification exists at this time for increasing the numerical limits.

17. *Top-Four Prohibition.* The Commission concludes that the top-four prohibition remains necessary to promote competition in the local television marketplace; accordingly, it retains the top-four prohibition in the Local Television Ownership Rule. First, the Commission continues to find that audience share is the appropriate metric for purposes of the top-four prohibition, and the record does not offer persuasive reason to depart from this determination. Second, the Commission finds that there typically remains a significant cushion of audience share points that separates the top-four stations in a market from the fifth-ranked station. Further, the court has twice upheld the Commission's rationale for retaining the top-four prohibition. The Commission notably has never based the top-four prohibition solely on the existence of the ratings cushion in every market. The Commission previously determined that the cushion existed in two-thirds of the markets with five or more full-power commercial television stations and the court in *Prometheus I*, cited specifically to this finding as evidence to support the Commission's line-drawing decision. Therefore, the Commission finds unconvincing any claim that the top-four prohibition cannot be supported because the ratings cushion is not present in every market. The cushion continues to exist in most markets and, as such, it continues to support the Commission's decision to retain the top-four prohibition. The Commission is not persuaded by NAB's assertions regarding the revenue of fourth- and fifth-ranked stations in a market. As noted in the *FNPRM*, NAB's analysis evaluates revenue share and does not sufficiently examine audience share, which the Commission has utilized when evaluating the need for the top-four prohibition. The Commission continues to find that the ability to attract mass audiences distinguishes the top ranked stations in local television markets, which is why ratings appropriately serve as the basis for the top-four prohibition. The only data NAB offers regarding audience share relate to the shares of the third and fourth ranked stations in comparison to the top ranked station in Nielsen markets, but do not compare

them to the fifth ranked station in the market. The court in *Prometheus I* rejected a similar argument when upholding the Commission's decision to retain the top-four prohibition. Therefore, NAB's evidence does not disturb the Commission's previous determinations that the relevant metric for purposes of the top-four prohibition is audience share and does not rebut the evidence in this proceeding that a cushion still exists between the fourth- and fifth-ranked stations in most markets.

18. The Commission reaffirms its belief that top-four combinations would generally result in a single firm obtaining a significantly larger market share than other firms in the market and that such combinations would create welfare harms. Top-four combinations reduce incentives for local stations to improve their programming by giving once strong rivals incentives to coordinate their programming to minimize competition between the commonly owned stations. The Commission is not persuaded by assertions that commonly owned stations have no incentive to coordinate their programming based solely on anecdotal showings from Nexstar-owned stations in two DMAs. While the Commission recognizes that duopolies permitted subject to the restrictions of the current rule can create operating efficiencies, which allow the commonly owned stations to invest in news and other local programming, the Commission finds that this potential benefit is outweighed by the harm to competition where a single firm obtains a significantly larger market share through a combination of two top-four stations. Accordingly, the Commission finds that the public interest is best served by retaining the top-four prohibition.

19. *Affiliation Swaps.* The Commission finds that application of the top-four prohibition to affiliation swaps is consistent with previous Commission action and policy; the Commission is merely closing a potential loophole and preventing circumvention of its rules. Parties can achieve through an affiliation swap the same result as a transfer of control or assignment of license, which would be subject to Commission review and be required to comply with the Local Television Ownership Rule. Absent Commission action, parties could utilize affiliation swaps to achieve a result otherwise prohibited by the Local Television Ownership Rule. Therefore, the Commission finds that its statutory authority to extend the Local Television Ownership Rule to include affiliation

swaps derives from the same general rulemaking authority that supports all of the Commission's broadcast ownership rules, as the Supreme Court has repeatedly held. In the *1999 Ownership Order* (64 FR 50651, Sept. 17, 1999, FCC 99-209, rel. Aug. 6, 1999) that adopted the top-four prohibition, the Commission did not make a statement regarding its authority to require divestiture if two merged stations both became ranked among the top-four rated stations in the market; it stated only that it would refrain from doing so to further certain, specific public interest benefits. By allowing combinations between a large station and a small station, the Commission sought to enable the smaller station to improve its operations and local program offerings. The Commission wanted to avoid penalizing a station whose operations improved to the point that it became a top-four station. By contrast, the Commission was concerned that mergers involving top-four stations would harm competition and viewpoint diversity. Affiliation swaps, by their design, implicate the specific harms to public interest that led the Commission to adopt the top-four prohibition. Aside from the assignment/transfer of a station license, an affiliation swap is essentially indistinguishable in its effect on the policy underlying the Commission's duopoly rule from a top-four merger described by the Commission in the *1999 Ownership Order*. If compelling evidence exists that an affiliation swap involving a top-four station and a non-top-four station would not result in the non-top-four station becoming a top-four station after the swap (e.g., a station's top-four ratings are driven by non-network programming that is unaffected by the affiliation swap), the parties are free to seek a waiver of this prohibition under Section 1.3 of the Commission's rules.

20. Moreover, the Commission cautioned in 1999 that future transactions, such as license transfers, that do not satisfy the top-four prohibition may not be granted. This demonstrates that the Commission sought to distinguish instances where a station organically becomes a top-four station through station improvement from situations where a station actively transacts to become a top-four station via an ownership transfer or assignment. As the Commission said in the *FNPRM*, acquiring control over a second in-market top-four station through affiliation swap transactions can be distinguished easily from other, legitimate actions a station may undertake to increase ratings at the

expense of a competitor, such as producing higher quality or more extensive local programming or acquiring higher quality syndicated programming. Moreover, the adopted extension of the top-four prohibition would not apply in situations where a network offers an existing duopoly owner (one top-four station and one station ranked outside the top four) a top-four-rated affiliation for the lower-rated station, perhaps because the network is no longer satisfied with the existing affiliate station and the duopoly owner has demonstrated superior station operation (i.e., earned the affiliation on merit). Such a circumstance represents organic growth of the station and not a transaction that is the functional equivalent of an assignment or transfer of control.

21. While the Commission said in the *1999 Ownership Order* that the top-four determination would be made at the time of the initial transaction, the Commission signaled its intent to review future transactions involving assignments or transfers of ownership resulting in a single entity owning two top-four stations in the same market. A contrary conclusion would greatly diminish the effectiveness of the top-four prohibition, as an entity could essentially transact to acquire a top-four station through an affiliation swap as soon as the Commission approved the initial duopoly. Although the Commission decided in 1999 not to prohibit licensees from owning two top-four stations when a station's top-four status resulted from organic growth, transactions involving the sale or swap of network affiliations between in-market stations that result in an entity holding an attributable interest in two top-four stations serve as the functional equivalent of a transfer of control or assignment of license. Therefore, affiliation swaps undermine the purpose of the top-four prohibition and the Local Television Ownership Rule as a whole. Application of the top-four prohibition to affiliation swaps is necessary to prevent circumvention of the Local Television Ownership Rule.

22. The Commission rejects any assertion that extending the top-four prohibition to affiliation swaps amounts to impermissible content regulation and is subject to strict scrutiny. The adopted clarifying amendment does not regulate content any more than the top-four prohibition and the media ownership rules that consistently have been upheld by the courts, and it is therefore subject to rational basis review. The decision to prohibit affiliation swaps involving two top-four stations, as described herein, does not consider content but rather the

content's ratings only. In that regard, the extension of the top-four prohibition to affiliation swaps operates exactly as the existing top-four prohibition does. The rule is predicated entirely on content-neutral objectives, primarily the public interest goal of promoting competition in local markets. The rule does not limit a licensee's discretion to air the content of its choice but rather limits the number of stations in a single market that a licensee may own if common ownership would result in significantly reduced competition.

23. The *Prometheus II* court found under the rational basis standard of review that the media ownership rules do not violate the First Amendment because they are rationally related to substantial government interests in promoting competition and protecting viewpoint diversity. The court rejected broadcasters' claims that the rules are impermissible attempts by the FCC to manipulate content and rejected Sinclair's argument that the Local Television Ownership Rule violates the First Amendment because it 'singles out television stations. Instead, the court recognized that these rules apply regardless of the content of the programming. The adopted extension of the top-four prohibition merely clarifies that the top-four prohibition applies to agreements that are the functional equivalent of a transfer of control or assignment of license from the standpoint of the Commission's Local Television Ownership Rule. The Commission noted in the 1999 *Ownership Order* that a duopoly may not automatically be transferred to a new owner if the market does not satisfy the eight voice/top four-ranked standard. Accordingly, this application of the top-four prohibition remains subject to the same constitutional analysis, and the amended rule is rationally related to the substantial government interests in promoting competition and diversity. Pursuant to that constitutional analysis, courts repeatedly have found that the Local Television Ownership Rule, which includes the top-four prohibition, does not violate the First Amendment.

24. The Commission also rejects the assertion that extension of the top-four prohibition constitutes unlawful interference in the network affiliation marketplace. The Commission does not believe that its action is likely to have a significant impact on the marketplace, as affiliation swaps are, at this point, rare. Indeed, the record demonstrates only a single instance of an affiliation swap that would be subject to the rule adopted herein. Evidence in the record demonstrates that the negotiation of

affiliation agreements typically does not involve affiliation swaps; therefore, most negotiations will be unaffected by the amendment clarifying the top-four prohibition. The Commission confirms that extension of the top-four prohibition to affiliation swaps would not prevent a station from obtaining an affiliation through negotiating with a national network outside the context of an affiliation swap. While affiliation swaps have not occurred often to date, given the potential of such transactions to undermine the Local Television Ownership Rule, the Commission finds that the application of the top-four prohibition to such transactions is necessary to ensure the continued effectiveness of that rule. Such action is necessary because the Commission does not believe a reliable marketplace solution exists that would restrain the future use of affiliation swaps to evade the top-four prohibition should it decline to extend the top-four prohibition to affiliation swaps, nor is there a less restrictive means to accomplish the goal.

25. Accordingly, to close this loophole, the Commission finds that affiliation swaps must comply with the top-four prohibition at the time the agreement is executed. Specifically, an entity will not be permitted to directly or indirectly own, operate, or control two television stations in the same DMA through the execution of any agreement (or series of agreements) involving stations in the same DMA, or any individual or entity with a cognizable interest in such stations, in which a station (the new affiliate) acquires the network affiliation of another station (the previous affiliate), if the change in network affiliations would result in the licensee of the new affiliate, or any individual or entity with a cognizable interest in the new affiliate, directly or indirectly owning, operating, or controlling two of the top-four rated television stations in the DMA at the time of the agreement. In addition, for purposes of making this determination, the new affiliate's post-consummation ranking will be the ranking of the previous affiliate at the time the agreement is executed, determined in accordance with § 73.3555(b)(1)(i) of the Commission's rules. The Commission will find any party that directly or indirectly owns, operates, or controls two top-four stations in the same DMA as a result of such transactions to be in violation of the top-four prohibition and subject to enforcement action. Application of this rule to affiliation swaps is prospective; therefore, all future transactions will be required to

comply with the Commission's rules then in effect. Parties that acquired control over a second in-market top-four station by engaging in affiliation swaps before the release date of this *Order* will not be subject to divestiture or enforcement action.

26. *Eight-Voices Test.* The Commission does not find that there have been any changes in the local television marketplace that would warrant modification of the eight-voices test at this time. Nearly every market with eight or more full-power television stations—absent a waiver of the Local Television Ownership Rule or unique circumstances—continues to be served by each of the Big Four networks and at least four independent competitors unaffiliated with a Big Four network. Competition among these independently owned stations serves an important function by motivating both the major network stations and the independent stations to improve their programming, including increased local news and public interest programming. This competition is especially valuable during the parts of the day in which local broadcast stations do not transmit the programming of affiliated broadcast networks and rely on local content uniquely relevant to the stations' communities.

27. The Commission continues to believe the minimum threshold maintained by the eight-voices test helps to ensure robust competition among local television stations in the markets where common ownership is permitted under the rule. The eight-voices test increases the likelihood that markets with common ownership will continue to be served by stations affiliated with each of the Big Four networks as well as at least four independently owned and operated stations unaffiliated with these major networks. In addition, the Commission disagrees with the interpretation that the eight-voices test implies that at least eight competing over-the-air TV stations are the minimum necessary to ensure competition and so each market must have at least eight independent stations. The eight-voices test only establishes the minimum level necessary to permit common ownership of stations in a market, subject to the other requirements in the rule. Therefore, markets with fewer than eight independent stations can still maintain a significant level of competition given the absence of duopolies in these markets. Also, because a significant gap in audience share persists between the top-four stations in a market and the remaining stations in most markets—demonstrating the dominant position of

the top-four-rated stations in the market—the Commission continues to believe that it is appropriate to retain the eight-voices test, which helps to promote at least four independent competitors for the top-four stations before common ownership is allowed. Accordingly, the Commission retains the eight-voices test.

28. The Commission also sought comment on whether the *Sinclair Broadcasting Group v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) (*Sinclair*), opinion compels the Commission to include other voices in addition to full-power television stations in the eight-voices test. The Commission finds that it does not. In *Sinclair*, the court rejected the eight-voices test, finding that the Commission had failed to justify its decision to define voices differently in the radio-television cross-ownership rule and the Local Television Ownership Rule. The primary purpose of the Local Television Ownership Rule and the eight-voices test is to promote competition among broadcast television stations in local television viewing markets. By contrast, the primary purpose of the radio-television cross-ownership rule is to promote viewpoint diversity; therefore, it is appropriate to consider a broader range of voices there than in the context of the Local Television Ownership Rule.

Accordingly, the Commission continues to include only full-power television stations in the voice count for purposes of the Local Television Ownership Rule.

29. The Commission's conclusion adheres to *Prometheus II*, where the court upheld the Commission's rationale in the *2006 Quadrennial Review* (73 FR 9481, Feb. 21, 2008, FCC 07–216, rel. Feb. 2008) proceeding for limiting voices in the Local Television Ownership Rule to full-power television stations. The Commission had determined in that proceeding that the primary goal of the Local Television Ownership Rule was to promote competition among local television stations, and not to foster viewpoint diversity because there were other outlets for diversity of viewpoint in local markets. Therefore, although other types of media contribute to viewpoint diversity, the Commission determined that they should not be counted as voices under the Local Television Ownership Rule. The court agreed and upheld the Commission's decision.

30. *Attribution of Television JSAs*. In the *JSA Order* (79 FR 28996, May 20, 2014, FCC 14–28, rel. Apr. 14, 2014), the Commission adopted a rule that attributed television JSAs under which a television station (the broker) sold more than 15 percent of the weekly

advertising time for another same-market television station (the brokered station). Pursuant to the new rule, in such circumstances, the brokering station was deemed to hold an attributable interest in the brokered station. Among other implications associated with attribution, this resulted in counting the brokered station toward the brokering station's permissible ownership totals. While one purpose of the attribution rules is to determine compliance with the Commission's various broadcast ownership rules, including the Local Television Ownership Rule, the Commission's attribution rules are relevant in many other contexts, as well (e.g., Form 323 ownership reporting, auctions, retransmission consent negotiations, and foreign ownership). Accordingly, even if the Commission were to eliminate all its ownership caps, the attribution rules would remain relevant in connection with a large number of other rules. As such, the Commission must retain the ability to update its attribution rules, as appropriate. In addition, the Commission provided a two-year period from the effective date of the *JSA Order* (March 31, 2014) for parties to existing, same-market television JSAs whose attribution resulted in a violation of the ownership limits to terminate or amend those JSAs or otherwise come into compliance with the ownership rules. Following the adoption of the *JSA Order*, Congress twice extended this compliance period, ultimately extending the relief through September 30, 2025.

31. The Third Circuit vacated the Television JSA Attribution Rule in *Prometheus v. FCC*, 824 F.3d 33 (3d Cir. 2016) (*Prometheus III*), finding that the adoption of the rule was procedurally invalid as a result of the Commission's failure to also determine that the Local Television Ownership Rule served the public interest. The court stated that the Commission could readopt the rule if it was able to justify readopting the ownership rules to which television JSA attribution applies or to adopt new ownership rules. The court specifically noted that it offered no opinion on substantive challenges to the Television JSA Attribution Rule.

32. Consistent with *Prometheus III*, having concluded that the Local Television Ownership Rule (with minor modifications) continues to serve the public interest, the Commission now readopt the Television JSA Attribution Rule first adopted in the *JSA Order*. In so doing, the Commission incorporates by reference the rationale articulated in the *JSA Order* for the adoption and application of the rule. The Commission

notes that television JSA attribution is also relevant in the other adopted broadcast ownership rules that involve ownership of a broadcast television station. The Commission continues to find attributing certain television JSAs under the Commission's attribution standards appropriate. Upon the effective date of this *Order*, the following rules, which were not modified or removed from the CFR, shall again be effective as they relate to television JSAs: 47 CFR 73.3555, Note 2(k)(2)–(3) and 47 CFR 73.3613(d)(2). The Commission finds that readopting the rule serves the public interest by ensuring compliance with its broadcast ownership rules, and anecdotal evidence exists that suggests the attribution of television JSAs has helped promote minority and female ownership opportunities.

33. In addition, the Commission adopts different transition procedures than those adopted in the *JSA Order*. Specifically, the Commission retains the previous effective date for application of the grandfathering relief—March 31, 2014—and will extend the compliance period through September 30, 2025. Until that time, such grandfathered agreements will not be counted as attributable, and parties will be permitted to transfer or assign these agreements to other parties without terminating the grandfathering relief. Any television JSAs adopted or revised following the Third Circuit's decision to vacate the Television JSA Attribution Rule are not provided any transition relief and must immediately be brought into compliance with the Commission's rules. This is consistent with the treatment of television JSAs executed after the release of the *JSA Order*, which were not provided any transition period. The Commission believes that it is reasonable to adopt a similar measure here given that parties were on notice following *Prometheus III* that the Commission could readopt the Television JSA Attribution Rule if the Commission were to conclude, following completion of its Section 202(h) review, that the existing Local Television Ownership Rule should be retained or replaced with a new rule—which has been done herein. In addition, any television JSA that previously lost grandfathering relief as a result of a condition imposed by the Commission in the approval of a transaction may seek to have the condition rescinded. Upon request of the transferee or assignee of the station license, the Commission will rescind the condition and permit the licensees of the stations whose advertising was

jointly sold pursuant to such agreement to enter into a new JSA—to the extent that both parties wish to enter into the agreement—on substantially similar terms and conditions as the prior agreement. The Commission delegates authority to the Media Bureau to review these requests and grant relief, as appropriate. While the Commission notes that this grandfathering relief is not typical of the relief normally provided by the Commission—generally grandfathered combinations cannot be assigned or transferred unless they comply with the ownership rules in effect at the time—it believes that the relief is warranted given the various expressions of Congressional will in this regard.

34. In addition to readopting the Television JSA Attribution Rule, the Commission finds that such attribution does not change its determination here that the existing Local Television Ownership Rule should be retained, with a minor contour modification. The analysis underlying the various components of the Local Television Ownership Rule (e.g., the numerical limits, the top-four prohibition, and the eight-voices test) assumes that independently owned and operating stations are just that—independent. The Commission's attribution rules are designed to help to ensure that independence, or, stated differently, to reflect a determination of when stations are *not* truly independent, because of common ownership or other relationships that provide the ability to exercise influence or control over another station's core operating functions. The Local Television Ownership Rule is a bright-line rule designed to promote competition. Accordingly, Commission analysis focuses on concepts that are generally applicable across all markets and this approach is favored by broadcasters. The bright-line approach, however, precludes full consideration of changing economic conditions within a particular local market or all of the variations that may exist across markets. To take account of such considerations, the Commission would need to adopt a case-by-case approach. However, such an approach provides less certainty to the market, imposes higher administrative burdens on the Commission than the bright-line approach, and may delay Commission decision-making, which could ultimately chill marketplace activity. The Commission does not find any support in the record for such an approach. Accordingly, arguments that the Commission's analysis regarding the

Local Television Ownership Rule and/or television JSAs fails to account for market-by-market differences are unavailing, as an approach that takes those differences into account would be inconsistent with the bright-line rule favored by broadcasters.

35. The attribution of certain television JSAs, which prevents those agreements from being used to circumvent the ownership limits by compromising the independence of a same-market station, helps to ensure that the goals of the Local Television Ownership Rule are realized. This mechanism applies to any circumstances in which an individual or entity has an attributable interest in more than one station in a market. The arguments that television JSAs should not be attributed because they produce public interest benefits are essentially indistinguishable from arguments that the ownership limits should be relaxed because common ownership produces public interest benefits. The Commission acknowledges and addresses these arguments throughout; however, it has ultimately determined that the Local Television Ownership Rule should be retained, with a minor modification to the contour standard. The Commission's responsibility under section 202(h) is to ensure that the Local Television Ownership Rule continues to serve the public interest, not to manipulate the rule to counterbalance the attribution of television JSAs. As discussed in this section, the Commission finds that the adopted rule serves the public interest.

36. *Waiver Policy.* Under the existing failed/failing station waiver policy, to obtain a waiver of the local television rule, an applicant must demonstrate that one of the broadcast television stations involved in the proposed transaction is either failed or failing and that the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station; and selling the station to an out-of-market buyer would result in an artificially depressed price. A station is considered to be failed if it has not been in operation due to financial distress for at least four consecutive months immediately before the application, or is a debtor in an involuntary bankruptcy or insolvency proceeding at the time of the application; a television station is considered to be failing if it has an all-day audience share of no more than four percent and it has had negative cash flow for three consecutive years immediately before the application. Under the failing station standard, the applicants must also demonstrate that consolidation of the two stations would

result in tangible and verifiable public interest benefits that outweigh any harm to competition and diversity.

37. Waiver of the Commission's rules is meant to be exceptional relief, and the Commission finds that the existing waiver criteria effectively establish when relief from the rule is appropriate. The Commission remains concerned that loosening the existing failed/failing station waiver criteria—such as by eliminating the four percent audience share requirement or by reducing the negative cash flow period from three years to one—would result in a waiver standard that is more vulnerable to manipulation by parties seeking to obtain a waiver. Also, such changes may not be rationally related to improving the Commission's ability to evaluate the viability of a station subject to the waiver request. The Commission declines to adopt any industry-proposed waiver standard that would significantly expand the circumstances in which a waiver of the Local Television Ownership Rule would be granted, absent sufficient demonstration that the stations could not effectively compete in the market. Such relaxation of the waiver standard would be inconsistent with the Commission's determination that the public interest is best served by retaining the existing television ownership limits to promote competition. Therefore, the Commission concludes that the existing waiver standard is not unduly restrictive and that it provides appropriate relief in all television markets. The Commission also declines to adopt a 180-day shot clock for waiver request reviews. No record evidence indicates that waiver requests are subject to undue delay; on the contrary, the Commission believes that the current process works effectively and that applications are processed in a timely and efficient manner. In addition, the Commission currently endeavors to complete action on assignment and transfer of control applications (including those requesting a failed/failing station waiver) within 180 days of the public notice accepting the applications. Routine applications are typically decided within the 180-day mark, and all applications are processed expeditiously as possible consistent with the Commission's regulatory responsibilities. However, several factors could cause the Commission's review of a particular application to exceed 180 days. Certain cases will present difficult issues that require additional consideration, and the Commission does not believe that artificially constraining its review is appropriate.

38. *Multicasting.* The Commission finds that the ability to multicast does not justify tightening the current numerical limits. Based on evidence in the record, broadcasting on a multicast stream does not typically produce the cost savings and additional revenue streams that can be achieved by owning a second in-market station. Therefore, tightening the numerical limits might prevent those broadcasters in markets where common ownership is permitted under the existing rule from achieving the efficiencies and related public interest benefits associated with common ownership. Accordingly, the Commission's view, based on the most recent record, is that adjusting the numerical limits as a result of stations' multicasting capability is not appropriate.

39. As proposed in the *FNPRM*, the Commission declines to regulate dual affiliations via multicast, including dual affiliation with more than one Big Four network, at this time. A significant benefit of the multicast capability is the ability to bring more local network affiliates to smaller markets, thereby increasing access to popular network programming and local news and public interest programming tailored to the specific needs and interests of the local community. The Commission finds that the strongest public interest concerns posed by dual affiliations via multicasting involve affiliations between two Big Four networks. However, based on the record, dual affiliations involving two Big Four networks via multicasting are generally limited to smaller markets where there are not enough full-power commercial television stations to accommodate each Big Four network or where other unique marketplace factors responsible for creating the dual affiliation exist. Marketplace incentives, at present, appear to limit the occurrence of dual affiliations via multicasting involving multiple Big Four networks largely to these smaller markets. Therefore, the Commission concludes that the nature of the local television market supports the Commission's decision to decline regulation of dual affiliations via multicasting at this time. However, the Commission will continue to monitor this issue and take action in the future, if appropriate; moreover, the Commission can consider issues that impact the Commission's policy goals in the context of individual transactions such as transfers of control or assignments of licenses.

40. The factors that justify the Commission's decision not to restrict dual affiliations via multicast are not present in circumstances involving

affiliation swaps. Dual affiliations via multicasting do not result in an entity owning two television stations rated in the top four in the market in violation of the Local Television Ownership Rule, which is the case with affiliation swaps now subject to the top-four prohibition, and no marketplace forces exist that would limit affiliation swaps absent the Commission's action in this *Order*. Indeed, given the marketplace conditions that tend to give rise to dual affiliations, prohibiting dual affiliation with more than one Big Four network could result in some Big Four networks becoming unavailable over the air in certain markets because there are not enough commercial television stations to accommodate each Big Four network in these markets. Prohibiting affiliation swaps would not create such a result since affiliation swaps, by definition, involve separate licensees affiliated with each network.

41. *Minority and Female Ownership.* The Commission affirms its tentative conclusion from the *FNPRM* that the current rule remains consistent with the Commission's goal to promote minority and female ownership of broadcast television stations. While the Commission retains the existing Local Television Ownership Rule for the reasons stated above, to promote competition among broadcast television stations in local markets, and not with the purpose of preserving or creating specific amounts of minority and female ownership, the Commission finds that retaining the existing rule nevertheless promotes opportunities for diversity in local television ownership. The competition-based rule helps to ensure the presence of independently owned broadcast television stations in the local market, thereby indirectly increasing the likelihood of a variety of viewpoints and preserving ownership opportunities for new entrants. The Commission notes also that it retains without modification the current failed/failing station waiver policy, including the requirement that the waiver applicant attempt to first solicit an out-of-market buyer, which promotes possible new entry in a market by ensuring that out-of-market entities interested in purchasing a station are aware of station sale opportunities.

42. The Commission is unconvinced by arguments made by the Coalition of Smaller Market Television Stations that sharing agreements, such as JSAs and SSAs, promote minority and female ownership. While the record demonstrates that some stations that are owned by minorities and women participate in JSAs, the record also indicates that many such stations do not. The Smaller Market Coalition

provides statistics regarding only full power television stations owned by women and African Americans. By their own data, the majority of stations owned by women do not participate in JSAs; moreover, they do not offer any statistics for stations owned by other minority groups, which make up the largest portion of minority station owners. No evidence shows that current minority or female station owners utilized such agreements to acquire those stations. To the contrary, anecdotal evidence suggests that JSAs, in particular, have been used by large station owners to foreclose entry into markets and that the Commission's decision to attribute JSAs has actually led to greater ownership diversity—a proposition supported by multiple parties throughout this proceeding.

43. Additionally, the Commission finds the claim that tightening the Local Television Ownership Rule will promote increased opportunities for minority and female ownership to be both speculative and unsupported by existing ownership data. No data provided in the record support a contention that the duopoly rule has reduced minority ownership or suggest that a return to the one-to-a-market rule would increase ownership opportunities for minorities and women. On the other hand, while the data reflect an increase in minority ownership following relaxation of the Local Television Ownership Rule, the Commission has no evidence in the record that would permit it to infer causation and thus it declines to loosen the rule on this basis.

44. Finally, the Commission finds that, at the present time, analyzing the implications of the incentive auction for the Local Television Ownership Rule generally, or minority and female ownership specifically is impossible. In the auction proceeding, the Commission has considered the effects of the auction on diversity, stating that voluntary participation in the reverse auction, via a channel sharing, ultra-high frequency (UHF)-to-very-high frequency (VHF), or high-VHF-to-low-VHF bid, offers a significant and unprecedented opportunity for these owners to raise capital that may enable them to stay in the broadcasting business and strengthen their operations. A licensee's participation in the reverse auction does not mean it has decided to exit the business, even if its bid is accepted. The auction provides for bid options that allow the licensee to obtain a share of auction proceeds but still remain on the air: (i) Channel sharing; (ii) a UHF station could bid to move to a VHF channel; and (iii) a high VHF station

(channels 7–13) could bid to move to a low VHF channel (2–6).

45. The broadcast television incentive auction is ongoing and its implications will not be known for some time. Broadcasters interested in participating in the reverse auction filed their applications in January 2016. Entities interested in bidding in the forward auction on the spectrum made available through the reverse auction filed applications in February 2016. The clock round bidding for the reverse auction commenced on May 31, 2016, and concluded on June 29, 2016; the Commission announced August 16, 2016, as the start date for the initial stage of the forward auction. Under statute, the identities of the broadcasters participating in the reverse auction are confidential. After the conclusion of the auction—the date of which is unknown—the Commission will release a public notice announcing the reverse and forward auction winners, and identifying those television stations that will be reassigned to new channels (or repacked). Reassigned stations will have up to 39 months after release of that public notice to complete the transition to their new channels, while winning bidders who will relinquish their spectrum entirely or move to share a channel with another station must do so within a specified number of months from receipt of their incentive payment.

46. Because of these factors, and because the incentive auction is a unique event without precedent, the Commission cannot evaluate or predict the likely impacts of the auction at this time. The Commission will soon commence its evaluation of the broadcast marketplace post-auction, and the Commission will address the implications of the incentive auction for the media ownership rules in the context of future quadrennial reviews. Further, the court in *Prometheus III* indicated that the Commission should consider how the ongoing broadcast incentive auction affects minority and female ownership. Consistent with this direction and the Commission's previous requests for comment on this issue, the Commission has evaluated the record and the status of the ongoing incentive auction, and its determination is that it is too soon to assess the impact of the auction on minority and female ownership.

## B. Local Radio Ownership Rule

### 1. Introduction

47. Based on the record in the 2010 and 2014 Quadrennial Review proceedings, the Commission finds that the current Local Radio Ownership Rule

remains necessary in the public interest and should be retained without modification. The Commission finds that the rule remains necessary to promote competition and that the radio ownership limits promote viewpoint diversity by ensuring a sufficient number of independent radio voices and by preserving a market structure that facilitates and encourages new entry into the local media market. Similarly, the Commission finds that a competitive local radio market helps to promote localism, as a competitive marketplace tends to lead to the selection of programming that is responsive to the needs and interests of the local community. Also, the Commission finds that the Local Radio Ownership Rule is consistent with its goal of promoting minority and female ownership of broadcast television stations. The Commission finds that these benefits outweigh any burdens that may result from retaining the rule without modification.

48. Accordingly, the Local Radio Ownership Rule will continue to permit the following: An entity may own (1) up to eight commercial radio stations in radio markets with 45 or more radio stations, no more than five of which can be in the same service (AM or FM); (2) up to seven commercial radio stations in radio markets with 30–44 radio stations, no more than four of which can be in the same service (AM or FM); (3) up to six commercial radio stations in radio markets with 15–29 radio stations, no more than four of which can be in the same service (AM or FM); and (4) up to five commercial radio stations in radio markets with 14 or fewer radio stations, no more than three of which can be in the same service (AM or FM), provided that an entity may not own more than 50 percent of the stations in such a market, except that an entity may always own a single AM and single FM station combination.

### 2. Discussion

49. Under section 202(h), the Commission considers whether the Local Radio Ownership Rule continues to be necessary in the public interest as a result of competition. In determining whether the rule meets that standard, the Commission considers whether the rule serves the public interest. While the Commission believes that the competition-based Local Radio Ownership Rule is consistent with its other policy goals and may promote such goals in various ways, the Commission does not rely on these other goals as the basis for retaining the rule. Consistent with Commission precedent, upheld by the court in

*Prometheus II*, the Commission finds that the Local Radio Ownership Rule continues to be necessary to protect competition, which provides a sufficient ground on which to retain the rule.

50. *Market*. In this *Order*, the Commission adopts its tentative conclusion from the *FNPRM* that the relevant product market for review of the Local Radio Ownership Rule is the radio listening market and that including non-broadcast audio sources in that market is not appropriate. When determining the appropriate market definition for the Local Radio Ownership Rule, the Commission must determine whether alternate audio platforms provide consumers with a meaningful substitute for local broadcast radio stations. For purposes of Commission review, the nature of broadcast radio must be considered when determining whether an alternate source of audio programming provides a meaningful substitute for broadcast radio—the ability to access audio content alone is not sufficient to demonstrate substitution. Broadcast radio stations provide free, over-the-air programming tailored to the needs of the stations' local markets. In contrast, Internet radio requires either a fixed or mobile broadband Internet connection, and satellite radio requires a monthly subscription to access programming. Neither of these sources is as universally and freely available as broadcast radio, and neither typically provides programming tailored to the needs and interests of specific local markets.

51. As noted in the *FNPRM*, despite the growing popularity of non-broadcast platforms such as satellite radio and Internet-delivered audio in the commercial audio industry, broadcast radio continues to dominate in its reach among listeners. Moreover, no data was submitted to the record to refute the findings stated in the *FNPRM*, and recent data confirm that broadcast radio listenership remains essentially unchanged. In addition, the vast majority of Americans prefer to use broadcast radio as their in-car audio entertainment over new technology options. Lastly, the Commission notes that the growth of online radio listening likely includes audiences that are listening to streams of broadcast radio stations online instead of or in addition to listening over the air. One data source cited by NAB to establish the competitive impact of online radio define online radio as listening to AM/FM radio stations online and/or listening to streamed audio content available only on the Internet. To the extent that online audio merely allows

listeners to access broadcast radio station content over the Internet rather than over the air, it may not be a true alternative to broadcast radio. Ultimately, broadcast radio remains the most easily accessible and popular way for consumers to listen to audio programming, and the only one that focuses on the needs and interests of local markets.

52. In addition, the Commission disagrees with NAB's assertion regarding the lack of significance of non-broadcast radio's national platform. The local character of broadcast radio is a significant aspect of the service that must be considered when determining whether alternate audio platforms provide a meaningful substitute. The record fails to demonstrate that non-broadcast radio programmers make programming decisions to respond to competitive conditions in local markets. As the Commission has stated previously, competition among local rivals most benefits consumers and serves the public interest.

53. The Commission also disagrees with NAB's characterization that the Commission has recognized non-broadcast radio programming as meaningful substitutes for broadcast radio simply by virtue of the Commission's acknowledgment of the potential impact of alternate audio platforms on AM radio. While the Commission has recognized that AM radio is susceptible to audience migration due to its technical shortcomings, recognition of this fact does not mean that non-broadcast audio alternatives are a meaningful substitute for AM radio, specifically, or broadcast radio, in general. As discussed earlier, non-broadcast audio alternatives do not respond to competitive conditions in local markets and are not available to all consumers in a local market to the same extent as broadcast radio, which are critical considerations when determining substitutability. While the Commission does not take the position that advanced telecommunications/broadband deployment and adoption must be universal before it will consider Internet-delivered audio programming to be a competitor in the local radio listening market, the Commission finds that the current level of penetration and adoption of broadband service remains relevant when considering the extent to which this platform is a meaningful substitute for broadcast radio stations.

54. Ultimately, the Commission finds that the record demonstrates that alternative sources of audio programming are not currently meaningful substitutes for broadcast radio stations in local markets;

therefore, the Commission declines to depart from its tentative conclusion to exclude non-broadcast sources of audio programming from the relevant market for the purposes of the Local Radio Ownership Rule. The Commission's approach to limit the relevant market to broadcast radio stations in local radio listening markets is consistent with current DOJ precedent in evaluating proposed mergers involving broadcast radio stations. The Commission finds that the Local Radio Ownership Rule should continue to focus on promoting competition among broadcast radio stations in local radio listening markets.

55. *Market Size Tiers.* As the *FNPRM* stated, the Commission's experience in applying the Local Radio Ownership Rule supports retention of the existing framework to promote competition. The Commission consistently has found that setting numerical ownership limits based on market size tiers remains the most effective method for preventing the acquisition of market power in local radio markets. This bright-line approach helps to keep the limited available radio spectrum from becoming locked up in the hands of one or a few radio station owners. Furthermore, the Commission believes that this approach benefits transaction participants by expediting the processing of assignment or transfer of control applications and by providing clear guidance on which transactions comply with the local radio ownership limits.

56. The Commission received two proposals for alternative methodologies for determining market size tiers. Mid-West Family proposes that the Commission assign different values to stations of different classes when calculating how many stations an entity owns in a local market (e.g., Class C FM station = 1 station; Class A FM station = .5 station) or adopt a case-by-case analysis that would allow a station owner to acquire more stations than otherwise permitted under the rule to equalize the population coverage achieved by an in-market competitor. Connoisseur proposes that acquisitions involving stations in embedded markets—smaller radio markets that are located within the boundaries of a larger radio market (parent market)—should not be required to include stations owned in other embedded markets when demonstrating compliance with the ownership limits of a parent market.

57. The Commission declines to adopt Mid-West Family's proposals. First, the Commission disagrees with Mid-West Family's contention that the *Prometheus I* decision mandates an adjustment to the rule's current methodology in the way proposed by Mid-West Family.

Second, as the Commission has said previously, adopting Mid-West Family's approach would permit potentially significant consolidation in local radio markets, which would be inconsistent with the rationale for the Commission's retention of the existing numerical ownership limits discussed below. Specifically, Mid-West Family's proposal to assign different values to stations of different classes does not account for the possibility of a relatively low power radio station potentially reaching a larger audience than a station with a larger service contour.

58. Moreover, service contour (and the associated population coverage) is just one of many aspects of station operations that may impact the ability to compete in a local market. Each station serves as a voice in its local market, and the Commission is not inclined to discount the value of certain voices, particularly based on criteria that may have a limited impact on a station's ability to compete. For these reasons, the Commission declines to change the methodology for determining market size tiers, as proposed by Mid-West Family.

59. The Commission also declines to adopt Mid-West Family's proposal for a case-by-case analysis of population coverage. The Commission does not believe that population coverage alone is an appropriate basis on which to judge the competitiveness of a station (or cluster of stations) or the impact of these voices in the local market. The existing rule already provides for economies of scale that help stations compete; the Commission does not believe it is appropriate (or even possible) to revise the rule based on population coverage in an attempt to achieve a competitive equilibrium, which is effectively what Mid-West Family seeks. Moreover, the ability to seek a waiver of the ownership limits already provides parties with an opportunity to assert that special circumstances justify deviation from the rule in a particular case.

60. The Commission also declines to alter the methodology for determining market size tiers as proposed by Connoisseur. Under the current methodology, owners wishing to acquire a radio station in an embedded market must satisfy the numerical limits in both the embedded market and the overall parent market. In the *2002 Biennial Review* (68 FR 46286, Aug. 5, 2003, FCC 03-127, rel. July 2, 2003) that adopted the Nielsen Audio Metro (formerly Arbitron Metro) methodology for determining radio markets, the Commission specifically declined to treat embedded markets differently. The

Commission found that requiring proposed combinations to comply with the Local Radio Ownership Rule in each Nielsen Audio Metro implicated by the proposed combination (*i.e.*, in both the embedded and parent markets) comports with its general recognition that Nielsen Audio's market definitions are the recognized industry standard. The Commission rejected a proposal to apply a different test for embedded markets because it concluded that the proposed scheme would be inconsistent with the general reliance on Nielsen Audio's market definition and cumbersome to administer. The Commission finds that Connoisseur has not presented evidence of changes in the radio industry that would warrant an across-the-board departure from the Commission's longstanding reliance on Nielsen Audio's market analysis as reported by BIA as the basis for multiple ownership calculations for embedded and parent markets. In these situations, a station's above-the-line listing in the parent market (*i.e.*, stations that are listed by BIA as home to that Metro) reflects a determination by Nielsen Audio and BIA that the station at issue competes in the parent market. For this reason, all embedded market stations that are listed as home to the parent market, like any other above-the-line stations, must be taken into account when demonstrating multiple ownership compliance in the parent market. This principle is consistent with Commission treatment of stations whose communities of license are outside the geographic boundaries of a Metro but are listed by BIA as home to the Metro. Such stations must comply with the multiple ownership limits in both the Metro market in which they are listed as home and the market in which their community of license is located, because they are considered to compete in both. Connoisseur conflates the embedded and parent market analyses, suggesting that the parent market analysis erroneously introduces stations from one embedded market to another, which may have tenuous economic or listenership ties to the first. This contention misses the point that, as a separate application of the Commission's multiple ownership rules, the parent market analysis necessarily includes all stations that compete in that market, whether or not they also compete in another embedded Metro market.

61. However, the Commission recognizes Connoisseur's concerns that Nielsen Audio and BIA's practice of designating all embedded market stations as home to the parent market—

regardless of actual market share—could result in certain stations being counted for multiple ownership purposes in a market in which they do not actually compete. Although the Commission does not believe that the record justifies a blanket exception to the rule, it will entertain market-specific waiver requests under section 1.3 demonstrating that the BIA listings in a parent market do not accurately reflect competition by embedded market stations and should thus not be counted for multiple ownership purposes.

62. *Numerical Limits.* The Commission concludes that the competitive conditions in the radio marketplace that supported the Commission's decision to retain the existing numerical limits in the *2006 Quadrennial Review Order* and to propose to retain the limits in the *FNPRM* remain largely unchanged. No data was provided in the record to contradict this conclusion. As demonstrated in the record, following the relaxation of the local radio ownership limits by Congress in the 1996 Act, there was substantial consolidation of radio ownership both nationally and locally. In local markets, the largest firms continue to dominate in terms of audience and revenue share.

63. The Commission also concludes that the record in this proceeding does not reflect changes in the marketplace that warrant reconsideration of the Commission's previous decision not to make the limits more restrictive. The Commission continues to believe that tightening the restrictions would disregard the previously identified benefits of consolidation in the radio industry and would be inconsistent with the guidance provided by Congress in the 1996 Act. Further, the Commission continues to find that tightening the rule, absent grandfathering, would require divestitures that it believes would be disruptive to the radio industry and would upset the settled expectations of individual owners. The record does not indicate that the benefits derived from tightening the limits would outweigh these countervailing considerations. For these reasons, and consistent with prior decisions, the Commission concludes that tightening the limits would not be in the public interest.

64. *Clarification of Application of Local Radio Ownership Rule.* In the *2002 Biennial Review Order*, the Commission established safeguards to deter parties from attempting to manipulate Nielsen Audio Metro market definitions for purposes of circumventing the Local Radio Ownership Rule. Specifically, the

restrictions prohibit a party from receiving the benefit of a change in Nielsen Audio Metro boundaries or home market designation unless that change has been in place for at least two years (or unless the station's community of license is within the Metro, in the case of a home designation change). In general, a licensee seeking to demonstrate multiple ownership compliance may rely upon the removal of a station from BIA's list of home stations in a Metro, without a two-year waiting period, when the exclusion results from an FCC-approved change in the community of license from a community that is within a Metro's geographic boundaries to one that is outside the Metro. In the *FNPRM*, the Commission proposed to clarify that this exception applies only where the community of license change also involves the physical relocation of the station facilities to a site outside the relevant Nielsen Audio Metro market boundaries. Otherwise, the licensee of a station currently located in a Nielsen Audio Metro market could use the exception to reduce the number of its stations listed as home to that Metro, without triggering the two-year waiting period and without any change in physical coverage or market competition, merely by specifying a new community of license located outside the Metro. No objections to this clarification of the exception to the two-year waiting period were voiced in the record. Accordingly, the Commission adopts this clarification as it will ensure that the local radio ownership limits cannot be manipulated based on Nielsen Audio market definitions.

65. Note 4 to § 73.3555 of the Commission's rules (Note 4) grandfathers existing station combinations that do not comply with the numerical ownership limits of § 73.3555(a). However, the Commission recognizes that certain circumstances require applicants to come into compliance with the numerical ownership limits even though the relevant station may have been part of an existing grandfathered cluster. One such circumstance is a community of license change, which occasionally can lead to difficulty when an applicant with a grandfathered cluster of stations seeks to move a station's community of license outside the relevant Nielsen Audio Metro market. Given that the Commission relies on the BIA database for information regarding Nielsen Audio Metro home designations, such an applicant cannot concurrently demonstrate compliance with the multiple ownership limits at the time of

application filing, because the station proposing to change its community will continue to be listed by BIA as home to the Metro. To resolve this administrative issue, the Commission adopts the proposal in the *FNPRM* to allow a temporary waiver of the radio multiple ownership limits in this limited instance for three months from grant of the community of license modification application to allow BIA sufficient time to change the affected station's home designation following a community of license relocation. Grant of the application will be conditioned on coming into compliance with the applicable multiple ownership limits within three months. If the relevant station is still listed by BIA as home to the Metro at the end of this temporary waiver period, the Commission will rescind grant of the application and re-specify the original community of license.

66. The Commission also proposed to exempt intra-Metro community of license changes from the requirements of Note 4. In 2006, the Commission introduced a streamlined procedure allowing an FM or AM broadcast licensee or permittee to change its community of license by filing a minor modification application. The Commission has found that strict application of Note 4 has produced disproportionately harsh results from what is now otherwise a minor and routine application process. The Commission also agrees with commenter Results Radio that the reasoning supporting the proposed exemption should apply not only to community of license changes within the physical boundaries of the Metro market, but to any community of license change where the station remains designated as home to the Metro market. Such an exemption would, in limited circumstances, provide equitable relief from the divestiture requirements of Note 4. Moreover, the Commission finds that such intra-market community of license changes in most cases will have little or no impact on the concentration of ownership within the local market. Accordingly, the Commission adopts these exemptions to Note 4.

67. Since 2003, the Commission has regularly waived the Nielsen Audio Metro market definition for Puerto Rico, which defines Puerto Rico as a single market, instead relying on a contour overlap analysis for proposed transactions. The Commission has held that the unique characteristics of Puerto Rico present a compelling showing of special circumstances that warrant departing from the Nielsen Audio Metro as the presumptive definition of the

local market. This practice is based on Puerto Rico's extremely mountainous topography, large number of radio stations and station owners, and division into eight Metropolitan Statistical Areas (MSAs) as defined by the Office of Management and Budget (OMB), which demonstrate that Puerto Rico has more centers of economic activity than are accounted for by the single Puerto Rico Nielsen Audio Metro definition.

68. In previous waiver proceedings involving the Puerto Rico radio market, the Commission utilized the contour-overlap methodology that normally applies to defining markets in non-Nielsen Audio rated markets. The contour-overlap methodology is generally permitted to define the local radio market only when a station's community of license is located outside of a Nielsen Audio Metro boundary. Under this methodology, the relevant radio market is defined by the area encompassed by the mutually overlapping principal community contours of the stations proposed to be commonly owned. The Commission has determined previously that this methodology was appropriate to apply when examining the Puerto Rico radio market because of Puerto Rico's unique characteristics. Therefore, the Commission concludes that adoption of the contour-overlap market definition will facilitate the most appropriate application of the Local Radio Ownership Rule in Puerto Rico, and there is no opposition to this proposal in the record. Accordingly, the Commission adopts the market definition based on contour overlap for Puerto Rico that it has applied consistently in previous waiver proceedings.

69. *AM/FM Subcaps.* The AM/FM subcaps limit the number of stations from the same service—AM or FM—that an entity may own in a single market. Just as the Commission has found that the public interest is served by retaining the existing numerical limits, it finds appropriate to retain the existing subcaps. The subcaps, as originally adopted by Congress, were premised on the ownership limits adopted in the 1996 Act. As the Commission has stated previously, tightening one or both of the subcaps absent a corresponding change to the numerical ownership limits (or a tightening of one subcap absent a loosening of the other) would result in an internal inconsistency in the rule, as such a tightening would result in an entity not being permitted to own all the stations otherwise permitted under certain numerical tiers. The Commission sought comment on

whether any reason supports adopting different subcaps despite this potential inconsistency and received no comments arguing for tightening the subcaps. The Commission also finds that loosening or abolishing the subcaps would create public interest harms by potentially permitting excessive consolidation of a particular service—an outcome the subcaps are designed to prevent—and reducing opportunities for new entry within local radio markets.

70. The Commission is not persuaded by suggestions that eliminating the subcaps would result in public interest benefits sufficient to justify that action. While flexibility in ownership structuring may benefit existing licensees, such benefits may not extend to new entrants who potentially would see opportunities for radio ownership diminish through the increased concentration of ownership in a particular service that elimination of the subcaps would permit. The Commission also does not agree that eliminating or modifying the AM subcap would be an effective way to revitalize AM radio. NAB's assertion that elimination of the subcap would revitalize AM radio is unsupported, as NAB fails to explain how additional consolidation of AM stations will improve the ability of those stations to overcome existing technological and competitive challenges.

71. The Commission continues to believe that broadcast radio, in general, remains the most likely avenue for new entry in the media marketplace—including entry by small businesses and entities seeking to serve niche audiences—as a result of radio's ability to more easily reach certain demographic groups and the relative affordability of radio stations compared to other mass media. As the Commission has stated previously, AM stations are generally the least expensive option for entry into the radio market, often by a significant margin, and therefore permit new entry for far less capital investment than is required to purchase an FM station. Nothing in the record of this proceeding indicates that this marketplace characteristic has changed. Therefore, the Commission concludes that the public interest remains best served by retaining the existing AM subcap, which limits concentration of AM station ownership and thereby promotes opportunities for new entry that further competition and viewpoint diversity. In addition, FCC Form 323 data for 2011 and 2013 notably indicates that minority and female ownership of radio stations (and AM stations, in particular) exceeds that of television stations.

72. Furthermore, despite the general technological limitations of AM stations, there continue to be many markets in which AM stations are significant radio voices. No data was offered in the record to refute the Commission's tentative conclusion in the *FNPRM* that AM stations continue to be significant radio voices in many markets. Also, AM stations are among the top revenue earners in some of the largest radio markets (e.g., New York, Chicago, and Los Angeles). The Commission therefore finds that, in addition to the general promotion of new entry across all markets described above, retention of the existing AM subcaps is also necessary to prevent a single station owner from acquiring excessive market power through concentration of ownership of AM stations in those markets in which AM stations are significant radio voices.

73. The Commission also concludes that there continue to be technical and marketplace differences between AM and FM stations that justify retention of both the AM and FM subcaps to promote competition in local radio markets. As the Commission has noted previously, FM stations enjoy unique advantages over AM stations, such as increased bandwidth, superior audio signal fidelity, and longer hours of operation. These technological differences often, but not always, result in greater listenership and revenues for FM stations that justifies a limit on the concentration of FM station ownership, in particular. Nothing in the record of this proceeding indicates that the Commission should depart from the tentative conclusions in the *FNPRM* regarding the differences between AM and FM radio. Therefore, the Commission concludes that retaining the existing FM subcap continues to serve the public interest as well. Accordingly, the Commission retains both the AM and FM subcaps without modification.

74. The Commission also finds that the digital radio transition and the changes to the FM translator rules have not yet meaningfully ameliorated the general differences between AM and FM stations, such that the justifications described above have been rendered moot. Recent digital radio deployment data support previous findings that FM stations are actually increasing the technological divide through greater adoption rates of digital radio technology than AM stations. The trends noted in the *FNPRM* have continued. Also, the recent changes to the FM translator rules, to allow AM stations to use currently authorized FM translator stations to retransmit their

AM service within their AM stations' current coverage areas, have not yet significantly impacted the technological and marketplace differences between AM and FM stations. While the change to the FM translator rule benefited many AM stations, more than half of all AM stations continue to operate without associated FM translators. The Commission received no objections or material in the record to refute its findings; however, the Commission will continue to monitor the impact of the digital radio deployment and the FM translator rule change in future media ownership proceedings.

75. *Waiver Criteria.* The Commission declines to adopt specific waiver criteria for the Local Radio Ownership Rule and will continue to rely on the general waiver standard. The Commission finds that the considerations in proposals for specific waiver criteria can be advanced adequately in the context of a general waiver request under § 1.3 of the Commission's rules and notes that the Commission has an obligation to take a hard look at whether enforcement of a rule in a particular case serves the rule's purpose or instead frustrates the public interest. Therefore, the Commission concludes that adoption of a specific waiver standard is not appropriate at this time.

76. *Minority and Female Ownership.* The Commission affirms its tentative conclusion from the *FNPRM* that the current rule remains consistent with the Commission's goal to promote minority and female ownership of broadcast radio stations. While the Commission retains the existing Local Radio Ownership Rule for the specific reasons stated above, it finds that retaining the existing rule nevertheless promotes opportunities for diverse ownership in local radio ownership. This competition-based rule indirectly advances the Commission's diversity goal by helping to ensure the presence of independently owned broadcast radio stations in the local market, thereby increasing the likelihood of a variety of viewpoints and preserving ownership opportunities for new entrants. The Commission has also retained the AM/FM subcaps, in part, to help promote new entry—as noted, the AM band in particular has historically provided lower-cost ownership opportunities for new entrants.

77. Consistent with Commission analysis of the local television ownership rule above, however, the Commission finds the claim that tightening the Local Radio Ownership Rule would promote increased opportunities for minority and female ownership to be speculative and

unsupported by existing ownership data. No data in the record support a contention that tightening the local radio ownership limits would promote ownership opportunities for minorities and women.

78. In addition, the Commission does not believe that Media Ownership Study 7, which considers the relationship between ownership structure and the provision of radio programming targeted to African-American and Hispanic audiences, supports the contention that tightening the local radio ownership limits would promote minority and female ownership. While the data suggest the existence of a positive relationship between minority ownership of radio stations and the total amount of minority-targeted radio programming available in a market, the potential impact of tightening the ownership limits on minority ownership was not part of the study design, nor something that can be reasonably inferred from the data.

79. Nothing in the data or any other evidence in the record permits the Commission to infer causation; therefore, the Commission declines to loosen the existing ownership limits on the basis of any trend reflected in the data. The Commission remains mindful of the potential impact of consolidation in the radio industry on ownership opportunities for new entrants, including small businesses, and minority- and women-owned businesses, and the Commission will continue to consider the implications in the context of future quadrennial reviews.

### C. Newspaper/Broadcast Cross-Ownership Rule

#### 1. Introduction

80. The Newspaper/Broadcast Cross-Ownership (NBCO) Rule prohibits common ownership of a daily newspaper and a full-power broadcast station (AM, FM, or TV) if the station's service contour encompasses the newspaper's community of publication. The rule currently in effect prohibits the licensing of an AM, FM, or TV broadcast station to a party (including all parties under common control) that directly or indirectly owns, operates, or controls a daily newspaper, if the entire community in which the newspaper is published would be encompassed within the service contour of the station, namely: (1) The predicted or measured 2 mV/m contour of an AM station, computed in accordance with § 73.183 or § 73.186; (2) the predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313; or (3) the

Grade A contour of a TV station, computed in accordance with § 73.684.

81. In analyzing the NBCO Rule under section 202(h), the Commission's focus is on the rule's primary purpose—to promote viewpoint diversity at the local level. As the Commission noted in adopting the NBCO Rule, if a democratic society is to function, nothing can be more important than insuring a free flow of information from as many divergent sources as possible. Broadcast stations and daily newspapers remain the predominant sources of the viewpoint diversity that the NBCO Rule is designed to protect. The proliferation of (primarily national) content available from cable and satellite programming networks and from online sources has not altered the enduring reality that traditional media outlets are the principal sources of essential local news and information. The rapid and ongoing changes to the overall media marketplace do not negate the rule's basic premise that the divergence of viewpoints between a cross-owned newspaper and broadcast station cannot be expected to be the same as if they were antagonistically run.

82. After careful consideration of the record, the Commission concludes that regulation of newspaper/broadcast cross-ownership within a local market remains necessary to protect and promote viewpoint diversity. The Commission continues to find, however, that an absolute ban on newspaper/broadcast cross-ownership is overly broad. Accordingly, and consistent with the Commission's approach in the 2006 proceeding, the adopted rule generally prohibits common ownership of a broadcast station and daily newspaper in the same local market but provides for a modest loosening of the previous ban on cross-ownership consistent with the Commission's view that an absolute ban may be overly restrictive in some cases. The Commission finds that the benefits of the revised rule outweigh any burdens that may result from adopting the rule.

## 2. Discussion

### a. Policy Goals

83. *Viewpoint diversity.* The record reaffirms the Commission's view that the NBCO Rule remains necessary to promote diversity, specifically viewpoint diversity. The *FNPRM* commenters that oppose this position do not present evidence persuading the Commission to alter its tentative conclusion in the *FNPRM* that newspapers and broadcast television stations, and their affiliated Web sites, continue to be the predominant

providers of local news and information upon which consumers rely. For the most part, opponents of the rule reiterate the two principal arguments put forth by commenters to the initial *NPRM*, namely that: (1) Ownership does not necessarily influence viewpoint and (2) an array of diverse viewpoints is widely available from an abundance of outlets, particularly via the Internet. The Commission addressed these arguments extensively in the *FNPRM* and does not find them any more persuasive after reviewing the *FNPRM* comments.

84. With regard to the first argument, in the *FNPRM*, the Commission acknowledged that *NPRM* commenters provided examples of instances when cross-owned properties diverged in viewpoint. The Commission noted, however, that, although similar examples were provided during the Commission's 2002 and 2006 reviews, the Commission continued to restrict newspaper/broadcast cross-ownership given that an owner has the opportunity, ability, and right to influence the editorial process of media outlets it owns, regardless of the degree to which it exercises that power. The Third Circuit affirmed the Commission's reasoning that the possibility of a connection between ownership and viewpoint is not disproved by evidence that a connection is not always present. Moreover, the Commission has noted previously the existence of ample evidence pointing in the other direction, namely that ownership can affect viewpoint. In any event, the Commission's goal is to maximize the number of distinct voices in a market, which the Commission believe is achieved more effectively by relying on separate ownership rather than on a hope or expectation that owners of cross-owned properties will maintain a distance from the editorial process. The Commission's concern is not alleviated by the broadcasters' argument that consumers' ideological preferences have a greater influence on editorial slant than ownership does. Indeed, the Commission believes that such influence only increases the importance of ensuring that a multiplicity of voices are available to consumers.

85. With regard to the second argument, in the *FNPRM*, the Commission addressed arguments that the NBCO Rule is obsolete because today's consumers have access to a vast array of news sources. The Commission tentatively concluded that a cross-ownership restriction remains necessary, despite the increase in media outlets. Supporters of the rule agreed with the Commission that traditional news providers, and their affiliated Web

sites, continue to be the most relied-upon sources of local news and information. In the *FNPRM*, the Commission pointed to evidence suggesting that, despite the Internet's increased role in news distribution, traditional news providers are still critical to ensuring viewpoint diversity at the local level. The record showed that independent online sources currently cannot substitute for the original reporting by professional journalists associated with traditional local media.

86. After reviewing the *FNPRM* comments, which raise substantially the same points that were addressed in the *FNPRM*, the Commission's position is unchanged. Several *FNPRM* commenters reiterate that the Commission's focus on traditional media is too narrow because other media outlets contribute to viewpoint diversity. Evidence shows, however, that the contributions of cable, satellite, and Internet sources serve as a supplement, but not as a substitute, for newspapers and broadcasters providing local news and information. A U.S. District Court judge recently rejected an argument that online sources of local news present sufficient competition to local newspapers in Orange County and Riverside County in Southern California (*United States v. Tribune Publishing Co.*, No. 16 CV 01822 AB (PJWx) (C.D. Cal. Mar. 18, 2016)). The judge concluded that, as creators of local content, local newspapers continue to serve a unique function in the marketplace and are not reasonably interchangeable with online sources of news. He was not convinced that the Internet renders geography and distinctions between kinds of news sources obsolete. The news and information provided by cable and satellite networks generally targets a wide geographic audience, and the record demonstrates that local news and information available online usually originates from traditional media outlets. As discussed in the *NPRM* and *FNPRM*, considerable evidence shows that most online sources of local news are affiliated with newspapers or broadcast stations or contain content that originates from those traditional sources. The Commission affirms its earlier finding that local, hyperlocal, and niche Web sites generally do not fill the role of local television stations or daily newspapers. Local television continues to dominate despite the increasing use of social media as a source of news. Moreover, the social media platforms that consumers turn to for news, such as Facebook, Twitter,

and Google, generally aggregate news stories from other sources and those sources do not focus necessarily on local news.

87. The Commission concludes that the NBCO Rule should continue to apply to newspaper/radio cross-ownership. The Commission finds that the newspaper/radio cross-ownership restriction serves the public interest because the record shows that radio stations contribute in meaningful ways to viewpoint diversity within their communities. The Commission is persuaded that radio adds an important voice in many local communities such that lifting the restriction could harm viewpoint diversity. Although the Commission tentatively concluded earlier in this proceeding that radio stations are not the primary outlets that contribute to viewpoint diversity in local markets and that consumers rely predominantly on other sources for local news and information, the Commission finds that radio's role in promoting viewpoint diversity is significant enough to warrant retention of the restriction. Therefore, the Commission declines to eliminate the restriction or to adopt a presumptive waiver standard, such as the one proposed in the *NPRM*, favoring newspaper/radio mergers in the top 20 DMAs.

88. As discussed in the *FNPRM*, the Commission's conclusion that radio contributes sufficiently to viewpoint diversity to warrant retention of the newspaper/radio cross-ownership restriction is consistent with the longstanding position that newspaper/radio combinations should be prohibited even though radio generally plays a lesser role in contributing to viewpoint diversity. A lesser role does not mean that radio plays no role. The record shows that broadcast radio stations produce a meaningful amount of local news and information content that is relied on by a significant portion of the population and, therefore, provide significant contributions to viewpoint diversity.

89. With over 90 percent of Americans listening to radio on a weekly basis, radio's potential for influencing viewpoint is great. Moreover, recent evidence suggests that radio stations air a substantial amount of local news programming. Evidence in the record also indicates that members of certain communities may rely more heavily on broadcast radio stations for local news and information. Such reliance may be especially strong when radio stations target particular demographic groups or offer news programs in a foreign language. A

community radio station recently licensed in Minneapolis reports local news stories in the Somali language and provides information of particular interest to the local Somali-American community. Although the NBCO Rule does not apply to that particular station due to its low-power status, the example nonetheless demonstrates the important contributions that radio can make to viewpoint diversity.

90. Evidence of reliance on broadcast radio for local news and public information programming is important for assessing radio's contributions to viewpoint diversity; however, to be a meaningful source of viewpoint diversity in local markets, broadcast radio stations must increase the diversity of local information, not simply its availability. The record demonstrates that radio stations still contribute to viewpoint diversity by producing a meaningful amount of local news and public interest programming that is responsive to the needs and concerns of the community. Moreover, invitations to call-in to a radio program offer local residents unique opportunities to participate interactively in a conversation about an issue of local concern.

91. For the foregoing reasons, the Commission finds that radio provides an important contribution to viewpoint diversity such that lifting the newspaper/radio cross-ownership restriction in all markets across-the-board could sweep too broadly. The Commission finds that it must take care not to overlook the contributions to viewpoint diversity offered by radio stations, particularly to the extent that dedicated audiences of radio stations rely on radio as a valuable source of local news and information, and that radio stations provide an additional opportunity for civic engagement, as certain commenters attest. Thus, while the Commission previously has recognized that a radio station generally cannot be considered the equal of a newspaper or television station when it comes to providing news, in fact, for a significant portion of the population radio may play an influential role as a source for news or the medium turned to for discussion of matters of local concern.

92. Accordingly, the Commission finds that radio stations can contribute in a meaningful way to viewpoint diversity within local communities and that a newspaper's purchase of a radio station in the same local market could harm viewpoint diversity in certain circumstances. As a result, the Commission retains both the newspaper/radio and the newspaper/

television cross-ownership restrictions. However, consistent with previous Commission findings, the Commission believes that enforcement of the NBCO Rule may not be necessary to promote viewpoint diversity in every circumstance and that there could be situations where enforcement would disserve the public interest.

Furthermore, the Commission reaffirms its earlier findings that the opportunity to share newsgathering resources and realize other efficiencies derived from economies of scale and scope may improve the ability of commonly owned media outlets to provide local news and information. In certain circumstances, newspaper/broadcast cross-ownership may benefit the news offerings in a local market without causing undue harm to viewpoint diversity. In recognition of this, the Commission will ease the application of the prohibition through a waiver process and other modifications to the scope of the rule.

93. *Localism*. The Commission affirms its belief stated in the *FNPRM* that the nation's interest in maintaining a robust democracy through a multiplicity of voices justifies maintaining certain NBCO restrictions even if doing so prevents some combinations that might create cost-savings and efficiencies in news production. While *FNPRM* commenters proffer further examples in support of the proposition that such cost-savings and efficiencies may allow cross-owned properties to provide a higher quality and quantity of local news, these additional examples do not change the Commission's conclusion. The Commission has long accepted that proposition but also recognized that increased efficiencies do not necessarily lead to localism benefits. Furthermore, even if cost-savings are used to increase investment in local news production, the purpose of this rule is to promote and preserve the widest possible range of viewpoint; it is not, as NAB seems to suggest, to promote localism. The Commission therefore disagrees with NAB's argument that retaining cross-ownership restrictions will stymie the rule's intended benefits. Allowing media owners to achieve economies of scale and scope may enable them to disseminate a greater amount of local news over one or both of their cross-owned properties, but the costly result would be fewer independently owned outlets in the market. The loss of a local voice runs counter to the Commission's goal of promoting viewpoint diversity, regardless of whether cross-ownership is more or less likely to produce localism benefits. Although the Commission has found previously that

the NBCO Rule is not necessary to promote its localism goal, that determination, which the Commission affirms in this *Order*, does not undermine the viewpoint diversity rationale for the rule.

94. *Competition*. Promoting competition was not the Commission's primary concern when it considered implementation of the NBCO Rule, and in its 2002 biennial review the Commission found that the rule was not necessary to promote competition because newspapers and broadcast stations do not compete in the same product markets. The *FNPRM* record does not present a convincing case that is contrary to the Commission's longstanding position. The fact that broadcasters and newspapers both sell to local advertisers does not mean they compete with each other for advertising.

95. Although the Commission does not find that the rule is necessary to promote competition, it has concluded that the rule is necessary to promote viewpoint diversity. Therefore, the Commission is not swayed by the media industry's arguments that the NBCO Rule should be eliminated because it potentially limits opportunities for newspapers and broadcasters to expand their businesses. As stated in the *FNPRM*, the Commission does not believe that viewpoint diversity in local markets should be jeopardized to enable media owners to increase their revenue by pursuing cross-ownership within the same local market. Moreover, the application of the NBCO Rule has a very limited geographic scope. Even if the potential efficiencies of inter-market consolidation are fewer than those to be gained from in-market acquisitions, the rule does not prevent media owners that seek new revenue streams from acquiring properties in other markets or alternative media outlets that are not subject to the NBCO Rule.

#### b. Scope of the Rule

96. *Newspaper/Television Combinations*. The current rule prohibits common ownership of a daily newspaper and a television station when the Grade A contour of the station encompasses the entire community in which the newspaper is published. The Commission retained the Grade A contour approach when it revised the NBCO Rule in 2006. The trigger for the newspaper/television cross-ownership restriction therefore relies on a station's Grade A contour, which was rendered obsolete by the transition to digital television service.

97. The Commission adopts its uncontested proposal in the *FNPRM* to update the geographic scope of the

restriction by incorporating both a television station's DMA and its digital service contour. Specifically, cross-ownership of a full-power television station and a daily newspaper will be prohibited when: (1) The community of license of the television station and the community of publication of the newspaper are in the same Nielsen DMA, and (2) the principal community contour (PCC) of the television station, as defined in § 73.625 of the Commission's rules, encompasses the entire community in which the newspaper is published. For the reasons provided in the *FNPRM*, the Commission will maintain the current definition of a daily newspaper as one which is published four or more days per week, which is in the dominant language in the market, and which is circulated generally in the community of publication. The Commission explained its disinclination to revise the definition such as by imposing a minimum circulation requirement. Both conditions need to be met for the cross-ownership prohibition to be triggered. The DMA requirement ensures that the newspaper and television station serve the same media market, and the contour requirement ensures that they actually reach the same communities and consumers within that larger geographic market.

98. *Newspaper/Radio Combinations*. The current rule prohibits cross-ownership when the entire community in which the newspaper is published would be encompassed within the service contour of: (1) The predicted or measured 2 mV/m contour of an AM station, computed in accordance with § 73.183 or § 73.186, or (2) the predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313. Consistent with arguments made in the record, the Commission will not replace radio contours, but instead the Commission will include an additional requirement that the radio station and the newspaper be located in the same Nielsen Audio Metro market, where one is defined. In circumstances in which neither the radio station nor the newspaper is geographically located within a defined Nielsen Audio Metro market, then the trigger will be determined, as before, solely on the basis of the station's service contour. The Commission finds that the added Nielsen Audio Metro market condition will serve a valid limiting role because Nielsen Audio designations are based on listening patterns, which will focus the restriction on properties serving the same audience.

99. Specifically, in areas designated as Nielsen Audio Metro markets, cross-

ownership of a full-power radio station and a daily newspaper will be prohibited when: (1) The radio station and the community of publication of the newspaper are located in the same Nielsen Audio Metro market, and (2) the entire community in which the newspaper is published is encompassed within the service contour of the station, namely: (a) The predicted or measured 2 mV/m groundwave contour of an AM station, computed in accordance with § 73.183 or § 73.186; or (b) the predicted or measured 1 mV/m contour for an FM station, computed in accordance with § 73.313. Both conditions need to be met for the cross-ownership restriction to apply, except when both the community of publication of the newspaper and the community of license of the radio station are not located in a Nielsen Audio Metro market, then only the second condition need be met. Consistent with the Local Radio Ownership Rule, the Commission will rely on Nielsen to determine whether a radio station is in the same Nielsen Audio Metro market as the newspaper's community of publication. The Local Radio Ownership Rule relies, in part, on Nielsen Audio Metro markets in applying the radio ownership limits. In that context, the Commission has developed certain procedural safeguards to deter parties from attempting to manipulate Nielsen Audio market definitions to evade the Local Radio Ownership Rules. By relying on Nielsen Audio Metro markets, where available, the revised NBCO Rule is susceptible to similar manipulation by parties; accordingly, the Commission will apply the procedures adopted in the context of the Local Radio Ownership Rule to the adopted NBCO Rule. Specifically, for purposes of this rule, a radio station will be counted as part of the Nielsen Audio Metro market in which the station's community of license is geographically located and any other Nielsen Audio Metro market in which the station is listed by BIA as home to that market. This approach will ensure that a radio station is considered to be part of each Nielsen Audio Metro market in which that station is either geographically located or competes. The Commission believes Nielsen's determination of a radio market's boundaries is useful in considering whether particular communities rely on the same media voices. The Commission believes that such a determination, combined with the actual service areas of the respective facilities, gives a stronger picture of the relevant market and instances in which the Commission should prohibit common ownership. Therefore, the

Commission believes that including consideration of the Nielsen Audio Metro market (if one exists) in the determination of when the cross-ownership prohibition is triggered will help focus the restriction specifically on those circumstances where the newspaper and broadcast facility truly serve the same audience.

#### c. Exception for Failed and Failing Broadcast Stations and Newspapers

100. For the reasons expressed in the *FNPRM*, the Commission will not create an exception for failed/failing stations or newspapers and no commenters addressed this issue. The current approach will not preclude waiver applicants from attempting to show how such a commitment could enhance viewpoint diversity in the local market. However, applicants seeking a waiver in part or in whole on that basis should recall the Commission's previously stated concerns that such a commitment would be impracticable to enforce and arguably might require the Commission to make content-based assessments.

101. Consistent with its proposal in the *FNPRM*, the Commission will adopt an express exception for proposed combinations involving a failed or failing newspaper, television station, or radio station. For the reasons explained below in connection with the timing of a waiver request, the Commission will require television and radio licensees to file for an exception to the NBCO Rule before consummating the acquisition of a newspaper. It stands to reason that a merger involving a failed or failing newspaper or broadcast station is not likely to harm viewpoint diversity in the local market. If the entity is unable to continue as a standalone operation, and thus contribute to viewpoint diversity, then preventing its disappearance from the market potentially can enhance, and will not diminish, viewpoint diversity.

102. The Commission adopts failed/failing criteria consistent with those proposed in the *FNPRM*, which are similar to those used for the Local Television Ownership Rule and the Radio/Television Cross-Ownership Rule. That is, a failed newspaper or broadcast station must show that, as applicable, it had stopped circulating or had been dark due to financial distress for at least four months immediately before the filing of the assignment or transfer of control application, or that it was involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings. To qualify as failing, the applicant would have to show that: (1) If a broadcast television station is the failing entity, that it has had a low all-day audience share (*i.e.*, 4

percent or lower); (2) the financial condition of the newspaper or broadcast station was poor (*i.e.*, a negative cash flow for the previous three years); and (3) the combination would produce public interest benefits. In addition, as with the exemption for satellite television stations pursuant to Note 5 of § 73.3555, in the event of an assignment of license or transfer of control of the broadcast/newspaper combination, the proposed assignee or transferee would need to make an appropriate showing demonstrating compliance with the elements of the failed/failing entity exception at the time of the assignment or transfer if it wishes to continue the common ownership pursuant to this exception. Further, although the Commission is not including this failed/failing exception in Note 7 of § 73.3555 of the Commission's rules (which addresses the failed/failing waiver criteria applicable to the local television ownership rule and the radio/television cross-ownership rule), given the similarities, the precedent established in the application of Note 7 shall apply to the application of the NBCO failed/failing criteria, as appropriate. In addition, the applicants must show that the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the failed or failing newspaper or station and that selling the newspaper or station to any out-of-market buyer would result in an artificially depressed price. One way to satisfy this requirement would be to provide an affidavit from an independent broker affirming that active and serious efforts had been made to sell the newspaper or broadcast station, and that no reasonable offer from an entity outside the market had been received.

103. Because the Commission is creating an exception to the NBCO Rule, rather than a waiver opportunity, applicants seeking a failed/failing entity exception need not show, either at the time of their application or during subsequent license renewals, that the tangible and verifiable public interest benefits of the combination outweigh any harms. As the Commission has concluded that the exception serves the public interest in diversity simply by preserving a media outlet, licensees need not demonstrate that the additional benefits outweigh the potential harms. Recognizing that an absolute ban on newspaper/broadcast cross ownership is overly broad, the Commission believes providing greater flexibility and certainty in the context of this rule is appropriate. Thus, the Commission believes a clear exception

to the rule for failed and failing entities, rather than a waiver requiring a balancing of the harms and benefits, is appropriate to provide certainty for relief, as the Commission believes such combinations will have a minimal impact on viewpoint diversity.

#### d. Waiver Standard

104. Consistent with the tentative conclusion in the *FNPRM*, the Commission declines to adopt a bright-line rule that would exempt certain combinations from the newspaper/broadcast cross-ownership rule based on a certain set of criteria. Given the variability among local markets, the Commission maintains its view that blanket exemptions should not be built into the rule. As the Commission explained in the *FNPRM*, while a rule with built-in exemptions might lend greater certainty to parties considering a merger, it would not lead necessarily to the best result in an individual market. The Commission reiterates its concern that such a rule would be too blunt an instrument to be used for these types of mergers. Rather, the Commission believes that the more prudent way to ease the rule's application is through a case-by-case waiver process with a particular focus on the impact the proposed merger would have on viewpoint diversity in the market.

105. Therefore, consistent with other efforts to ease the rule's application, the Commission provides for the consideration of waiver requests of the NBCO Rule on a case-by-case basis. The Commission believes a case-by-case waiver approach will produce sensible outcomes and also improve transparency and public participation in the process. To facilitate public participation further, the Commission will require television and radio licensees to file a request for waiver of the NBCO Rule before consummating the acquisition of a newspaper, rather than at the time of the station's license renewal. As the Commission explained in the *FNPRM*, a broadcast licensee that triggered the NBCO Rule with the purchase of a newspaper previously was required, absent a waiver, to dispose of its station within one year or by the time of its next renewal date, whichever was longer. Alternatively, it could have pursued a waiver in conjunction with its license renewal, at which point interested parties could comment on the waiver request. As a result, the opportunity to comment on a licensee's acquisition of a newspaper might have arisen years after the purchase. The Commission's remedy will enable the public to comment on such acquisitions in a timely and effective manner before

the purchase is consummated. Moreover, by requiring prior approval, this approach will provide certainty to transaction participants that the proposed combination will not be subject to potential divestiture after the operations already have been integrated—a certainty that is not provided by the current approach. To alert interested parties to a proposed newspaper acquisition, the Commission will require that the Media Bureau place such waiver requests on public notice and solicit public comment on the proposed acquisition.

106. With regard to the two case-by-case options described in the *FNPRM* for considering waivers, the Commission adopts what is termed a pure case-by-case approach. That is, the Commission will evaluate waiver requests by assessing the totality of the circumstances for each individual transaction, considering each waiver request anew without measuring it against a set of defined criteria or awarding the applicant an automatic presumption based on a *prima facie* showing of particular elements. Waiver applicants will have the flexibility to present their most compelling reasons why strict application of the rule is not necessary to promote the goal of viewpoint diversity in that particular local market. Furthermore, consistent with its tentative conclusion in the *FNPRM*, the Commission declines to adopt the four-factor test that applied to waiver requests under the 2006 rule because the Commission concludes that the factors would be vague, subjective, difficult to verify, and costly to enforce. As the Commission stated in the *FNPRM*, evidence supporting considerations like those reflected in the four factors, although not required, is also not discouraged if a waiver applicant believes it would be useful in supporting its request. Thus, an applicant seeking a waiver under this approach will have to show that grant of the waiver will not unduly harm viewpoint diversity. Likewise, opponents of a transaction can respond with a range of arguments and evidence they consider most pertinent to that case. The Commission believes this approach will provide the Commission the flexibility needed to allow due consideration of all factors relevant to a case, without spending time and resources assessing presumptive criteria that may not be useful for a particular review. The 2006 rule required a waiver applicant attempting to overcome a negative presumption to show, with clear and convincing evidence, that the merged entity would increase diversity

and competition. In the *FNPRM*, the Commission proposed not to incorporate the requirement into any presumptive waiver standard that the Commission might adopt. *FNPRM* commenters did not address the issue, and the Commission's concern remains that the requirement would impose an overly burdensome evidentiary standard. Although the issue arguably is mooted by the Commission's decision not to adopt a presumptive waiver standard, the Commission also will not incorporate that standard into the adopted waiver approach. Thus, the Commission can hone in quickly on the most important considerations of the proposed transaction and approach them with an openness that might not occur with a set framework. The Commission believes that, as a result, it will be able to determine more accurately and precisely whether a proposed combination will have an adverse impact on viewpoint diversity in the relevant local market. If a proposed combination does not present any undue harm to viewpoint diversity, which is the underlying purpose of the rule, then prohibiting the combination is not necessary in the public interest.

107. The Commission recognizes that a case-by-case approach with presumptive guidelines, such as the one described in the *FNPRM*, potentially could offer waiver applicants greater certainty and consistency. The criteria proposed in this proceeding, however, were widely criticized and rejected by commenters. Ultimately, the Commission is persuaded by the criticism in the record that the proposed presumptive guidelines should not be adopted. Moreover, the Commission is concerned that any presumptive approach could result in an unduly rigid evaluation of a waiver application. Instead, the Commission believes that the pure case-by-case approach is the appropriate way to assess requests for waiver of the NBCO Rule. For all the reasons that favor a pure case-by-case approach, plus those stated in the *FNPRM*, the Commission declines to adopt Cox's proposal for a two-part test that would measure every proposed transaction against the same set of fixed criteria. As the Commission stated in the *FNPRM*, it believes that the first part of Cox's proposed test would define independent media voices too broadly and that the second part of Cox's proposed test would be difficult to apply and enforce in an objective, content-neutral manner.

108. In addition, the Commission disagrees with Cox that a pure case-by-case approach is necessarily a retreat from a presumptive waiver standard.

Rather, a pure case-by-case approach lifts the potential burden of having to overcome a negative presumption. Regardless, the Commission's intent in choosing a pure case-by-case approach over a presumptive waiver standard is not to increase or decrease the number of waiver approvals; it is to increase the likelihood of achieving the proper result in each individual case. Applying presumptive criteria can work well in other contexts and for other rules, but, under the current record and given the nature of viewpoint diversity and its dependency on the particular facts and circumstances of a specific market, the Commission finds that a pure case-by-case approach is best suited for handling requests for waiver of this rule.

109. The Commission also disagrees with Cox that a pure case-by-case approach is the equivalent of not having a waiver standard. To be clear, the Commission's standard requires applicants seeking a waiver of the NBCO Rule to show that their proposed combination would not unduly harm viewpoint diversity in the local market. The pure case-by-case approach describes the method by which the Commission will determine whether this standard is met. The method of examining the totality of the circumstances may entail a broad review, but the standard to be met is narrowly focused on the impact on viewpoint diversity. The Commission anticipates that the precedent that evolves from future waiver decisions will provide further guidance to entities considering a merger.

110. The Commission clarifies that this waiver standard is distinct from the traditional waiver standard under section 1.3, which requires a showing of good cause and applies to all Commission rules. By specifically allowing for a waiver of the NBCO Rule in cases where applicants can demonstrate that the proposed combination will not unduly harm viewpoint diversity, the Commission signals its recognition that there may be instances where enforcing the prohibition against ownership of a newspaper and broadcast station is not necessary to serve the rule's purpose of promoting viewpoint diversity in the local market. Indeed, the Commission's determination herein is that the public interest would not be served by restricting specific combinations that do not unduly harm viewpoint diversity. While in the context of section 1.3 waiver requests the Commission has considered showings of undue hardship, the equities of a particular case, or other good cause, in this particular context an applicant is

required to make a narrower showing, and a waiver will be granted so long as the applicants can demonstrate that viewpoint diversity will not be unduly harmed as a result of the proposed combination. The NBCO waiver standard does not replace or limit a waiver applicant's available options under section 1.3. Indeed, while the NBCO waiver standard articulated focuses specifically on the impact of the proposed merger on viewpoint diversity in the local market and requires applicants to make a showing as to such impact, waiver requests under section 1.3 could include a broader public interest showing, under which parties can assert any variety of considerations they believe warrant waiver of the rule consistent with established precedent. Waiver of the Commission's policies or rules under section 1.3 is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation will serve the public interest. Under this section, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. Although the Commission must give waiver requests a hard look, an applicant for waiver under section 1.3 faces a high hurdle even at the starting gate and must support its waiver request with a compelling showing.

111. *FNPRM* commenters did not address the Commission's question whether a case-by-case approach should incorporate, or disavow, these waiver criteria, which remain in effect along with the current rule. Accordingly, because of the lack of comment on these criteria (for or against), and for the reasons discussed above, the Commission is adopting a new waiver standard that replaces these earlier divestiture waiver criteria.

#### e. Grandfathering

112. The Commission will grandfather, to the extent required, any existing newspaper/broadcast combinations that no longer comply with the NBCO Rule as a result of the changes to the scope of the rule. In addition, as stated in the *FNPRM*, the Commission will continue to allow all combinations currently in existence that have been grandfathered or approved by permanent waiver to the extent that grandfathering/permanent waivers are still necessary to permit common ownership. As the Commission explained, it leaves in place any filing deadlines the Commission has imposed previously on specific parties related to cross-ownership proceedings. Consistent with Commission precedent,

grandfathered combinations, including those subject to permanent waivers, are not transferrable. The Commission disagrees with assertions that, contrary to longstanding Commission precedent, grandfathered and approved combinations should be freely transferable in perpetuity. As stated in the *FNPRM*, the Commission will continue to allow grandfathered status to survive *pro forma* changes in ownership and involuntary changes of ownership due to death or legal disability of the licensee. The Commission's approach strikes the appropriate balance between avoiding imposition of the hardship of divestiture on owners of existing combinations that have owned a combination in reliance on the rules and moving the industry toward compliance with current rules when owners voluntarily decide to sell their properties. A transferee or assignee of the properties must comply with the NBCO Rule in effect at the time of the transaction or obtain a new waiver. This requirement applies to the transfer of existing combinations already grandfathered or approved and to the transfer of combinations grandfathered as a result of becoming non-compliant due to the changes to the scope of the rule.

#### f. Minority and Female Ownership

113. The Commission has declined to adopt the potential rule changes that commenters argue could lead to increased consolidation to the possible detriment of minority- and women-owned businesses. Instead, the adopted rule generally prohibits common ownership of a broadcast station and daily newspaper in the same local market but provides for a modest loosening of the previous ban on cross-ownership through revisions to the rule's geographic scope, creation of an exception for failed/failing entities, and adoption of a viewpoint diversity-based waiver standard. The Commission does not believe that these modest revisions are likely to result in significant new combinations, nor does the record establish that significant demand exists for newspaper/broadcast combinations; indeed, the trend is in the opposite direction, as cross-owned combinations are being severed. Moreover, as discussed in the *FNPRM*, the Commission finds that the record fails to demonstrate that the modifications to the adopted NBCO Rule are likely to result in harm to minority and female ownership. Additionally, the study that Free Press proposes, which involves examining grandfathered combinations separately from waived combinations, would be unlikely to provide useful

results given the small sample size available for each of those categories (Free Press's own criticisms of the MMTC Cross-Ownership Study are instructive in this regard). Nor is such a study necessary given the existing record evidence and the modest revisions adopted.

114. Ultimately, while the Commission adopts the revised NBCO Rule based on its viewpoint diversity goal, and not with the purpose of preserving or creating specific amounts of minority and female ownership, the Commission finds that this rule nevertheless helps to promote opportunities for diversity in broadcast television and radio ownership. The rule helps to increase the likelihood of a variety of viewpoints and to preserve potential ownership opportunities for new voices.

#### D. Radio/Television Cross-Ownership Rule

##### 1. Introduction

115. The Radio/Television Cross-Ownership Rule prohibits an entity from owning more than two television stations and one radio station within the same market, unless the market meets the following size criteria. The rule applies only to commercial stations. If at least 10 independently owned media voices would remain in the market post-merger, an entity may own up to two television stations and four radio stations. If at least 20 independently owned media voices would remain in the market post-merger, an entity may own either: (1) Two television stations and six radio stations, or (2) one television station and seven radio stations. In all instances, entities also must comply with the local radio and local television ownership limits. The market is determined by looking at the service contours of the relevant stations. The rule specifies how to count the number of media voices in a market, including television stations, radio stations, newspapers, and cable systems.

116. After consideration of the full record, including the further comments received in response to the *FNPRM*, the Commission concludes that the Radio/Television Cross-Ownership Rule continues to be necessary given that radio stations and television stations both contribute in meaningful ways to promote viewpoint diversity in local markets. The Commission's finding is consistent with its decision in the *2006 Quadrennial Review Order* to retain the rule, which the Third Circuit upheld. In the *NPRM* and *FNPRM*, the Commission asked whether the rule continues to serve the public interest by preserving

viewpoint diversity in local markets or whether the local radio and television ownership rules alone would protect these goals adequately. The Commission has concluded that the rule continues to play an independent role in serving the public interest separate and apart from the local radio and television ownership rules, which are designed primarily to promote competition. Accordingly, given the important policy interests at stake, the Commission will retain the cross-ownership rule to ensure that consumers continue to have access to a multiplicity of media voices.

## 2. Discussion

117. The Commission concludes that the Radio/Television Cross-Ownership Rule should be retained because it finds that radio stations are meaningful contributors to viewpoint diversity within their communities. The Commission finds that broadcast radio and television stations are valuable mediums for viewpoint expression such that losing a distinct voice through additional consolidation could disserve the public interest. The Commission recognizes that the current rule permits a degree of common ownership, especially in larger markets, but that latitude is not a sufficient reason to ignore the potential harms to viewpoint diversity that may result from further consolidation. The Commission believes that a significant risk of harm exists in potentially reducing the number of diverse and antagonistic information sources within a market. Therefore, the Commission retains the Radio/Television Cross-Ownership Rule, with modifications limited to updating its obsolete references to analog television service contours, to protect viewpoint diversity in local markets. Consistent with Commission analysis in the NBCO context, it finds that Radio/Television Cross-Ownership Rule is not necessary to promote competition or localism in local markets. In the *FNPRM*, the Commission recognized that cross-ownership can create efficiencies that may result in public interest benefits, such as localism. However, there is no guarantee that owners will use any gains produced by such efficiencies to benefit consumers.

118. *Retaining the Rule.* While broadcast television stations and newspapers may be the primary sources of viewpoint diversity in local markets, the current record shows that broadcast radio contributes to viewpoint diversity in meaningful ways. Moreover, platforms such as the Internet or cable do not contribute significantly to viewpoint diversity in local markets and therefore do not meaningfully protect

against the potential loss of viewpoint diversity that would result from increased radio/television cross-ownership. The Commission is cognizant of the fact that consumers' reliance on radio for local news and information has declined over time, as has the number of all-news commercial radio stations. While broadcast radio stations have historically been a less significant source of viewpoint diversity than newspapers and broadcast television stations, the Commission has still been justified in its efforts to regulate cross-ownership. Nonetheless, the Commission finds that it would be inconsistent with the goal of preserving viewpoint diversity to rescind the Radio/Television Cross-Ownership Rule and allow greater consolidation to diminish the viewpoint diversity available in local markets.

119. As acknowledged in the *FNPRM*, the existing rule already permits various levels of cross-ownership, based on the size of the market. The Commission sought comment in the *FNPRM* on the extent to which the rule constrains consolidation beyond what is permitted under the local television and local radio ownership rules and whether those rules would be sufficient to protect Commission policy goals absent the Radio/Television Cross-Ownership Rule. The Commission tentatively concluded that eliminating the rule would have no effect on the number of television stations an entity could own in a market and would permit the acquisition of only one or two additional radio stations in large markets. As the Commission has found previously, however, the existing limits strike an appropriate balance between the protection of viewpoint diversity and the potential public interest benefits that could result from the efficiencies gained by common ownership of radio and television stations in a local market. While relying solely on the local television and local radio ownership rules, each designed to promote competition, might result in only limited additional consolidation, there would still be a loss to viewpoint diversity if the Radio/Television Cross-Ownership Rule were eliminated. Although the Commission continues to find that, in general, newspapers and television stations are the main sources that consumers turn to for local news and information, and the Commission previously has held that radio generally plays a lesser role in contributing to viewpoint diversity, it nevertheless concludes that radio contributes meaningfully to viewpoint diversity. The record shows that broadcast

television and radio are both important sources of viewpoint diversity in local markets; accordingly, the Commission finds that the public interest is best served by retaining the existing rule to protect viewpoint diversity in these markets. The *FNPRM* referenced *Prometheus I* for the proposition that mergers involving media that are not significant sources of local news do not pose a serious threat to viewpoint diversity. The cited discussion in *Prometheus I* does not contradict the Commission's conclusion that radio's contributions to viewpoint diversity are significant enough to warrant the rule's retention. Rather, *Prometheus I* supports the Commission's current view that cable and satellite television and the Internet are not significant sources of independently produced local news and information.

120. Finally, the Commission asked in the *NPRM* how the results of Media Ownership Studies 8A and 8B, which found little to no correlation between radio/television cross-ownership and viewpoint diversity, should inform its analysis. As explained in the *FNPRM*, Media Ownership Study 8A analyzes the impact of radio/television cross-ownership on viewpoint diversity available in local markets by examining how consumers react to content. Media Ownership Study 8B examines the impact of media ownership, including radio/television cross-ownership, on the amount of programming provided in television news programs in three categories: Politics, local programming, and diversity in coverage of news topics. The Commission did not receive meaningful comment on how the results of these studies should inform its analysis. Based on Commission review, these studies provide some evidence that common ownership does not always limit viewpoint diversity. The Commission already has recognized that some evidence exists that cross-ownership does not always limit viewpoint diversity. However, the Commission also has found that the possibility of a connection between ownership and viewpoint is not disproved by evidence that a connection is not always present. Indeed, the Commission has noted previously the existence of ample evidence that ownership can affect viewpoint. As noted in the context of the NBCO Rule, the Commission believes the best way to promote viewpoint diversity is by maximizing the number of independently owned stations in a market, not by relying on a hope or expectation that cross-owned properties will maintain distinct voices. The

Commission finds, however, that the conclusions in these studies are too limited to serve as a basis for a rule change. The authors of Media Ownership Study 8A caution that their evidence does not provide any conclusive basis for policymaking, that they do not make any claims of causality, and that their findings are based on limited data. The authors of Media Ownership Study 8B, while forming more detailed conclusions than in Media Ownership Study 8A, concede that they were forced to rely on limited variation in many policy variables, a constraint that leads to less precise estimates, making it difficult to identify the effects of interest. Ultimately, while the studies do present interesting findings based on indirect means of measuring viewpoint diversity, the Commission does not find that the results—standing in contrast to the record evidence demonstrating the importance of broadcast radio and television stations to viewpoint diversity in local markets—justify elimination of the Radio/Television Cross-Ownership Rule.

121. *Contour Modifications.* In the *NPRM*, the Commission sought comment on how the Radio/Television Cross-Ownership Rule could be modified to account for the fact that the analog broadcast television contours upon which the rule relies became obsolete with the transition to digital television service. The Commission observed that the digital NLSC approximates the Grade B contour but that the Grade A contour does not have a digital equivalent. Given that the Commission is retaining the rule and did not receive any comments on this issue in the context of this rule, the Commission will draw from the relevant discussions and comments in the context of other rules to make the modifications necessary to update the Radio/Television Cross-Ownership Rule.

122. The first of these modifications updates the television contour used to determine when the rule is triggered. The digital PCC, as defined in § 73.625 of the Commission's rules, will replace the analog Grade A contour when assessing whether a television station's contour encompasses a radio station's community of license. This change is consistent with the Commission's replacement of the Grade A contour for purposes of the NBCO Rule. Additionally, as stated in the *FNPRM*, a television station's PCC ensures reliable service for the community of license, is already defined in the Commission's rules, and can be verified easily in the event of a dispute.

123. The second modification updates the use of a television station's Grade B contour for purposes of determining how many media voices would remain in a market following a station acquisition. A television station's digital NLSC, the digital approximate of the Grade B contour, will replace that analog measurement. Therefore, the Commission will count as media voices those independently owned and operating full-power broadcast television stations within the DMA of the television station's (or stations') community (or communities) of license that have digital NLSCs that overlap with the digital NLSC(s) of the television station(s) at issue. This digital NLSC substitution is consistent with the Commission's replacement of the Grade B contour in the Local Television Ownership Rule.

124. *Grandfathering.* Due to the contour modifications the Commission adopts herein, there may be circumstances in which an existing combination now will be impermissible under the revised rule. Consistent with the Commission's approach in adopting technical modifications to the Local Television Ownership Rule and the NBCO Rule, the Commission will grandfather any existing combinations, so long as they are held by their current owners, to avoid imposing the hardship of divestiture on owners previously compliant with the rules. However, subsequent purchasers must either comply with the rule in effect at that time or obtain a waiver. Thus, stations that are subject to license assignment or transfer of control applications will be required to comply with the applicable rules, except that grandfathering will continue to apply to stations that are subject to *pro forma* changes in ownership and involuntary changes of ownership due to death or legal disability of the licensee.

125. *Minority and Female Ownership.* While the Commission retains the existing Radio/Television Cross-Ownership Rule (with minor contour modifications) based on its viewpoint diversity goal, and not with the purpose of preserving or creating specific amounts of minority and female ownership, the Commission finds that retaining the existing rule nevertheless helps to promote opportunities for diversity in broadcast television and radio ownership. The rule helps to increase the likelihood of a variety of viewpoints and to preserve ownership opportunities for new entrants.

## E. Dual Network Rule

### 1. Introduction

126. Based on the record compiled in the 2010 and 2014 Quadrennial Review proceedings, the Commission finds that the Dual Network Rule, which permits common ownership of multiple broadcast networks but prohibits a merger between or among the top-four networks (specifically, ABC, CBS, Fox, and NBC), continues to be necessary to promote competition and localism and should be retained without modification. The rule provides that a television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations *unless* such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were networks as defined in § 73.3613(a)(1) of the Commission's regulations. The Third Circuit upheld the Commission's decision in the *2006 Quadrennial Review Order* to retain the dual network rule to promote competition and localism. The Commission finds that, in comparison to other broadcast and cable networks, the top-four broadcast television networks have a distinctive ability to attract larger primetime audiences on a regular basis, which enables the top-four networks to earn higher rates from those advertisers seeking to reach large, national mass audiences consistently. By reducing the number of choices available to such advertisers, a combination among top-four broadcast networks could substantially lessen competition and lead the networks to pay less attention to viewer demand for innovative, high-quality programming. The Commission also finds that the Dual Network Rule remains necessary to preserve the ability of affiliates to influence network decisions in a manner that best serves the interests of their local communities, thereby maintaining the balance of bargaining power between the top-four networks and their affiliates. The Commission concludes that the benefits of retaining the rule outweigh any potential burdens.

### 2. Discussion

127. *Competition.* The Commission concludes that the Dual Network Rule continues to be necessary in the public interest to foster competition in the provision of primetime entertainment programming and the sale of national advertising time. The Commission continues to believe that at present these four major networks continue to constitute a strategic group in the national advertising marketplace and

compete largely among themselves for advertisers that seek to reach comparatively large, national audiences. Accordingly, the Commission finds that a top-four network merger would substantially lessen competition for advertising dollars in the national advertising marketplace, which would, in turn, reduce incentives for the networks to compete with each other for viewers by providing innovative, high-quality programming. Based on their distinctive characteristics relative to other broadcast and cable networks, the Commission concludes that the top-four broadcast networks continue to serve a unique role in the provision of primetime entertainment programming and the sale of national advertising time that justifies the retention of this rule specific to them.

128. The Commission finds that the top-four broadcast networks continue to attract primetime audiences that are more consistent and larger than those achieved by other broadcast or cable networks, as measured both by the audience size for individual programs and by the audience size for each network as a whole. The primetime entertainment programming supplied by the top-four broadcast networks generally is designed to appeal to a mass audience, and financing such programming on the scale needed for a consistent primetime lineup, in turn, requires investment of substantial revenues that only a consistently large, mass audience can provide. Thus, the primetime entertainment programming that the top-four networks provide to their affiliated local stations is intended to attract on a regular basis both mass audiences and the advertisers that want to reach them. This is in contrast to other broadcast networks, and many cable networks, which tend to target more specialized, niche audiences. Due to their targeted approaches, programming on these networks attracts smaller audiences than the top-four networks.

129. The Commission notes that in recent years some cable networks may have modified their primetime lineups to more closely resemble those of broadcast networks and that some online video providers have started offering original programming that may also attract sizable audiences. Nonetheless, at this time the Commission does not believe that cable networks or online providers have assembled a platform of programming that is consistently of the same broad appeal and audience share, on the whole, as the primetime entertainment programming provided by the top-four broadcast networks.

130. Commission staff review of more recent data shows that, while certain cable networks have continued to air a discrete number of individual programs or episodes that have become increasingly capable of attracting primetime audiences on par with, or even greater than, the top-four broadcast networks, no one cable network—let alone several—has been able to consistently deliver such audiences beyond individual programs or episodes.

131. This conclusion is also supported by data on the average primetime audience size of individual broadcast and cable networks, as measured at the network level. Even though an increasing number of individual cable primetime entertainment programs or episodes have achieved audiences of a similar size to their broadcast network counterparts, on average the primetime audience size for each of the top-four broadcast networks has remained significantly larger than the audience size for even the most popular cable networks. Accordingly, the Commission concludes that the primetime entertainment programming provided by the top-four broadcast networks continues to be a distinct product capable of attracting large audiences of a size that individual cable networks cannot consistently replicate, despite the ability of a few primetime cable network programs to achieve similarly large audiences on an individual basis.

132. In addition, there continues to be a wide disparity in the advertising rates earned by the top-four broadcast networks and the advertising rates charged by other broadcast and cable networks, which further indicates that the top-four broadcast networks are distinct from other networks.

133. Data on net advertising revenues provide further indication that the top-four broadcast networks are particularly appealing to advertisers seeking consistent, large national audiences. The Commission finds that the data further support its conclusion that the top-four broadcast networks comprise a strategic group in the national advertising marketplace and compete largely among themselves for advertisers that seek to reach large, national mass audiences consistently.

134. Therefore, the Commission retains the existing Dual Network Rule without modification to promote competition in the sale of national advertising time. The Commission also agrees with comments that the rule remains necessary to promote competition in the marketplace for primetime programming. Specifically,

the Commission finds that the top-four broadcast networks have a distinctive ability to attract, on a regular basis, larger primetime audiences than other broadcast and cable networks, which enables them to earn higher rates from those advertisers that are willing to pay a premium for such audiences. Thus, a combination between two top-four broadcast networks would reduce the choices available to advertisers seeking large, national audiences, which could substantially lessen competition and lead the networks to pay less attention to viewer demand for innovative, high-quality programming. The Commission therefore concludes that the primetime entertainment programming provided by the top-four broadcast networks and national television advertising time are each distinct products—the availability, price, and quality of which could be restricted, to the detriment of consumers, if two of the top-four networks were permitted to merge. Accordingly, the Commission finds that the Dual Network Rule remains necessary to foster competition in the sale of national television advertising time and the provision of primetime entertainment programming.

135. *Localism.* In addition to furthering its competition goal, the Commission concludes that, consistent with past Commission findings, the Dual Network Rule also continues to be necessary to foster localism. Specifically, the Commission finds that eliminating the rule could increase the bargaining power of the top-four broadcast networks over their affiliate stations, thereby reducing the ability of the affiliates to influence network programming decisions in a manner that best serves the interests of their local communities. Typically, a critical role of a broadcast network is to provide its local affiliate stations with high-quality programming. Because this programming is distributed nationwide, broadcast networks have an economic incentive to ensure that the programming both appeals to a mass, nationwide audience and is widely shown by affiliate stations. By contrast, a network's local affiliate stations provide local input on network programming decisions and air programming that serves the specific needs and interests of that specific local community. As a result, the economic incentives of the networks are not always aligned with the interests of the local affiliate stations or the communities they serve.

136. In the context of this complementary network-affiliate relationship, the Commission agrees with network affiliate commenters that

a top-four network merger would reduce the ability of a network affiliate station to use the availability of other top, independently owned networks as a bargaining tool to exert influence on the programming decisions of its network, including the affiliate's ability to engage in a dialogue with its network over the suitability for local audiences of either the content or scheduling of network programming. Elimination of the Dual Network Rule would increase the economic leverage of the top-four networks over their affiliate stations, which would harm localism by diminishing the ability of the affiliates to serve their communities. The Commission has recognized that affiliate stations play an important role in assuring that the needs and tastes of local viewers are served. The Commission also agrees with network affiliate commenters that the Dual Network Rule is an important structural principle that helps to maintain equilibrium between the top-four networks and their affiliate stations. Accordingly, the Commission concludes that the Dual Network Rule remains necessary to foster localism. In the *NPRM*, the Commission also sought comment on whether antitrust laws and its public interest standard are sufficient to address any harms to competition or localism that might result from a top-four network merger. The Commission's concern here is that a merger of two or more top-four networks would restrict the availability, price, and quality of primetime entertainment programming and the bargaining power and influence of network affiliate stations, harming consumers and localism. Because these harms to consumers and localism are not typically considered in a structural antitrust analysis, the Commission does not believe that antitrust enforcement would adequately protect against these harms.

137. *Dual Affiliation*. As noted previously, some commenters have urged the Commission to prohibit a TV station from affiliating with two or more top-four broadcast networks in a single market, claiming that dual affiliation allows a broadcaster to do locally what the networks are forbidden from doing nationally, which is to consolidate the bargaining power of multiple top-four network signals under the control of a single entity. The Commission finds, however, that dual affiliation does not implicate the Dual Network Rule and that the rule should not be expanded to address dual affiliation practices. The Dual Network Rule addresses harms to competition and localism that would result from a decrease in the number of

networks competing for national advertisers and the reduced ability of local affiliate stations to use the availability of other top, independently owned networks as a bargaining tool to influence network programming decisions. Because dual affiliation does not reduce the number of network owners, the Commission believes that dual affiliation does not give rise to either of these harms. Accordingly, arguments related to dual affiliation are not relevant to the Commission's consideration of the Dual Network Rule.

138. *Minority and Female Ownership*. In this proceeding, the Commission sought comment on the impact of its media ownership rules on minority and female ownership of broadcast stations. No commenters, however, addressed the potential impact of the Dual Network Rule on minority and female ownership. Given the distinct nature of the Dual Network Rule and its focus on mergers involving the top-four broadcast networks, and not ownership limits in local markets, the Commission does not believe that this rule would be expected to have any meaningful impact on minority and female ownership levels.

#### IV. Diversity Order Remand

139. In addition to assessing each of the broadcast ownership rules subject to quadrennial review pursuant to Section 202(h), the Commission is considering in this proceeding the Third Circuit's remand of the Commission's 2008 *Diversity Order*, in particular the decision in that order to adopt a revenue-based eligible entity definition as a race-neutral means of facilitating ownership diversity. In *Prometheus III*, the Third Circuit ordered the Commission to act promptly to bring the eligible entity definition to a close by making a final determination as to whether to adopt a new definition. The court stated that it did not intend to prejudge the outcome of this analysis.

140. The *Order* discusses below the actions that the Commission believes are appropriate in response to the Third Circuit's remand. As a threshold matter, the *Order* discusses the Commission's ongoing initiatives to promote diversity of ownership among broadcast licensees and to expand opportunities for minorities and women to participate in the broadcast industry. The *Order* also discusses the Commission's ongoing improvements to the collection of data and other empirical evidence that are relevant to minority and female ownership issues. Next, the *Order* discusses the measures the Commission adopted to enhance ownership diversity. Based on the record in this proceeding, the Third Circuit's remand

instructions, and Commission analysis of the preexisting eligible entity standard and the measures to which it applied, the Commission concludes that it should reinstate the revenue-based eligible entity standard and apply the standard to the regulatory policies set forth in the *Diversity Order*. The Commission concludes that reinstating the previous revenue-based standard will serve the public interest by promoting small business participation in the broadcast industry and potential entry by new entrepreneurs. The Commission finds that small businesses benefit from flexible licensing policies and that easing certain regulations for small business applicants and licensees will encourage innovation and enhance viewpoint diversity. The Commission also believes that the benefits of reinstating the eligible entity standard and applying it to the regulatory measures set forth in the *Diversity Order* outweigh any potential costs of the Commission's decision to do so. Accordingly, the Commission concludes that this action will advance the policy objectives that traditionally have guided the Commission's analyses of broadcast ownership issues.

141. This action does not, of course, preclude Commission consideration of other or additional eligibility standards that have been put forward as means to promote minority and women ownership of broadcast stations. The Commission has carefully studied the record, and the evidence does not establish a basis for race-conscious remedies. Thus, the Commission does not believe that such measures would withstand review under the equal protection component of the Due Process Clause of the Constitution. The Supreme Court held in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (*Adarand*), that any federal program in which the government treats any person unequally because of his or her race must satisfy the strict scrutiny constitutional standard of judicial review. Finally, the Commission evaluates additional measures that commenters have proposed as potential means of promoting diversity of ownership, aside from the measures that the Third Circuit remanded in *Prometheus II*, including a proposal that the Commission adopt an Overcoming Disadvantage Preference (ODP) standard.

#### A. Commission Diversity Initiatives and Data Collection Efforts

##### 1. Continuing Diversity Initiatives

142. *Diversity Rules and Policies*. The Commission strongly believes that a

diverse and robust marketplace of ideas is essential to democracy. As the Supreme Court has recognized *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990), safeguarding the public's right to receive a diversity of views and information over the airwaves is an integral component of the FCC's mission. The Commission has established numerous policies and rules intended to further the proliferation of diverse and antagonistic sources. Furthermore, as noted by the Third Circuit in *Prometheus III*, the Commission has a congressional mandate to disseminate spectrum licenses among a wide variety of applicants, including businesses owned by members of minority groups and women. This statutory directive, however, does not mandate race- or gender-conscious initiatives.

143. The Commission and Congress previously adopted race- and gender-conscious measures intended specifically to assist minorities and women in their efforts to acquire broadcast properties, such as tax certificates and distress sale policies. Following the *Adarand* decision, however, the Commission discontinued those policies and programs. Congress repealed the tax certificate policy in 1995 as part of its budget approval process. Subsequently, the Commission continued its efforts to promote viewpoint diversity through a variety of race- and gender-neutral initiatives intended to promote diversity of broadcast ownership, and the Commission currently has a number of such rules and initiatives in place. The Commission addresses the concerns raised by the court in *Prometheus II* and finds that reinstating the revenue-based eligible entity standard and the related regulatory policies will serve its broader goal of diversity of ownership, and thus viewpoint diversity, by facilitating small business and new entrant participation in the broadcast industry. In addition to these measures, the Commission also took a number of other actions in the *Diversity Order* to promote viewpoint diversity through diversity of ownership. Beyond fostering viewpoint diversity, the Commission has taken steps to facilitate the entry of new participants into the broadcasting industry to promote innovation in the field also. Because the Third Circuit expressly upheld those other actions, they remain in place. Those actions include, among others, a ban on discrimination in broadcast transactions, a zero tolerance policy for ownership fraud, and a requirement that non-discrimination provisions be

included in advertising sales contracts. The Commission has revised its Form 303-S license renewal application form to include this certification requirement. The court also expressly upheld several other measures adopted by the Commission in the *Diversity Order*, including the commissioning of longitudinal research on minority and women ownership trends, enabling the Commission's Office of Communications Business Opportunities (OCBO) to coordinate with the Small Business Administration to encourage local and regional banks to make loans through SBA's guaranteed loan programs, the holding of Access to Capital conferences, and the creation of a guidebook on diversity. Similarly, the *Prometheus II* opinion did not question the Commission's decision to reinstate the failed station solicitation rule (FSSR), which is intended to provide out-of-market buyers, including minorities and women, with notice of a sale and an opportunity to bid on stations before the seller seeks a waiver of certain ownership rules. The FSSR provides that, before selling a station to an in-market buyer, an applicant for a failed or failing station waiver of the local television ownership rule or the radio/television cross-ownership rule must demonstrate that the in-market buyer is the only entity ready, willing, and able to operate the station and that sale to a buyer outside the market would result in an artificially depressed price. In the *2002 Biennial Review Order*, the Commission eliminated the FSSR, finding that the buyer most likely to deliver public interest benefits by using the failed, failing, or unbuilt station will be the owner of another station in the same market. The *Prometheus I* court remanded the issue on the basis that the Commission did not consider the potential impact on minority owners when it eliminated the rule. In the *2006 Quadrennial Review Order*, the Commission reinstated the FSSR. Accordingly, this measure has remained in place and is retained as part of this *Order* on the local television ownership rule. In addition, the Commission notes that anecdotal evidence suggests that JSAs may have had the effect of enabling large station owners to foreclose entry into markets and that the Commission's decision to attribute JSAs has actually led to greater ownership diversity.

144. *OCBO Initiatives*. Additionally, OCBO promotes diversity by serving as the principal advisor to the Chairman and the Commissioners on issues, rulemakings, and policies affecting small, women-owned, and minority-

owned communications businesses. OCBO also hosts workshops and conferences designed to help promote small business and minority participation in the communications marketplace. OCBO's efforts to promote small business participation and ownership diversity—in broadcast, telecommunications, and new media—have continued since the release of the *FNPRM*.

145. *Foreign Ownership*. The Commission has taken steps to help facilitate investment in the broadcast industry, which a number of commenters suggest would help to facilitate ownership diversity. Recently, the Commission released a Notice of Proposed Rulemaking proposing to extend to broadcast licensees the same streamlined procedures and rules used to review foreign ownership in common carrier licensees, with certain tailored modifications. These proposed changes, if adopted, could facilitate investment from new sources of capital at a time of growing need for investment in the broadcast sector. Further, MMTC and others believe that these proposed changes could potentially benefit minority-owned broadcasters and facilitate diverse programming.

146. *Tax Certificate Legislation*. Consistent with comments in the record, the Commission's most recent Section 257 Report to Congress includes a recommendation that Congress pass tax deferral legislation. The report states that such a program could permit tax credits for sellers of communications properties who offer financing to small firms.

147. *AM Revitalization*. As discussed in the *FNPRM*, several of the Diversity and Competition Supporter's (DCS) proposals involve modifications to the AM broadcast service, and the *AM Revitalization NPRM* (78 FR 69629, Nov. 20, 2013, FCC 13-139, rel. Oct. 29, 2013) solicited comment on a number of the technical issues that DCS raised in this proceeding. Given the nature of these proposals, they must be considered in the broader context of the Commission's efforts to revitalize the AM service. Since the release of the *FNPRM*, the Commission has adopted the six proposals set forth in the *AM Revitalization NPRM*. The Commission believes that its actions in the *AM Revitalization Order* (81 FR 2751, Jan. 19, 2016, FCC 15-142, rel. Oct. 23, 2013) will assist AM broadcasters to better serve the public, thereby advancing the Commission's fundamental goals of diversity, competition, and localism in broadcast media. These actions address some of the technical issues that DCS has raised

in this proceeding about the AM broadcast service. The Commission notes that some commenters regard the AM radio service as a critical point of entry for women and minorities seeking to become broadcasters.

148. *Hispanic Television Study*. In addition, the Commission conducted a study of Hispanic television viewing. The study is the Commission's first systematic examination of the Hispanic television marketplace, which comprises a growing segment of the nation's population. Specifically, the study considers: (1) The impact of Hispanic-owned television stations on Hispanic-oriented programming and Hispanic viewership in selected local television markets; and (2) the extent of Hispanic-oriented programming on U.S. broadcast television. The results of the study's regression analysis indicate that, among other things, Hispanic viewers favor the major Spanish-language networks, especially Univision (which is not Hispanic-owned); watch local, Spanish-language news at higher levels than English-language news; and watch more telenovelas than other program types.

149. The Commission recognizes, however, that no one study, including the *Hispanic Television Study*, will be responsive to the many and varied concerns raised by commenters. The objective of the study was to attempt to examine the nexus, if any, between Hispanic ownership of broadcast television stations and Hispanic-oriented program content.

## 2. Continuing Improvements to Data Collection

150. *Collection of Biennial Ownership Data*. The Commission has improved its collection and analysis of broadcast ownership information. Indeed, its recent efforts have largely addressed the concerns expressed by certain commenters. The Commission has been engaged in a sustained effort to improve the quality, utility, and reliability of broadcast ownership data it collects on FCC Forms 323 and 323-E.

151. To improve the quality of its broadcast ownership data, the Commission adopted several significant changes to Form 323 in the *323 Order* (74 FR 25163, May 27, 2009, FCC 09-33, rel. May 5, 2009). The Commission established a new, machine-readable Form 323, expanded the filing requirement to sole proprietors, partnerships of natural persons, low power television (LPTV), and Class A television licensees and established a uniform filing deadline of November 1 for biennial ownership reports on Form 323. Most recently, the Commission in

2016 adopted a number of additional enhancements to its broadcast ownership data collection to further improve the comprehensiveness and reliability of the data. In particular, the Commission implemented a Restricted Use FCC Registration Number (Restricted Use FRN)—a new identifier within the Commission's Registration System (CORES)—that will allow for unique identification of individuals listed on broadcast ownership reports, without necessitating the disclosure to the Commission of individuals' full Social Security Numbers. The Commission also eliminated the availability of the interim Special Use FRN for individuals reported on broadcast ownership reports, except in certain limited circumstances.

152. In addition, the Commission revised Form 323-E to collect race, gender, and ethnicity information for attributable interest holders; to require that CORES FRNs or Restricted Use FRNs be used; and to conform to the biennial filing deadline for NCE station ownership reports to the biennial filing deadline for commercial station ownership reports. Together, the further enhancements that the Commission adopted in the *Form 323/CORES Report and Order* (81 FR 19432, Apr. 4, 2016, FCC 16-1, rel. Jan. 20, 2016) will enable the Commission to obtain data providing a more useful, accurate, and thorough picture of minority and female broadcast station ownership, while reducing filing burdens.

153. *Improving Response Rates and Data Quality*. In addition to substantially revising Forms 323 and 323-E, the Commission has made ongoing outreach efforts to assist filers in an effort to improve response rates and to reduce common filing errors. Prior to the 2011, 2013, and 2015 biennial filing periods for Form 323, the Media Bureau released public notices to remind commercial licensees of their obligation to file a biennial ownership report. To assist both novice and experienced filers, the Bureau has hosted information sessions regarding the filing of biennial ownership reports on Form 323, which are also available on the Commission's Web site.

154. *Analysis of Ownership Data*. To assist parties in their ability to access and analyze the ownership data, the Commission has ensured that the data submitted on Form 323 are incorporated into a relational database, the most common database format, which is standard for large, complex, interrelated datasets. Complete raw data from the Commission's broadcast ownership filings, both current and historical, are available for download from the

Commission's Web site, and the data are updated on a daily basis to account for new and amended filings. Researchers and other parties may download the data files from the Commission's Web site at any time and study, search, and manipulate the data in a wide variety of ways. The Commission has made explanatory documents publicly available and easy to find. Also, in response to requests from outside parties, the Commission now provides spreadsheets that contain additional ownership data, such as call signs, broadcast location, and market information. These spreadsheets are released with the 323 Reports to help present a broader picture of the biennial Form 323 data.

155. In addition, the Media Bureau hosted an all-day public workshop in September 2015 to assist individuals and organizations that wish to use and study the large amount of broadcast ownership data that is available to the public on the Commission's Web site. The workshop addressed a number of topics concerning access to, and use of, the Commission's commercial broadcast ownership data, including relevant data that the Commission collects, how members of the public can access those data, and mechanisms for querying, studying, and visualizing the data, including in combination with data available from non-FCC sources. The workshop, a video of which is available online, provides researchers with the tools and understanding to electronically search, aggregate, and cross reference the data to prepare their own analysis.

## B. Remand Review of the Revenue-Based Eligible Entity Standard

156. The Commission concludes that its prior revenue-based eligible entity definition should be reinstated and applied to the regulatory policies set forth in the *Diversity Order*. The Commission finds that reinstating the eligible entity definition and the measures to which it applied will serve the public interest by promoting small business participation in the broadcast industry and potential entry by new entrepreneurs. Accordingly, the Commission reinstates its previous revenue-based eligible entity definition and the measures adopted in the *Diversity Order* that were vacated and remanded by the Third Circuit in *Prometheus II*.

157. The Commission concludes that the revenue-based eligible entity standard is a reasonable and effective means of promoting broadcast station ownership by small businesses and potential new entrants. The Commission

continues to believe that small business applicants and licensees often have financial and operational needs that are distinct from those of larger broadcasters, and that they require greater flexibility with regard to licensing, construction, auctions, and transactions. By easing certain regulations for small business applicants and licensees, the Commission believes it will increase station ownership opportunities for small businesses and new entrants, to the benefit of the public interest.

158. Moreover, the Commission concludes that its traditional policy objectives will be served by enhancing opportunities for small business participation in the broadcast industry via the eligible entity standard. The Commission continues to believe that enabling more small businesses to participate in the broadcast industry will encourage innovation and promote competition and viewpoint diversity. As the Commission has noted previously in the *2002 Biennial Review Order*, greater small business participation in communications markets will expand the pool of potential competitors and should bring new competitive strategies and approaches by broadcast station owners in ways that benefit consumers in those markets. The Commission continues to believe that this is true. Furthermore, increasing opportunities for small businesses to participate in the broadcast industry will foster viewpoint diversity by facilitating the dissemination of broadcast licenses to a wider variety of applicants than would otherwise be the case. Competition and viewpoint diversity are two primary policy objectives that have traditionally guided the Commission's analysis of broadcast ownership issues.

159. The record supports these conclusions. Commenters, including AWM and NAB, agree that re-adopting the revenue-based eligible entity standard is an appropriate means of enhancing ownership opportunities for small businesses and new entrants. Although public interest commenters criticize the Commission's proposal to reinstate the revenue-based standard, they also acknowledge the data cited in the *FNPRM* to support the Commission's conclusion that the standard promotes viewpoint diversity. Public interest commenters that criticize the revenue-based eligible entity standard do so based on their view that the standard is not an effective means of increasing ownership specifically by women and minorities. However, this has no bearing on the Commission's conclusion that the standard will help

promote small business and new entrant participation in the broadcast industry.

160. The Native Public Media and the National Congress of American Indians (NPM/NCAI) argue that, pending further action on a race- and gender-conscious eligible entity standard, the Commission can take another significant step towards overcoming the underrepresentation of Native Americans in broadcast station ownership by expanding the definition of eligible entity to include Native Nations. The Commission does not believe expanding its revenue-based eligible entity definition to include Tribes and Tribal Applicants to enable more small businesses to participate in the broadcast industry is necessary. Moreover, as NPM/NCAI point out, the Commission has adopted measures in a separate proceeding that are intended to expand broadcast opportunities for Tribal Nations and Tribal entities. To the extent that their proposal is intended to increase broadcast service to Tribal lands, the Commission believes it is outside the scope of this quadrennial review proceeding. The Commission notes that, in a proceeding concerning rural radio, the Commission adopted a Tribal Radio Priority to expand the number of radio stations owned or majority controlled by federally recognized American Indian Tribes and Alaska Native Villages, or Tribal consortia, broadcasting to Tribal lands.

161. The Commission's decision to reinstate the revenue-based eligible entity standard is also supported by the Commission's own records, which indicate that a significant number of broadcast licensees and permittees availed themselves of policies based on the revenue-based eligible entity standard between the implementation of that standard and its suspension following *Prometheus II*. One of those policies was to allow an eligible entity that acquired an expiring broadcast construction permit to obtain additional time to build out its facilities in certain circumstances.

162. The data clearly suggest that providing additional time to construct broadcast facilities has facilitated market entry by small broadcasters. Further, the Commission notes that the data reflect the use of the prior eligible entity standard in a limited context and do not reflect the total number of applicants and permittees that benefited from all the various broadcast policies that relied on the revenue-based eligible entity standard. Even so, this information supports the Commission's conclusion that the revenue-based eligible entity standard has been used successfully by a significant number of

small firms and has not only aided their entry, but also contributed to the sustained presence of small firms in broadcasting in furtherance of the Commission's public interest goals.

163. In addition to reinstating the revenue-based eligible entity standard, the Commission believes applying the standard to the full range of construction, licensing, transaction, and auction measures to which it previously applied is in the public interest. Commenters that have argued against reinstatement have done so based on whether the measures will specifically increase minority and female ownership of broadcast stations, which has no bearing on whether the measures will promote small business participation in the broadcast industry. Accordingly, the Commission hereby re-adopts each measure relying on this definition that was remanded in *Prometheus II*. Specifically, the Commission reinstates the following measures: (1) Revision of Rules Regarding Construction Permit Deadlines; (2) Modification of Attribution Rule; (3) Distress Sale Policy; (4) Duopoly Priority for Companies that Finance or Incubate an Eligible Entity; (5) Extension of Divestiture Deadline in Certain Mergers; and (6) Assignment or Transfer of Grandfathered Radio Station Combinations. In reinstating this measure, the Commission emphasizes that this exception to its strict broadcast station construction policy is limited to one 18-month extension based on one assignment to an eligible entity. In addition, pursuant to the new entrant bidding credits available under the Commission's broadcast auction rules, the modified EDP attribution standard was available to interest holders in eligible entities that are the winning bidders in broadcast auctions. The Commission also reinstates this application of the modified EDP standard. Moreover, to ensure realization of the Commission's policy goals, in reviewing the sale of a permit to an eligible entity, the Commission will assess the *bona fides* of both the arms-length structure of the transaction and the assignee's status as an eligible entity as proposed in the *FNPRM*. In addition, the Commission clarifies that this exception to its broadcast station construction policy applies both to original construction permits for the construction of new stations and to construction permits for major modifications of authorized broadcast facilities. The Commission also lifts any prior suspension of Commission rules implementing these measures and applying the eligible entity standard,

including 47 CFR 73.3555, Note 2(i)(2); 73.3598(a); and 73.5008(c)(2). As of the effective date of the reinstated Eligible Entity measures, the suspension will no longer be in effect.

164. Consistent with the Commission's pre-existing eligible entity definition, the Commission defines an eligible entity as any entity—commercial or noncommercial—that would qualify as a small business consistent with SBA standards for its industry grouping, based on revenue. As the Commission previously held, going forward it will include both commercial and noncommercial entities within the scope of the term eligible entity to the extent that they otherwise meet the criteria of this standard. In the *FNPRM*, the Commission sought comment on whether to use different eligible entity definitions for commercial and noncommercial entities, and no commenters have urged the Commission to do so. For all SBA programs, a radio or television station with no more than \$38.5 million in annual revenue currently is considered a small business. The definition of small business for the radio industry is listed in North American Industry Classification System (NAICS) code 515112, and the definition of a small business for the television industry is listed in NAICS code 515120. To determine qualification as a small business, the SBA considers the revenues of domestic and foreign affiliates, including the parent corporation and affiliates of the parent corporation, not just the revenues of individual broadcast stations. The Commission will also require an eligible entity to satisfy one of several control tests to ensure that ultimate control rests in an entity that satisfies the revenue criteria. Specifically, the eligible entity must hold: (1) 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interest; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company. When the Commission, in the *2002 Biennial Review Order*, ruled that licenses would be allowed to transfer grandfathered station combinations to eligible entities, it required that control of the eligible entity purchasing the

grandfathered combination must meet one of several control tests to meet the Commission's public interest objectives and ensure that the benefits of the exception flowed as intended. The Commission readopts these requirements for the same reasons.

#### *C. Remand Review of a Race- or Gender-Conscious Eligible Entity Standard*

165. The Commission's adoption of a revenue-based definition of eligible entity to promote small business participation in the broadcast industry does not, of course, preclude the Commission from considering whether to adopt an additional standard designed specifically to promote minority and female ownership of broadcast stations.

166. However, the Commission declines to adopt an SDB eligibility standard or other race- or gender-conscious eligible entity standard. While the Commission finds that a reviewing court could find the Commission's interest in promoting a diversity of viewpoints over broadcast media compelling, the Commission does not believe that the record evidence sufficiently demonstrates that adoption of race-conscious measures would be narrowly tailored to further that interest. In particular, the Commission finds that the evidence in the record, including the numerous studies that have been conducted or submitted, does not demonstrate a connection between minority ownership and viewpoint diversity that is direct and substantial enough to satisfy strict scrutiny. The two recent studies that directly address the impact of minority ownership on viewpoint diversity, *Media Ownership Studies 8A* and *8B*, find almost no statistically significant relationship between such ownership and their measure of viewpoint diversity. Other studies in the record examine the relationship between minority ownership and other aspects of the Commission's diversity goal, such as programming or format diversity, rather than the viewpoint diversity that the Supreme Court has recognized as an interest of the highest order and that the Commission believes is most central to First Amendment values. Many of the studies, too, demonstrate at most a limited relationship between minority ownership and other aspects of the Commission's diversity goal.

167. In addition, the Commission does not believe that the record evidence establishes a sufficiently strong relationship between diversity of viewpoint and female ownership of broadcast stations that would satisfy the constitutional standards for gender-

based classifications. The Commission finds that the evidence in the record does not reveal that the content provided via women-owned broadcast stations substantially contributes to viewpoint diversity in a manner different from other stations or otherwise varies significantly from that provided by other stations. Because the studies in the record do not indicate that increased female ownership will increase viewpoint diversity, the Commission believes that they do not provide a rationale for adopting gender-based diversity measures.

168. Moreover, the Commission does not believe that the record evidence is sufficient to establish a compelling interest in remedying past discrimination. The Commission finds that no evidence exists in the record demonstrating a statistically significant disparity between the number of minority- and women-owned broadcast stations and the number of qualified minority- and women-owned firms, and the Commission lacks a plausible way to determine the number of qualified firms owned by minorities and women. The Commission believes that it cannot demonstrate a compelling interest in remedying discrimination in the Commission's licensing process in the absence of such evidence. Because the only statistical evidence in the record pertains to discriminatory access to capital and the rest is anecdotal evidence that is of more limited value for purposes of satisfying heightened scrutiny, the Commission finds that the record evidence of past discrimination in the broadcast industry—both by the Commission itself and by private parties with the Commission acting as a passive participant—is not nearly as substantial as that accepted by courts in other contexts as satisfying strict scrutiny. Based on its evaluation of the record evidence, the Commission also concludes that it is not of sufficient weight to support gender-based remedial action. Accordingly, the Commission cannot adopt rules that explicitly rely on race or gender. The *FNPRM* also contains a detailed and thorough analysis of these issues, and it reflects the Commission's extensive efforts to evaluate the current constitutional considerations and available evidence regarding the adoption of race- and gender-conscious measures.

#### 1. Enhancing Viewpoint Diversity

169. *Race-Based Diversity Measures.* In the *FNPRM*, the Commission expressed its belief that the Commission's interest in promoting viewpoint diversity could be deemed

sufficiently compelling to survive the first prong of the strict scrutiny test, and the Commission sought comment on this analysis. In response to the *FNPRM*, many commenters agree that the Commission's interest in promoting viewpoint diversity could be deemed sufficiently compelling under strict scrutiny, and the Commission affirms this belief. The U.S. Supreme Court to date has accepted only two justifications for race-based action as compelling for purposes of strict scrutiny: Student body diversity in higher education and remedying past discrimination. In *Metro Broadcasting*, the Court held, based on the application of intermediate constitutional scrutiny, that the interest in enhancing broadcast diversity is, at the very least, an important governmental objective. In reaching its determination that broadcast diversity is, at the very least, an important governmental objective, the Court stated that safeguarding the public's right to receive a diversity of views and information over the airwaves is . . . an integral component of the FCC's mission and that the Commission's public interest' standard necessarily invites reference to First Amendment principles. In *Adarand*, the Court overruled the application of intermediate scrutiny in *Metro Broadcasting* but did not disturb other aspects of that decision, including the recognition of an important governmental interest in broadcast diversity. However, the D.C. Circuit held in *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354–55 (D.C. Cir. 1998) that broadcast diversity does not rise to the level of a compelling governmental interest. Also, in 2007, the Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), declined to recognize a compelling interest in diversity outside of the context of higher education. In the *FNPRM*, the Commission tentatively found that the case law nevertheless supports its position that viewpoint diversity would be found to be compelling—even though the law is unsettled. Regardless of whether viewpoint diversity is a compelling interest, however, the Commission finds that it still cannot adopt an SDB eligibility standard or other race- or gender-conscious eligibility standard.

170. Assuming a reviewing court could be convinced that diversity of viewpoint is a compelling governmental interest, the Commission finds that the record in this proceeding fails to satisfy the second prong of the strict scrutiny test, *i.e.*, that a sufficient nexus exists

between minority ownership of broadcast stations and viewpoint diversity. As explained in the *FNPRM*, the two recent studies in the record that directly address the impact of minority ownership on viewpoint diversity find almost no statistically significant relationship between such ownership and their measure of viewpoint diversity. Also, consistent with the *FNPRM*, the Commission finds that the body of evidence contained in the other 2010 Media Ownership Studies and the studies that commenters submitted in this proceeding largely concerns program or format diversity rather than viewpoint diversity, which the Commission believes is the only kind of diversity likely to be accepted as a compelling governmental interest under strict scrutiny. As stated in the *FNPRM*, the Supreme Court's prior recognition of broadcast diversity as an interest of the highest order seems to pertain to viewpoint diversity. Moreover, as explained in the *FNPRM*, many of those studies support only limited conclusions. Although the Commission invited commenters to provide additional evidence and other information that might be relevant to its analysis, some commenters merely dispute the assessment of known evidence, rather than submit additional information that the Commission did not consider in the *FNPRM*. However, these commenters generally seem to accept the Commission's view that the record evidence does not provide a sufficient basis for the Commission to adopt race-conscious measures that will withstand strict scrutiny. The Commission rejects claims that, in tentatively finding that the evidence in the record does not demonstrate the requisite connection between minority ownership and viewpoint diversity, the Commission relied on dissenting opinions to establish an artificial and unofficial standard for narrow tailoring or evaluated the record evidence inconsistently to minimize evidence of a connection between minority ownership and viewpoint diversity. The Commission disagrees with assertions that it is premature for the Commission to reach any conclusions on narrow tailoring. The Third Circuit directed the Commission to consider the SDB eligibility standard and other eligible entity definitions proposed in the *Third Diversity FNPRM* (73 FR 28400, May 16, 2008, FCC 07–217, rel. March 5, 2008), and the Commission is complying with the court's instruction based on an extensive analysis of applicable judicial precedent and available empirical evidence. In addition to criticizing the

*FNPRM's* assessment of the record evidence and the applicable evidentiary standard, public interest commenters also criticize the *FNPRM* for asking whether a theory of viewpoint diversity or remediation is viable, when in fact the Commission would likely need to pursue several legal theories jointly to succeed. As the Commission explained in the *FNPRM* and continues to believe, it does not believe that any interest other than viewpoint diversity or remediation of discrimination (if established by the record) would be found to be a compelling governmental interest sufficient to satisfy the first prong of the strict scrutiny test. And the Commission knows of no case law, nor do the commenters cite any, which analyzes justifications for race-conscious action on a cumulative basis. Consequently, the Commission rejects this suggestion from the commenters.

171. The Commission's narrow tailoring analysis included a discussion of relevant judicial precedent, and its tentative findings were based on a careful reading of that precedent, taken as a whole, and its assessment of the body of evidence in this proceeding. The Commission finds no reason in the present record to depart from that analysis. Other commenters suggest additional topics that they believe the Commission should study but do not propose specific, executable studies or claim that the additional inquiries they propose would establish the requisite nexus between minority ownership and viewpoint diversity.

172. Moreover, while the Commission finds that the *Hispanic Television Study* is an important contribution to the study of the impact of ownership on programming and viewership, the Commission does not believe that the study's findings materially impact the Commission's constitutional analysis. The Commission does not believe that the study changes the Commission's constitutional analysis, though it has helped inform the study of these issues. Indeed, commenters generally agree with the Commission's assessment that the study has not provided a basis for the Commission to adopt race-conscious measures.

173. Some commenters disagree with the Commission's analysis of case law involving judicial review of race-based classifications, but they do not cite any precedent that the Commission did not consider in the *FNPRM*. As explained in the *FNPRM*, the Commission believes that empirical evidence of a stronger nexus between minority ownership and viewpoint diversity than was demonstrated in *Metro Broadcasting* would be required in order for a race-

conscious rule to withstand strict scrutiny. The Commission is not persuaded by assertions to the contrary, which it believes are substantially the same as those it considered and rejected in the *FNPRM*, and commenters do not cite any additional judicial precedent to support their argument here. And while some commenters disagree with the sufficiency of the Commission's efforts to study the connection between minority ownership and viewpoint diversity, the evidence in the record, the Commission's assessment of the evidence, and the applicable evidentiary standard in this proceeding, they generally seem to accept the view that the evidence is not sufficient to enable the Commission to adopt race-based measures. Other commenters also seem to concede, implicitly or explicitly, that the evidence in the present record is insufficient to support race-conscious action by the Commission.

174. In addition, the Commission continues to believe that implementing a program for awarding or affording preferences related to broadcast licenses based on the individualized review that the Supreme Court has required under strict scrutiny would pose a number of significant administrative and practical challenges for the Commission and would not be feasible. As explained in the *FNPRM*, where race-conscious governmental action is concerned, the Supreme Court previously has found that narrow tailoring requires individualized review, serious, good-faith consideration of race-neutral alternatives, minimal adverse impacts on third parties, and temporal limits. In particular, the Court found that narrow tailoring demands that race be considered in a flexible, non-mechanical way alongside other factors that may contribute to diversity and that consideration of race was permissible only as one among many disparate factors to evaluate individual applicants for admission to an educational institution. The Commission finds that the manner in which it allocates broadcast licenses differs from university admissions in many important respects. The process of acquiring a new commercial broadcast license is dictated by statute and involves a highly structured, open, and competitive bidding process. Individuals or entities must enter bids for broadcast allotments—a market-based regime—and must offer the highest monetary value for the allotment to acquire a construction permit. As explained in the *FNPRM*, the Commission believes that this framework does not lend itself to the

type of case-by-case consideration envisioned by the Court. Although the *FNPRM* sought comment on potential ways in which an individualized review process could be incorporated feasibly, effectively, and efficiently into any race-conscious measures adopted by the Commission, no commenter has offered such a proposal, nor has the Commission been able to develop one. Therefore, the Commission concludes that the record reveals no feasible means of carrying out the type of individualized consideration that the Supreme Court has required under strict scrutiny. The Commission disagrees with the assertion that the *FNPRM* confines its consideration of the proposed ODP standard to the Commission's viewpoint diversity interest without considering whether the proposed ODP standard could be applied as a remedial measure. The administrative, practical, and First Amendment issues that the Commission has identified would need to be resolved before the implementation of an ODP standard regardless of whether that standard is used to further the Commission's interest in viewpoint diversity or remedy past or present discrimination. Contrary to the assertions of some public interest commenters, the *FNPRM* did not tentatively conclude that the Commission must emulate university admissions to pursue viewpoint diversity. Rather, the *FNPRM* noted that the Supreme Court relied in part on the concept of critical mass to find the requisite nexus between student body diversity and race-based admissions and that this concept is not easily transferable to broadcasting.

175. *ODP Proposal.* As the Commission noted in the *FNPRM*, whether the proposed ODP standard would be subject to heightened constitutional scrutiny is not entirely clear. The Commission disagrees with MMTC's assertion that the *FNPRM* mischaracterized the ODP standard as a race-conscious measure that would be subject to heightened scrutiny. The *FNPRM* did not describe the proposed ODP standard as a race-conscious measure. Rather, the *FNPRM* noted that whether the proposed ODP standard would be subject to heightened constitutional scrutiny is not entirely clear. The Commission explained that an ODP standard that does not facially include race-conscious criteria, yet is constructed for the purpose of promoting minority ownership, might be subject to heightened scrutiny. Even assuming that it is not subject to heightened review under the equal

protection component of the Due Process Clause, the Commission declines to adopt the proposed ODP standard in the absence of a feasible means of implementing such a standard without running afoul of First Amendment values. Several commenters express general support for the proposed ODP standard but none have proposed a method for the Commission to provide the type of individualized consideration that an ODP standard would require without being unduly resource-intensive and inconsistent with First Amendment values. Commenters also have not addressed other specific issues that the *FNPRM* indicated would need to be resolved before implementation of the ODP proposal. In particular, no commenter has proposed a means for the Commission to validate claims of eligibility for ODP status. Based on available information about the proposal, the Commission believes that validating a claim of eligibility for ODP status would require a finding that the applicant has faced and overcome a substantial disadvantage—a determination that inherently would be prone to some degree of subjectivity—as well as a finding that the applicant would likely contribute to viewpoint diversity by virtue of him or her facing and overcoming a substantial disadvantage. The Commission does not believe that a means exists for the Commission to administer such a program in a manner that is sufficiently objective and consistent, and that would ensure that the Commission does not evaluate applicants based on a subjective determination as to whether a particular applicant would be likely to contribute to viewpoint diversity. In addition, no commenter has offered input on (1) what social or economic disadvantages should be cognizable under an ODP standard, (2) whether applicants should bear the burden of proving specifically that they would contribute to diversity as a result of having overcome certain disadvantages, (3) how the Commission could measure the overcoming of a disadvantage if an applicant is a widely held corporation rather than an entity with a single majority shareholder or a small number of control persons, and (4) how the Commission could evaluate the effectiveness of the use of an ODP standard. In its recommendation concerning a preference for overcoming disadvantage, the Diversity Advisory Committee identified a non-exhaustive list of disadvantages which, if substantial, would likely qualify an individual for a preference. No

commenters in this proceeding have offered additional input on the social or economic disadvantages that should be cognizable under an ODP standard. Accordingly, the Commission is not adopting the proposed ODP standard.

#### 176. *Gender-Based Diversity*

*Measures.* Gender-based measures are subject to a less restrictive Constitutional standard—intermediate scrutiny—than race-based measures. Under intermediate scrutiny, a gender-based classification must be substantially related to the achievement of an important objective. While *Metro Broadcasting* established that viewpoint diversity is at least an important government objective, *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992), found that available evidence failed to demonstrate a statistically meaningful link between ownership of broadcast stations by women and programming of any kind. As a result, the D.C. Circuit, in *Lamprecht*, overturned the Commission's former gender preference policy. To overcome *Lamprecht*, the Commission must be able to establish the requisite connection between viewpoint diversity and ownership by women; however, in the *FNPRM*, the Commission stated that, based on its evaluation of relevant studies, the Commission did not believe there was evidence to demonstrate that the content provided via women-owned broadcast stations substantially contributes to viewpoint diversity in a manner different from other stations or otherwise varies significantly from that provided by other stations.

177. In response to the *FNPRM*, commenters did not provide any additional evidence, studies, proposed study designs, or other information that is relevant to the Commission's analysis of this issue. The Commission has similarly been unable to identify such evidence or devise study designs that are likely to provide such evidence. In its efforts to create specific study designs (which includes reaching out to experts in the field), the Commission has identified a number of issues that significantly impede study of the connection between ownership and viewpoint diversity. These issues include the lack of a reliable measure of viewpoint; small sample size; accounting for potential variations from differences in the way the data were collected rather than actual changes in the marketplace when combining old and new sets; and the lack of relevant data sets from before and after policy changes or marketplace developments (if any can be identified) that would help demonstrate causation regarding the impact of ownership on viewpoint

diversity. While commenters still express general support for gender-based initiatives, such support is not sufficient absent evidence to establish a connection between viewpoint diversity and ownership by women. And while the Commission acknowledges that the data show that women-owned stations are not represented in proportion to the presence of women in the overall population, the Commission does not believe that the evidence reveals that the content provided via women-owned broadcast stations substantially contributes to viewpoint diversity in a manner different from other stations or otherwise varies significantly from that provided by other stations. As explained in the *FNPRM*, the only study included in the record of this proceeding that analyzes the relationship between female ownership and broadcast content is the Turner Radio Study, which finds that markets that contain radio stations with either female or minority ownership are more likely to broadcast certain progressive and conservative talk shows. The Commission does not believe that this study demonstrates a causal relationship between female or minority ownership and the diversity of viewpoints or content available, as it does not control for other factors that may explain both the presence of a greater diversity of talk shows and a higher percentage of female or minority ownership in certain markets. Other studies in the record establish that female ownership of broadcast stations is well below the proportion of women in the population, a fact that is not in dispute in this proceeding. Therefore, the Commission concludes that there is insufficient evidence to satisfy the constitutional standards that apply to gender-based measures.

#### 2. Remedying Past Discrimination

178. Similarly, the Commission concludes that, although it has studied extensively the question, no strong basis exists in evidence of discrimination in the award of broadcast licenses or other discrimination in the broadcast industry in which the government has actively or passively participated that would satisfy the constitutional standards that apply to race- or gender-based remedial measures. Less evidence is required for gender-based measures than for race-based measures, although an exceedingly persuasive justification is still necessary. The question of whether governmental participation is required is unsettled. Some courts have held that private discrimination need not be linked to governmental action under intermediate scrutiny. As discussed in this section, the Commission also

concludes that the record evidence is not of sufficient weight to support gender-based remedial action. In the *FNPRM*, the Commission noted that it never has asserted a remedial interest in race- or gender-based broadcast regulation. The Commission explained that the evidence of discrimination offered in the studies that commenters cited, while informative, was not nearly as substantial as that accepted by courts in other contexts. In response, commenters are generally critical of the Commission's analysis but most do not cite any additional relevant precedent or data that the Commission did not discuss in the *FNPRM*. Although commenters identify additional information that they believe is relevant to an analysis of the Commission's interest in remedying past discrimination, they do not assert that such information is sufficient to satisfy the relevant constitutional requirements. There is no inconsistency, as some comments claim, between the Commission's conclusion in this proceeding that it lack the strong basis in evidence of racial discrimination in the broadcast industry in which the Commission has been complicit that is necessary to adopt *race-conscious remedial action* and the Commission's adoption of bans on discrimination in advertising contracts and in private transactions. The latter actions are not race-conscious measures and therefore did not require an evidentiary foundation sufficient to withstand strict scrutiny. They were simply measures designed to combat private discrimination in the marketplace. The Commission has evaluated the evidence in the record and finds that it is not of sufficient weight to support race- or gender-based remedial measures.

179. The Commission disagrees with the assertion that it raised the bar in its remedial interest tentative conclusions and that it incorrectly rejected or ignored evidence of discrimination in the broadcast industry. Rather than rejecting evidence because it does not prove that the Commission itself has engaged in discrimination, the *FNPRM* tentatively found that existing evidence of past discrimination is not nearly as substantial in this case as the evidence that courts have required in other contexts. In particular, the Commission noted the absence of evidence demonstrating a statistically significant disparity between the number of minority- and women-owned broadcast stations and the number of qualified minority- and women-owned firms. The Commission asked commenters to address whether evidence of a

statistically significant disparity between the number of minority- and women-owned broadcast stations and the number of qualified minority- and women-owned firms is ascertainable. In the *FNPRM*, the Commission also observed that the only statistical evidence of discrimination in the record at the time pertained to discriminatory access to capital and that the rest of the evidence was anecdotal and therefore of more limited value because of the heightened evidentiary requirements of strict scrutiny. As the Commission explained there, the Capital Markets Study found statistical evidence of discrimination in U.S. capital markets, but the study indicates that its results are not fully conclusive. Also, its focus on wireless auctions and other non-broadcast industry information makes it less probative of discrimination in the broadcast licensing process. In *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Supreme Court found that the factual predicate for race-based action was deficient where, among other things, the government failed to make findings specific to the market to be addressed by the remedy. Because broadcasting is the industry that would be addressed if the Commission were to adopt remedial measures here, and neither the 2000 Capital Markets Study nor the Auction Utilization Study contains conclusive findings that reveal a governmental role in discrimination in the broadcast industry, the Commission does not believe these studies establish a factual predicate for race-based action that the Court would deem sufficient. Even considering the Capital Markets Study together with available anecdotal evidence in other studies, the Commission finds that the evidence of past discrimination in the Commission's broadcast licensing process is not nearly as substantial as that accepted by courts in other contexts. In *Adarand v. Slater*, 228 F.3d 1147 (10th Cir. 2000), a leading public contracting case in which the Tenth Circuit found the requisite strong basis in evidence, the record contained 39 studies revealing an aggregate 13 percent disparity between minority business availability and utilization in government contracting, a figure which the court found to be significant, if not overwhelming, evidence of discrimination. In reaching that determination, the court relied on evidence of private discrimination. The evidence was similar in nature to the evidence in this case—denial of access to capital, as well as the existence of exclusionary old boy networks and union discrimination that prevented access to the skills and experience

needed to form a business—but it was substantially greater in extent and weight. The court had the benefit of a Department of Justice report, prepared in response to the Supreme Court's decision in *Adarand*, summarizing 30 congressional hearings and numerous outside studies providing both statistical and anecdotal evidence of such private discrimination.

180. The Commission also disagrees with suggestions that it is legally permissible for the Commission to infer past discrimination based on the disparity between the number of minority- and women-owned broadcast stations and the number of minorities and women in the general population. As explained in the *FNPRM*, the Supreme Court has held that an inference of discrimination may arise when a significant statistical disparity between the number of *qualified* minority contractors willing and able to perform a particular service and the number of such contractors actually engaged arises. Although public interest commenters suggest that no special qualifications are necessary to own a broadcast station, the Commission has long required that broadcast applicants meet certain character, financial, and other qualifications to operate a station. And, of course, not all members of the population are interested in operating a broadcast station. Accordingly, the Commission does not believe that evidence of a significant statistical disparity between the number of minority- and women-owned broadcast stations and the number of minorities and women in the general population would be sufficient by itself to overcome the constitutional hurdle that has been established for race- and gender-based remedial measures. Instead, the Commission continues to believe that, absent evidence showing a statistically significant disparity between the number of minority- and women-owned broadcast stations and the number of qualified minority- and women-owned firms, the Commission cannot demonstrate a compelling interest in remedying discrimination in the Commission's broadcast licensing process.

181. Some commenters assert that the Commission is required to fund research to identify whether such disparities exist. According to these commenters, the Commission should refrain from making any tentative conclusions until its work is complete, including examining its own records and history to evaluate evidence to show that remedying past racial (or gender) discrimination is a compelling (or substantial) governmental interest.

Based on its review of existing disparity studies, the Commission does not believe that is true. In particular, commenters identify no method of studying this question that would produce meaningful results in the broadcast context. For existing studies, often employed in government contracting cases, there is generally a ready database of minority or female contractors that are willing and able to perform a particular service—or an established methodology to identify such contractors—that can be compared to the number of such contractors that are actually engaged by the government. Indeed, in most industries one need not be a government contractor to operate a business that provides the services that the government seeks (e.g., construction or advertising). This provides an ample pool of available contractors for the researchers to identify, both nationally and locally, depending on the nature of the program. And Supreme Court precedent instructs that the appropriate comparison is to the number of qualified firms that would be interested in being engaged by the government. However, there are no broadcast station owners other than those already licensed to be broadcasters, and the record does not reveal any method for identifying otherwise qualified firms that are not already broadcast licensees. In these circumstances, no pool of qualified non-licensee minority- or women-owned broadcast firms exists to compare against existing minority- or women-owned broadcast stations. Without such evidence or a methodology for ascertaining such evidence, the Commission finds that a disparity study similar to those relied on by other agencies for government contracting purposes is not feasible in the broadcast context. Given the Commission's determination of the infeasibility of this research, the lack of any support in the record indicating that it would be feasible, and the very substantial funds and time it would take to conduct it—likely millions of dollars and several years—the Commission does not believe that the Commission undertaking a disparity study is in the public interest.

### 3. Other Issues

182. Several commenters state that the *FNPRM* falls short of what these commenters assert to be the Third Circuit's directive that the Commission gather relevant ownership data and develop policies to address the paucity of female and minority owners among broadcast licensees. As stated previously, the Commission disagrees with arguments that the *Prometheus II*

decision requires that it adopt a race- or gender-conscious eligible entity standard in this quadrennial review proceeding or that the Commission continue this proceeding until the it has completed whatever studies or analyses that will enable it to take race- or gender-conscious action in the future consistent with current standards of constitutional law. By evaluating the feasibility of implementing a race- or gender-conscious eligibility standard based on an extensive analysis of the available evidence, the Commission has followed the Third Circuit's direction in *Prometheus II* and *Prometheus III*. The Commission notes that over the course of this proceeding, it has performed or commissioned a dozen studies. The *FNPRM* provides a detailed analysis of the relevant studies that were available at the time, and the Commission discusses herein more recent evidence and pertinent information that commenters submitted in response to the *FNPRM*. The Third Circuit court in *Prometheus III* stated that it did not intend to prejudge the outcome of the Commission's analysis of the evidence or the feasibility of implementing a race- or gender-conscious standard that would be consistent both with applicable legal standards and the Commission's practices and procedures.

183. Moreover, the Commission does not believe that any relevant statutory directive requires the adoption of race- or gender-conscious measures to promote ownership diversity. The Commission has previously determined that it has a general mandate to promote ownership diversity under section 257 of the 1996 Act and section 309(j) of the Act, which includes promoting ownership by small businesses, new entrants, and minority- and women-owned businesses. But this authority does not mandate specific outcomes or ownership levels or race- or gender-conscious action to foster diversity, nor does it permit the adoption of rules and policies that are not supported by the record or that conflict with the Constitution. Therefore, the Commission finds the suggestion that either the Third Circuit or the statute compels it to adopt race- or gender-conscious measures to be untenable. The Third Circuit ordered the Commission to make a final determination as to whether to adopt a new eligible entity definition (including consideration of SDB- and ODP-based definitions), and the Commission has done so. As discussed herein, the Commission continues to take significant steps to improve its ownership data and to promote

ownership diversity, and its determination that it cannot take race- or gender-conscious action at this time does not mean that the Commission has failed to act appropriately in furtherance of its goal to promote ownership diversity.

184. Some commenters criticize the Commission based on their perception that the Commission has not made a substantial effort to gather evidence that would support race- and gender-conscious measures. Free Press notes that an analysis of ownership diversity would be useful even if it fell short of justifying race- and gender-based policies. One basic assessment that the Commission has not made is a study of the types of market and ownership structures that correlate with women's and people of color's entry into the market, success in the market, or exit from the market. The Commission disagrees and notes that it has made significant efforts to analyze issues of ownership diversity and market structure. Other public interest commenters assert that the Commission inappropriately places the burden of providing additional evidence on commenting parties without describing what it believes is necessary to withstand strict scrutiny. However, the Commission has not only commissioned a number of studies, none of which provided it a constitutional basis to take race- or gender-conscious action; it has also taken a number of steps to improve the quality of its broadcast ownership data and to facilitate future additional studies that commenters, academics, or others believe might provide a constitutional basis to adopt race- and gender-conscious measures. Further, the Commission has provided a detailed and thorough analysis of what is necessary to meet the relevant constitutional standards and identified the reasons it believes that, having studied the question, it does not have evidence that would allow it to meet those standards.

185. In addition, while some commenters have suggested study topics or broad research frameworks, none has provided actionable study designs that the Commission or private researchers could execute. The Commission has expended considerable time and effort throughout the course of this proceeding in an effort to create such study designs; and it has commissioned or performed a dozen studies that it was able to develop over the course of the proceeding. General calls to conduct *Adarand* studies or to study the impact of the Commission's rules on ownership diversity do not help advance the Commission's research in these areas.

At present, neither the record in this proceeding nor the Commission's own efforts have produced additional study designs that the Commission expects would develop the evidence necessary to support race- and/or gender-conscious measures. Therefore, the Commission's decision in this *Order* that the record does not support the adoption of race- or gender-conscious measures reflects the inability of the Commission and commenters—including many groups and individuals experienced in research methodology—to identify relevant study designs that, if implemented, would be likely to support such measures. While the Commission believes it worthwhile to continue to explore these issues and to monitor the relevant constitutional jurisprudence, the Commission exercises in this *Order* its responsibility to pass on the race- and gender-based proposals before it at this time. The Commission's action in this *Order* does not prevent the Commission from reassessing these measures in the future if changed circumstances suggest a different outcome. Indeed, this decision does not preclude a different finding in the future, including the adoption of a race- and/or gender-conscious measure, based on new information. Additionally, the Commission will be on alert to any such data that may support such a finding and/or that may suggest steps that may lead to the collection of other relevant data.

#### *D. Additional Proposals Related to Minority and Female Ownership*

186. As discussed in the *FNPRM*, several commenters asked the Commission to consider additional measures that they believed would foster ownership diversity. Those measures include: (1) Relaxing the foreign ownership limitations under section 310(b)(4) of the Communications Act; (2) encouraging Congress to reinstate and update tax certificate legislation; (3) granting waivers of the local radio ownership rule to parties that incubate qualified entities; and (4) migrating AM radio to VHF Channels 5 and 6. The Commission also sought comment on various proposals that the Alliance for Women in Media (AWM) asserted would help to promote ownership opportunities for women. The Commission noted that some of these measures have already been implemented and tentatively concluded that the other measures would raise public interest concerns, might not provide meaningful assistance to the intended beneficiaries, or are outside the scope of this proceeding.

187. Since the release of the *FNPRM*, the Commission has implemented more of these measures, including several of the proposals regarding the AM band. The Commission also notes that the 2008 *Diversity Order* considered a number of DCS's earlier diversity proposals and adopted a dozen of those proposals, some with modifications. The specific proposals are discussed below.

#### 1. Incubation

188. In the *FNPRM*, the Commission stated its concern that proposals like DCS's incubation proposal, which would allow blanket waivers of the local radio ownership rule to broadcasters that finance or incubate an SDB or valid eligible entity, would allow for more consolidation in local radio markets than the Commission's rules currently permit without sufficient offsetting benefits. In addition, the Commission stated that implementation of an incubator program would pose other concerns and administrative challenges, including challenges relating to the need to monitor over time the types of complex financing and other arrangements that would qualify an entity for an incubation waiver under DCS's incubation proposal.

189. The Commission does not believe that its concerns are addressed by the incubator program that NAB proposes, which would rely on an ODP standard to define the class of entities eligible to benefit from incubation. The Commission finds that the type of individualized consideration that would be required under an ODP standard would be administratively inefficient, unduly resource-intensive, and potentially inconsistent with First Amendment values. Therefore, limiting the incubator program in the manner that NAB suggests would not address the Commission's concern that implementation of an incubator program would pose administrative challenges, such as the need to monitor continually the complicated legal and financial agreements between broadcasters and the entities they seek to incubate. Other commenters that urge the Commission to adopt an incubator program similarly do not address the policy and practical concerns identified above. Therefore, the Commission declines to adopt an incubator program as proposed by NAB and others.

#### 2. Migration of AM Radio to VHF Channels 5 and 6

190. In the *FNPRM*, the Commission sought comment on its tentative conclusion not to adopt the proposal that most AM radio be migrated to VHF

Channels 5 and 6 in this proceeding. In response to the *FNPRM*, commenters did not express opposition to this tentative conclusion. No commenters dispute that implementation of this proposal would involve extensive changes to the Commission's current licensing rules and spectrum policies. As noted in the *FNPRM*, Congress directed the Commission to conduct an incentive auction of broadcast television spectrum—which is ongoing—to make additional spectrum available for wireless use. The Commission finds that implementation of the Channel 5 and 6 proposal has a realistic potential to interfere with the Commission's implementation of the incentive auction and is therefore contrary to the spectrum policies established by Congress. Accordingly, the Commission declines to adopt this proposal.

#### 3. Additional DCS Proposals

191. The *FNPRM* identified numerous other DCS proposals that involved changes to various Commission licensing, service, and engineering rules and policies. It also noted that some of the proposals related to the AM band were already being considered in a separate proceeding. The Commission also notes that DCS asks the Commission to clarify that the 18-month construction extension policy applies both to original construction permits (for the construction of new stations) and to construction permits for major modifications of authorized broadcast facilities (Proposal 17). This is not a new diversity-related proposal, but a request for a clarification of an existing policy, which has been provided herein. Moreover, the Commission notes that relaxation of the main studio rule—among other DCS proposals—is being explored in the AM Revitalization Proceeding. And while the Commission declines to adopt a specific waiver standard for the main studio rule in this proceeding, it notes that currently licensees are able to seek waiver of the rule under the Commission's general waiver standard. While some general support exists for the remaining proposals—primarily from MMTC—the Commission does not believe that the record establishes that these changes to Commission licensing, service, and engineering rules and policies would provide meaningful benefits to the intended beneficiaries. Commenters have had multiple opportunities to voice support for these proposals and explain the potential benefits that would arise from their implementation, but the record contains almost no support for the vast majority of these proposals.

192. The Commission has reviewed these proposals multiple times throughout the course of this proceeding. Those proposals that, based on Commission analysis, warranted additional consideration have been explored in relevant proceedings, such as the AM Revitalization Proceeding. However, upon review, the Commission determines that many of these proposals would be ineffective or insufficient to address the diversity issues under consideration in this proceeding. Despite multiple opportunities for comment, the record reflects little support for the majority of these proposals or evidence that would cause the Commission to reconsider its determination that these proposals warrant additional consideration or adoption. Accordingly, consistent with the tentative conclusion in the *FNPRM*, the Commission declines to adopt these proposals: (1) Bifurcate Channels for Share-Times with SDBs; (2) Use the Share-Time Rule to Allow Broadcasters to Share Frequencies to Foster Ownership of DTV and FM Subchannels; (3) Extend the Three-Year Period for New Station Construction Permits for Eligible Entities and SDBs; (4) Create Medium-Powered FM Stations; (5) Authorize Interference Agreements; (6) Harmonize Regional Interference Protection Standards; Allow FM Applicants to Specify Class C, CO, C1, C2 and C3 Facilities in Zones I and IA; (7) Relax the Limit of Four Contingent Applications; (8) Create a New Local L Class of LPFM Stations; (9) Redefine Community of License as a Market for Section 307 Purposes; (10) Remove Non-Viable FM Allotments; and (11) Issue a One-Year Waiver, on a Case-by-Case Basis, of Application Fees for Small Businesses and Nonprofits.

193. In the *FNPRM*, the Commission also tentatively concluded that certain DCS proposals are outside the scope of this proceeding. The Commission explained that some of those proposals extend into areas that are beyond the Commission's authority and ultimately would require legislative action or action by other federal entities aside from the Commission to create changes in rules or policies. The Commission further explained that other proposals involve non-broadcast services that are outside the scope of the quadrennial review proceedings. While the Commission stated that it did not anticipate taking further action on these proposals within this or successive quadrennial review dockets, it also noted that some of these proposals may warrant further consideration.

194. MMTC challenged the Commission's decision not to consider

these 24 proposals in its appeal of the *FNPRM*. In the course of the *Prometheus III* litigation, the court issued a letter asking MMTC to address which, if any, of the 24 proposals . . . met both of the following criteria: (1) The FCC can adopt them without actions by Congress or other regulators and (2) they relate to the broadcast industry. In response, MMTC identified 17 proposals that it asserted met both criteria; in a reply letter to the court, the Commission indicated that it would address the proposals in this item. In *Prometheus III*, the court declined to act on MMTC's challenge, but indicated that it expected the Commission to adhere to its representations to the court.

195. Following the release of *Prometheus III*, MMTC met with Commission staff to discuss the 17 proposals identified for the court. Following these discussions, MMTC now requests that the Commission address five of these proposals in this Order; the remaining 12 proposals are being withdrawn from consideration in the context of this proceeding, though MMTC asserts that it may pursue some of these proposals in other proceedings. The five proposals are: (1) Examine How to Promote Minority Ownership as an Integral Part of All FCC General Media Rulemaking Proceedings; (2) Extend the Cable Procurement Rule to Broadcasting; (3) Mathematical Touchstones: Tipping Points for the Non-Viability of Independently Owned Radio Stations in a Consolidating Market and Quantifying Source Diversity; (4) Engage Economists to Develop a Model for Market-Based Tradable Diversity Credits as an Alternative to Voice Tests; and (5) Create a New Civil Rights Branch of the Enforcement Bureau. The remaining 12 proposals presented to the Third Circuit are: (1) Collect, Study and Report on Minority and Women Participation in Each Step for the Broadcast Auction Process; (2) Increase Broadcast Auction Discounts to New Entrants; (3) Require Minimum Opening Bid Deposits on Each Allotment for Bidders Bidding for an Excessive Proportion of Available Allotments; (4) Only Allow Subsequent Bids to Be Made Within No More than Six Rounds Following the Initial Bid; and (5) Require Bidders to Specify an Intention to Bid Only on Channels with a Total Minimum Bid of Four Times Their Deposits; (6) Grant Eligible Entities a Rebuttable Presumption of Eligibility for Waivers, Reductions, or Deferrals of Commission Fees; (7) Designate a Commissioner to Oversee Access to Capital and Funding Acquisition Recommendations; (8)

Develop an Online Resource Directory to Enhance Recruitment, Career Advancement, and Diversity Efforts; (9) Study the Feasibility of a New Radio Agreement with Cuba; (10) Must-Carry for Certain Class A Stations; (11) Create a Media and Telecom Public Engineer Position to Assist Small Businesses and Nonprofits with Routine Engineering Matters; and (12) Conduct Tutorials on Radio Engineering Rules at Headquarters and Annual Conferences. In addition, MMTC is also withdrawing from consideration in this proceeding the seven proposals that it did not identify to the Third Circuit, which largely were legislative recommendations. These legislative recommendations include: (1) Legislative Recommendation to Expand the Telecommunications Development Fund (TDF) Under section 614 and Finance TDF with Auction Proceeds; (2) Legislative Recommendation to Amend section 257 to Require the Commission to Annually Review and Remove or Affirmatively Prohibit Known Market Entry Barriers; (3) Legislative Recommendation to Clarify section 307(b) to Provide that Rules Adopted to Promote Localism are Presumed to be Invalid if They Significantly Inhibit Diversity; (4) Legislative Recommendation to Amend the FTC Act (15 U.S.C. 41–58) to Prohibit Racial Discrimination in Advertising Placement Terms and Advertising Sales Agreements; (5) Legislative Recommendation to Amend section 614 to Increase Access to Capital by Creating a Small and Minority Communications Loan Guarantee Program; (6) Legislative Recommendation to Amend section 614 to Create an Entity to Purchase Loans Made to Minority and Small Businesses in the Secondary Market; (7) Legislative Recommendation to Provide Tax Credit for Companies that Donate Broadcast Stations to an Institution Whose Mission is or Includes Training Minorities and Women in Broadcasting. Consistent with the direction from the Third Circuit and the revised request from MMTC, the Commission will now address the five remaining proposals. While these proposals were originally submitted in this proceeding as part of the DCS Supplemental NPRM Comments, the Commission notes that MMTC submitted the comments on behalf of DCS; accordingly, the Commission finds that relying on MMTC's assertions regarding the preferred treatment of these proposals in this proceeding is appropriate. Moreover, consistent with the Third Circuit's letter, the Commission is generally limiting its consideration of

these proposals to the extent that they relate to the broadcast industry.

196. *Proposal 5*. MMTC requests that the Commission consider how to promote minority ownership as part of all of its media-related proceedings. At the outset, the Commission notes that OCBO currently provides outreach services to assist small businesses and new entrants into the communications industry and input on how the Commission's proposed rules impact minority ownership. While OCBO already plays an important role in this process, the Commission finds room potentially to do more to help inform the Commission's consideration of these important issues. Accordingly, going forward, the Commission will consider how to promote minority ownership in relevant media-related rulemaking proceedings and include an inquiry in any appropriate rulemaking to inform that question.

197. *Proposal 10*. MMTC also proposes that the Commission extend the cable procurement requirements to broadcasters and other regulated communications industries. Pursuant to section 634 of the Communications Act, as amended, the Commission adopted what DCS and MMTC refer to as the cable procurement rule, which generally requires that a cable system encourage minority and female entrepreneurs to conduct business with all parts of its operation, for example, by recruiting as wide as possible a pool of qualified entrepreneurs from sources such as employee referrals, community groups, contractors, associations, and other sources likely to be representative of minority and female interests. The Commission notes that the Commission's OCBO has already implemented various initiatives consistent with this proposal, holding multiple supplier diversity conferences and a government advertising workshop—and the Commission anticipates that there will be more such events in the future. However, the Commission finds that merit exists in exploring whether, and if so, how, to extend the cable procurement requirements to the broadcasting industry. Therefore, the Commission will evaluate the feasibility of adopting similar procurement rules for the broadcasting industry.

198. *Proposal 33*. MMTC proposes two formulas it asserts are aimed at creating media ownership limits that promote diversity. Specifically, it suggests a Tipping Point Formula that would be applied in the local radio rule context, and a Source Diversity Formula that appears to be more broadly applicable. The Tipping Point Formula

would be applied in the local radio rule context to determine the tipping point in the distribution of radio revenue in a market between independent owners and owners of multiple stations in that market. The theory is that the independent stations would no longer be able to survive once the combined revenues of the owners of multiple stations exceed the tipping point. The Source Diversity Formula is based on the premise that increases in consumer utility flow from their access to additional sources, with diminishing returns to scale, and is intended to express the consumer benefit derived from marginal increases in source diversity. At present, neither of these proposals is sufficiently defined. As MMTC itself notes, the Tipping Point Formula rests on admittedly rough assumptions, and the record does not provide the Commission with sufficient information to justify or refine the formula for general application across all radio markets. Similarly, the Source Diversity Formula would require field-testing before it could be applied, and the Commission does not believe that the record provides it with the information necessary to rely on the formula to adopt media ownership limits. The Commission therefore directs the Media Bureau to consider these proposals further and to solicit input on these ideas in the document initiating the next quadrennial review of the media ownership rules.

199. *Proposal 37.* MMTC also proposes that the Commission engage economists to develop a model for market-based tradable diversity credits that would serve as an alternative method for adopting ownership limits. Broadly speaking, this proposal involves issuing Diversity Credits that could be traded in a market-based system and redeemed by a station buyer to offset increased concentration that would result from a proposed transaction. While the Commission's authority to adopt such a system is, at best, unclear, the Commission finds merit in evaluating the underlying proposal. The Commission therefore directs the Media Bureau to consider this proposal further and to solicit input on this idea in the document initiating the next quadrennial review of the media ownership rules.

200. *Proposal 40.* MMTC recommends the creation of a new Civil Rights Branch of the Enforcement Bureau that would enforce Media Bureau Equal Employment Opportunity rules, as well as other rules impacting the broadcasting, cable, satellite, wireless, and wireline industries. The Commission has evaluated this proposal

and finds that it warrants further consideration. Though the Commission does not see a need to denominate a separate branch, enforcement of the Media Bureau Equal Employment Opportunity rules, which is presently handled by the Media Bureau, might be more appropriate as a function of the Enforcement Bureau, given the Enforcement Bureau's existing mission and expertise in the enforcement of the Commission's regulations. The Commission in no way, however, believes that the Media Bureau has failed to effectively enforce these rules. Accordingly, the Commission directs the appropriate Commission Bureaus and Offices, including the Media Bureau, Enforcement Bureau, and Office of the Managing Director, to discuss the feasibility, implications, and logistics of shifting the enforcement of the Media Bureau Equal Employment Opportunity rules from the Media Bureau to the Enforcement Bureau.

#### 4. AWM Proposals

201. In response to the *NPRM*, AWM proposed that the Commission (i) prepare a primer on investment in broadcast ownership for smaller and regional lenders willing to provide loans to new broadcast entrants; (ii) prepare a primer for new entrants that provides guidance on how to find financing; (iii) establish a link on the Commission's Web site to provide information on stations that may be available for sale to small businesses; and (iv) allow sellers to hold a reversionary interest in a Commission license in certain circumstances. The Commission sought comment on these proposals in the *FNPRM*.

202. The Commission believes it has acted to achieve the purposes of these proposals to the extent appropriate for the industry and the regulatory agency. As noted in the *FNPRM*, OCBO currently engages in a number of activities that provide broadcasters and potential investors with resources that are similar in substance to primers on investment and financing. Beyond those activities, the Commission continues to believe that specific advice about investment and financing is more appropriately provided by private parties that are directly involved in the financial marketplace than by the Commission.

203. With regard to the proposal to allow sellers to hold reversionary interests in Commission licenses in certain circumstances, the Commission previously noted that AWM's proposal does not address the Commission's historical concerns about reversionary interests and is insufficiently developed

to warrant departure from the Commission's longstanding policy against the holding of such interests. The Commission has traditionally held that no right of reversion can attach to a broadcast license and that a station licensee is fully responsible for the conduct of the station and its operation in the public interest—a responsibility that cannot be delegated by contract. While NAB notes that it has previously urged the Commission to allow sellers to hold reversionary interests in certain circumstances, NAB does not address the specific concerns the Commission discussed in the *FNPRM* regarding this proposal. The Commission declines to adopt these proposals. If presented with appropriate evidence or analysis regarding the Commission's historical concerns, the Commission may consider in a future proceeding a general review of its reversionary interest policy, subject to resource constraints.

## V. Shared Service Agreements

### A. Introduction

204. With this Order, the Commission brings transparency to the use of sharing agreements between independently owned commercial television stations. Through these agreements, competitive stations in a local market are able to combine certain operations, with effectively the same station personnel handling or facilities performing functions for multiple, independently owned stations. While such combined operations no doubt result in cost savings—savings that could be reinvested in improved programming and other public interest-promoting endeavors—the Commission has an obligation to ensure that these agreements are not being used to circumvent the Commission's broadcast ownership rules and are not otherwise inconsistent with the Commission's rules and policies. Specifically, the Commission adopts a comprehensive definition of SSAs and a requirement that commercial television stations disclose these agreements by placing them in the stations' online public inspection files. This method of disclosure will place a minimal burden on stations, while providing the public and the Commission with easy access to the agreements. Accordingly, the Commission finds that the benefits of this rule outweigh the minimal burdens associated with disclosure.

### B. Discussion

205. The Commission finds that commenters have raised meaningful concerns regarding the potential impact of sharing agreements involving

commercial television stations on the Commission's competition, localism, and diversity policy objectives, particularly with respect to its local broadcast ownership rules. At the same time, resource sharing can deliver meaningful public interest benefits, and the sharing of certain resources may have no negative impact on any of the Commission's policy goals. At present, however, consideration of these issues is impeded because so little is known by the Commission and the public about the content, scope, and prevalence of sharing agreements. Therefore, the Commission adopts a clear definition of SSAs—substantially similar to the definition proposed in the *FNPRM*—to identify the agreements between stations that are relevant to the Commission's improved understanding of how stations share services and resources, and a mechanism for making such arrangements involving commercial television stations transparent to the public and the Commission. Specifically, commercial television stations will now be required to disclose these agreements by placing them in the participating stations' online public inspection files. Through this action, the public and the Commission will be able to better evaluate the impact of these agreements, if any, on the Commission's policy goals.

#### 1. Definition of Shared Service Agreement

206. *Scope of definition.* The Commission finds that the definition proposed in the *FNPRM*, with a minor modification, best comports with the informational needs that support its efforts to define SSAs. Contrary to broadcaster assertions, the Commission does not believe excluding certain resource sharing, such as administrative support or other back-office services, from the definition based on premature assessments of the potential future regulatory treatment of such activities is appropriate. In addition, the Commission agrees with Free Press that a definition narrower than the one adopted would invite legal gamesmanship whereby parties would be able to draft sharing agreements to fall outside of the established definition to avoid disclosure. For this reason, the Commission will not adopt exclusions from the definition of SSA, such as those based on the duration of the agreement or a set dollar amount.

207. To address concerns expressed by certain commenters, however, the Commission emphasizes that the adopted definition limits the scope of agreements to those that involve station-

related services. The Commission also provides non-exhaustive examples in the definition for guidance, consistent with the proposal in the *FNPRM*. Station-related services include, but are not limited to, administrative, technical, sales, and/or programming support. Indeed, the Commission's goal is not to adopt a definition of SSAs that encompasses station interactions that do not relate to station operations or that are incidental in nature. For example, community service initiatives and charity events, while worthwhile in their own regard, do not relate to the operation of the broadcast station; accordingly, charitable collaborations involving independently owned broadcast stations would not fit within the adopted definition of SSAs.

208. Similarly, the Commission clarifies that ad hoc or on-the-fly arrangements during breaking news coverage are also outside the definition of SSAs. While such interactions may involve a station-related service, namely news-gathering, such informal, short-term arrangements are typically precipitated by unforeseen or rapidly developing events. Absent a covering agreement that facilitates such cooperation, the Commission does not believe that these types of interactions demonstrate that the stations are working together; rather, they are acting in a manner that allows each station to separately pursue its own ends (e.g., the production of an independent news story). For example, if two news trucks from independently owned broadcast television stations arrive at the scene of an accident at the same time and agree to set up their camera shots from different angles or to rely on the footage shot by only one of the stations due to limited space and safety concerns, this agreement does not evidence actual collaboration between the stations to produce the news segments. Instead, the news teams are reacting to unforeseen circumstances and ensuring that each news team can safely and effectively create its own news story. By contrast, such conduct would be evidence of collaboration, and included in the definition of SSAs, if the stations were parties to an LNS agreement (or similar agreement) that governs the terms of news coverage, even if the stations retain the ability to produce their own segments.

209. *Text of Definition.* While the Commission finds that a clear definition of SSAs is appropriate, one technical change to the text proposed in the *FNPRM* is necessary. In the *FNPRM*, the proposed definition of SSAs was designed to identify the universe of agreements for the provision of station-

related services involving stations that are not under common control. Stations under common control do not share services or collaborate in the same way as stations that operate independently for purposes of this definition.

210. Accordingly, the Commission defines an SSA as any agreement or series of agreements, whether written or oral, in which (1) a station provides any station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to a station that is not directly or indirectly under common *de jure* control permitted under the Commission's regulations; or (2) stations that are not directly or indirectly under common *de jure* control permitted under the Commission's regulations collaborate to provide or enable the provision of station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to one or more of the collaborating stations. For purposes of this rule, the term *station* includes the licensee, including any subsidiaries and affiliates, and any other individual or entity with an attributable interest in the station. The Commission emphasizes that sharing agreements to which non-licensee entities are a party (e.g., an operating subsidiary of the ultimate parent company) fall within the adopted definition. The Commission finds that including such entities within the term *station* is necessary to foreclose the possibility that stations could use operating subsidiaries or similar entities to evade the SSA disclosure requirement. This is consistent with the proposal in the *FNPRM* that the Commission should not limit the definition of SSAs to only those agreements to which licensees are parties. Consistent with previous Commission rules, the substance of oral agreements shall be reduced to writing.

#### 2. Disclosure of Shared Service Agreements

211. *Justification for disclosure.* The Commission requires the disclosure of SSAs in each participating station's online public inspection file. The SSA disclosure requirement shall apply regardless of whether the agreement involves stations in the same market or in different markets. This approach follows the approach taken with the public file disclosures for JSAs and LMAs and is consistent with the Commission's intent to learn more about how commercial television stations use these agreements. The Commission finds that this disclosure requirement is tied to a clear regulatory purpose. Commenters in the proceeding have

raised meaningful issues regarding the potential impact of the joint operation of independently owned commercial broadcast television stations pursuant to SSAs on the Commission's rules and policy goals, including, but not limited to, the Commission's local broadcast ownership rules and rules regarding unauthorized transfer of control. These commenters have identified specific provisions in sharing agreements that, according to the commenters, convey a significant degree of influence over the core operating functions of an independent commercial television station (and potentially *de facto* control over the station). In addition, commenters have also provided examples of markets in which sharing agreements have been executed and of the asserted impact of these agreements on the market (e.g., job losses and reductions in independently produced local news programming). According to these commenters, such sharing agreements impact the Commission's competition, localism, and diversity goals, as well as suggest violations of the Commission's rules against unauthorized transfers of control. The disclosure of these agreements is necessary for the public and the Commission to evaluate these potential impacts.

212. Moreover, the Commission's rules have long required that television and radio broadcast stations enable public inspection of certain documents to provide information both to the public and to the Commission about station operations. The public and the Commission rely on information about the nature of a station's operations and compliance with Commission rules to verify that a station is meeting its fundamental public interest obligations. The Commission has consistently found that disclosure requirements facilitate the Commission's regulatory purposes while imposing only a minimal burden on licensees.

213. Additionally, the Commission disagrees that it must first address the appropriate regulatory status of sharing agreements (e.g., make them attributable) before requiring their disclosure. The Commission agrees with public interest commenters in rejecting NAB's assertion that back-office or administrative agreements—agreements that clearly relate to station operations within the adopted definition of SSAs—should be excluded from disclosure because they currently do not raise any attribution or other regulatory concerns. Disclosure itself informs such decisions, and the Commission has wide latitude to impose such a requirement. Moreover, such agreements may also

help inform allegations involving unauthorized transfers of control. In the past, the Commission has first required the disclosure of certain agreements that relate to station operations before making a determination that such agreements should be subject to additional regulation. The Commission's action in this *Order* is consistent with this precedent. Indeed, the Commission could hardly fulfill its obligation to ensure that station operations are consistent with Commission rules and policies if it were required to determine the regulatory status of certain agreements *before* obtaining the information necessary to evaluate the agreements. The Commission does not think the public interest would be served by adopting such a constricted view of the Commission's authority. The Commission notes that its action does not predetermine that any additional regulation will be forthcoming for SSAs; rather, the disclosure is necessary for the Commission to make such a determination.

214. Furthermore, the Commission is not persuaded that the adopted disclosure requirement will discourage stations from entering into SSAs. First, the adopted method for disclosure minimizes the cost of compliance and utilizes a procedure with which commercial television broadcasters already have extensive experience. It cannot be credibly stated that the burden associated with disclosure would exceed the benefits of the agreements. Second, the Commission finds it instructive that no evidence exists showing that the disclosure requirements for JSAs and LMAs, specific types of SSAs, have inhibited the formation of those agreements. To the contrary, the Commission first required the public filing of television JSAs in 1999, and the prevalence of these agreements increased significantly after the disclosure requirement was adopted. Ultimately, the Commission does not find any evidence to support the contention that disclosure of SSAs would discourage stations from executing such agreements, particularly if the agreements are as beneficial as broadcast commenters contend.

215. Finally, the Commission rejects NAB's assertion that the SSA disclosure requirement would violate the First Amendment because the Commission is immersing itself in broadcasting stations' day-to-day operations. The cases cited by NAB in support of its theory are readily distinguishable from the adopted disclosure requirement, as neither case involves simply requiring disclosure of contracts relating to station

operations. Contrary to NAB's claims, the Commission is not interfering with broadcasters' editorial discretion. Rather, the Commission is simply requiring that commercial television stations place certain contracts in their public file, just as the Commission has done numerous times in the past. In particular, the Commission is not restricting broadcasters' discretion to determine what content to offer, nor is the Commission mandating or prohibiting any particular contractual terms. Thus, the disclosure requirement does not burden broadcasters' speech. In particular, the Commission is not compelling broadcasters to express a message or viewpoint. Further, no evidence exists that previous disclosure requirements have resulted in such involvement. Indeed, the Commission has a long history of deferring to a licensee's good faith discretion in programming decisions—particularly news programming—and the Commission believes that the SSA disclosure requirement is consistent with this precedent. In this case, the Commission is not even proposing to regulate SSAs beyond the bare disclosure requirement.

216. NAB further argues that the disclosure requirement fails to satisfy the constitutional standards for regulations that require businesses to disclose factual information, stating that the agency must show that a substantial government interest exists that is directly and materially advanced by the restriction and that the restriction is narrowly tailored to achieve the government interest. On the contrary, even assuming that the disclosure requirement burdens broadcasters' speech to any extent (which the Commission concludes above is not the case), the requirement would be subject, at most, to rational basis review, which is the same standard that courts have applied to the Commission's ownership rules. Under this standard of review, a rule does not violate the First Amendment if it is a reasonable means of promoting the public interest in diversified mass communications.

217. The Commission's SSA disclosure requirement satisfies this standard. SSAs relate to a broadcast station's core operational functions and thus could have the effect of lessening competition, diversity, or localism by creating a commonality of interests. They could also have beneficial effects. Public interest commenters and broadcasters have conflicting viewpoints about whether SSAs should be deemed attributable for purposes of the Commission's ownership rules and whether they negatively or positively

affect the Commission's public interest goals of competition, diversity, and localism. Without an industry-wide disclosure rule, the Commission lacks the information necessary to determine the extent to which SSAs may affect diversity, competition, and localism and whether SSAs in fact confer significant influence or control warranting attribution for purposes of its ownership rules or raising unauthorized control concerns. Although broadcasters have disclosed SSAs in connection with individual license assignments/transfers of control applications, the Commission does not know what types of SSA are in place between stations that are not parties to such pending Commission applications, nor does the Commission know the extent to which broadcasters across the industry utilize SSAs that are not already required to be disclosed. Thus, the Commission believes industry-wide disclosure is necessary to allow the Commission and public to evaluate in a comprehensive manner the extent to which broadcasters use various types of SSA, the nature of the contractual relationships, and the manner in which specific types of agreements affect competition, diversity, or localism. Broadcasters hold licenses issued by the Commission and are obligated to operate in the public interest, and thus they have no right to withhold from the Commission or the public agreements that may significantly affect their service to the public. Therefore, the Commission's rule is a reasonable means of promoting the Commission's diversity, competition, and localism goals and assuring that SSAs do not raise unauthorized control concerns and satisfies the criteria for First Amendment rational basis review.

218. The case law NAB cites in support of a higher standard of review concerns requiring a regulated entity to undertake new speech, and presents the question of whether a restriction on commercial speech, normally subject to intermediate scrutiny, satisfies the criteria for rational basis review under the exception applicable to compelled commercial speech that is strictly factual. Ultimately, NAB seems to be relying on *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), for the proposition that restrictions on commercial speech are subject to intermediate scrutiny. In *Central Hudson*, the Court invalidated a state regulation that prohibited public utilities from promoting the use of electricity in their advertising and marketing materials. Here, in contrast, the Commission is simply requiring

broadcasters to publicly disclose contracts they have already executed, not undertake new speech. Further, although the SSA disclosure rule does nothing more than require placement of SSAs in the broadcasters' public inspection file, it is subject to rational basis review for a different reason (*i.e.*, because it is a content-neutral rule that furthers the Commission's scheme of broadcast ownership regulation and the policy goals supporting such regulation). Thus, if the SSA disclosure requirement burdens speech at all, the rational basis review applicable to structural broadcast regulations—not the intermediate scrutiny standard applicable to commercial speech—applies to the disclosure requirement.

219. Finally, even assuming that the intermediate scrutiny standard of *Central Hudson* applies, which the Commission concludes is not the case, the rule directly and materially advances governmental interests that the Supreme Court has recognized in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994), as substantial. The purpose of the rule is to provide information that is directly relevant to the Commission's regulation of broadcast ownership and the policy goals that underlie its ownership rules. The filing of SSAs will further the Commission's goal of collecting the necessary information. The Commission has tailored the requirement to exclude agreements that are already subject to disclosure in a station's public file and to exclude agreements that are not likely to implicate the Commission's policy concerns. The rule does not restrict or dictate the ways in which broadcasters may share resources but simply requires them to disclose contracts that already exist. The filing requirement is therefore narrowly tailored to achieve the regulatory objective, and the burden is minimal. Accordingly, the Commission finds that the disclosure requirement does not violate the First Amendment even under the higher standard of review that NAB advocates.

220. *Disclosure in station's online public inspection file.* The Commission will require commercial broadcast television stations to post SSAs to each participating station's online public inspection file that is hosted by the Commission. The Commission finds that the online public filing requirement, pursuant to § 73.3526 of the Commission's rules, best facilitates the disclosure of SSAs. In the *Enhanced Disclosure Order* (77 FR 27631, May 11, 2012, FCC 12-44, rel. Apr. 21, 2012), the Commission updated the disclosure requirements to make information concerning broadcast service more

accessible to the public by having stations post their public files online in a central, Commission-hosted database. Consistent with its findings in that order, the Commission finds that an online public filing requirement best comports with Commission policy to modernize the procedures that television broadcasters use to inform the public about how stations are serving their communities. Having stations post their SSAs online in a central, Commission-hosted database utilizes existing technology to make information concerning broadcast service more accessible to the public and reduces broadcasters' costs of compliance over time. The Commission is not convinced that other disclosure methods, such as an ECFS docket or filing with the Commission pursuant to § 73.3613 of the Commission's rules, are less burdensome than the online public file requirement or that such methods provide meaningful advantages to the public and the Commission in terms of identifying and accessing SSAs.

221. The Commission declines to adopt NAB's proposed alternative to require that stations submit an aggregate list of SSAs as part of the biennial ownership reports. The Commission agrees with comments that a mere list of agreements would be insufficient for the purpose the Commission seeks. Such a limited disclosure would not permit the public or the Commission to develop a full and complete understanding of SSAs and their impact on the broadcast television industry. Simply submitting a list of agreements would not provide the public or the Commission with any information about the nature and scope of the agreements, only that the agreements exist. While the prevalence of SSAs is of some importance, the terms of the agreements and their impact on station operations are far more critical to an analysis of the potential impact of SSAs on the Commission's rules and policy goals. In addition, disclosure only in biennial ownership reports would not result in timely disclosure of these agreements, which would frustrate continued efforts to study SSAs. Moreover, searching for SSAs disclosed in biennial ownership reports would be a more laborious task for the public and the Commission than searching the online public files. Indeed, a significant benefit of the online public file is that it improves public access to documents while minimizing burdens on stations. NAB's proposal ignores this significant benefit without identifying any meaningful benefits in return.

222. *Disclosure by noncommercial stations, radio, and newspapers.* The

Commission declines to expand the SSA disclosure requirement beyond commercial television stations, as commenters have not provided sufficient justification for such an expansion at this time. Commenters provided the Commission with numerous examples of sharing agreements involving commercial television stations. Based on these examples, commenters raised meaningful concerns about the potential impact of such agreements on the Commission's public interest goals. The evidence in the record, however, does not demonstrate that SSAs involving noncommercial stations, radio stations, or newspapers are common or that they present the same kinds of potential public interest concerns. However, the Commission may revisit its decision to limit disclosure to commercial television stations in the future if evidence suggests that additional disclosure may be appropriate.

223. *Redaction of confidential or proprietary information.* As part of the SSA disclosure requirement, the Commission adopts provisions that permit stations to redact confidential or proprietary information, just as the Commission has for LMAs and JSAs. The Commission notes, however, that the redacted information must be made available to the Commission upon request. The redaction allowance directly addresses the concerns of commenters that oppose the disclosure of SSAs on the grounds that it will require stations to disclose sensitive, confidential business information.

224. The Commission rejects NAB's argument that the redaction allowance will not be sufficient to protect broadcast stations' business interests because the disclosure of the mere existence of these agreements will provide useful information to competitors. All broadcasters have long been required to attach copies of transaction-related SSAs to a license assignment or transfer application, including placing the application and relevant agreements in the station's public inspection file until final action has been taken on the application. No evidence in the record indicates that this requirement has resulted in any competitive harm. In addition, the Commission notes that broadcast commenters have failed to provide evidence that the business interests of television broadcast stations have been inhibited by the adoption of the LMA and JSA disclosure requirements or that such interests are likely to be inhibited by the substantially similar SSA disclosure requirement adopted in this *Order*. Furthermore, the Commission

finds that NAB's argument is at odds with its own proposed alternative for stations to submit aggregate lists of SSAs as part of their biennial ownership reports, which would disclose the existence of such agreements. The Commission concludes that the adopted redaction allowance sufficiently balances the informational needs of the public and the Commission with the business interests of broadcasters to keep proprietary information confidential.

225. *Cost of compliance.* Consistent with Commission precedent, the Commission finds that an online public filing requirement minimizes the cost to broadcasters while ensuring that the public has easy and convenient access to the information. As the Commission has previously stated, the Commission finds that the electronic upload or scanning and upload of SSAs is not unduly burdensome. The Commission does not find arguments to the contrary to be persuasive or supported by evidence. Aside from general statements that disclosure will be too costly, commenters opposing disclosure provide no cost estimates to support their assertions. Moreover, because of the clarifications above, the Commission finds that it has adequately addressed concerns that the definition of SSAs is overly broad and would result in a significant increase in the number of agreements stations would be required to upload to their public inspection file. Television broadcasters should also be well versed in uploading documents to the Commission's online public inspection file database, as they have been required to use the database since 2012.

226. *Duplicative filings.* As the Commission already requires broadcasters to submit JSAs and LMAs in accordance with its public file disclosure requirements, the Commission confirms that, to the extent that the SSA disclosure requirement would duplicate established JSA and LMA disclosures, a broadcaster would have to place these agreements in their public inspection file only once. A broadcaster will not be required to file additional copies of JSAs and LMAs for the SSA disclosure requirement if the broadcaster's public inspection file already contains a copy of the agreement. This clarification reduces the burden of compliance to broadcasters and is consistent with previous Commission decisions regarding duplicative filings.

227. *Procedural matters.* Each station that is party to an SSA executed before the effective date of the adopted disclosure requirement, which is subject

to OMB approval, shall place a copy of the SSA in its public inspection file within 180 days after the disclosure requirement becomes effective, provided that the agreement is not already in the station's public inspection file. The Commission will seek OMB approval for the disclosure requirement, and, upon receiving approval, the Commission will release a Public Notice specifying the date by which SSAs must be placed in the stations' online public files. The Public Notice will also provide further details on how the SSA files are to be designated within each station's online public file. SSAs that are executed after the disclosure requirement is effective must be placed in the stations' online public files in a timely fashion, and stations are reminded to maintain orderly public files.

### 3. Attribution

228. Finally, in response to the *FNPRM*, multiple commenters assert that the Commission should immediately make SSAs attributable based on the existing record and the Commission's experience with SSAs in the context of assignments/transfers of control of station licenses. The Commission declines to make SSAs attributable. As noted in the *FNPRM*, and as confirmed herein, the Commission believes that first defining SSAs and requiring their disclosure is necessary before making any decisions regarding attribution or any other regulatory action that may be appropriate based on review of these agreements. Unlike the resource sharing provided for in LMAs and JSAs—which are specific types of SSAs involving discrete, easily defined activities with a clear impact on a station's core operating functions—the types of resource sharing in other SSAs are not easily categorized and their potential impact on a station's core operating functions is not well understood at this time, largely due to the lack of a definition of SSAs and lack of disclosure. Accordingly, the Commission's action in this *Order* is a necessary step before the Commission can consider whether attribution of any additional types of SSAs or any other regulatory action is appropriate. The Commission has traditionally taken an incremental approach in determining whether and how to attribute agreements between and among broadcasters. In these circumstances, the Commission finds that proceeding in this fashion, one step at a time, when addressing these complicated issues is appropriate and reasonable. The Commission notes also that the court in

*Prometheus III* rejected the argument that the Commission acted arbitrarily and capriciously by not attributing all . . . SSAs in the *JSA Order*, finding instead that the Commission was justified in its sequential approach in addressing this issue. Though the Commission reiterated that its action in this *Order* is not intended to prejudice whether attribution or any other regulatory actions are appropriate for SSAs. Once the Commission has had an opportunity to evaluate the potential impact of SSAs on the Commission's rules and policy goals, it will be able to consider whether attribution or other regulatory action is warranted.

## VI. Procedural Matters

### A. Final Regulatory Flexibility Analysis

229. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact on small entities of the policies and rules addressed in the *Second Report and Order*.

230. *Need for, and Objectives of, the Second Report and Order*. The *Second Report and Order* concludes the 2010 and 2014 Quadrennial Reviews of the broadcast ownership rules, which were initiated pursuant to section 202(h) of the Telecommunications Act of 1996, Public Law 104–104, section 202(h), 110 Stat. 56, 111–12 (1996) (1996 Act) (codified as amended at 47 U.S.C. 303 note) (1996 Act). The Commission is required by statute to review its media ownership rules every four years to determine whether they are necessary in the public interest as the result of competition and to repeal or modify any regulation the Commission determines to be no longer in the public interest. The media ownership rules that are subject to this quadrennial review—the Local Television Ownership Rule, the Local Radio Ownership Rule, the Newspaper/Broadcast Cross-Ownership Rule, the Radio/Television Cross-Ownership Rule, and the Dual Network Rule—are found, respectively, at 47 CFR 73.3555(b), (a), (d), (c), and 73.658(g). Ultimately, while the Commission acknowledged the impact of new technologies on the media marketplace, it concluded that some limits on broadcast ownership remain necessary to protect and promote the Commission's policy goals of fostering competition, localism, and diversity.

231. Specifically, the *Order* retains the Local Television Ownership Rule, which allows an entity to own two television stations in the same Nielsen Designated Market Area (DMA) only if

no Grade B contour overlap exists between the commonly owned stations, or at least one of the commonly owned stations is not ranked among the top-four stations in the market (top-four prohibition) and at least eight independently owned television stations remain in the DMA after ownership of the two stations is combined. The *Order* modifies the Local Television Ownership Rule by updating the contour provision for the rule's application to reflect the digital television transition. The *Order* also clarifies that the top-four prohibition applies to transactions involving the sale or swapping of network affiliations between in-market stations that result in an entity holding an attributable interest in two top-four stations in the same DMA.

232. The *Order* retains the Local Radio Ownership Rule, which specifies the maximum number of commercial radio stations that can be owned depending on the total number of full-power commercial and noncommercial radio stations in the market. The *Order* makes minor modifications to the Local Radio Ownership Rule to assist the Media Bureau in processing license assignment and transfer applications. Specifically, the *Order* (1) clarifies the exception to the two-year waiting period for certain Nielsen Audio Market changes; (2) adopts an exemption from the Note 4 grandfathering requirements for intra-Metro community of license changes; and (3) redefines the Puerto Rico market.

233. The *Order* adopts a revised Newspaper/Broadcast Cross-Ownership Rule, which prohibits certain newspaper/television and newspaper/radio combinations subject to a case-by-case waiver. The *Order* updates the Newspaper/Broadcast Cross-Ownership Rule's contour provision to consider digital television contours consistent with the switch to digital television. The *Order* also eases application of the cross-ownership prohibition by adopting new market criteria for the rule's application and an explicit exception for failed/failing properties.

234. The *Order* retains the Radio/Television Cross-Ownership Rule, which restricts common ownership of television and radio stations in a local market based on the number of independently owned media voices in the market. The *Order* updates the Radio/Television Cross-Ownership Rule's contour provision for the rule's application from analog to digital to reflect the digital television transition. First, consistent with the update to the NBCO Rule, a television station's digital PCC will be used instead of its analog

Grade A contour when determining the rule's trigger. Second, a television station's digital NLSC will be used instead of its analog Grade B contour when counting the number of media voices remaining in the market post-merger.

235. The *Order* finds that the Dual Network Rule, which permits common ownership of multiple broadcast networks, but prohibits a merger between or among the top four networks (ABC, CBS, Fox, and NBC), continues to be necessary to promote competition and localism and should be retained without modification.

236. The *Order* readopts the Television Joint Sales Agreement (JSA) Attribution Rule, which was vacated on procedural grounds by the Court of Appeals for the Third Circuit in *Prometheus III*. The Commission has found that certain JSAs between in-market television stations rise to the level of attribution as they afford the brokering station the potential to unduly influence or control the brokered station. The Television JSA Attribution Rule attributes same-market television JSAs in which the broker sells more than 15 percent of the brokered station's weekly advertising time. In such circumstances, the brokered station will be counted towards the brokering station's permissible broadcast ownership totals for purposes of the Local Television Ownership Rule. The Television JSA Attribution Rule also requires the filing of attributable television JSAs with the Commission pursuant to 47 CFR 73.3613 and authorizes the Media Bureau to amend certain forms that are impacted by the FCC's action to attribute certain television JSAs. The *Order* preserves the existing grandfathering legislation (which grandfathered until Sept. 30, 2025 those television JSAs that were in effect as of March 31, 2014) and allows for the transferability of such grandfathered television JSAs, consistent with congressional guidance.

237. The *Order* reinstates the revenue-based eligible entity standard and associated measures to promote the Commission's goal of encouraging small business participation in the broadcast industry, which will cultivate innovation and enhance viewpoint diversity. In the *Order*, the Commission considers possible definitions that would expressly recognize the race and ethnicity of applicants but finds that the legal standards the courts have said must be met before government implementation of preferences based on such race- or gender-conscious definitions have not been satisfied.

238. The *Order* adopts a definition of shared service agreements (SSAs) and requires commercial television stations to disclose those SSAs by placing the agreements in each station's online public inspection file. The SSA disclosure requirement will lead to more comprehensive information about the prevalence and content of SSAs between commercial television stations, which will improve the Commission's and the public's ability to assess the potential impact of these agreements on the Commission's rules and policies. The method of disclosure by placing SSAs in the online public inspection file will apply a minimal burden on stations, while providing the public and the Commission with easy access to the agreements.

239. *Response to Public Comments and Comments by the Chief Counsel for Advocacy of the Small Business Administration.* The Commission received no comments in direct response to the IRFA or the SIRFA. The Chief Counsel for Advocacy of the Small Business Administration did not file any comments in response to the proposed rules in this proceeding.

240. *Description and Estimate of the Number of Small Entities to Which Rules Will Apply.* The SBA defines a television broadcasting station that has no more than \$38.5 million in annual receipts as a small business. Census data for 2012 indicate that 751 television broadcasting firms were in operation for the duration of that entire year. Of these, 656 had annual receipts of less than \$25.0 million per year and 95 had annual receipts of \$25.0 million or more per year. Based on this data and the associated size standard, the Commission concludes that the majority of such firms are small.

241. Additionally, the Commission has estimated the number of licensed commercial television stations to be 1,387. According to Commission staff review of the BIA/Kelsey, LLC's Media Access Pro Television Database on June 2, 2016, about 1,264 of an estimated 1,387 commercial television stations (or approximately 91 percent) had revenues of \$38.5 million or less. The Commission has estimated the number of licensed noncommercial educational television stations to be 395.

242. The SBA defines a radio broadcasting entity that has \$38.5 million or less in annual receipts as a small business. Census data for 2012 indicate that 3,187 radio broadcasting firms were in operation for the duration of that entire year. Of these, 3,134 had annual receipts of less than \$25.0 million per year and 53 had annual receipts of \$25.0 million or more per

year. Based on this data and the associated size standard, the Commission concludes that the majority of such firms are small.

243. Further, according to Commission staff review of the BIA/Kelsey, LLC's Media Access Pro Radio Database on June 2, 2016, about 11,386 (or about 99.9 percent) of 11,395 commercial radio stations in the United States have revenues of \$38.5 million or less. The Commission has estimated the number of licensed noncommercial radio stations to be 4,096. The Commission does not have revenue data or revenue estimates for these stations. These stations rely primarily on grants and contributions for their operations, so it will assume that all of these entities qualify as small businesses.

244. The Commission notes, however, that, in assessing whether a business concern qualifies as small under the SBA definition, business (control) affiliations must be included. The Commission's estimate, therefore, likely overstates the number of small entities that might be affected by its action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

245. In addition, an element of the definition of small business is that the entity not be dominant in its field of operation. The Commission is 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 estimate of small businesses to which rules may apply does not exclude any television or radio station from the definition of a small business on this basis and therefore may be over-inclusive to that extent. Also, as noted, an additional element of the definition of small business is that the entity must be independently owned and operated. The Commission notes that assessing these criteria in the context of media entities is difficult at times and the estimates of small businesses to which they apply may be over-inclusive to this extent.

246. The SBA has developed a small business size standard for the census category of Newspaper Publishers; that size standard is 1,000 or fewer employees. Census Bureau data for 2012 show that there were 4,466 firms in this category that operated for the entire year. Of this total, 4,378 firms had employment of 499 or fewer employees, and an additional 88 firms had employment of 500 to 999 employees. Therefore, the Commission estimates that the majority of Newspaper Publishers are small entities that might be affected by its action.

#### 247. *Description of Reporting, Record Keeping, and other Compliance Requirements for Small Entities.*

The *Order* adopts rule changes that will affect reporting, recordkeeping, and other compliance requirements. The need for and content of each of these rule changes is described in detail above in the summary of the action, and the Commission's efforts to minimize the impact of these rules is described in detail below. Additionally, the *Order* adopts a requirement that commercial broadcast television stations must place a copy of any SSA entered into between commercial broadcast television stations in their online public inspection files within 180 days after the filing requirement becomes effective. The Commission will seek OMB approval for the filing requirement, and, upon receiving approval, the Commission will release a Public Notice specifying the date by which SSAs must be filed. Going forward, commercial broadcast television stations must place copies of such agreements in their online public inspection files in a timely fashion following execution.

248. As a result of these new or modified requirements, the Commission does not believe that small businesses will need to hire additional professionals (e.g., attorneys, engineers, economists, or accountants) to comply with the new reporting, recordkeeping, and other compliance requirements. Commercial television stations should already have staff capable of placing SSAs in the stations' online public files, given the existing public file requirements.

249. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.* In conducting the quadrennial review, the Commission has three chief alternatives available for each of the Commission's media ownership rules—eliminate the rule, modify it, or, if the Commission determines that the rule is necessary in the public interest, retain it. The Commission finds that the rules adopted in the *Order*, which are intended to achieve the policy goals of competition, localism, and diversity, will continue to benefit small entities by fostering a media marketplace in which they are better able to compete and by promoting additional broadcast ownership opportunities among a diverse group of owners, including small entities. The Commission discusses below several ways in which the rules may benefit small entities as well as steps taken, and significant alternatives considered, to minimize any potential burdens on small entities.

250. The Commission finds that the Local Television Ownership Rule, as modified, will continue to help ensure that local television markets do not become too concentrated and, by doing so, will allow more firms, including those that are small entities, to enter local markets and compete effectively. The *Order* also addresses the competitive challenges faced by broadcasters that operate in small markets—including small entities—by retaining the existing failed/failing station waiver policy. In particular, the Commission notes that a review of recent transactions demonstrates that waivers under the failed/failing station policy are frequently granted in small and mid-sized markets, which often provides relief for small entities.

251. The *Order* concludes that, consistent with previous Commission findings, broadcast radio continues to be a viable avenue for new entry in the media marketplace, including by small businesses, minorities, women, and entities seeking to serve niche audiences. The Commission finds that retention of the local radio ownership limits, including the AM/FM subcaps, will help foster opportunities for new entry in local radio markets, including by small entities. Moreover, the Commission believes that by limiting the consolidation of market power among the dominant groups, the rule will help ensure that small radio station owners remain economically viable.

252. In several ways, the Commission's decisions regarding the NBCO Rule minimize the economic impact on small entities, namely small broadcasters and newspaper owners. First, retaining the prohibition on newspaper/broadcast combinations in local markets will help small entities compete on more equal footing with larger media owners that may have pursued consolidation strategies through cross-ownership. Second, by entertaining waiver requests on a pure case-by-case basis, taking into consideration the totality of circumstances surrounding a proposed transaction and the potential harm to viewpoint diversity, the Commission will have the flexibility to accord the proper weight to any factors that are particularly relevant for small media owners. The significant alternatives that the Commission considered, such as allowing combinations under either a bright-line rule or a presumptive waiver standard, would not have afforded the Commission the same degree of flexibility. Third, adopting a more lenient approach for proposed combinations involving a failed or failing broadcast station or newspaper

will benefit entities in financial distress, which may be more likely to include small entities. Fourth, grandfathering existing combinations will avoid disruption of settled expectations of existing licensees and prevent any impact on the provision of service by smaller entities that are part of such combinations. Finally, requiring subsequent purchasers of grandfathered combinations to comply with the rule in effect at that time will provide opportunities for new entrants to acquire a divested media outlet.

253. By retaining the Radio/Television Cross-Ownership Rule, the Commission minimizes the economic impact on small entities. The Commission considered the significant alternative of eliminating the rule but concluded that it remained necessary to promote viewpoint diversity. Retaining the rule will benefit small broadcast stations by limiting the growth of existing combinations of radio stations and television stations in local markets. In addition, grandfathering existing combinations will avoid disruption of settled expectations of existing licensees and prevent any impact on the provision of service by smaller stations that are part of such combinations; requiring subsequent purchasers of grandfathered combinations to comply with the rule in effect at that time will provide opportunities for new entrants to acquire a divested media outlet. The Commission's decision also alleviates the concern expressed by commenters that further consolidation would harm small businesses because radio provides one of the few entry points into media ownership for minorities and women.

254. The Commission finds that the Dual Network Rule remains necessary to preserve the balance of bargaining power between the top-four networks and their affiliates, thus improving the ability of affiliates to exert influence on network programming decisions in a manner that best serves the interests of their local communities. The Commission believes that these benefits to affiliates are particularly important for small entities that may otherwise lack bargaining power.

255. The Commission finds that reinstating the revenue-based standard will help promote small business participation in the broadcast industry. The Commission believes that small-sized applicants and licensees benefit from flexible licensing, auctions, transactions, and construction policies. Often, small-business applicants have financing and operational needs distinct from those of larger broadcasters. By easing certain regulations for small broadcasters, the Commission believes

that it will promote the public interest goal of making access to broadcast spectrum available to a broad range of applicants. The Commission also believes that enabling more small businesses to participate in the broadcast industry will help encourage innovation and expand viewpoint diversity. In addition, the Commission's intent in reinstating the previous revenue-based eligible entity definition—and in applying it to the construction, licensing, transaction, and auction measures to which it previously applied—is to expand broadcast ownership opportunities for new entrants, including small entities. Therefore, the Commission anticipates that these measures will benefit small entities, not burden them.

256. Although the Commission does not currently require the filing or disclosure of sharing agreements that do not contain time brokerage or joint advertising sales provisions, broadcasters are required to file many types of documents in their public inspection files. Therefore, broadcasters, including those qualifying as small entities, are well versed in the procedures necessary for compliance and will not be overly burdened with having to add SSAs to their public inspection files. In addition, the Commission considered various disclosure alternatives in the record, but determined that such measures would either be more burdensome than the disclosure method adopted in the *Order* or that the proposals would not adequately address the concerns raised by the Commission. Ultimately, as the Commission finds that the new SSA disclosure requirement will not be especially burdensome to small entities, adopting any special measures for small entities with respect to this new disclosure requirement is therefore unnecessary.

#### *B. Final Paperwork Reduction Act Analysis*

257. This Report and Order contains information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. The requirements will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the information collection requirements contained in this proceeding. The Commission will publish a separate document in the **Federal Register** at a later date seeking these comments. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of

2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the Commission previously sought specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees. In this present document, the Commission has assessed the effects of the SSA disclosure requirement, and finds that the disclosure requirement will not impose a significant filing burden on businesses with fewer than 25 employees. In addition, the Commission has described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the FRFA.

*C. Congressional Review Act*

258. The Commission will send a copy of this Second Report and Order to the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

**VII. Ordering Clauses**

259. Accordingly, *it is ordered*, that pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, 310, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, and 403, and section 202(h) of the Telecommunications Act of 1996, this Second Report and Order *is adopted*. The rule modifications attached hereto as Appendix A shall be effective thirty (30) days after publication of the text or summary thereof in the **Federal Register**, except for those rules and requirements involving Paperwork Reduction Act burdens, which shall become effective on the effective date announced in the **Federal Register** notice announcing OMB approval. Changes to Commission Forms required as the result of the rule amendments adopted herein *will become effective* on the effective date announced in the **Federal Register** notice announcing OMB approval.

260. *It is further ordered*, that the proceedings MB Docket No. 09–182 and MB Docket No. 14–50 *are terminated*.

**List of Subjects in 47 CFR Part 73**

Radio, Reporting and recordkeeping requirements, Television.

Federal Communications Commission.

**Gloria J. Miles,**

*Federal Register Liaison Officer, Office of the Secretary.*

**Final Rules**

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 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 and 339.

■ 2. Amend § 73.3526 by adding paragraph (e)(18) to read as follows:

**§ 73.3526 Local public inspection file of commercial stations.**

\* \* \* \* \*

(e) \* \* \* \* \*  
 (18) *Shared service agreements.* For commercial television stations, a copy of every Shared Service Agreement for the station (with the substance of oral agreements reported in writing), regardless of whether the agreement involves commercial television stations in the same market or in different markets, with confidential or proprietary information redacted where appropriate. For purposes of this paragraph, a Shared Service Agreement is any agreement or series of agreements in which:

(1) A station provides any station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to a station that is not directly or indirectly under common de jure control permitted under the Commission’s regulations; or

(2) Stations that are not directly or indirectly under common de jure control permitted under the Commission’s regulations collaborate to provide or enable the provision of station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to one or more of the collaborating stations. For purposes of this paragraph, the term “station” includes the licensee, including any subsidiaries and affiliates, and any other individual or entity with an attributable interest in the station.

\* \* \* \* \*

■ 3. Amend § 73.3555 by revising paragraphs (b) introductory text, (b)(1) introductory text, (b)(1)(ii), (c)(1)(i) and (ii), (c)(3)(i), and (d), and revising Note 4 and Note 5; and adding Note 11 and Note 12 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) if:

(1) The digital noise limited service contours of the stations (computed in

accordance with § 73.622(e)) do not overlap; or

\* \* \* \* \*

(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. Count only those TV stations the digital noise limited service contours of which overlap with the digital noise limited service contour of at least one of the stations in the proposed combination. In areas where there is no DMA, count the TV stations present in an area that would be the functional equivalent of a TV market. Count only those TV stations digital noise limited service contours of which overlap with the digital noise limited service contour of at least one of the stations in the proposed combination.

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(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 principal community contour(s) of the TV broadcast station(s) (computed in accordance with § 73.625) 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 § 73.186), encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the principal community contour(s) of the TV broadcast station(s) (computed in accordance with § 73.625) encompass(es) the entire community of license of the AM station.

\* \* \* \* \*

(3) \* \* \*

(i) TV stations: Independently owned and operating full-power broadcast TV stations within the DMA of the TV station’s (or stations’) community (or communities) of license that have digital noise limited service contours (computed in accordance with § 73.622(e)) that overlap with the digital noise limited service contour(s) of the TV station(s) at issue;

\* \* \* \* \*

(d) *Newspaper/broadcast cross-ownership rule.* (1) No party (including all parties under common control) may directly or indirectly own, operate, or control a daily newspaper and a full-

power commercial broadcast station (AM, FM, or TV) if:

(i) The predicted or measured 2 mV/m groundwave contour of the AM station (computed in accordance with § 73.183 or § 73.186) encompasses the entire community in which the newspaper is published and, in areas designated as Nielsen Audio Metro markets, the AM station and the community of publication of the newspaper are located in the same Nielsen Audio Metro market;

(ii) The predicted or measured 1 mV/m contour of the FM station (computed in accordance with § 73.313) encompasses the entire community in which the newspaper is published and, in areas designated as Nielsen Audio Metro markets, the FM station and the community of publication of the newspaper are located in the same Nielsen Audio Metro market; or

(iii) The principal community contour of the TV station (computed in accordance with § 73.625) encompasses the entire community in which the newspaper is published; and the community of license of the TV station and the community of publication of the newspaper are located in the same DMA.

(2) The prohibition in paragraph (d)(1) of this section shall not apply upon a showing that either the newspaper or television station is failed or failing.

\* \* \* \* \*

**Note 4 to § 73.3555:** Paragraphs (a) through (d) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities, and will not apply to applications for assignment of license or transfer of control filed in accordance with § 73.3540(f) or § 73.3541(b), or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy, or to FM or AM broadcast minor modification applications for intra-market

community of license changes, if no new or increased concentration of ownership would be created among commonly owned, operated or controlled media properties. Paragraphs (a) through (d) of this section will apply to all applications for new stations, to all other applications for assignment or transfer, to all applications for major changes to existing stations, and to all other applications for minor changes to existing stations that seek a change in an FM or AM radio station's community of license or create new or increased concentration of ownership among commonly owned, operated or controlled media properties. Commonly owned, operated or controlled media properties that do not comply with paragraphs (a) through (d) of this section may not be assigned or transferred to a single person, group or entity, except as provided in this Note, the Report and Order in Docket No. 02-277, released July 2, 2003 (FCC 02-127), or the Second Report and Order in MB Docket No. 14-50, FCC 16-107 (released August 25, 2016).

**Note 5 to § 73.3555:** Paragraphs (b) through (e) of this section will not be applied to cases involving television stations that are "satellite" operations. Such cases will be considered in accordance with the analysis set forth in the Report and Order in MM Docket No. 87-8, FCC 91-182 (released July 8, 1991), in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. An authorized and operating "satellite" television station, the digital noise limited service contour of which overlaps that of a commonly owned, operated, or controlled "non-satellite" parent television broadcast station, or the principal community contour of which completely encompasses the community of publication of a commonly owned, operated, or controlled daily newspaper, or the community of license of a commonly owned, operated, or controlled AM or FM broadcast station, or the community of license of which is completely encompassed by the 2 mV/m contour of such AM broadcast station or the 1 mV/m contour of such FM broadcast station, may subsequently become a "non-

satellite" station under the circumstances described in the aforementioned Report and Order in MM Docket No. 87-8. However, such commonly owned, operated, or controlled "non-satellite" television stations and AM or FM stations with the aforementioned community encompassment, may not be transferred or assigned to a single person, group, or entity except as provided in Note 4 of this section. Nor shall any application for assignment or transfer concerning such "non-satellite" stations be granted if the assignment or transfer would be to the same person, group or entity to which the commonly owned, operated, or controlled newspaper is proposed to be transferred, except as provided in Note 4 of this section.

\* \* \* \* \*

**Note 11 to § 73.3555:** An entity will not be permitted to directly or indirectly own, operate, or control two television stations in the same DMA through the execution of any agreement (or series of agreements) involving stations in the same DMA, or any individual or entity with a cognizable interest in such stations, in which a station (the "new affiliate") acquires the network affiliation of another station (the "previous affiliate"), if the change in network affiliations would result in the licensee of the new affiliate, or any individual or entity with a cognizable interest in the new affiliate, directly or indirectly owning, operating, or controlling two of the top-four rated television stations in the DMA at the time of the agreement. Parties should also refer to the Second Report and Order in MB Docket No. 14-50, FCC 16-107 (released August 25, 2016).

**Note 12 to § 73.3555:** Parties seeking waiver of paragraph (d)(1) of this section, or an exception pursuant to paragraph (d)(2) of this section involving failed or failing properties, should refer to the Second Report and Order in MB Docket No. 14-50, FCC 16-107 (released August 25, 2016).

[FR Doc. 2016-25567 Filed 10-31-16; 8:45 am]

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