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

In the Matter of	)	
	)	
Promoting Diversification of Ownership In the Broadcasting Services	)	MB Docket No. 07-294
	)	
2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 06-121
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	
Ways to Further Section 257 Mandate and To Build on Earlier Studies	)	MB Docket No. 04-228

REPORT AND ORDER
AND THIRD FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: December 18, 2007 **Released: March 5, 2008**

Comment Date: [30 days after date of publication in the Federal Register]
Reply Comment Date: [45 days after date of publication in the Federal Register]

By the Commission: Chairman Martin, Commissioners Tate and McDowell issuing separate statements; Commissioners Copps and Adelstein concurring in part, dissenting in part, and issuing separate statements.

TABLE OF CONTENTS

Heading Paragraph #

I. INTRODUCTION 1
II. BACKGROUND 2
III. REPORT AND ORDER 6

A. Definition of Eligible Entities ... 6
B. Actions to Expand Opportunities for Eligible Entities ... 10
1. Revision of Rules Regarding Construction Permit Deadlines ... 10
2. Modification of Attribution Rule ... 17
3. Distress Sale Policy ... 35
4. Ban on Discrimination in Broadcast Transactions ... 40
5. “Zero Tolerance” Policy for Ownership Fraud ... 43
6. Non-Discrimination Provisions in Advertising Sales Contracts ... 49
7. Longitudinal Research on Minority and Women Ownership Trends ... 51
8. Local and Regional Bank Participation in SBA Guaranteed Loan Programs ... 54
9. Duopoly Priority for Companies that Finance or Incubate an Eligible Entity ... 56
10. Extension of Divestiture Deadlines in Certain Mergers ... 57
11. Transfer of Grandfathered Radio Station Combinations to Non-Eligible Entities ... 61
12. “Access to Capital” Conference ... 62
13. Guidebook on Diversity ... 64
C. Other Proposals ... 65
1. Transfer of Grandfathered Station Combinations to SDBs ... 65
2. Structural Rule Waiver for Selling a Station to an SDB; Staged Implementation of Deregulation ... 66
3. Structural Rule Waivers for Creating Incubator Programs ... 68
4. Opening FM Spectrum for New Entrants ... 69
5. Advocacy of Tax Deferral Legislation; Promotion of Minority Ownership in All General Media Rulemaking Proceedings ... 72
6. Extension of the Community Reinvestment Act ... 75
7. Establish a “Fund of Funds” ... 76
8. Relax Foreign Ownership Restrictions ... 77
9. Permit AM Stations to Use FM Translators ... 78
10. Repeal Radio Subcaps ... 79
IV. THIRD FURTHER NOTICE OF PROPOSED RULE MAKING ... 80
A. Definition of Socially and Economically Disadvantaged Businesses ... 80
B. Share-Time Proposals ... 87
C. Retention on Air of AM Expanded Band Owners’ Stations if One of the Stations is Sold to an Eligible Entity ... 88
D. Modifications to Form 323 ... 93
E. Structural Rule Waivers for Creating Incubator Programs ... 97
F. Opening FM Spectrum for New Entrants ... 98
G. Must-Carry for Class A Television Stations ... 99
H. Reallocation of TV Channels 5 and 6 for FM Service ... 100
I. Proposals of the National Association of Black Owned Broadcasters and the Rainbow/PUSH Coalition ... 101
V. CONCLUSION ... 102
VI. PROCEDURAL MATTERS ... 103
A. Filing Requirements ... 103
B. Initial and Final Regulatory Flexibility Analysis ... 108
C. Paperwork Reduction Act Analysis ... 110
D. Congressional Review Act ... 115
VII. ORDERING CLAUSES ... 116
APPENDIX A – Rule Changes
APPENDIX B – Initial Regulatory Flexibility Analysis
APPENDIX C – Final Regulatory Flexibility Analysis

I. INTRODUCTION

1. In this Report and Order and Third Further Notice of Proposed Rule Making ("*Report and Order and Third Further Notice*"), we take several steps to increase participation in the broadcasting industry by new entrants and small businesses, including minority- and women-owned businesses, which historically have not been well-represented in the broadcasting industry. After setting forth our objectives, we define the entities that will benefit initially from our actions and adopt a number of measures modifying certain of our rules and policies to encourage ownership diversity and new entry in broadcasting. We also seek comment on several additional proposals.

II. BACKGROUND

2. "[I]t has long been a basic tenet of national communications policy that the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[1] Today, we seek to further this important policy goal by expanding opportunities for new entrants and small businesses, including minority- and women-owned businesses, to own broadcasting outlets. By broadening participation in the broadcast industry, we seek to strengthen the diverse and robust marketplace of ideas that is essential to our democracy.[2] As the Supreme Court has recognized, "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."[3] Beyond fostering viewpoint diversity, we also believe that taking steps to facilitate the entry of new participants into the broadcasting industry may promote innovation in the field. "[T]he most potent sources of innovation often arise not from incumbents but from new entrants."[4] We believe that this may be particularly true with respect to small businesses, including those owned by minorities and women. "[E]xpanding the pool of potential competitors in media markets" to include such businesses "should bring new competitive strategies and approaches by broadcast station owners in ways that benefit consumers in those markets."[5]

[1] *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 663-64 (1994) (*"Turner I"*) (quoting *Midwest Video*, 406 U.S. 649, 668 n.27) (plurality opinion) and *Associated Press v. United States*, 326 U.S. 1, 20 (1945)) .

[2] *See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13627, ¶ 19 (2003) ("*2002 Biennial Review Order*"), *aff'd in part and remanded in part, Prometheus Radio Project. v. FCC*, 373 F.3d 372 (2004) ("*Prometheus*"), *stay modified on rehearing,* No. 03-3388 (3d Cir. Sept. 3, 2004) ("*Prometheus Rehearing Order*"), *cert. denied,* 73 U.S.L.W. 3466 (U.S. June 13, 2005) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168, and 04-1117); *see also 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Further Notice of Proposed Rule Making, 21 FCC Rcd 8834 (2006) ("*Further Notice*"); *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Second Further Notice of Proposed Rule Making, MB Docket No. 06-121 *et al.*, 22 FCC Rcd 14215 (2007) ("*Second Further Notice*").

[3] *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990), *overruled in part on other grounds in Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 227 (1995)("*Adarand*").

[4] *2002 Biennial Review Order*, 18 FCC Rcd at 13632, ¶ 40.

[5] *Id*. at 13637, ¶ 51.

3. Commenters likewise agree that increasing diversity in broadcast ownership is beneficial.[6] The Diversity and Competition Supporters ("DCS"), a coalition of national organizations created to advance the cause of minority ownership, argue that "curing the acute minority under-representation in broadcast ownership would do much to promote competition and diversity of viewpoints."[7] Consumers Union/Consumer Federation of America/Free Press (collectively "Consumers Union") support increasing diversity (and localism) in ownership because doing so would produce "more diverse speech, more choices for listeners, and more owners who are responsive to their local communities and serve the public interest."[8] Clear Channel Communications, Inc. ("Clear Channel") also urges the Commission to seek to increase such ownership.[9]

4. Not only have a variety of commenters urged us to adopt measures to promote new entry and diverse ownership, including increased ownership by women and minorities, but, over the years, they have also, in a variety of proceedings and contexts, advanced proposals as to how these goals can be achieved. Indeed, as indicated in Appendix A of the *Second Further Notice*, DCS advanced many proposals considered or adopted in this *Report and Order and Third Further Notice* in the 2002 Biennial Review proceeding. The Commission specifically sought comment on these proposals in the *Further Notice* and the *Second Further Notice* in the 2006 Quadrennial Review proceeding.[10] In response, DCS advanced additional and/or revised proposals, as did other commenters. Accordingly, we consolidate this docket with the media ownership proceeding, in which these proposals were filed, and resolve the issues involved in the *Second Further Notice*.

5. We believe that it is important to act now to achieve these objectives, and we hope that, in fact, the actions we take in this item will facilitate ownership diversity and new entry in the broadcasting industry.

III. REPORT AND ORDER

A. Definition of Eligible Entities

6. To define the group intended to receive the benefits of the measures adopted herein, we will use the term "eligible entity" as it is defined in the Commission's *2002 Biennial Review Order*. In that proceeding, the Commission adopted an exception to the prohibition on the transfer of grandfathered station combinations that violated new local media ownership rules. The Commission ruled that licensees would be allowed to transfer control of or assign a grandfathered combination to "eligible entities," which were defined as any entity that would qualify as a small business consistent with Small Business Administration ("SBA") standards for its industry grouping, based on revenue.[11] At present, the SBA

---

[6] *See, e.g.*, Comments of the National Association of Broadcasters at 2 (Oct. 1, 2007)(reiterating general support for policies that create industry incentives to increase minority and female ownership and participation in the broadcast industry) ("NAB Comments").

[7] Initial Comments of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking (Oct. 2, 2007), at 2 ("DCS Initial Comments").

[8] Comments of Consumers Union, Consumer Federation of America and Free Press at 4 (Oct. 2, 2007) ("Consumers Union Comments").

[9] *See* Comments of Clear Channel Communications, Inc. on Second Further Notice of Proposed Rulemaking (Oct. 1, 2007) ("Clear Channel Comments").

[10] *See supra* Note 2.

[11] *2002 Biennial Review Order*, 18 FCC Rcd at 13810-12, ¶¶ 488-89. We include both commercial and noncommercial entities within the scope of the term "eligible entity" to the extent that they otherwise meet the criteria.

(continued….)

defines as a small business a television broadcasting station that has no more than $13 million in annual receipts and a radio broadcasting entity that has no more than $6.5 million in annual receipts.[12] To determine qualifications as a small business, the SBA considers the revenues of the parent corporation and affiliates of the parent corporation, not just the revenues of individual broadcast stations.[13] In addition, in order to ensure that ultimate control rests in an eligible entity that satisfies the revenue criteria, the entity must satisfy one of several control tests. 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; or (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 interests; 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.[14]

7. We conclude that use of this definition of "eligible entity" will advance our objectives of promoting diversity of ownership in the broadcast industry by making it easier for small businesses and new entrants – that otherwise might find it difficult or impossible to compete – to acquire a license and attract the capital necessary to compete in the marketplace with larger and better financed companies. In addition, by facilitating entry into the broadcast industry by new entrants, we are hopeful that these measures will result in a wider array of programming services, including some that are responsive to local needs and interests and audiences that are currently underserved. We anticipate that small businesses will be more likely than large corporations to have ties to the communities that they seek to serve, and thus be more attuned to local needs and interests.

8. We disagree with DCS's contention in its supplemental comments that adoption of this small business classification "would actually be regressive and serve to *diminish* minority ownership."[15] DCS bases this contention on data compiled by Free Press, which purport to show that minority owned commercial radio stations are less well represented among SBA-defined small businesses (5.88 percent) than they are in the industry as a whole (7.78 percent).[16] According to the Free Press data, there are 812 minority owned commercial radio stations, 225 of which are owned by seven mid-sized minority controlled companies that would not qualify as an "eligible entity," yielding 587 minority owned

(Continued from previous page)
The U.S. Court of Appeals for the Third Circuit, which reviewed the *2002 Biennial Review Order,* upheld the transfer policy that included the "eligible entity" exception. It also rejected arguments that the transfer restriction violated Section 202(h) of the Telecommunications Act of 1996, constituted arbitrary and capricious decision-making, and violated the Fifth Amendment of the Constitution. The court stated that the Commission successfully demonstrated that the transfer restriction is "in the public interest" as required under § 202(h). *Prometheus,* 373 F.3d at 426-28.

[12] *See* 13 C.F.R. § 121.201 (North American Industry Classification System (NAICS) code categories). The definition of small business for the radio industry is listed in NAICS code 515112, and the definition of a small business for the TV industry is listed in NAICS code 515120.

[13] 13 C.F.R. §§ 121.103, 121.105.

[14] *2002 Biennial Review Order,* 18 FCC Rcd at 13811, ¶ 489.

[15] Supplemental Ex Parte Comments of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking at 2 (Nov. 20, 2007) (emphasis in original) ("DCS Supplemental Comments").

[16] *Id.* at 38.

commercial radio stations among small businesses.[17] In calculating the overall number of commercial radio stations owned by SBA-defined small businesses, DCS and Free Press cite to the Supplemental Regulatory Flexibility Analysis that accompanied the *Further Notice* in the 2006 Quadrennial Review proceeding, which states that about 95 percent of commercial radio stations have revenues under the applicable limit.[18] They err, however, in assuming for purposes of their calculations that, because 95 percent of radio *stations* have revenues under the SBA limit, 95 percent of radio station *owners* also have such revenues.[19] As a result, their analysis is fundamentally flawed. In fact, the Supplemental Regulatory Flexibility Analysis specifically cautions that "in assessing whether a business entity qualifies as small . . . business control affiliations must be included."[20] Analyzing BIA figures as of December 1, 2007, we find that 4,532 of the 11,475 commercial radio stations are owned by entities with annual revenues clearly in excess of $6.5 million. Thus, 6,943 radio stations (or about 61 percent) are owned by small businesses. Indeed, due to lack of revenue data for privately-held companies, even this 61 percent figure likely overestimates small business control. Using Free Press data, we find that at least 8.5 percent, not 5.88 percent, of commercial radio stations owned by SBA-defined small businesses are minority owned.[21] Furthermore, it is impossible to estimate how many minority owned new entrants may form to take advantage of the proposals we adopt herein, thereby increasing, potentially dramatically, the percentage of minority owned small businesses. Accordingly, we believe that concerns that our definition of eligible entities will be regressive are unfounded.

9. We recognize that some commenters have urged us to take action to increase the ownership of broadcast stations by minorities and women specifically.[22] In the *Third Further Notice* below, we seek comment on whether we should adopt an alternative definition of "eligible entity" that would specifically identify these groups. In the meantime, we have decided to employ a race- and gender-neutral definition in the rules we adopt today so as to avoid constitutional difficulties that might create impediments to the timely implementation of the steps we take today to diversify broadcast ownership. As described below, we believe that the measures we adopt today will be effective in creating new opportunities for broadcast ownership by a variety of small businesses and new entrants, including those owned by women and minorities.

---

[17] *Id.* at 38, n.82. DCS states that these companies are Access.1 Communications, Radio One, Bustos Media Holdings, Border Media Partners, Inner City Broadcasting Corporation, Spanish Broadcasting System, and Multicultural Radio Broadcasting.

[18] *Further Notice* at App. B, Supplemental Regulatory Flexibility Analysis ("According to Commission staff review of the BIA Financial Network, Inc. Media Access Radio Analyzer Database as of June 6, 2005, about 10,425 (95 percent) of 11,000 commercial radio stations in the United States have revenues of $6 million or less").

[19] DCS Supplemental Comments at 38-39, n.82 ("Since about 95% of all commercial radio stations are owned by SBA-defined small businesses…there are about 9,981 small business owned radio stations, and of those, 587 (812 minus 225) are minority owned, representing 5.88% of the SBA-defined small business-owned stations").

[20] *Further Notice* at App. B, Supplemental Regulatory Flexibility Analysis.

[21] We arrive at our calculation by considering the 587 minority owned stations among small businesses as a percentage of the roughly 6,943 stations owned by small businesses in total.

[22] *See, e.g.*, DCS Initial Comments at 8, n.34 (stating that "socially disadvantaged businesses" (SDBs) are a "subset of small businesses" and asserting that limiting the class of eligible small businesses to SDBs would be "desirable because it would be less dilute in its impact on minorities by omitting, for example, the children of millionaires who, as new entrants, can qualify as small businesses although they have never been disadvantaged").

B. Actions to Expand Opportunities for Eligible Entities

1. Revision of Rules Regarding Construction Permit Deadlines

10. We revise Section 73.3598 of the Commission's Rules (the "Rules") to afford eligible entities that acquire an expiring construction permit additional time to build out the facility. Specifically, we allow eligible entities the time remaining on the original construction permit or 18 months, whichever is greater. This revision is intended to foster diversity of ownership by providing eligible entities with additional market entry opportunities.

11. *Background.* Section 73.3598 requires that each construction permit for the construction of a new TV, AM, FM, International Broadcast, low power TV, TV translator, TV booster, FM translator or FM booster station must specify a period of three years from the date of issuance of the original construction permit within which construction shall be completed and an application for license filed.[23] Construction permits for new LPFM stations allow permittees 18 months to complete construction and file a license application.[24] In its decision adopting the three-year construction period for broadcast stations, the Commission provided for automatic forfeiture of a permit if station construction has not been completed and an application for a license has not been filed by the end of that period; adopted a formal system by which the construction period would be "tolled" in the event that: (a) an "act of God" interfered with construction efforts, or (b) a permit itself was the subject of administrative or judicial review; and eliminated the restriction on payment allowable for the sale of an unbuilt construction permit.[25] The Commission also noted that there may be rare and exceptional circumstances other than those delineated

[23] 47 C.F.R. § 73.3598(a).

[24] *See Creation of Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205 (2000). The *Report and Order* established an 18-month construction period for all LPFM facilities, stating that deadlines would be strictly enforced. However, as a temporary measure, the Commission subsequently adopted an interim waiver policy to allow permittees with soon-to-expire permits to request additional time to construct their facilities. Under that policy, the Media Bureau has the authority to consider and grant requests for an additional 18 months to construct facilities, upon a showing that the permittee reasonably can be expected to complete construction within the extended period. *Creation of a Low Power Radio Service*, Second Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd 6763, 6775, ¶ 27 (2005). The Commission recently adopted a *Third Report and Order* that amended the Commission's rules to allow all permittees, including current ones whose construction permits have yet to expire, the opportunity to seek an 18-month extension to complete construction of their facilities upon a showing of good cause. *Creation of a Low Power Radio Service*, Third Report and Order and Second Further Notice of Proposed Rulemaking, FCC 07-204, ¶ 40 (rel. Dec. 11, 2007).

[25] *See 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Policies and Rule Regarding Minority and Female Ownership of Mass Media Facilities,* Report and Order ("*1998 Biennial Regulatory Review*"), 13 FCC Rcd 23056 (1998), *on reconsideration, Streamlining of Mass Media Applications*, Memorandum Opinion and Order ("*Streamlining*"), 14 FCC Rcd 17525 (1999). Prior to the revision of Section 73.3598, the construction period for radio stations was 18 months, and the construction period for television stations was 24 months. A permittee could request additional time if it failed to complete construction by the qualified date by filing FCC Form 307. Additional time would be authorized if the permittee demonstrated one of the following three conditions: (1) construction is complete and testing is underway looking toward the prompt filing of a license application; (2) substantial progress has been made, *i.e.*, equipment is on order or on hand, site acquired, site cleared, and construction proceeding to completion; or (3) no progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems), but the permittee has taken all possible steps to resolve the problem expeditiously and proceed with construction. A permittee making a satisfactory showing under these criteria would be afforded up to an additional six months to complete construction. Furthermore, the rules afforded permittees an additional six months to construct from the grant of a modification application and an additional one year to construct from consummation of an assignment or transfer. *Streamlining*, 14 FCC Rcd at 17532, ¶ 20.

in its rules or decisions adopting the rules that would warrant the tolling of construction time, *i.e*., other circumstances beyond the control of the permittee such that it would be entitled to tolling of the construction time under Section 319(b) of the Communications Act of 1934, as amended (the "Act"). In these very limited circumstances, the Commission noted that it would entertain requests for waiver of its strict tolling provisions.[26]

12. As part of a general effort to streamline its rules, the Commission also eliminated the practice of providing extra time to construct after a permit has been modified or assigned or transferred.[27] Thus, under these Rules, any construction permit for which construction has not been completed and for which an application for license has not been filed, is automatically forfeited upon expiration without any further affirmative cancellation by the Commission.[28]

13. These modifications were intended to accomplish a variety of goals, including reducing applicant and licensee burdens, increasing the efficiency of application processing, preserving the public's ability to participate fully in the broadcast licensing process, expediting service to the public, and preventing the warehousing of spectrum.[29] In revising the Rules, the Commission noted its intention to establish an incentive for all potential applicants to plan construction carefully even prior to applying for a permit and, once the permit is received, to bring to the construction process the same degree of urgency brought to other business endeavors.[30] The Commission noted its experience that, despite financial and site availability certification requirements, applicants had, in some instances, filed for permits without taking preliminary steps to ensure that they could begin – much less complete – construction once an authorization was received.[31] Such tactics, the Commission noted, deprive the public of the prompt initiation of additional broadcast service and represent an abuse of the Commission's processes.[32] Therefore, the Commission adopted the revisions to minimize instances when those who do not have the intent or foresight to ensure the prompt initiation and conclusion of construction "tie up" the spectrum indefinitely.[33] In so doing, however, the Commission also noted that Section 319 of the Act and its rules governing construction permits were intended to strike a balance between our fundamental interests in expediting new service to the public and preventing the warehousing of scarce spectrum, and our recognition that permit holders sometimes encounter unforeseen obstacles that may prevent the rapid construction of broadcast facilities.[34]

14. DCS urges the Commission to allow holders of expiring construction permits to sell them to SDBs, rather than have their expired permits forfeited to the Commission for auction.[35] DCS proposes

---

[26] *Streamlining*, 14 FCC Rcd at 17541, ¶ 42.

[27] *Id.* at 17533, ¶ 21.

[28] *1998 Biennial Regulatory Review*, 13 FCC Rcd at 23091, ¶ 89. *See* 47 C.F.R. § 73.3598(e). While Section 319(b) of the Communications Act provides for the automatic forfeiture of an expired construction permit unless the Commission authorizes additional time or the delay was caused by circumstances outside the permittee's control, the Commission's practice, before the rule was changed, had been to take an affirmative step cancelling a construction permit before it was forfeited. *1998 Biennial Regulatory Review*, 13 FCC Rcd at 23087-88, 23091 n.149, ¶¶ 78, 89.

[29] *1998 Biennial Regulatory Review*, 13 FCC Rcd at 23090, 23093, ¶¶ 83, 90.

[30] *Streamlining,* 14 FCC Rcd at 17539, ¶ 36.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *1998 Biennial Regulatory Review,* 13 FCC Rcd at 23093, ¶ 90.

[35] DCS Initial Comments at 9-11.

allowing the sale of soon-to-expire construction permits to SDBs for four reasons: (1) to promote diversity; (2) to give the permittees a "well-deserved rescue;"[36] (3) to enhance the likelihood that the public would receive service on an expedited basis; and (4) to relieve the Commission of the time and expense of putting the allotment out for bids again.[37] The FCC Advisory Committee on Diversity for Communications in the Digital Age (the "Diversity Committee") has endorsed DCS's idea and recommends that Section 73.3598 be revised to permit sales of expiring construction permits to SDBs that pledge to build out the permit within the time remaining in the original construction permit or within 18 months, whichever is greater.[38] According to the Diversity Committee, by allowing the sale of the construction permit on the open market, the Commission would increase the likelihood of expediting service to the community more quickly and with more administrative efficiency than by auctioning those allotments.[39]

15. *Discussion.* To enhance and promote ownership by small businesses, including those owned by minorities and women, we revise Section 73.3598 of the Rules to permit the sale of expiring construction permits to eligible entities, as defined herein,[40] that pledge to build out the permit within the time remaining in the original construction permit or within 18 months, whichever is greater. We believe that this revision will advance diversity of ownership, as broadcasters that otherwise would forfeit their construction permits would be motivated to sell them to eligible entities as an alternative. Moreover, we believe that it will serve as an appropriate accommodation of the capital constraints and other financial issues that small businesses often confront.

16. We remain cognizant of our general goal of advancing broadcast service to the public in a timely manner, and we seek to assure that applicants continue to build their facilities in a timely manner. We believe, however, that this revision achieves an appropriate balance between the goals of ownership diversity and timeliness of service. Permittees are unlikely to fail to construct facilities in a timely manner simply because they know that they can sell an expiring permit to an eligible entity, especially

---

[36] According to DCS, a permittee that honestly tried but failed to build out its permit is hardly a profiteer or a trafficker. DCS argues that it is often inequitable to leave such a permittee with nothing after it invested heavily, in good faith, in obtaining the permit and beginning construction. DCS Initial Comments at 11.

[37] In addition, Entravision Holdings, LLC ("Entravision") filed a petition to the Commission to amend Section 73.3598 of the Commission's Rules to permit qualified broadcasters having significant minority group participation or proposing to meet the broadcasting needs of minority group populations "to obtain a construction permit that would otherwise be declared forfeited and, as a result thereof, receive additional time in which to complete construction." In the Matter of Amendment of Section 73.3598 of the Commission's Rules, RM-9567, filed Mar. 10, 1999, by Entravision and Paul A. Zevnik ("Entravision Petition"). The Entravision Petition was put out for public notice, RM-9567, DA 99-648 (rel. Apr. 8, 1999), and comments were received. We incorporate the Entravision Petition and comments thereto into this proceeding. Our decision here addresses Entravision's petition by granting, in part, its request to amend 47 C.F.R. § 73.3598 to give eligible entities, as defined herein, an opportunity to obtain a construction permit that would otherwise be forfeited and to receive additional time in which to complete construction.

[38] Diversity Committee Financial Issues Subcommittee Incentive-Based Recommendations (Jun. 14, 2004). *See* http://www.fcc.gov/DiversityFAC/.

[39] *Id.* at 8-9.

[40] As noted above, for purposes of this Order, we define "eligible entity" as any entity that would qualify as a small business consistent with SBA standards for its industry grouping, based on revenue. *See supra* ¶ 6. In the *Third Further Notice* below, we seek comment on whether we should adopt an alternative definition of "eligible entity." *See infra* ¶¶ 80-86.

given the financial loss they would almost certainly take when compared to sale of a fully-constructed and operating facility. Moreover, we believe that service to the public would be expedited by providing eligible entities up to 18 months additional time to complete construction of an expiring permit, rather than allowing the permit to expire and auctioning the allotment a second time.

2. Modification of Attribution Rule

17. We revise Note 2(i) to Section 73.3555 of our Rules,[41] which sets forth the Commission's equity/debt plus ("EDP") attribution standard, to facilitate investment in eligible entities and thereby promote diversity of ownership in broadcast facilities. We sought comment on this matter in the *Second Further Notice*,[42] and, in response, DCS submitted a proposal recommended by the MMTC EDP Task Force.[43] We adopt the Task Force's proposal, with modifications, and expect that this action will spur more investments in eligible entities that are seeking to enter the broadcast market for the first time.

18. *Background*. The Commission's broadcast attribution rules define which financial or other interests in or relationships with a licensee are counted in applying the broadcast ownership rules. The rules "seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions."[44] At the same time, the attribution rules are designed to "permit arrangements in which a particular ownership or positional interest involves minimal risk of influence, in order to avoid unduly restricting the means by which investment capital may be made available to the broadcast industry."[45] With regard to corporate entities, the broadcast attribution rules generally attribute voting stock interests of five percent or more.[46] Minority stock interests in a corporation with a single-majority shareholder, non-voting stock interests, warrants, debt, properly

---

[41] 47 C.F.R. § 73.3555, Note 2(i).

[42] *Second Further Notice*, 22 FCC Rcd at 14229, App. A, proposal #8.

[43] DCS Initial Comments at 17-19. MMTC's EDP Task Force included the following members: Richard Bodorff, Steven Lerman, Jane Mago, Vincent Pepper, Eve Reed, Julian Shepard, Gregg Skall, Jerianne Timmerman, and S. Jenell Trigg, Esqs. *Id.* at 17, n.62.

[44] *Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Regulation and Policies Affecting Investment in the Broadcast Industry and Reexamination of the Commission's Cross Interest Policy*, Report and Order, 14 FCC Rcd 12559, 12560 ¶ 1 (1999) ("*1999 Broadcast Attribution Order"*), *recon. granted in part*, *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, *Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1097, 1116-17, ¶¶ 40-44 ("*Broadcast Attribution Reconsideration Order"*), *stayed in part*, 16 FCC Rcd 22310 (2001).

[45] *See 1999 Broadcast Attribution Order,* 14 FCC Rcd at 12562-63, ¶ 5.

[46] 47 C.F.R. § 73.3555, Note 2(a). Generally, interests in partnerships and limited liability companies are attributable regardless of the amount or percentage of equity held. Limited partnership and LLC interests are not attributable, however, if the entity's governing agreement insulates the limited partner or LLC member from material involvement in the management or operations of the entity's media activities of the partnership and the entity so certifies to the Commission. 47 C.F.R. §73.3555, Note 2(f)(1); *1999 Broadcast Attribution Order*, 14 FCC Rcd at 12613, 12619, ¶ 124, n.265 (outlining insulation criteria). However, for specified "passive" institutional investors only voting stock interests of 20 percent or greater are attributable. 47 C.F.R. §§ 73.3555, Note 2(b), 76.501, Note 2(b). Passive investors are investment companies, as defined by 15 U.S.C. § 80a-3 (mutual funds), insurance companies, and banks holding stock through their trust departments in trust accounts. *Id*.

insulated limited partnership and LLC interests, and unexercised options are not attributable, unless the EDP rule is triggered.[47]

19. The EDP rule is designed to resolve concerns that multiple non-attributable interests could be combined to allow the holders to exert significant influence over licensees such that these interests should be counted in applying the multiple ownership rules. Under the EDP rule, where an investor is either (1) a major program supplier (providing programming constituting over 15 percent of a broadcast station's total weekly broadcast programming hours); or (2) a same-market media entity subject to the broadcast multiple ownership rules, its interest in a licensee or other media entity will be attributed if that interest, aggregating both debt and equity holdings, exceeds 33 percent of the total assets (equity plus debt) of the licensee or media entity.[48] In other words, attribution results where the financial interest exceeds 33 percent *and* there is a triggering relationship, *i.e.*, either the investor is a major program supplier or a same-market media entity subject to the broadcast multiple ownership rules. The EDP rule limits the single majority shareholder attribution exemption, as well as the exemptions from attribution applicable to non-voting stock, debt, and properly insulated interests in limited partnerships and LLCs.[49] The EDP rule applies to all of the broadcast ownership rules.

20. The Commission adopted the EDP rule as the result of its broad review of its broadcast attribution rules, begun in 1995.[50] It began that review for a number of reasons, including: (1) changes in the broadcasting industry and in the multiple ownership rules since its last revision of the attribution rules in the mid 1980s and its consequent desire to ensure that the attribution rules remained appropriate in identifying interests that should be counted for purposes of applying the multiple ownership rules; (2) concerns raised that certain non-attributable investments, while permissible under then-current rules, might permit a degree of influence that warrants their attribution; and (3) concerns that individually permissible cooperative arrangements between broadcasters were being combined so as to result in influence in multiple stations that the rules had intended to prohibit.[51] The Commission adopted the EDP rule to address those concerns.

21. As the Commission noted "[t]he function of our attribution rules is not to limit investment, but to identify influential interests over the core operations of a licensee that should be counted in applying the multiple ownership rules."[52] The Commission intended that the EDP rule would operate "in addition to other attribution standards and would attempt to increase the precision of the attribution rules, address our concerns about multiple nonattributable relationships, and respond to concerns about whether the single majority shareholder and nonvoting stock attribution exemptions were too broad."[53]

22. Over the years, parties have expressed concern that the EDP rule may be deterring potential investment in broadcast entities owned by small businesses, including minority- and women-owned businesses, and investments in new entrants. For example, in its comments in the 2002 biennial review proceeding, DCS contended that the EDP rule has the "unintended consequence" of discouraging broadcasters from investing in any SDB at a level that would exceed the 33 percent EDP threshold anywhere in the country, regardless of whether the potential investor is currently a same-market media

---

[47] 47 C.F.R. § 73.3555, Notes 2(e), (f), (h), & (i).

[48] 47 C.F.R. § 73.3555, Notes 2(a) & (i).

[49] *See 1999 Broadcast Attribution Order*, 14 FCC Rcd at 12579, ¶ 36.

[50] *Id*.

[51] *Id.* at 12561, ¶ 2.

[52] *Broadcast Attribution Reconsideration Order*, 16 FCC Rcd at 1100, ¶ 6.

[53] *1999 Broadcast Attribution Order,* 14 FCC Rcd at 12573, ¶ 27.

entity or a major program supplier to the SDB.[54] DCS stated that broadcasters consider small, potentially attributable interests disadvantageous because such non-strategic interests could become attributable upon a sizable merger or acquisition that would result in the financial interest holder's satisfying the second prong and having its otherwise nonattributable interest become attributable.[55] In comments to the *Second Further Notice*, DCS states that its experience has shown that the EDP rule has had the unintended effect of too severely restricting small business financing, especially in the form of seller financing that so often is vital to new entrants' ability to close a transaction.[56]

23. Indeed, commenters have proposed a variety of revisions to the EDP rule, based on their concerns that minority-owned or smaller entities were having difficulty obtaining financing. In the 2002 biennial review proceeding, DCS proposed that the Commission exempt from attribution "otherwise nonattributable EDP interests in SDBs where: (1) the EDP interest holder merges with, acquires, or is acquired by a company unrelated to the company holding a nonattributable EDP interest in an SDB, (2) the unrelated transaction occurs at least a year after the EDP relationship was formed, (3) the unrelated transaction would otherwise cause the EDP interest holder's interest in the SDB to become attributable, and (4) the EDP interest holder and the SDB proffer an affirmative showing that the EDP interest holder does not exercise undue influence over the SDB."[57]

24. In the Section 257 proceeding,[58] NAB also proposed revisions to the EDP attribution rule, arguing that the rule discourages investment in new entrants, including businesses owned by minorities or women. It stated that the rule discourages spinoffs to new entrants because merging group owners are reluctant, or unable, to transfer stations to minorities, women, or other new entrants in the local market because these potential owners are more likely to need investments from the merging parties.[59] Therefore, it urged the Commission to repeal the EDP rule, or, alternatively, to narrow the rule by

---

[54] Initial Comments of Diversity and Competition Supporters at 110-12 (Jan. 2, 2003) ("DCS 2002 Biennial Review Comments").

[55] *Id.*

[56] DCS Initial Comments at 17.

[57] DCS 2002 Biennial Review Comments at 112. In 1999, when the Commission adopted the EDP rule, MMTC similarly argued on reconsideration that the Commission should exempt from attribution any existing interest in an SDB that would trigger the EDP rule if the interest holder acquired another media entity in the same market at a later date. *See* Petition for Partial Reconsideration and Clarification of the Minority Media and Telecommunications Council, MM Docket Nos. 94-150, 92-51, 87-154 (Oct. 18, 1999). MMTC also sought to exempt from the attribution rules any interest otherwise attributable under the EDP rule that would allow an SDB to acquire or build out an unbuilt permit. *Id.* MMTC requested that the Commission vest the interest holder with the right to the processing of any other of the interest holder's applications regardless of the duopoly or cross-ownership rules. MMTC argued that the vested right would provide the larger broadcaster investing in the SDB with "the secure knowledge that its public spiritedness in making an especially risky investment in an SDB will be rewarded with a guaranteed opportunity to acquire a full complement of local properties." *Id*. at 4. The Commission deferred consideration of MMTC's request to create exemptions for SDBs because it was hesitant to adopt any preferences based on minority status since the Supreme Court's decision in *Adarand Broadcast Attribution Reconsideration Order*, 16 FCC Rcd at 1109-10, ¶ 24. In addition, in response to NAB's request on reconsideration, the Commission "found no reason to believe that the EDP rule would unduly curb investment in smaller, minority stations." *Id*. at 1102, ¶ 9.

[58] *Media Bureau Seeks Comment on Ways to Further Section 257 Mandate and to Build on Earlier Studies*, Public Notice, MB Docket No. 04-228, 19 FCC Rcd 10491 (MB Jun. 15, 2004).

[59] Comments of the NAB (Oct. 12, 2004), at 3-5.

applying it only to investors that are also major program suppliers, or by not attributing investments comprised solely of debt.[60]

25. In 2004, the Diversity Committee recommended that the Commission allow entities to invest in SDBs without triggering the EDP rule in order to enable SDBs to buy a station, retain an existing one, or to build out a construction permit.[61] Under its proposal, a firm would be able to own more than 33 percent of the SDB, or provide more than 15percent of the weekly programming without ownership attribution. This proposal would allow entities to increase their investments in new entrants without implicating the multiple ownership rules and, according to the Diversity Committee, potentially resolving impediments to financing new entrants and small businesses. Further, the Diversity Committee recommended that the Commission exempt an entity from attribution that invests in an SDB at levels that do not trigger the EDP rule, but subsequently acquires other broadcast interests in the market, which otherwise would trigger the EDP rule. It argued that this would encourage investments by removing any risk of future attribution of currently nonattributable interests.[62]

26. In response to the *Further Notice* in this proceeding, DCS and several other parties proposed revisions to the EDP rule to promote investment. American Women in Radio and Television, Inc. proposed that the Commission eliminate the EDP rule for the limited purpose of allowing large broadcasters to invest in small businesses owned by women and minorities, but cautions that stringent guidelines are needed to prevent ownership fraud.[63] NAB suggested eliminating or revising the EDP rule to improve access to capital and provide benefits to small businesses, new entrants, and existing broadcasters.[64] Nexstar Broadcasting, Inc. proposed relaxing the EDP rule for otherwise non-attributable interest holders of small business entities and/or creating incentives for larger broadcasters to "incubate" small business broadcast owners.[65]

27. In early 2007, MMTC convened an EDP Task Force to revise the EDP Rule to permit broadcasters to provide financing to a small business without materially conflicting with the purpose of the EDP Rule.[66] As a result of its deliberations, the Task Force recommended the following revisions to Section 73.3555, Note 2(i) of the Rules and DCS submitted the proposal in its comments in response to the *Second Further Notice*:

> (i) Notwithstanding paragraphs (e) and (f) of this NOTE, the holder of an equity or debt interest or interests in a broadcast licensee, cable television system, daily newspaper, or other media outlet subject to the broadcast multiple ownership or cross-ownership rules ("interest holder") shall have that interest attributed if:
>
> (1) The equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total

---

[60] *Id.* at 5. NAB also made similar arguments concerning the EDP rule on reconsideration of the *Attribution Report and Order*. *See Broadcast Attribution Reconsideration Order*, 16 FCC Rcd at 1103, 1109, ¶¶ 10, 23. The Commission rejected these arguments and denied NAB's petition for reconsideration.

[61] http://www.fcc.gov/DiversityFAC/040614/recommend/IncentiveBasedRegulationsRecommend.doc.

[62] *Id*.

[63] Comments of American Women in Radio and Television, Inc at 9-10 (Oct. 23, 2006),; *see also* Comments of American Women in Radio and Television at 8 (Oct. 12, 2004).

[64] Comments of the NAB at 125 (Oct. 23, 2006).

[65] Comments of Nexstar Broadcasting, Inc. at 20 (Oct. 23, 2006).

[66] DCS Initial Comments at 17.

asset value, defined as the aggregate of all equity plus all debt, of that media outlet provided, however, that the equity and debt may exceed 33 percent in either of the following circumstances to enable a small business, as defined under the U.S. Small Business Administration's small business size standards set forth in 13 C.F.R. §121.201, to acquire a broadcast station: (i) The combined equity and debt of the interest holder described in section (2) below must be less than 50 percent, or (ii) Where there is no equity, the debt may not exceed 80 percent of the asset value of the station being acquired, provided that the lender does not hold an equity interest in the licensee or any related person, does not hold an option or other right to acquire an equity interest in the future and has not received a promise of such a right, unless such combined interest has been granted subject to an appropriate waiver as provided at Section 1.3 of the Commission's Rules; and (2)(i) The interest holder also holds an interest in a broadcast licensee, cable television system, newspaper, or other media outlet operating in the same market that is subject to the broadcast multiple ownership or cross-ownership rules and is attributable under paragraphs of this note other than this paragraph (i); or (ii) The interest holder supplies over fifteen percent of the total weekly broadcast programming hours of the station in which the interest is held. For purposes of applying this paragraph, the term, "market," will be defined as it is defined under the specific multiple ownership rule or cross-media limit that is being applied, except that for television stations, the term "market," will be defined by reference to the definition contained in the local television multiple ownership rule contained in paragraph (b) of this section.[67]

28. In response to the *Second Further Notice*, numerous parties supported modifying the EDP rule. NAB contends that the EDP rule has the "unintended consequence" of discouraging broadcasters from investing in SDBs.[68] In support of EDP Task Force proposal, DCS states that if adopted, it would authorize much more substantial levels of seller paper and other broadcaster financing of small businesses without adding any material risk of abuse. It also argues that it is among the easiest and most important steps the Commission could take to expand access to capital for minority and women broadcasters.[69] ION Media Networks supports modification because it would enhance opportunities for minority-owned businesses to obtain capital for acquisitions.[70] Financial Services Companies supports modification because it agrees that such action would restore seller paper, which new entrants need in order to show financers that a seller has confidence in a buyer.[71] No commenters opposed the EDP modification proposals.

29. *Discussion.* In 2000, when the Commission deferred action on requests raised on reconsideration that it carve out exemptions to the EDP rule, there was insubstantial evidence in the record that the rule would deprive entities of financing necessary to enter the broadcast market.[72] Though the Commission had attempted to tailor the new rule to avoid unduly limiting investment, it did not have sufficient experience with the actual operation of the new rule in the media marketplace to determine at that time whether or not the EDP rule as tailored actually resulted in the unintended consequence of

---

[67] *Id*. at 17-18.

[68] NAB Comments at 6.

[69] DCS Initial Comments at 17.

[70] Reply of ION Media Networks at 4-5 (Nov. 1, 2007).

[71] Reply of Financial Services Companies in Response to the Second Further Notice of Proposed Rulemaking at 2 (Nov. 1, 2007).

[72] *See Broadcast Attribution Reconsideration Order*, 16 FCC Rcd at 1103, ¶¶ 9, 23.

unduly limiting investment in small businesses. Therefore, the Commission rejected proposals to waive or limit the EDP attribution rule to enhance investment in small businesses or minority-owned stations.[73]

30. The EDP rule has now been in effect for more than eight years. During this time period, a large and varied number of commenters have evidenced the financing problems that small businesses, including those owned by women and minorities, have faced. They have repeatedly alleged that relaxing the EDP rule may foster investments in small businesses by larger broadcasters and, therefore, may make it easier for eligible entities to obtain financing. As the Commission stated when it adopted the rule, the function of our attribution rules, including the EDP rule, is to identify influential interests to be taken into account for purposes of compliance with the multiple ownership rules. It is not the purpose of the attribution rules to limit investments, or to limit investment opportunities available to otherwise qualified broadcast licensee candidates. Thus, in adopting the EDP attribution rule, we tried to balance the purpose of the rule with our goal of not unduly limiting investment. We believe that relaxing the rule as specified herein would be appropriate based on our eight years of experience with the operation of the rule.

31. Specifically, we will allow the holder of an equity or debt interest in a media outlet subject to the media ownership rules to exceed the 33 percent threshold set forth in Note 2(i) to Section 73.3555 of our Rules without triggering attribution where such investment would enable an eligible entity to acquire a broadcast station provided: (1) the combined equity and debt of the interest holder in the eligible entity is less than 50 percent, or (2) the total debt of the interest holder in the eligible entity does not exceed 80 percent of the asset value of the station being acquired by the eligible entity and the interest holder does not hold any equity interest, option, or promise to acquire an equity interest in the eligible entity or any related entity.[74] These higher investment limits in eligible entities also apply for purposes of determining eligibility for the new entrant bidding credit in broadcast auctions, as the standards for determining attribution in a winning bidder parallel the attribution standards in Section 73.3555, Note 2, which we are revising in this proceeding.[75]

32. There is ample support from the Task Force participants and from parties in the record to adopt this revision, none of which opposed it. We believe that these higher levels of investment are appropriate and will facilitate the financing of eligible entities without materially undermining our attribution rules. With respect to a combined equity and debt interest, we note that the new threshold still does not permit a controlling interest. With respect to investments restricted to debt, we note that, although the revised permissible level is substantially higher than that allowed under the current rule, the debt must be nonconvertible and cannot be coupled with any equity interest, option, or promise to acquire an equity interest in the future. Thus, the holder of the debt would have limited ability to influence the eligible entity. Under such circumstances, attribution is not warranted, especially given the significant interest in facilitating investment in such entities. Moreover, because we are applying the exemption to

---

[73] *Id*.

[74] We are not adopting the Task Force's waiver language. There is no evidence in the record that it is necessary to specifically provide for such waivers in addition to the other circumstances in which waivers of the multiple ownership rules may be sought in order to advance the goals of this proceeding. Further, to the extent that the Task Force seeks to make clear that already existing combinations, permitted because of an outstanding waiver, should not be disturbed, that does not need to be specified in the rule.

[75] *See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, Memorandum Opinion and Order, 14 FCC Rcd 12541, 12543 ¶ 5 (1999) (finding it appropriate to attribute the mass media interests of investors holding more than a 33% equity and/or debt interest in a broadcast auction bidder claiming new entrant status); *see also* 47 C.F.R. § 73.5008(c).

eligible entities, rather than SDBs as MMTC previously proposed, we also conclude that there are no constitutional concerns with adopting this proposal.

33. We decline to adopt NAB's proposals. First, we find that repeal of the EDP rule in its entirety is unnecessary to achieve our goals. We believe that the EDP rule, in general, continues to resolve concerns that certain interest that otherwise would be non-attributable but for the EDP rule, could be combined to allow the holders to exert significant influence over licensees. In addition, NAB has not submitted any evidence in the record to suggest that limiting the exemption to major program suppliers would further our goals of balancing our concerns about capturing interests that could allow the holders to exert significant influence over licensees, while at the same time avoiding unduly limiting investment in eligible entities. We have considered and modified NAB's suggestion of not attributing investments comprised solely of debt in our adoption of the MMTC Task Force proposal, which would allow an entity to hold 80 percent of the debt without having its interest attributed under the EDP rule. Finally, we find that the Task Force's proposal, as opposed to other proposals discussed herein, provides for minimal changes to our existing rule while at the same to specifically targeting the concerns raised – removing potential deterrence for eligible entities to obtain financing to purchase broadcast stations.

34. In conclusion, we are modifying the EDP rule today in response to concerns that it may be hindering investment in eligible entities. We find sufficient evidence in the record to show that difficulty in accessing capital investment currently is inhibiting diversity of ownership of broadcast stations and new entry. Moreover, we think it is reasonable to conclude that modification of the EDP rule could alleviate or, at the least minimize this problem. We believe that this modification will further our goal of improving access to capital in order to foster diversity of ownership, new entry, and, ultimately, the provision of new programming and other services to the public. We find sufficient evidence in the record warrants a change in our policy. We also believe that the changes we are making today will retain regulatory certainty for entities in planning their financial transactions, an important goal of the attribution rules, which are designed as bright line tests. Finally, we believe that the public interest weighs in favor of allowing existing broadcasters to acquire a minority equity ownership interest in an eligible entity in order to provide the opportunity for such a new entrant to enter the broadcasting market.

3. Distress Sale Policy

35. *Background.* The Commission's distress sale policy permits "a licensee whose license has been designated for revocation hearing, or whose renewal application has been designated for hearing on basic qualifications issues, to assign its license prior to commencement of the hearing to a minority controlled entity" at a price that is substantially below its fair market value.[76] Under this policy, a licensee facing the possible loss of its license can sell the station in a "distress sale." The licensee faces a substantial financial penalty as a result of the "distress" sale but recoups a portion of the value of its station and avoids the revocation or renewal hearing. The Commission saves the time and expense of conducting a revocation or renewal hearing and subsequent appeals. Most important, the station is placed expeditiously in the hands of a qualified operator that might otherwise have few opportunities to acquire a station and the public does not lose service from a local broadcast station. Although the U.S. Supreme Court initially affirmed the constitutionality of the distress sale policy,[77] it later overruled that decision "[to] the extent that" the former case was inconsistent with the principle that racial classifications imposed by the federal government are subject to strict scrutiny, and thus may be upheld as constitutional

[76] *Martin W. Hoffman*, Memorandum Order and Opinion, 15 FCC Rcd 22086, ¶ 3 (2000). *See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849, 851 (1982); *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979, 983 (1978).

[77] *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 600-01 (1990).

"only if they are narrowly tailored measures to further compelling governmental interests."[78] *Adarand* threw the constitutionality of our distress sale policy into considerable doubt and highlights the need to strengthen its constitutional foundation.[79]

36. The Financial Issues Subcommittee of the Diversity Committee has proposed that the Commission "reaffirm the viability and routine applicability of" the Commission's distress sale policy.[80] The Subcommittee also suggested that, in the operation of the policy, the Commission "assess each distress sale purchaser's ability to promote diversity, such as by requiring a showing of the *bona fides* of the purchaser's company, its commitment to promoting diversity and providing service for a substantial length of time, and its plans to serve the needs of the public and to correct any deficiencies in station operations caused by the distress sale seller."[81]

37. DCS maintains that the distress sale policy should be "redesigned as a race-neutral policy that is likely to benefit minority broadcasters."[82] They state that "under the Diversity Committee's formulation, a potential buyer, of any race, could demonstrate that its proposed service to the community would address needs unmet by existing media" and that "[s]ervice to minority audiences could be an unmet need."[83] In this way, they suggest that the policy can be "redesigned as a race-neutral policy that is likely to benefit minority broadcasters."[84]

38. *Discussion.* We agree with DCS that it would be beneficial to put the distress sale policy on a sound constitutional footing by making it race-neutral. We are reluctant, however, to require entities that are eligible to purchase stations under the policy to demonstrate that their proposed service to the community would address needs unmet by existing media. First, this would require the Commission to sit in judgment of what "needs" are unmet by existing media, and also whether the programming service proposed by the prospective buyer would fulfill those needs. The Commission historically has been reluctant to become involved in making programming judgments of this kind due to First Amendment sensitivities. In addition, to the extent that "needs" were defined in part through the use of racial classifications, such a revised policy would not eliminate the constitutional concerns referenced above. Furthermore, if we were to award a license based on programming commitments, we would have to adopt measures to ensure that the buyer lives up to its commitments so that the perceived benefits of the transaction actually materialize.[85] This would further entangle the Commission in assessing the programming of its licensees and would be administratively burdensome as well. For these reasons, we decline to adopt this proposal.

---

[78] *See Adarand,* 515 U.S. 200, 227 (1995).

[79] *See MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 21-22 (D.C. Cir.), *reh'g denied*, 253 F.3d 752 (D.C. Cir. 2001); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354-56 (D.C. Cir. 1988) (striking down Commission equal employment opportunity rules that resulted in racial classifications and were thus subject to strict scrutiny under *Adarand*).

[80] Report and Recommendations of the Financial Issues Subcomm. of the Advisory Comm. for Diversity in the Digital Age at 18-19 (Jun. 14, 2004).

[81] *Id*.

[82] DCS Initial Comments at 36.

[83] *Id.*

[84] *Id.*

[85] *See Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).

39. Instead, we have decided to place the distress sale policy on a sound constitutional and administrative footing by allowing a licensee whose license has been designated for a revocation hearing or whose renewal application has been designated for a hearing on basic qualifications issues to sell its station prior to the commencement of the hearing to an "eligible entity," as defined above. Like the other measures we adopt today, we believe that this will promote diversity of ownership in the broadcast industry by making it easier for small businesses and new entrants, including minority owned businesses, to purchase stations. This, in turn, may result in a greater diversity of program services, including services that are responsive to local needs and interests and the interests of underserved audiences. Similar to our new rule facilitating the transfer of expiring construction permits to eligible entities, the modified distress sale policy can expedite new service or facilitate the continuation of existing service to the public by avoiding lengthy revocation or renewal hearings and subsequent appeals, and it also conserves substantial private and Commission resources that would otherwise be devoted to such proceedings. Thus, we view this modified policy as a "win-win" for diversity of ownership, for the swift delivery of new services to the public, and for the conservation of public and private resources.

4. Ban on Discrimination in Broadcast Transactions

40. We adopt a rule that bars discrimination on the basis of race or gender and related protected categories in broadcast transactions.[86] DCS, the Commission's Diversity Committee, and Consumers Union all advocate that the Commission take action in this area.[87] Specifically, this rule will state that:

> No qualified person or entity shall be discriminated against on the basis of race, color, religion, national origin or sex in the sale of commercially operated AM, FM, TV, Class A TV or international broadcast stations (as defined in this part).

41. We conclude that adoption of a nondiscrimination rule with respect to sales is consistent with our Section 257 statutory mandate,[88] and will advance the statutory goal of fostering minority and female ownership in the provision of commercial spectrum-based services.[89] We also conclude that this rule will advance the Commission's public-interest mandate to foster viewpoint diversity by promoting

---

[86] *See* 47 U.S.C. § 151; *see also* 47 C.F.R. § 73.2080(a); *cf* 42 U.S.C. § 2000e.

[87] DCS Initial Comments at 5-7 & nn. 22-32; Advisory Committee on Diversity, *Transactional Transparency Recommendations*, at 4 (May 14, 2004); Consumers Union Comments at 30.

[88] 47 U.S.C. § 257 (directing the Commission to identify and eliminate, through regulatory action, market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications and information services, in order to promote the policies and purposes of the Act favoring diversity of media voices, vigorous economic competition, technological advancement, and the promotion of the public interest, convenience and necessity).

[89] 47 U.S.C. § 309(j)(4)(D) directs the Commission to "consider the use of tax certificates, bidding preferences, and other procedures" to ensure that businesses owned by members of minority groups and women are given the opportunity to participate in the provisions of spectrum-based services. This provision's reference to tax certificates and other procedures could arguably be interpreted as authorizing measures beyond those related to the competitive bidding process in order to promote opportunity for minorities and women to participate in the provision of spectrum-based services.

the dissemination of licenses to a wide variety of applicants.[90] Moreover, we agree with DCS that "discrimination simply has no place" in the broadcast industry.[91]

42. Sellers will be required to certify compliance with this rule against discrimination by checking a box on Form 314 or 315 applications. Consequently, this new rule will both remind sellers of these prohibitions and require them to certify to the government that they have not been violated. We therefore amend Form 314 and 315 accordingly.

5. "Zero Tolerance" Policy for Ownership Fraud

43. We adopt DCS's proposed "zero tolerance" policy for ownership fraud, as outlined below. We also reaffirm our principle that applicants' representations to the Commission must be complete and correct.[92]

44. DCS asserts that ownership fraud occurs when real-parties-in-interest structure transactions so that the principals of the putative applicant entity have no real voice in practice, and that such fraud may be relatively common.[93] Consumers Union also "strongly supports" these concerns.[94]

45. The Commission agrees that ownership fraud could impede both the Commission's efforts to assess or increase media ownership diversity. Rules granting preferences to qualified applicants encourage applicants to qualify for the preference. Inevitably, some potential applicants will try to claim the preference by creating an appearance of qualification that does not accord with reality. Because the risk of such fraud arises whenever some applicants can obtain a preference, we agree that the Commission should adopt measures to deter such fraud. We conclude that adopting this "zero tolerance" policy will help deter and detect ownership fraud. [95]

---

[90] This mandate has been recognized repeatedly by the courts. *See*, *e.g*., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 409 (1969).

[91] DCS Initial Comments at 7.

[92] 47 C.F.R. § 1.65.

[93] DCS Initial Comments at 19-20 & nn.67-69 (citing allegations made in eight cases arising between 2004 and 2007, but arguing that limited enforcement resources ensured that more such cases went undetected). The Commission, however, can adopt measures to deter ownership fraud without ruling on DCS's claim that ownership fraud may be widespread. Rules granting preferences to qualified classes of applicants are meant to encourage potential applicants to qualify for the preference. Inevitably, some potential applicants will try to claim the preference by creating an appearance of qualification that does not accord with reality. Because the risk of such fraud arises whenever some applicants can obtain a preference, the Commission can adopt measures to deter such fraud without assessing its current prevalence.

[94] Consumers Union Comments at 30.

[95] In 2000, the Commission adopted aspects of a proposed "zero tolerance" policy for employment discrimination. *See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, MM Dockets 98-204 et al*., Report and Order, 15 FCC Rcd 2329, 2362, ¶ 72 (2000), *rev'd in part on other grounds, MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 19 (D.C. Cir. 2001) (adopting a "zero-tolerance policy" for employment discrimination including proposals to (1) consider non-final allegations of discrimination if they were well-supported by a large number of individuals against one broadcast station or cable unit or shocking to the conscience or particularly egregious; (2) potentially consider as evidence of discrimination evidence showing that "a broadcaster or cable entity engages in a pattern of deliberate and systematic violations of the EEO program requirements" that deny women and minorities access to job opportunities."). But the Commission agrees that this zero-tolerance policy should differ slightly from those used in the context of employment discrimination.

46. Moreover, because the Commission relies upon applicants' representations to assess minority and female ownership, inaccurate or misleading submissions not only violate the Commission's rules, they also hinder evaluation of its efforts to promote viewpoint and ownership diversity. Consequently, a "zero tolerance" policy for ownership fraud will facilitate both law enforcement and information-gathering efforts. DCS also argues that we should adopt a policy of random auditing in order to ensure that ownership fraud is not occurring.[96] We do not believe that such a practice is either necessary or advisable. The FCC has the authority to audit applications to ensure compliance with all Commission rules, including our ownership rules. Nevertheless, it is not possible for the FCC to determine now how these auditing resources should be most efficiently allocated in the future when the issues that will be before the Commission are, as of yet, unknown and unknowable.

47. We also agree that the Commission should resolve ownership-fraud complaints expeditiously. Consequently, we agree with DCS that the Commission should "fast track" ownership-fraud claims and seek to resolve them within 90 days.

48. In addition, we agree that the Commission should, when permissible, provide confidentiality to whistleblowers who disclose potential ownership fraud. But we believe that we lack the legal authority to adopt DCS's proposal to help whistleblowers secure alternative employment. Moreover, even if we had such authority, DCS has not shown that it should be exercised. Such efforts could create conflicts of interest or the appearance of impropriety if the Commission were to assist whistleblowers seeking employment within industries regulated by the Commission.[97] Consequently, we adopt a "zero tolerance" policy as a general statement of policy guiding the enforcement of our media ownership disclosure and reporting rules.

6. Non-Discrimination Provisions in Advertising Sales Contracts

49. The Commission also adopts DCS's proposal to require broadcasters renewing their licenses to certify that their advertising sales contracts contain nondiscrimination clauses that prohibit all forms of discrimination, as outlined below.[98] Reports that some advertising contracts contain "no urban/no Spanish dictates" that are intended to minimize the proportion of African American or Hispanic customers patronizing an advertiser's venue—or that presume that African Americans or Hispanics cannot be persuaded to buy an advertiser's product or service—indicate potential violations of U.S. nondiscrimination laws.[99] For over 20 years, the Commission has been aware of the insidious practices of certain advertisers, rep firms and advertising agencies of imposing written or unwritten "no urban/no Spanish" dictates.[100] Discriminatory practices have no place in broadcasting.

[96] DCS Initial Comments at 19-20.

[97] The Commission recognizes that the Freedom of Information Act and other federal laws may require the Commission to disclose otherwise confidential data under appropriate circumstances. Nevertheless, the Commission agrees that it should preserve the confidentiality of whistleblowers when federal law permits it to do so.

[98] DCS Initial Comments at 26-27 & nn. 93-96; *see also* Consumers Union Comments at 30.

[99] *See* DCS Initial Comments at 26, n.94.

[100] Kofi Ofori in "When Being Number One Is Not Enough: The Impact of Advertising Practices On Minority-Owned And Minority-Formatted Broadcast Stations," Civil Rights Forum on Communications Policy (1999). This study, which was sponsored by the Commission, examined discriminatory advertising practices and their impact on minority owned and minority formatted broadcasters, and found that radio stations that are successful in attracting large minority audiences still do not attract the dollars their ratings should earn.

50. We reject DCS's suggestion that reports about "no urban/no Spanish dictates" require the Commission to dictate the specific language that advertising contracts can or should contain. Reports indicating that some advertising contracts have contained potentially impermissible provisions do not permit the Commission to dictate the language of those contracts. Indeed, serious First Amendment concerns could arise were the Commission to do so. Consequently, we conclude that it is appropriate for the Commission to require broadcasters renewing their licenses to certify that their advertising contracts do not discriminate on the basis of race or gender and that such contracts contain nondiscrimination clauses. As such, we will amend Form 303-S to require broadcasters to make such a certification.

7. Longitudinal Research on Minority and Women Ownership Trends

51. DCS and Consumers Union argue that the Commission should conduct annual longitudinal studies of minority and female ownership.[101] The Commission agrees with these concerns. For the reasons noted below, we will commence such research once we have resolved the data-gathering issues raised in the accompanying *Third Further Notice*.

52. We agree that longitudinal studies could help the Commission track ownership trends over time. We also agree that such studies could help scholars and other interested parties assess the impact of rule changes on minority and female ownership. We agree that this, in turn, could help provide real-time feedback on the impact of the Commission's rules and policies on the access to capital, on the availability of spectrum and opportunity to minority and female-owned entities, and the ability of such entities to serve the public. We also agree that conducting such studies annually would help it build a more robust database that could better illuminate the optimal intervals for conducting future studies.

53. Consequently, although we disagree with assertions that the Commission "has absolutely no idea" about the current state of female and minority broadcast ownership, we do recognize that our current data-collection efforts could be improved. Accordingly, we propose to modify our existing reporting instrument concerning broadcast ownership, Form 323, by augmenting the information it collects, as set forth in the *Third Further Notice*.[102] Once we have collected improved information, we will conduct longitudinal studies as suggested by the commenters.[103]

8. Local and Regional Bank Participation in SBA Guaranteed Loan Programs

54. The Commission also adopts the proposal from DCS, the Diversity Committee and NAB to increase Commission efforts to encourage local and regional banks to participate in SBA-guaranteed

[101] *See id.* at 30-31 & nn. 110-115; Consumers Union Comments at 31 (Oct. 1, 2007).

[102] These concerns do not require the Commission to defer action on all of the DCS proposals. For example, both Consumers Union and the Consumer Federation of America agree that some of the proposals can be justified based upon the imperfect data in the record. *Compare* Consumers Union Comments at 29-32 (urging the Commission to adopt certain MMTC proposals), *with id.* at 4 (urging the Commission "to proceed with caution, and first establish the portfolio of research that is needed to adequately make these important public policy decisions" that relate to increasing ownership diversity"). Indeed, most commenters did not dispute the utility of better ownership data, but they still supported "proposals that promote diversity of ownership in the broadcast industry." NAB Comments at 9. The National Association of Black-Owned Broadcasters, Inc. and The Rainbow/PUSH Coalition, Inc. also support the adoption of "proposals to increase minority ownership *in this proceeding*." Comments of The National Association of Black-Owned Broadcasters, Inc. and The Rainbow/PUSH Coalition, Inc. at 3 (Oct. 1, 2007) (emphasis added). Therefore, the Commission has adopted herein proposals aimed at increasing diversity in media ownership even though their utility must be assessed based upon the record provided by the Commission's existing ownership data.

[103] We seek comment in the *Third Further Notice* as to how often these studies should be conducted.

loan programs to facilitate broadcast and telecommunications-related transactions.[104] Through its Office of Communications Business Opportunities, the Commission will work closely with the SBA to educate and encourage more local and regional banks (which have not been heavily involved in broadcast and telecommunications lending) to make loans through the SBA's 7(a) or 504 programs.

55. Such efforts could be useful because these types of transactions raise unique valuation and logistical issues. By increasing outreach to local and regional banks and to the SBA, the Commission can better assist both local banks and SBA programs to facilitate such transactions. Moreover, we believe that this effort will provide potential lenders with special expertise regarding transactions that require lending based—not on hard assets—but on cash flow and assets that primarily include a revocable Commission license. Absent such efforts, uncertainty about asset valuation could cause local and regional banks to refuse to facilitate otherwise viable transactions. Such outcomes could frustrate Commission efforts to promote ownership and viewpoint diversity.

9. Duopoly Priority for Companies that Finance or Incubate an Eligible Entity

56. The Commission adopts DCS's and the Diversity Committee's proposal that any entity financing or incubating an eligible entity[105] should be given a priority if it files for a duopoly simultaneously with non-eligible entities in a market that can only support one additional duopoly, as outlined below.[106] DCS and the Diversity Committee argue that "when the local television ownership rules permit only one additional duopoly in a market, a 'race to the courthouse' could determine which duopoly application is processed first."[107] We agree that one way to cure this problem is to create an incentive plan under which a company financing or incubating an eligible entity would be guaranteed a priority if it files for a duopoly simultaneously with other entities in a market that can support only one additional duopoly. This vested priority in a duopolization queue would reward the large broadcaster that had incubated or financed an eligible entity if it filed simultaneously for a duopoly with a non-incubating entity. Moreover, such a priority in the duopolization queue could have substantial value and therefore provide the added benefit of an incentive for eligible entity financing. The Commission agrees that in this situation, a general statement of policy that grants priority to entities funding or incubating eligible entities would promote ownership diversity.

10. Extension of Divestiture Deadlines in Certain Mergers

57. We adopt DCS's proposal to consider requests to extend divestiture deadlines in mergers in which applicants have actively solicited bids for divested properties from eligible entities.[108] This proposal was also supported by the Commission's Diversity Committee.

58. The Commission has encouraged companies undertaking major transactions to assist small businesses, including those owned by minority and female entrepreneurs interested in purchasing divested

---

[104] DCS Initial Comments at 33-34 & nn.119-121; Advisory Committee on Diversity, *Financial Issues Recommendations* at 16 (Jun. 14, 2004); NAB Comments at 8; *see also* Consumers Union Comments at 31.

[105] The proposal contemplates a benefit in exchange for financing or incubating an SDB. However, as noted above, for purposes of this Order we define "eligible entity" as any entity that would qualify as a small business consistent with SBA standards for its industry grouping, based on revenue. *See supra* ¶ 6. In the *Third Further Notice* below, we seek comment on whether we should adopt an alternative definition of "eligible entity." *See infra* ¶¶ 80-86.

[106] DCS Initial Comments at 36-37 & nn.128-129; Advisory Committee on Diversity, *Financial Issues Recommendations* at 17-18 (Jun. 14, 2004).

[107] DCS Initial Comments at 36.

[108] *Id.* at 39-40 & nn. 134-36.

properties. But such efforts may take time, and such entities may need additional time to secure funding to complete potential transactions.[109] Consequently, while rigidly enforced divestiture deadlines might be intended to increase minority ownership and viewpoint diversity, they could sometimes have the perverse effect of disadvantaging potential minority owners.

59. Because divestiture deadlines are intended to prevent undue concentration of media ownership, requests to extend these deadlines in order to facilitate acquisition of divested properties by small businesses could promote both diversity in media ownership and the objective that divestiture seeks to achieve. Consequently, the Commission will adopt a policy of considering requests to extend divestiture deadlines when applicants have actively solicited bids for divested properties from eligible entities.

60. The Commission also adopts DCS's proposal that entities availing themselves of an extension must either sell a given property to an eligible entity within the extended deadline or have the property placed in an irrevocable trust for sale by an independent trustee to an eligible entity. This would prevent potential abuse of the extensions and ensure that they will actually result in sales to eligible entities.

11. Transfer of Grandfathered Radio Station Combinations to Non-Eligible Entities

61. We adopt DCS's proposal that the Commission permit the assignment or transfer of grandfathered radio station combinations intact to *any* buyer, not just an eligible entity as currently permitted,[110] provided that such a buyer files an application to assign the excess stations to an eligible entity, or to an irrevocable divestiture trust for purposes of ultimate assignment to an eligible entity, within 12 months after consummation of the purchase of the grandfathered cluster.[111] This proposal is the subject of a *Petition for Rulemaking* filed by MMTC on July 12, 2007. The Commission sought comment on it in a Public Notice dated August 6, 2007.[112] Commenters encouraged the Commission to adopt the proposal, including a coalition of 48 parties, comprised of 21 radio broadcast companies, five financial institutions and capital providers, 16 media brokerages, and six public interest and civil rights organizations.[113] DCS contends that this proposal would promote small business investment in broadcasting by providing additional time and flexibility to raise the capital necessary to purchase the

---

[109] *Letter to Henry Rivera, Chairman of the Advisory Committee on Diversity for Communications in the Digital Age, from Kevin J. Martin, Chairman of the Federal Communications Commission* (Sept. 27, 2007). Chairman Martin has encouraged the creation of "educational conferences to be conducted by the communications industry whenever a significant ownership-related transaction is proposed to the Commission. These conferences would serve to encourage and facilitate communications companies that engage in transactions and license transfers to include small businesses, minorities and women entrepreneurs, and other designated entities during negotiations on assets and properties identified for divestiture."

[110] In the *2002 Biennial Review Order*, the Commission permitted the sale of grandfathered station combinations to "eligible entities," which were defined as entities that would qualify as a small business consistent with SBA standards for its industry grouping. *2002 Biennial Review Order*, 18 FCC Rcd at 13811, ¶ 489. This proposal is similar to another that advocates modifying the class of entities that may acquire a grandfathered combination, which is addressed below. *See infra*, ¶ 65.

[111] DCS Initial Comments at 40-41.

[112] *See* Petition for Rulemaking of the Minority Media and Telecommunications Council to Facilitate the Entry of Small Businesses into Local Radio Markets, RM-11338 (Jul. 12, 2007).

[113] *See* Reply of 48 Parties (Oct. 5, 2007).

excess stations. We agree. In order to ensure that this proposal will not undermine our local radio ownership rule, we will require non-eligible entities seeking to acquire a grandfathered radio station group to file the divestiture trust agreement with its initial application to allow the Commission to evaluate the proposed trust at the outset.[114]

12. "Access to Capital" Conference

62. The Commission adopts DCS's and the Diversity Committee's proposal to convene an access-to-capital conference.[115] This proposal was also strongly supported by NAB, which identified access to capital as "the largest roadblock to a more diverse broadcast industry."[116] Moreover, we agree with commenters that eligible entities and new entrants ought to have an opportunity to build a dialogue with their new fellow broadcasters.[117]

63. With the counsel of its Diversity Committee, the Commission will attempt to organize such a conference and will tentatively schedule it to be held during the first half of 2008 in New York City. As recommended by the Diversity Committee, this conference will focus on the investment banking and private equity communities, and the opportunities for small businesses, new entrants, and designated entities to acquire access to financing and thereby facilitate entry to ownership in the communications sector. Moreover, the Commission will seek to facilitate the creation of educational conferences whenever a significant ownership transaction is proposed to the Commission.[118]

13. Guidebook on Diversity

64. The Commission adopts the proposal to create a guidebook on diversity that would focus on activities that companies can make to promote diversity in ownership and contracting.[119] DCS argues that voluntary industry efforts to promote diversity would be more successful if the Commission were to "provide the industry with the necessary tools, including solid, comprehensive information on what diversity initiatives are most likely to have an impact and how companies can most effectively implement those initiatives."[120] The Commission agrees, and will thus create *Increasing Diversity in the Media and Telecom Industries*, a guidebook based tentatively upon the title and structure proposed by the Diversity Committee.[121]

C. Other Proposals

1. Transfer of Grandfathered Station Combinations to SDBs

65. DCS proposes that the Commission permit the licensee of a grandfathered station combination to sell the cluster intact to an SDB.[122] No commenter other than DCS specifically addressed

---

[114] *See* MMTC *ex parte* comment (Nov. 19, 2007).

[115] DCS Initial Comments at 51-52 & n.175; Advisory Committee on Diversity, *Interim Report of the Access to Capital Subcommittee of the Diversity Committee,* (Sep. 27, 2007).

[116] NAB Comments at 8; *see also* DCS Initial Comments at 51-52.

[117] DCS Initial Comments at 52-53.

[118] *Id.*

[119] *Id.* at 52-53 & n. 176.

[120] *Id.* at 52.

[121] Advisory Committee on Diversity, *Preparation of a Guidebook on Diversity,* (Sep. 27, 2007).

[122] DCS Initial Comments at 7-9.

this proposal. We decline to adopt it. In the *2002 Biennial Review Order*, the Commission permitted the sale of grandfathered station combinations to "eligible entities," which were defined as entities that would qualify as a small business consistent with SBA standards for its industry grouping.[123] As noted above, we adopt the same definition for the class of entities that benefit initially from the actions we take in this *Report and Order*. Should we adopt a definition of SDB at the conclusion of the proceeding initiated by the *Third Further Notice* below, by operation of the existing rule such SDBs would be permitted to acquire grandfathered combinations.

2. Structural Rule Waiver for Selling a Station to an SDB; Staged Implementation of Deregulation

66. DCS proposes that the Commission adopt a "structural" waiver of its broadcast ownership rules for applicants selling a station to an SDB. Under this proposal, an applicant selling a station to an SDB would be permitted to complete a transaction that otherwise would be barred by an ownership rule.[124] DCS links this proposal to another, which urges the Commission, should it decide to relax its broadcast ownership rules, to implement such deregulation in stages, measuring its impact and adopting "mid-course corrections" as needed.[125] It suggests that the confluence of these two proposals would have the effect of permitting an applicant selling a station to an SDB to have its transaction evaluated under more liberal ownership rules that would take effect later in the staged deregulation process.[126] Consumers Union comments that the structural rule waiver proposal, while "well intentioned . . . would be a disaster for both the cause of increasing female and minority ownership [and] the Commission goals of localism and viewpoint diversity."[127] It further comments that any rule waiver granted in exchange for selling a station to an SDB should be granted on a case-by-case basis, not as the result of the proposed "bright-line" policy.[128]

67. We decline to adopt these proposals. We agree with Consumers Union that the short-term benefit of the waiver proposal – an immediate increase in the number of stations owned by SDBs – is likely to be offset by the public interest harms resulting from the approval of station combinations that exceed our ownership rules. Moreover, as we have no current plans to implement the type of deregulation envisioned by DCS, we find the proposals to be premature.

3. Structural Rule Waivers for Creating Incubator Programs

68. DCS proposes that the Commission waive its broadcast ownership rules to allow an applicant to acquire stations in a market beyond the permissible limit if it establishes and implements an "incubator" program designed to promote ownership by disadvantaged businesses.[129] We decline to adopt this proposal. While we appreciate the value that incentives-based programs such as this can have, we are concerned that companies participating in such a program will expend only the barest minimum in financial and other support required to qualify for the waiver. Moreover, we are concerned that, by allowing the incubating party to acquire stations in excess of local ownership caps, the proposal would create a significant potential for undermining our broadcast ownership restrictions. Therefore, we are not

---

[123] *2002 Biennial Review Order*, 18 FCC Rcd at 13811, ¶ 489.

[124] DCS Initial Comments at 9.

[125] *Id.* at 24-26.

[126] *Id.* at 9.

[127] Consumers Union Comments at 32.

[128] *Id.* at 34.

[129] DCS Initial Comments at 9.

convinced that the potential benefits associated with this proposal outweigh the potential harms.[130] We note, however, that DCS has modified this proposal to narrow its application.[131] We seek comment on this modified proposal in the *Third Further Notice* below.[132]

4. Opening FM Spectrum for New Entrants

69. DCS proposes that the Commission take three steps to open FM spectrum for new entrants. First, DCS proposes that we relax the current limit on the filing of contingent applications set forth in Section 73.3517(e) of the Rules, which provides that the Commission will accept up to four contingent applications filed by FM licensees or permittees for minor modification of facilities. Second, DCS proposes that we repeal the third adjacent channel requirements found in Section 73.215(a) of the Rules, or recommend to Congress that we be allowed to do so. Finally, DCS proposes that we relax our FM service and allotment rules and policies in two respects: (1) replace the community of license coverage requirement for commercial FM stations, set forth in Section 73.315(a) of the Rules,[133] with the less stringent coverage requirement for noncommercial FM stations, set forth in Section 73.515 of the Rules;[134] and (2) authorize stations to change their community of license to any community located within the same market, as defined by Section 73.3555(a) of the Rules.[135]

70. DCS urges the adoption of these proposals to facilitate efforts of minority-owned stations, which it states are disproportionately licensed to suburban areas, to relocate closer to the urban audiences they seek to serve.[136] Consumers Union filed comments generally supporting the proposal to eliminate third adjacent channel protection requirements.[137]

71. We decline to adopt these proposals. In amending Section 73.3517 of the Rules to permit the filing of contingent applications, the Commission concluded that a limit of four struck the proper balance between the desire of broadcasters for additional flexibility in proposing coordinated changes and the limited staff resources that are available to review the substantially more complex facilities change applications that the revised rule permits.[138] DCS has not presented evidence sufficient to persuade us to upset this balance. With respect to DCS's second proposal, we note that the third adjacent channel requirements are statutory. The Commission issued a report to Congress in 2004, based on the FCC-commissioned Mitre Study, advising that, because LPFM stations do not pose a significant risk of causing

---

[130] DCS implicitly recognizes the difficulty in ensuring the public receives a fair trade for the harms that would be caused by granting waivers to further concentrate the media market when it notes that "[t]he key to the effectiveness and integrity of an incubation program is that it would include concrete, definitive, and verifiable commitments of 'sufficient magnitude and permanence' to justify a waiver." *Id.* at 14 (citations omitted).

[131] DCS Supplemental Comments at 4-8.

[132] *See infra* ¶ 97.

[133] 47 C.F.R. § 73.315(a). Commercial FM stations are deemed to "substantially comply" with the community of license coverage requirements if at least 80% of the area or population of the community of license is located within the 70 dBu contour. *See* John R. Hughes, 50 Fed. Reg. 5679 (1985).

[134] 47 C.F.R. § 73.515 (requiring noncommercial FM stations to place a 60 dBu contour over at least 50% of the area or population of its community of license).

[135] DCS Initial Comments at 22-24.

[136] *Id.* at 24.

[137] Consumers Union Comments at 30.

[138] *1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, First Report and Order, 14 FCC Rcd, 5272, 5282, ¶ 14 (1999).

interference to existing full service FM stations or FM translator and FM booster stations, Congress should eliminate the third adjacent channel protection requirement.[139] We will continue to recommend such legislation. Finally, with respect to DCS's third proposal, we believe that relaxing community of license coverage requirements for commercial FM stations and increasing the ability of radio stations to change their communities of license to any community within the same market will undermine our broadcast regulatory policy of enhancing localism. Such actions would result in the licensing of stations that technically cannot serve their communities of license, a result antithetical to the concept of localism. Furthermore, we note that we recently declined to abandon our policy against removing the sole local transmission service at a community in order to allow it to become the first local transmission service at another community.[140] We note, however, that DCS has modified this last proposal in accordance with a recent recommendation of the Diversity Committee.[141] We seek comment on this revised proposal in the *Third Further Notice* below.[142]

5. Advocacy of Tax Deferral Legislation; Promotion of Minority Ownership in All General Media Rulemaking Proceedings

72. DCS proposes that the Commission recommend to Congress that it reinstate the Commission's authority to adopt the former Tax Certificate Policy.[143] That policy, originally adopted by the Commission in 1978, allowed a seller to defer capital gains taxes on the sale of a media property to a minority-controlled firm. Commenters that specifically addressed this proposal were uniformly in favor of it.

73. The Commission recommended reinstatement of the necessary statutory authority in its recently adopted Section 257 Triennial Report to Congress.[144] We believe, therefore, that we have already satisfied this proposal and decline to commit to further action in this proceeding.

74. DCS also proposes that the Commission consider, as part of all general media rulemaking proceedings (except for individual FM or TV allotment proceedings), how the proposed rules would impact minority ownership.[145] The Commission's Office of Communications Business Opportunities currently provides outreach services to assist small businesses and new entrants into the communications industry and input on how our proposed rules impact minority ownership. We believe, therefore, that we have already satisfied this proposal and decline to commit to further action in this proceeding.

---

[139] *Report to Congress on the Low Power FM Interference Testing Program*, Pub. L. No. 10-553 (rel. Feb. 19, 2004).

[140] *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14227-30 ¶¶ 28-34 (2006).

[141] DCS Supplemental Comments at 22-24.

[142] *See infra* ¶ 98.

[143] DCS Initial Comments at 28.

[144] *See Section 257 Triennial Report to Congress - Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses*, Report, 19 FCC Rcd 3034 (Feb. 12, 2004).

[145] DCS Initial Comments at 29.

6. Extension of the Community Reinvestment Act

75. DCS proposes that the Commission work with the Treasury Department to expand application of the Community Reinvestment Act ("CRA") credit[146] to encourage institutions to place capital in minority-focused private equity funds.[147] We decline to adopt this proposal. We note that the CRA already encourages debt financing to small broadcasters; to the extent that the MMTC proposal advocates adding a race-based dimension to the CRA, we conclude that we are constrained by judicial precedent from enacting it.[148]

7. Establish a "Fund of Funds"

76. DCS proposes that the Commission initiate discussions with the major pension funds to encourage the establishment of a special fund to place capital with minority-focused private equity funds. We decline to adopt this proposal at this time. In the absence of a congressional directive explicitly granting us the power to hold such discussions, we conclude that we lack the statutory authority to adopt it. Moreover, although we recognize that eligible entities, as defined herein, have difficulty accessing capital, we have taken action that will help mitigate that difficulty and do not believe that the additional measures suggested by DCS are appropriate Commission functions.

8. Relax Foreign Ownership Restrictions

77. DCS proposes that the Commission consider relaxing restrictions on foreign ownership to permit non-controlling foreign investment where such investment would help eliminate a barrier to access to capital for domestic, minority-owned broadcasters.[149] We decline to adopt this proposal. DCS does not explain why the Commission's concerns about foreign ownership of broadcast interests generally would not apply in this context. At a minimum, the Commission would be required to undertake a significant rulemaking proceeding to examine this issue in greater depth. We are not convinced, on the basis of the record before us, that taking the extraordinary step of relaxing our foreign ownership rules would advance our interest in promoting diversification among broadcast licensees, including women and minorities.

9. Permit AM Stations to Use FM Translators

78. DCS proposes that the Commission permit AM stations to rebroadcast their signals on FM translator stations. We note that the Commission already has released a *Notice of Proposed Rulemaking* to seek comment on such a rule change.[150] We expect to issue an order resolving this proceeding soon. Therefore, no action is necessary in this item.

---

[146] 12 U.S.C. § 2901. The CRA was enacted in 1977 to prevent redlining and to encourage banks and thrifts to help meet the credit needs of all segments of their communities, including low- and moderate-income neighborhoods. It extends and clarifies the longstanding expectation that banks will serve the convenience and needs of their local communities. The CRA and its implementing regulations require federal financial institution regulators to assess the record of each bank and thrift in helping to fulfill their obligations to the community and to consider that record in evaluating applications for charters or for approval of bank mergers, acquisitions, and branch openings. http://www.occ.treas.gov/crainfo.htm

[147] DCS Initial Comments at 32.

[148] *See Adarand*, 515 U.S. 200, 227 (1995).

[149] DCS Initial Comments at 37-39.

[150] *See Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, MB Docket No. 07-172, Notice of Proposed Rule Making, 22 FCC Rcd 15890 (Aug. 15, 2007).

10. Repeal Radio Subcaps

79. In its Supplemental Comments, DCS urges the Commission to seek comment on a proposal advanced by Multicultural Radio Broadcasting, Inc. ("Multicultural").[151] Multicultural proposes that the Commission repeal the subcaps on ownership of same-service (AM or FM) stations contained in the local radio ownership rule.[152] We note that we retain the subcaps as a component of the local radio ownership rule in our *Report and Order* in the 2006 Quadrennial Review proceeding. Therefore, we will take no action in this item.

IV. THIRD FURTHER NOTICE OF PROPOSED RULE MAKING

A. Definition of Socially and Economically Disadvantaged Businesses

80. As stated above, we defined the class of entities benefiting from the rule and policy changes set forth in this item as "eligible entities," using the SBA definition of small businesses. We seek comment on whether we can or should expand that definition.

81. *Socially and Economically Disadvantaged Businesses*. DCS has recommended that, instead of extending the benefits only to "eligible entities," we should instead use a race-conscious definition of socially and economically disadvantaged business (SDB) to define the relevant class of companies.[153] For example, to qualify for participation in Small Business Administration's Small Disadvantaged Business program, [154] a small business must be at least 51 percent owned and controlled by a socially and economically disadvantaged individual or individuals.[155] Under the program, African Americans, Hispanic Americans, Asian Pacific Americans, Subcontinent Pacific Americans, and Native Americans are presumed to qualify, and other individuals can qualify if they can show by a preponderance of the evidence that they are disadvantaged.[156] We invite comment on the DCS proposal to adopt a race-conscious definition of SDBs.

82. We are mindful that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."[157] As a result, any race conscious measure the Commission might adopt to promote minority ownership would be subject to strict scrutiny under the equal protection component of the Due Process Clause of the Fifth Amendment.[158] The hurdle posed by strict scrutiny is quite high. In *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 21-22 (D.C. Cir. 2001), *rehearing denied*, 253 F.3d 752, and *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354-56 (D.C. Cir. 1988), the United States Court of Appeals for the D.C. Circuit twice struck down Commission equal employment opportunity rules after concluding that they resulted in race-based classifications that were subject to strict scrutiny.

---

[151] DCS Supplemental Comments at 11-12.

[152] 47 C.F.R. § 73.3555(a).

[153] *See* Reply of the Diversity and Competition Supporters in Response to the Second Notice of Proposed Rulemaking Docket No. 06-121, at 1 (Nov. 1, 2007),.

[154] 13 C.F.R. § 124.1.

[155] *See* SBA, *Small Disadvantaged Business*, http://www.sba.gov/sdb/indexaboutsdb.html (visited Jan. 30, 2007).

[156] 13 C.F.R. §§ 124.103(b-c), 124,104(a).

[157] *Adarand*, 515 U.S. 200, 236 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)).

[158] U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law"); *see Adarand*, 515 U.S. at 227.

83. Race-based classifications subject to strict scrutiny may be upheld "only if they are narrowly tailored measures that further compelling governmental interests."[159] Accordingly, parties who contend that a race-conscious classification would be the best approach, or indeed even a permissible approach, to encourage ownership diversity and new entry must explain specifically, using empirical data and legal analysis, how such a classification would not just be tailored, but narrowly tailored, to advance a governmental interest that is not simply important, but compelling.

84. *Other Definitions*. Pending the potential adoption of an alternative definition, DCS proposes the adoption of race-neutral, "individualized 'full file' review, similar to that used by Michigan, California, and Texas state university admission departments following the passage of state initiatives and court decisions banning affirmative action."[160] Under this proposal, "each applicant would demonstrate (to the satisfaction of an independent, politically insulated professional entity, perhaps modeled after the Universal Service Board) that it has overcome significant social and economic disadvantages, the overcoming of which would be predictive of success in a challenging industry and of the promotion of diversity of information and perspectives and satisfaction of unmet needs in the industry."[161] DCS states that this disadvantage often, but not necessarily, would be related to race or gender discrimination or their present effects.[162] DCS offers several hypothetical applicants who might benefit from "full file" review, including an applicant injured in military service in Iraq who later completed a leadership training program; a rural applicant who put herself through college and successfully ran a previously-bankrupt AM station; and a Spanish language radio company owner who succeeded despite advertiser resistance to program language and format.[163]

85. We seek comment on the DCS proposal regarding "full file" review, and pose a number of specific questions regarding that proposal. Would the grant of broadcast licenses to applicants who have overcome social and economic disadvantages likely result in greater diversity of broadcast information and viewpoints? How should "full file review" be structured so that it is race-neutral and does not trigger strict scrutiny? Can the "full file review" framework applied and upheld in the context of university admissions be applied to the media industry in an effective manner to foster diversity of viewpoints without involving the Commission in content-based decisions that could raise First Amendment concerns? How should the Commission or an "independent, politically insulated professional entity" assess whether an applicant has overcome social and economic disadvantage and whether granting the application would increase diversity of viewpoints? How could the concept of "full file" review, which in the higher education context is used to compare candidates competing for a limited number of admissions slots, be applied in an administratively feasible manner to a situation where applicants will not be compared to each other (because mutually exclusive licenses applications are resolved through an auction) but applicants instead will be evaluated to see if they meet a specified standard? Should an applicant bear the burden of proving specifically that it would contribute to diversity of viewpoints as a result of having overcome these disadvantages? When the applicant is a company, which individuals

---

[159] *Adarand*, 515 U.S. at 227.

[160] DCS Supplemental Comments at 39.

[161] *Id*. at 40-41; *see also* MMTC Letter to Chairman Martin and Commissioners Adelstein, Copps, McDowell, and Tate at 1-2 (Dec. 11, 2007) ("A full file review paradigm would be based on an applicant's success in overcoming obstacles and entry barriers, the overcoming of which would naturally yield diversity of information and viewpoints and would be predictive of success in a challenging environment.") (available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519818049).

[162] DCS Supplemental Comments at 41.

[163] *Id*.

would we evaluate to determine if the company meets the relevant standard under "full file review"? Would a determination by an independent board be advisory to the Commission? Would an affirmative determination qualify the entity as an eligible entity for all future transactions or for a specified period of time or would it have to seek a new determination for each transaction? How would "full file" review or a similar standard compare to an "eligible entity" or SDB standard in promoting viewpoint and/or ownership diversity? Should we substitute the "full file review" approach for the "eligible entity" approach until we can adopt an SDB standard or should we adopt it in lieu of an SDB standard?

86. We also invite commenters to propose any alternative definition of "eligible entity" that they believe would better advance our goals of promoting ownership diversity and new entry. With respect to any proposed definition that is race conscious, commenters should address the constitutionality of such definition.

B. Share-Time Proposals

87. DCS proposes that the Commission afford FM licensees that broadcast in HD using IBOC technology the voluntary option of assigning the right to operate an HD radio stream to an SDB.[164] As proposed by DCS, the SDB operating the HD radio stream would receive a license under the Commission's share-time rule.[165] DCS further proposes that the Commission use share-time procedures to permit the bifurcation of a single-channel, analog FM station into an "Entertainment Station" and a "Free Speech Station" Such a "Free Speech Station" would be independently owned by an SDB, have at least 20 non-nighttime hours per week of airtime, and be primarily devoted to non-entertainment programming. We seek specific comment on these proposals. In particular, we seek comment on the extent to which, if the SDB (or eligible entity) becomes a Commission licensee, these proposals may provide the non-SDB entity a way to circumvent our ownership restrictions.

C. Retention on Air of AM Expanded Band Owners' Stations if One of the Stations is Sold to an Eligible Entity

88. In 1987, the Commission began a comprehensive review of numerous technical, legal, and policy issues relating to AM broadcasting in an effort to identify and address its most pressing problems.[166] The allotment of additional spectrum (1605 – 1705 kHz)[167] for broadcasting provided the Commission with a "unique opportunity" to address these problems, most importantly the channel congestion and interference that had significantly degraded the technical quality of the service.[168] Accordingly, the Commission limited initial applications for expanded band authorizations to existing AM broadcasters in the standard band and gave the highest priority to those fulltime stations that would most reduce congestion and interference by moving their operations to one of the new channels.[169] To ensure that this process achieved its intended goals, the Commission further provided that the license for

---

[164] DCS Initial Comments at 41-47.

[165] 47 C.F.R. § 73.1715.

[166] *Review of the Technical Assignment Criteria for the AM Broadcast Service*, Notice of Inquiry, 2 FCC Rcd 5014 (1987).

[167] This spectrum, known as the AM expanded band, was allocated to the domestic AM radio service in 1979 by the International Telecommunication Union World Administrative Radio Conference.

[168] *Review of the Technical Assignment Criteria for the AM Broadcast Service*, Notice of Proposed Rule Making, 5 FCC Rcd 4381, 4382 (1990) ("*Expanded Band NPRM*").

[169] *Review of the Technical Assignment Criteria for the AM Broadcast Service*, Report and Order, 6 FCC Rcd 6273, 6317 (1991) ("*Expanded Band R&O*").

an expanded band station would issue conditioned upon the surrender of one of the paired frequencies, preferably the standard band frequency, following a five-year transition period during which dual operations would be permissible.[170] On reconsideration, the Commission reordered its priorities in light of Congress's recent amendment of the Act to add Section 331(b)[171] and gave first priority to a special class of four AM stations – those daytime-only stations licensed to serve communities with populations of more than 100,000 persons that lacked a fulltime aural service.

89. In 1997, the Commission released its final 88-station allotment plan for the expanded band and invited the selected stations to file construction permit applications.[172] A total of 54 expanded band stations were licensed through this process. Two construction permit applications and one license application remain pending. To date, 19 licensees have surrendered their lower band licenses and one licensee has surrendered its expanded band license at the end of each of these licensees's five-year dual operating authority period. In March 2006, eleven licensees and four public interest groups petitioned the Commission to waive the surrender requirement in order to allow the transfer of one of the stations to a recognized small business, or its retention by the licensee if the licensee is a small business.[173]

90. DCS argues that the technical benefits that the Commission anticipated from the surrender of lower band AM licenses are now outweighed by continued service to the listening public. They claim that "numerous" AM licensees have specifically targeted the programming on the lower band paired station to serve the needs of minorities and niche audiences. They propose that the Commission extend the dual operating period authorization[174] and the temporary exemption of the expanded band authorization for multiple ownership purposes.[175] As proposed, licensees would be permitted, prior to a specified disposition date, to assign or transfer control of one the paired AM stations to a qualifying "small business" as that term applies to radio broadcasters in the Small Business Administration's Regulations.[176] Under DCS's proposal, the consideration which a licensee could receive for one of its paired AM stations could not exceed 75 percent of the station's fair market value. Further, in the event that the licensee is itself a small business, it would be permitted to retain permanently both authorizations.

91. We seek comment on this proposal. In particular, we seek comment on how to properly balance the competing goals of improving the technical viability of the AM service and promoting ownership diversity. In the event that the Commission adopts this proposal, we also seek comment on the length of time licensees operating paired stations should be given to dispose of one station to a qualifying small business. We tentatively conclude that any licensee, which itself is not a qualifying small business and which fails to consummate the sale of one station by the disposition date, must surrender one of the two licenses by the disposition. Moreover, we tentatively conclude that in the event that a licensee fails to

---

[170] *See Expanded Band NPRM* at 4392; *Expanded Band R&O* at 6320, and 47 C.F.R. § 73.3555 Note 10. *See also Letter to Jennifer Wagner, Esq*., 16 FCC Rcd 21398 (2001).

[171] 47 U.S.C. § 331(b).

[172] *See Implementation of the AM Expanded Band Allotment Plan*, Memorandum Opinion and Order, 12 FCC Rcd 3361 (1997). *See also Mass Media Bureau Announces Revised AM Expanded Band Allotment Plan and Filing Window for Eligible Stations*, Public Notice, 12 FCC Rcd 3185 (1997).

[173] *See Request for Waiver of Rules Requiring Return of AM Licenses*, MM Docket No 87-267 (filed Mar. 27, 2006).

[174] *See* 47 C.F.R. 73.3555, Note 10.

[175] *See id*. Note 9.

[176] *See* 13 C.F.R. § 121.201 (radio station licensee treated as "small business" if it and affiliated entities have annual gross receipts under $6.5 million).

take any action by the disposition date, the lower band station shall automatically expire on that date. We seek comment on these procedures.

92. Finally, we seek comment on the proposal of DCS to reinstate the 20 licenses which were unconditionally surrendered by licensees in accordance with the terms of their authorizations. We note that subsequent licensing activity may preclude reinstatement and that certain circumstances, such as the sale of a former transmitter site and station equipment, may make resumption of operations by a formerly paired station infeasible or impossible. We seek comment on whether the Commission should accept construction permit applications from these licensees and the technical standards that the Commission should use to process these applications. We seek comment on whether the acceptance of such applications without providing an opportunity for competing applications complies with *Ashbacker* principles.[177] Lastly, we seek comment on whether a successor licensee should be permitted to seek reinstatement of a surrendered license.

D. Modifications to Form 323

93. As part of its 1998 biennial review of media ownership rules, the Commission adopted modifications to its Annual Ownership Report, FCC Form 323, to require the provision of information on the racial and gender identity of radio and television licensees.[178] The Commission reasoned that the action was needed in order to "determine accurately the current state of minority and female ownership of broadcast facilities, to determine the need for measures designed to promote ownership by minorities and women, to chart the success of any such measures that the Commission may adopt, and to fulfill the Commission's statutory mandate under Section 257 of the 1996 Act and Section 309(j) of the Communications Act of 1934 to promote opportunities for small businesses and businesses owned by women and minorities in the broadcasting industry."[179] FCC Form 323 is filed by commercial AM, FM and television stations at two-year intervals on the anniversary date of the station's renewal application filing date.[180] Partnerships composed entirely of natural persons and sole proprietorships are not required to file the FCC Form 323 on a biennial basis. In addition to gender information, the racial/ethnic origin categories include American or Alaska Native, Asian, Black or African American, Hispanic of Latino, Native Hawaiian or Other Pacific Islander.[181] The Commission periodically posts its compilation of data derived from these forms on its webpage.[182]

94. As part of our quadrennial media ownership review, several commenters and FCC study authors have expressed concern about the Commission's data collection process and have proposed revisions to the Form 323 to enhance its utility in measuring current levels of minority and female broadcast ownership. DCS has criticized the form as an inadequate basis upon which to develop effective minority ownership policies, regardless of whether such policies are race conscious.[183] DCS notes that

---

[177] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). *See also Bachow Communications, Inc. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001).

[178] *See 1998 Biennial Regulatory Review*, 13 FCC Rcd at 23096-99, ¶¶ 100-05.

[179] *See* 47 U.S.C. §§ 257, 309 (j).

[180] 47 C.F.R. § 73.3615. Noncommercial educational station licensees file FCC Form 323-E. *See* 47 CFR § 73.3615 (d).

[181] FCC Form 323, Question 9, Ownership Instructions – Section II, Note 4.

[182] Minority and female ownership data are posted at http://www.fcc.gov/ownership/data.html.

[183] *See* Reply of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking at 14-15 (Nov. 1, 2007).

the authors of several media ownership studies have indicated that the Commission's most recent research study on minority ownership is "not sufficient" to validate a race conscious initiative.[184] Other commenters state that problems with the Form 323 derive from the process the Commission uses to automate and cull the data from the forms.[185] Areas of concern include the filing of multiple forms for a single station, the practice of some filers to attach racial/gender information in a separate attachment to the form, the lack of questions regarding gender/racial classifications on the Form 323-E used by noncommercial educational stations, and filers who write "no change – info on file" as opposed to electronically validating completing the information previously submitted, including race, gender, and ethnicity data.[186]

95. We now seek initial comment on issues related to the Commission's collection of information on the racial and gender identity of radio and television licensees. We tentatively conclude that we should make changes to Form 323 to increase the accuracy of the data collected and the potential uses for the form. As previously indicated, sole proprietorships and partnerships composed entirely of natural persons have not routinely been required to complete Form 323. We solicit input from the public on whether expansion of the scope of parties required to file the biennial ownership report would enhance the race, gender, and ethnicity data collection. Further, we seek comment on whether the Commission should establish a uniform filing date for all radio and television station licensees and eliminate the current practice of permitting licensees to file on the anniversary of their renewal date. Would a single filing date pose a burden on licensees? What are the benefits to a single filing date requirement? Would the data collection be improved with such a change? Under current procedures, if the licensee or permittee is directly or indirectly controlled by another entity, or if another entity has an attributable interest in such licensee or permittee, a separate Form 323 must be submitted for such entity. Does this practice make the race, gender and ethnicity data more, or less, reliable? What other changes to Form 323 would make use of the data more reliable? Are there reasons that justify maintaining the current collection process such as streamlining, paperwork burdens, or administrative efficiencies?

96. We are concerned about the accuracy of data submitted by licensees, as this information may for the basis for Commission policy and rulemaking. Should the Commission adopt a new form to more accurately collect information from licensees on race, gender, and ethnicity, and delete these questions from the Form 323? Moreover, we are concerned about the accuracy of data submitted from licensees as this information may form the basis for Commission policy and rulemaking. We ask commenters to address whether the Commission should conduct audits to assess the accuracy of the information filed in the annual ownership report. Would the data collection be enhanced if we imposed an audit process? If so, what type of audit should be conducted? Should the Commission periodically audit a random sample of filers? How often should the audit be conducted? What penalties should be imposed for licensees that file inaccurate information on Form 323?

E. Structural Rule Waivers for Creating Incubator Programs

97. As noted above, DCS has modified its proposal advocating the grant of a structural rule waiver for parties that create and maintain an incubator program for SDBs. DCS narrowly tailors

[184] *Id.* at 16 (*citing* Arie Beresteanu and Paul B. Ellickson, "Minority and Female Ownership in Media Enterprises (Jun. 2007) ("The data currently being collected by the FCC is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis")).

[185] *See, e.g.,* Consumers Union Comments at 275-293. Commenters criticize Media Ownership Study #2 for missing "well over half" of all female and minority-owned broadcast stations. *See* Ownership Structure and Robustness of Media, Kiran Duwadi, Scott Roberts, Andrew Wise and C. Anthony Bush, FCC (Sep. 2007).

[186] *Id.*

application of the proposal to address the concerns, expressed by Consumers Union and others, that it could undermine our local broadcast ownership limits. Specifically, DCS now proposes a "Trial Incubation Plan" that would operate for two years, at which point the Commission would analyze its effects before renewing or expanding it. The Trial Incubation Plan would apply only to the local radio ownership rule in large markets and permit the incubating party to acquire only one additional station beyond the applicable local cap, including any same-service subcap. That additional station must be in the same service (AM or FM) and in the same market, or a market of approximately the same size, as the newly SDB-controlled station. Furthermore, DCS proposes that the two transactions be contingent, such that the SDB transaction would close prior to or simultaneously with the incubating party's transaction. We seek comment on this revised proposal.

F. Opening FM Spectrum for New Entrants

98. As noted above, DCS has modified its proposal advocating that FM stations be permitted to change their community of license to any community located in the same radio market. In accordance with a recently adopted recommendation of the Diversity Committee, DCS proposes that the Commission authorize stations to change their community of license to any community within the same market, provided that "if the community of license being vacated (the "Original Community") has no other full power AM or FM or LPFM station licensed to it and which originates local programming for at least 15% of its airtime (a "Local Service LPFM"), the licensee vacating the Original Community must underwrite the cost of licensing, construction and one full year of operation of a new Local Service LPFM to be licensed to the Original Community." We seek comment on this proposal.

G. Must-Carry for Class A Television Stations

99. In its Supplemental Comments, DCS urges the Commission to take action in accordance with a proposal advanced by the Community Broadcasters Association ("CBA").[187] CBA proposes that the Commission "actively support[] cable must-carry legislation for Class A stations."[188] We agree that cable carriage of Class A television stations could promote both programming diversity and localism, given that all such stations are required to originate local content. We seek comment on whether we have authority under the Act to adopt rules requiring such carriage.

H. Reallocation of TV Channels 5 and 6 for FM Service

100. In its Supplemental Comments, DCS urges the Commission to give a "hard look" to a proposal advanced by Mullaney Engineering, Inc. ("Mullaney").[189] Mullaney proposes that the Commission reallocate TV Channels 5 and 6 for FM broadcasting, thereby creating a "staggering expansion of the existing FM band."[190] We agree with DCS that this proposal could yield tremendous opportunities for new entrants, and we seek comment on it.

---

[187] DCS Supplemental Comments at 10-11.

[188] Reply of Community Broadcasters Association at 2 (Nov. 1, 2007).

[189] DCS Supplemental Comments at 11.

[190] *See* Petition for Reconsideration and/or Comment of Mullaney Engineering, Inc., MM Docket No. 87-268 (Oct. 26, 2007).

I. Proposals of the National Association of Black Owned Broadcasters and the Rainbow/PUSH Coalition

101. In its Supplemental Comments, DCS endorses several proposals advocated by NABOB and Rainbow/PUSH.[191] These proposals were advanced in the course of the 2002 Biennial Review proceeding, and we believe that the record with respect to them should be refreshed. Specifically, NABOB and Rainbow/PUSH propose that the Commission: (1) examine assignment and transfer applications to discern the potential impact of the proposed transaction on minority ownership; (2) decline to grant temporary waivers of the local ownership rules to parties proposing a transaction that would create station combinations exceeding the ownership caps; (3) treat local marketing agreements as attributable interests; and (4) allow minorities to own station combinations equal to the largest combination in a market to counterbalance the economic impact of grandfathered holdings. We seek comment on these proposals. In particular we ask parties to address our authority to enact them, the extent to which they would apply, and whether they contradict any of the proposals we adopt in this item.

V. CONCLUSION

102. The measures we adopt today, as well as the proposals on which we seek further comment, are intended to promote diversity of ownership of media outlets in order to promote diversity and competition, longstanding and important Commission goals, as well as to enhance innovation in broadcasting. We adopt a number of measures, advocated by a variety of commenters, that should help small businesses, including those owned by women and minorities, with access to financing and availability of spectrum, which have been identified as critical problem areas for new entrants into broadcasting, including women and minorities. We invite comment on a number of other measures including a measure to enhance participation by new entrants into digital broadcasting as well as measures to improve our data gathering in this important area. We also invite comment on whether to expand the class of entities benefiting from our proposals and new measures. We ask commenters to buttress their comments with economic and other evidence so that any further action can be based on a rigorous and thorough record.

VI. PROCEDURAL MATTERS

A. Filing Requirements

103. *Ex Parte Rules*. The *Third Further Notice of Proposed Rulemaking* in this proceeding will be treated as "permit-but-disclose" subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the Commission's rules.[192] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[193] Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

104. *Comments and Reply Comments*. Pursuant to sections 1.415 and 1.419 of the Commission's rules,[194] interested parties may file comments and reply comments on or before the dates

---

[191] *See* DCS Supplemental Comments at 12-13; Comments of the National Association of Black Owned Broadcasters and the Rainbow/PUSH Coalition (Jan. 2, 2003).

[192] *See* 47 C.F.R. § 1.1206(b), as revised.

[193] *See id.* § 1.1206(b)(2).

[194] 47 C.F.R. §§ 1.415, 1.419.

indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS); (2) the Federal Government's eRulemaking Portal; or (3) by filing paper copies.[195]

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.
  - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
  - The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
  - U.S. Postal Service First-Class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

105. *People with Disabilities*: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

106. *Availability of Documents*. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0267 (voice), (202) 418-7365 (TTY), or bill.cline@fcc.gov. These documents also will be available from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554; they can also be reached by telephone, at (202) 488-5300 or (800) 378-3160; by e-mail at fcc@bcpiweb.com; or via

[195] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

their website at http://www.bcpiweb.com. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-1400 (voice), (202) 418-7365 (TTY).

107. *Information*. For additional information on this proceeding, contact Mania Baghdadi at (202) 418-7200. Press inquiries should be directed to Mary Diamond at (202) 418-2388.

B. Initial and Final Regulatory Flexibility Analysis

108. *Initial Regulatory Flexibility Analysis ("IRFA")*. The Regulatory Flexibility Act of 1980, as amended ("RFA"),[196] requires that a regulatory flexibility analysis be prepared for notice and comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[197] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[198] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[199] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[200] As required by the RFA,[201] the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities of the proposals addressed in the *Third Further Notice of Proposed Rulemaking*. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the filing deadlines on the first page of this document.

109. *Final Regulatory Flexibility Analysis ("FRFA")*. As required by the RFA,[202] the Commission has prepared an FRFA relating to the Report and Order. The FRFA is set forth in Appendix C.

C. Paperwork Reduction Act Analysis

110. *Initial Paperwork Reduction Act Analysis*. The Third Further Notice of Proposed Rulemaking has been analyzed with respect to the Paperwork Reduction Act of 1995 ("PRA"),[203] and contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget

---

[196] The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[197] 5 U.S.C. § 605(b).

[198] *Id.* § 601(6).

[199] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." *Id.* § 601(3).

[200] 15 U.S.C. § 632.

[201] *See* 5 U.S.C. § 603.

[202] *See* 5 U.S.C. § 604.

[203] The Paperwork Reduction Act of 1995 ("PRA"), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

(OMB) to comment on the proposed information collection requirements contained in this Notice, as required by the PRA.

111. Written comments on the PRA proposed information collection requirements must be submitted by the public, the OMB, and other interested parties on or before 60 days after publication in the *Federal Register*. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002,[204] we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

112. Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via Internet at Nicholas_A._Fraser@omb.eop.gov or via fax at (202) 395-5167 and to Cathy Williams, Federal Communications Commission, Room 1-C823, 445 12th Street, SW., Washington, DC or via Internet at Cathy.Williams@fcc.gov or PRA@fcc.gov.

113. *Further Information*. For additional information concerning the PRA proposed information collection requirements contained in the Third Further Notice of Proposed Rulemaking, contact Cathy Williams at (202) 418-2918, or via the Internet at PRA@fcc.gov.

114. *Final Paperwork Reduction Act Analysis*. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. It 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 are invited to comment on the new and/or modified information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

D. Congressional Review Act

115. The Commission will send a copy of this *Report and Order and Third Further Notice of Proposed Rulemaking* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

VII. ORDERING CLAUSES

116. Accordingly, **IT IS ORDERED**, that pursuant to the authority contained in sections 1, 2(a), 4(i), 257, 303(r), and 307-310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 257, 303(r), and 307-310, this *Report and Order* **IS ADOPTED**.

117. **IT IS FURTHER ORDERED**, that pursuant to the authority contained in sections 1, 2(a), 4(i), 257, 303(r), and 307-310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 257, 303(r), and 307-310, the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix A.

[204] The Small Business Paperwork Relief Act of 2002 ("SBPRA"), Pub. L. No. 107-198, 116 Stat 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); see 44 U.S.C. § 3506(c)(4).

118. **IT IS FURTHER ORDERED**, that the rule amendments adopted in herein **WILL BECOME EFFECTIVE** 60 days after publication of this *Report and Order and Third Further Notice of Proposed Rulemaking* in the Federal Register. Changes to FCC Forms required as the result of the rule amendments adopted herein **WILL BECOME EFFECTIVE** 30 days after the Commission publishes a notice in the Federal Register announcing approval by the Office of Management and Budget of the forms.

119. **IT IS FURTHER ORDERED**, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

120. **IT IS FURTHER ORDERED**, that the Commission **SHALL SEND** a copy of this Report and Order and Third Further Notice of Proposed Rulemaking in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

121. **IT IS FURTHER ORDERED**, that pursuant to the authority contained in Sections 1, 2(a), 4(i, j), 257, 303(r), 307-10, and 614-15 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i, j), 257, 303(r), 307-10, 534-35, this *Third Further Notice of Proposed Rule Making* **IS ADOPTED**.

122. **IT IS FURTHER ORDERED**, that pursuant to the authority contained in sections 1, 2(a), 4(i, j), 257, 303(r), 307-10, 336, and 614-15 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i, j), 257, 303(r), 307-310, 336, 534-35, **NOTICE IS HEREBY GIVEN** of the proposals described in this *Third Further Notice of Proposed Rule Making*.

123. **IT IS FURTHER ORDERED**, that the Petition for Rulemaking of Entravision Holdings, LLC, RM-9567, **IS GRANTED IN PART**.

124. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Third Further Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Rule Changes

47 CFR Part 73 is amended as follows:

PART 73 – RADIO BROADCAST SERVICES

1. Section 73.2090 is added to read as follows:

§ 73.2090 Ban on discrimination in broadcast transactions.

No qualified person or entity shall be discriminated against on the basis of race, color, religion, national origin or sex in the sale of commercially operated AM, FM, TV, Class A TV or international broadcast stations (as defined in this part).

2. Section 73.3555, Note 2(i) is amended to read as follows:

§ 73.3555, Note 2(i)

(i) Notwithstanding paragraphs (e) and (f) of this note, the holder of an equity or debt interest or interests in a broadcast licensee, cable television system, daily newspaper, or other media outlet subject to the broadcast multiple ownership or cross-ownership rules ("interest holder") shall have that interest attributed if:

(1) **Where the entity in which the interest is held is not an eligible entity, t**he equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value, defined as the aggregate of all equity plus all debt, of that media outlet, **or where the entity in which the interest is held is an eligible entity, the combined equity and debt of the interest holder in the eligible entity is less than 50 percent or the total debt of the interest holder in the eligible entity does not exceed 80 percent of the asset value of the station being acquired by the eligible entity and the interest holder does not hold any equity interest, option, or promise to acquire an equity interest in the eligible entity or any related entity;** and

(2)(i) The interest holder also holds an interest in a broadcast licensee, cable television system, newspaper, or other media outlet operating in the same market that is subject to the broadcast multiple ownership or cross-ownership rules and is attributable under paragraphs of this note other than this paragraph (i); or

(ii) The interest holder supplies over fifteen percent of the total weekly broadcast programming hours of the station in which the interest is held. For purposes of applying this paragraph, the term, "market," will be defined as it is defined under the specific multiple or cross-ownership rule that is being applied, except that for television stations, the term "market," will be defined by reference to the definition contained in the local television multiple ownership rule contained in paragraph (b) of this section.

For purposes of paragraph (i)(1) of this note, an "eligible entity" shall include any entity that qualifies as a small business under the Small Business Administration's size standards for its industry grouping, as set forth in 13 C.F.R. § 121-201, at the time the transaction is approved by the FCC, and holds (i) 30 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will own the media outlet; or (ii)

15 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will own the media outlet, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (iii) more than 50 percent of the voting power of the corporation that will own the media outlet if such corporation is a publicly traded company.

3. Section 73.3598 is amended by revising paragraph (a) to read as follows:

§ 73.3598 Period of construction.

(a) **Except as provided in the last two sentences of this paragraph, e**ach original construction permit for the construction of a new TV, AM, FM or International Broadcast; low power TV; TV translator; TV booster; FM translator; or FM booster station, or to make changes in such existing stations, shall specify a period of three years from the date of issuance of the original construction permit within which construction shall be completed and application for license filed. **Except as provided in the last two sentences of this paragraph, e**ach original construction permit for the construction of a new LPFM station shall specify a period of eighteen months from the date of issuance of the construction permit within which construction shall be completed and application for license filed. A LPFM permittee unable to complete construction within the time frame specified in the original construction permit may apply for an eighteen month extension upon a showing of good cause. The LPFM permittee must file for an extension on or before the expiration of the construction deadline specified in the original construction permit. **An eligible entity that acquires an issued and outstanding construction permit for a station in any of the services listed in this paragraph shall have the time remaining on the construction permit or eighteen months from the consummation of the assignment or transfer of control, whichever is longer, within which to complete construction and file an application for license. For purposes of the preceding sentence, an "eligible entity" shall include any entity that qualifies as a small business under the Small Business Administration's size standards for its industry grouping, as set forth in 13 C.F.R. § 121-201, at the time the transaction is approved by the FCC, and holds (i) 30 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will hold the construction permit; or (ii) 15 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will hold the construction permit, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (iii) more than 50 percent of the voting power of the corporation that will hold the construction permit if such corporation is a publicly traded company.**

4. Section 73.5008 is amended by revising paragraph (c) to read as follows:

(c) An attributable interest in a winning bidder or in a medium of mass communications shall be determined in accordance with Section 73.3555 and Note 2. In addition, the attributable mass media interests, if any, held by an individual or entity with an equity and/or debt interest(s) in a winning bidder shall be attributed to that winning bidder for purposes of determining its eligibility for the new entrant bidding credit, if the equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed thirty-three (33) percent of the total asset value (defined as the aggregate of all equity plus all debt) of the winning bidder**, or where the winning bidder is an eligible entity, the combined equity and debt of the interest holder in the winning bidder is less than 50 percent or the total debt of the interest holder in the winning bidder does not exceed 80 percent of the asset value of the winning bidder and the interest holder does not hold any equity interest, option, or promise to acquire an equity interest in the winning bidder or any related entity. For purposes of the preceding sentence, an "eligible entity" shall include any entity that qualifies as a small business under the Small Business Administration's size standards for its**

industry grouping, as set forth in 13 C.F.R. § 121-201, at the time the transaction is approved by the FCC, and holds (i) 30 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will own the media outlet; or (ii) 15 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will own the media outlet, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (iii) more than 50 percent of the voting power of the corporation that will own the media outlet if such corporation is a publicly traded company.

APPENDIX B

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Third Further Notice of Proposed Rule Making* ("*Notice*"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice*. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[2] In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rules

2. The *Notice* invites comment on several ways to increase participation in the broadcasting industry by new entrants and small businesses, especially minority- and women-owned businesses, with the goal of promoting innovation, diversity of ownership and viewpoints, spectrum efficiency, and competition in media markets. The *Notice* first invites comment on how to define the class of eligible entities that will be entitled to benefit from the Commission's proposals.

3. The *Notice* then invites comment on a range of proposals to stimulate ownership diversity, including permitting share-time arrangements between FM licensees and SDBs; extension of the dual operating period authorization and temporary exemption of expanded band authorization in the AM radio context; and reinstatement of 20 AM licenses that were voluntarily surrendered. In addition, the Commission seeks comment on proposed revisions to FCC Form 323 to enhance the ability of the Commission to collect information on the racial and gender identity of radio and television licensees.

4. The *Notice* further requests comment on a proposal to grant structural rule waivers for parties that create and maintain incubator programs for SDBs; a proposal that the FCC permit FM licensees to change their station community of license to any community located in the same radio market under certain conditions; and seeks input on whether the Commission has authority to require cable operators to carry Class A television stations and whether the Commission should reallocate TV Channels 5 and 6 for FM broadcasting. Finally, the Commission requests refreshed comments on certain proposals advanced by NABOB and Rainbow/PUSH Coalition during the 2002 Biennial Review of the Commission's media ownership rules.

B. Legal Basis

5. This *Notice* is adopted pursuant to sections 1, 2(a), 3, 4(i, j), 257, 301, 303(r), 307-10, and 614-15 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 153, 154(i, j), 257, 301, 303(r), 307-10, 534-35.

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

6. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[4] The RFA defines the

---

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *See id*.

[4] 5 U.S.C. § 603(b)(3).

term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental entity" under Section 3 of the Small Business Act.[5] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[6] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[7]

7. **Television Broadcasting.** In this context, the application of the statutory definition to television stations is of concern. The Small Business Administration defines a television broadcasting station that has no more than $13 million in annual receipts as a small business. Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[8] According to Commission staff review of the BIA Financial Network, Inc. Media Access Pro Television Database as of December 7, 2007, about 825 (66 percent) of the 1,250 commercial television stations in the United States have revenues of $13 million or less. However, in assessing whether a business entity qualifies as small under the above definition, business control affiliations[9] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the attribution rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

8. 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 and in this context to define or quantify the criteria that would establish whether a specific television station is dominant in its market of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any television stations from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. It is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

9. **Radio Broadcasting.** The Small Business Administration defines a radio broadcasting entity that has $6.5 million or less in annual receipts as a small business.[10] Business concerns included in this industry are those "primarily engaged in broadcasting aural programs by radio to the public."[11] According to Commission staff review of the BIA Financial Network, Inc. Media Access Radio Analyzer Database as of December 7, 2007, about 10,500 (95 percent) of 11,050 commercial radio stations in the United States have revenues of $6.5 million or less. We note, however, that in assessing whether a

---

[5] *Id*. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies, "unless an agency, after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of the term where appropriate to the activities of the agency and publishes the definition(s) in the Federal Register."

[6] *Id.*

[7] 15 U.S.C. § 632.

[8] 2007 NAICS Code 515120. This category description states: "This industry comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public". U.S. Census Bureau 2007 NAICS Definitions, Television Broadcasting.

[9] "[Business concerns] are affiliates of each other when one business concern controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1).

[10] *See* 2007 NAICS code 515112.

[11] *Id.*

business entity qualifies as small under the above definition, business control affiliations[12] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

10. In this context, the application of the statutory definition to radio stations is of concern. An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time and in this context to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any radio station from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

11. **Class A TV, LPTV, and TV translator stations.** The rules and policies adopted herein may also apply to licensees of Class A TV stations, low power television ("LPTV") stations, and TV translator stations, as well as to potential licensees in these television services. The same SBA definition that applies to television broadcast licensees would apply to these stations. The SBA defines a television broadcast station as a small business if such station has no more than $13.0 million in annual receipts.[13] Currently, there are approximately 567 licensed Class A stations, 2,227 licensed LPTV stations, and 4,518 licensed TV translators.[14] Given the nature of these services, we will presume that all of these licensees qualify as small entities under the SBA definition. We note, however, that under the SBA's definition, revenue of affiliates that are not LPTV stations should be aggregated with the LPTV station revenues in determining whether a concern is small. Our estimate may thus overstate the number of small entities since the revenue figure on which it is based does not include or aggregate revenues from non-LPTV affiliated companies. We do not have data on revenues of TV translator or TV booster stations, but virtually all of these entities are also likely to have revenues of less than $13.0 million and thus may be categorized as small, except to the extent that revenues of affiliated non-translator or booster entities should be considered.

12. **FM Translator Stations and Low Power FM Stations**. The proposed rules and policies could affect licensees of FM translator and booster stations and low power FM (LPFM) stations, as well as to potential licensees in these radio services. The same SBA definition that applies to radio broadcast licensees would apply to these stations. The SBA defines a radio broadcast station as a small business if such station has no more than $6.5 million in annual receipts.[15] Currently, there are approximately 5540 licensed FM translator and 262 booster stations and 820 licensed LPFM stations.[16] Given the nature of these services, we will presume that all of these licensees qualify as small entities under the SBA definition.

---

[12] "[Business concerns] are affiliates of each other when one business concern controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1).

[13] *See* 13 C.F.R. § 121.201, NAICS Code 515120.

[14] *See* News Release, "Broadcast Station Totals as of December 21, 2006," (Jan. 26, 2007), *available at* http://www.fcc.gov/mb/.

[15] *See* 13 C.F.R. § 121.201, NAICS Code 515112.

[16] *See News Release*, "Broadcast Station Totals as of December 31, 2006" (rel. Jan. 26, 2007) (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269784A1.doc).

13. **Cable and Other Subscription Programming**. The Census Bureau recently updated the NAICS so that these firms are included in the Wired Telecommunications Carriers category[17] which is described as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[18] The SBA has updated the small business size standards to accord with the revised NAICS. The size standard for Wired Telecommunications Carriers is all firms having an average of 1,500 or fewer employees. The Census Bureau has not collected information on the size distribution of firms in the revised classification of Wired Telecommunications Carriers. Accordingly we will apply the new size standard to Census Bureau data for 2002 regarding the size distribution of Cable and Other Program Distribution.[19] There were a total of 1,191 firms in this category that operated for the entire year.[20] Of this total, 1,178 firms had fewer than 1,000 employees.[21] Thus, under this size standard, the majority of firms can be considered small.

14. **Cable System Operators.** The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[22] The Commission has determined that an operator serving fewer than 653,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[23] Industry data indicate that, of 994 cable operators nationwide, all but thirteen are small under this size standard.[24] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[25] and therefore we are unable to estimate

[17] 13 C.F.R. § 121.201 (2007), NAICS code 517110

[18] U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[19] 13 C.F.R. § 121.201 (2002), NAICS code 517510.

[20] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 5, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

[21] *Id.*

[22] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[23] 47 C.F.R. § 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (CSB Jan. 24, 2001).

[24] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2007*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of Mar. 30, 2006); Warren Communications News, *Television & Cable Factbook 2007*, "Ownership of Cable Systems in the United States," pages D-1737 to D-1786.

[25] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

more accurately the number of cable system operators that would qualify as small under this size standard.

15. **Open Video Services**. Open Video Service ("OVS") systems provide subscription services.[26] In 2007, the SBA created a small business size standard for Cable and Other Subscription Programming.[27] The Census Bureau has not collected information on the size distribution of firms in the new standard. Accordingly we will apply the new size standard to Census Bureau data for 2002 regarding the size distribution of Cable and Other Program Distribution.[28] This standard provides that a small entity is one with $13.5 million or less in annual receipts. The Commission has certified a large number of OVS operators, and some of these are currently providing service.[29] Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that it does not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS. Given this fact, the Commission concludes that those entities might qualify as small businesses, and therefore may be affected by the rules and policies adopted herein.

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

16. Depending on the rules adopted as a result of this *Notice*, the Report and Order (R&O) ultimately adopted in this proceeding may contain new information collections for eligible entities and/or modified ones for incumbent broadcasters. Any changes in recording or recordkeeping would result from any changes in the Commission's forms necessary to implement any rules adopted to promote new entry of small businesses and eligible entities. As noted above, we invite small entities to comment on any such recordkeeping issues in response to the *Notice*.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

17. The RFA requires an agency to describe any significant alternatives that might minimize any significant economic impact on small entities. Such alternatives may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[30]

18. As noted, we are directed under law to describe any such alternatives we consider, including alternatives not explicitly listed above.[31] The *Notice* describes and seeks comment on several possible ways to ease entry into the broadcasting business by small entities that have traditionally faced significant difficulties in entering broadcasting. The *Notice* seeks comment on how the proposals herein will achieve that goal. The Commission especially encourages small entities to comment on the proposals in the *Notice* in this proceeding. The Commission welcomes comment on how to minimize any burdens

[26] *See* 47 U.S.C. § 573.

[27] 13 C.F.R. § 12.1201, NAICS code 517210.

[28] 13 C.F.R. § 121.201 (2002), NAICS code 517510.

[29] *See* http://www.fcc.gov/mb/ovs/csovsarc.html (last visited in January 2008).

[30] 5 U.S.C. § 603(c).

[31] 5 U.S.C. § 603(b).

on small cable system operators that might result from eligible entities being entitled to carriage on such systems under the must carry statute and rules.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

APPENDIX C

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*NPRM*) in MB Docket No. 02-277.[2] The Commission sought written public comment on the proposals in the *NPRM* including comment on the IRFA. The Commission also prepared a Supplemental Initial Regulatory Flexibility Analysis (Supplemental IRFA) and a Second Supplemental Initial Regulatory Flexibility Analysis (Second Supplemental IRFA) of the possible significant economic impact on small entities of the proposals in the *Further Notice of Proposed Rulemaking* (*Further Notice*)[3] and the *Second Further Notice of Proposed Rulemaking* (*Second Further Notice*),[4] respectively. The Commission sought written public comment on the *Further Notice*, including comment on the Supplemental IRFA, and written public comment on the *Second Further Notice*, including comment on the Second Supplemental IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[5]

A. Need for, and Objectives of, the *Report and Order* (*Order*)

2. The *Order* takes several steps to increase participation in the broadcasting industry by new entrants and small businesses, including minority- and women-owned businesses, which historically have not been well-represented in the broadcasting industry. The *Order* sets forth the Commission's objectives, defines the entities that will benefit initially from the Commission's actions, and adopts a number of measures modifying certain Commission rules and policies to encourage ownership diversity and new entry in broadcasting.

B. Legal Basis

3. This *Order* is adopted pursuant to Sections 1, 2(a), 4(i), 257, 303, and 307-310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 257, 303, and 307-310.

C. Summary of Significant Issues Raised by Public Comments in Response to the IRFA and the Supplemental IRFA

4. The Commission received no comments in direct response to the IRFA, the Supplemental IRFA, or the Second Supplemental IRFA. However, the Commission received comments that discuss issues of interest to small entities. These comments were taken into account during the Commission's decision-making process to adopt certain rule modifications to promote broadcast ownership among new

---

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Broadcast Stations in Local Markets, Definition of Radio Markets,* 17 FCC Rcd 18503, 18558 App. A (2002).

[3] *2006 Quadrennial Regulatory Review – Review Of The Commission's Broadcast Ownership Rules And Other Rules Adopted Pursuant To Section 202 Of The Telecommunications Act Of 1996*, Further Notice of Proposed Rule Making, 21 FCC Rcd 8834 (2006).

[4] *2006 Quadrennial Regulatory Review – Review Of The Commission's Broadcast Ownership Rules And Other Rules Adopted Pursuant To Section 202 Of The Telecommunications Act Of 1996*, Second Further Notice of Proposed Rule Making, 22 FCC Rcd 14215 (2007).

[5] *See* 5 U.S.C. § 604.

entrants and small businesses, including minority- and women-owned businesses. These rule modifications are summarized in the section of this FRFA discussing the steps taken to minimize a significant impact on small entities, and the significant alternatives considered.

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

5. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[6] The RFA defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental entity” under Section 3 of the Small Business Act.[7] In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.[8] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[9]

6. **Television Broadcasting.** In this context, the application of the statutory definition to television stations is of concern. The Small Business Administration defines a television broadcasting station that has no more than $13 million in annual receipts as a small business. Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”[10] According to Commission staff review of the BIA Financial Network, Inc. Media Access Pro Television Database as of December 7, 2007, about 825 (66 percent) of the 1,250 commercial television stations in the United States have revenues of $13 million or less. However, in assessing whether a business entity qualifies as small under the above definition, business control affiliations[11] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

7. 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 and in this context to define or quantify the criteria that would establish whether a specific television station is dominant in its market of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any television stations from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of “small business” is that the entity must be independently owned and operated. It is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

---

[6] 5 U.S.C. § 603(b)(3).

[7] *Id*. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies, “unless an agency, after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of the term where appropriate to the activities of the agency and publishes the definition(s) in the Federal Register.”

[8] *Id.*

[9] 15 U.S.C. § 632.

[10] 2007 NAICS Code 515120. This category description states: “This industry comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.” U.S. Census Bureau 2007 NAICS Definitions, Television Broadcasting.

[11] “[Business concerns] are affiliates of each other when one business concern controls or has the power to control the other or a third party or parties controls or has the power to control both.” 13 C.F.R. § 121.103(a)(1).

8. **Radio Broadcasting.** The Small Business Administration defines a radio broadcasting entity that has $6.5 million or less in annual receipts as a small business.[12] Business concerns included in this industry are those "primarily engaged in broadcasting aural programs by radio to the public."[13] According to Commission staff review of the BIA Financial Network, Inc. Media Access Radio Analyzer Database as of December 7, 2007, about 10,500 (95 percent) of 11,050 commercial radio stations in the United States have revenues of $6.5 million or less. We note, however, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations[14] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

9. In this context, the application of the statutory definition to radio stations is of concern. An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time and in this context to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any radio station from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

10. **Class A TV, LPTV, and TV translator stations.** The rules and policies adopted herein may also apply to licensees of Class A TV stations, low power television ("LPTV") stations, and TV translator stations, as well as to potential licensees in these television services. The same SBA definition that applies to television broadcast licensees would apply to these stations. The SBA defines a television broadcast station as a small business if such station has no more than $13.0 million in annual receipts.[15] Currently, there are approximately 567 licensed Class A stations, 2,227 licensed LPTV stations, and 4,518 licensed TV translators.[16] Given the nature of these services, we will presume that all of these licensees qualify as small entities under the SBA definition. We note, however, that under the SBA's definition, revenue of affiliates that are not LPTV stations should be aggregated with the LPTV station revenues in determining whether a concern is small. Our estimate may thus overstate the number of small entities since the revenue figure on which it is based does not include or aggregate revenues from non-LPTV affiliated companies. We do not have data on revenues of TV translator or TV booster stations, but virtually all of these entities are also likely to have revenues of less than $13.0 million and thus may be categorized as small, except to the extent that revenues of affiliated non-translator or booster entities should be considered.

11. **FM Translator Stations and Low Power FM Stations**. The proposed rules and policies could affect licensees of FM translator and booster stations and low power FM (LPFM) stations, as well as to potential licensees in these radio services. The same SBA definition that applies to radio broadcast licensees would apply to these stations. The SBA defines a radio broadcast station as a small business if

[12] *See* 2007 NAICS code 515112.

[13] *Id.*

[14] "[Business concerns] are affiliates of each other when one business concern controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1).

[15] *See* 13 C.F.R. § 121.201, NAICS Code 515120.

[16] *See* News Release, "Broadcast Station Totals as of December 21, 2006," (Jan. 26, 2007), *available at* http://www.fcc.gov/mb/.

such station has no more than $6.5 million in annual receipts.[17] Currently, there are approximately 5540 licensed FM translator stations and 262 FM booster stations and 820 licensed LPFM stations.[18] Given the nature of these services, we will presume that all of these licensees qualify as small entities under the SBA definition.

12. **International Broadcast Stations.** Commission records show that there are approximately 24 international high frequency broadcast station authorizations. We do not request nor collect annual revenue information, and are unable to estimate the number of international high frequency broadcast stations that would constitute small businesses under the SBA definition.

13. **Daily Newspapers.** The SBA has developed a small business size standard for the census category of Newspaper Publishers; that size standard is 500 or fewer employees.[19] Census Bureau data for 2002 show that there were 5,159 firms in this category that operated for the entire year.[20] Of this total, 5,065 firms had employment of 499 or fewer employees, and an additional 42 firms had employment of 500 to 999 employees. Therefore, we estimate that the majority of Newspaper Publishers are small entities that might be affected by our action.

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

14. Licensees engaged in the sale of a commercially operated AM, FM, TV, Class A TV, or international broadcast station will be required to certify on Form 314 or 315 that they did not discriminate on the basis of race, color, religion, national origin, or sex in the sale of their station. Broadcasters that are renewing their licenses will have to certify on Form 303-S that their advertising sales contracts do not contain discriminatory clauses.

15. The Commission revised its rules to afford eligible entities that acquire an expiring construction permit additional time to build out the facility (either the time remaining on the original construction permit or 18 months, whichever is greater). To obtain this benefit, eligible entities will have to demonstrate that they meet the eligibility criteria. In addition, the Commission relaxed its equity/debt plus attribution standard for interest holders in eligible entities in order to encourage investment in smaller companies. For both these rule changes, there will be revisions to application forms or the forms' instructions.

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

16. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small

[17] *See* 13 C.F.R. § 121.201, NAICS Code 515112.

[18] *See News Release*, "Broadcast Station Totals as of December 31, 2006" (Jan. 26, 2007), *available at* (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269784A1.doc).

[19] 13 C.F.R. § 121.201; NAICS code 511110.

[20] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 511110 (issued Nov. 2005).

entities.[21]

17. The Commission's intent in adopting the rule modifications in the *Order* was to expand broadcast ownership opportunities for new entrants and small businesses, including minority- and women-owned businesses. Therefore, it is anticipated that the adopted rule changes will benefit small businesses, not burden them. Although the Commission adopted numerous proposals to benefit small businesses, it declined to adopt certain other proposals after considering the various ramifications involved. The *Order* describes in detail the Commission's reasoning for each proposal adopted or declined.

18. To promote and expand media ownership diversity, the Commission: (1) changed the construction permit deadlines to allow eligible entities that acquire expiring construction permits additional time to build out the facility; (2) revised the equity/debt plus attribution standard to facilitate investment in eligible entities; (3) modified the distress sale policy to allow certain licensees – those whose license has been designated for a revocation hearing or whose renewal application has been designated for a hearing on basic qualifications issues – to sell the station to an eligible entity prior to the commencement of the hearing; (4) adopted an Equal Transactional Opportunity Rule that bars race or gender discrimination in broadcast transactions; (5) adopted a "zero-tolerance" policy for ownership fraud and agreed to "fast-track" ownership-fraud claims; (6) required broadcasters renewing their licenses to certify that their advertising sales contracts do not discriminate on the basis of race or gender; (7) resolved to conduct annual longitudinal studies of minority and female ownership after the Commission improves its data gathering process; (8) encouraged local and regional banks to participate in SBA-guaranteed loan programs in order to facilitate broadcast and telecommunications-related transactions; (9) adopted modifications to give priority to any entity financing or incubating an eligible entity in certain duopoly situations; (10) permitted the consideration of requests to extend divestiture deadlines in mergers in which applicants have actively solicited bids for divested properties from eligible entities; (11) revised the exception to the prohibition on the assignment or transfer of grandfathered radio station combinations; (12) agreed to convene an access-to-capital conference; and (13) decided to create a guidebook on increasing diversity in the media and telecom industries.

19. The Commission considered but did not adopt proposals: (1) to permit the licensee of a grandfathered station combination to sell the cluster intact to a socially and economically disadvantaged business ("SDB"); (2) to adopt a "structural" waiver of its broadcast ownership rules for applicants selling a station to an SDB and to implement any ownership deregulation in stages; (3) to permit applicants to acquire stations beyond permissible ownership limits if they establish and implement an "incubator" program for disadvantaged businesses; (4) to adopt certain measures to open FM spectrum for new entrants; (5) to work with the Treasury Department to encourage institutions to place capital in minority-focused private equity funds; (6) to initiate discussions with the major pension funds to encourage the establishment of a special fund to place capital with minority-focused private equity funds; (7) to consider relaxing foreign ownership restrictions where non-controlling foreign investment would help supply capital to domestic, minority-owned broadcasters; and (8) to repeal the subcaps on ownership of same service (AM or FM) local radio stations.

G. Report to Congress

20. The Commission will send a copy of this Order, including this FRFA, in a report to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.[22] In

[21] 5 U.S.C. § 603 (c).

[22] *See* 5 U.S.C. § 801(a)(1)(A).

addition, the Commission will send a copy of this *Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[23]

[23] *See* 5 U.S.C. § 604 (b).

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: *Promoting Diversification of Ownership in the Broadcasting Services, et al.* (MB Docket Nos. 07-294, 06-121, 02-277, 01-235, 01-317, 00-244 and 04-228).

In order to ensure that the American people have the benefit of a competitive and diverse media marketplace, we need to create more opportunities for different, new and independent voices to be heard. The Commission has recently taken steps to address the concern that there are too few local outlets available to minorities and new entrants.

Last month, we significantly reformed our Low Power FM rules in order to facilitate LPFM stations' access to limited radio spectrum. The new order streamlines and clarifies the process by which LPFM stations can resolve potential interference issues with full-power stations and establishes a going-forward processing policy to help those LPFMs that have regularly provided eight hours of locally originated programming daily in order to preserve this local service. The new rules are designed to better promote entry and ensure local responsiveness without harming the interests of full-power FM stations or other Commission licensees.

The Commission also adopted an order last month that will facilitate the use of leased access channels. Specifically, the order made leasing channels more affordable and expedited the complaint process. These steps will make it easier for independent programmers to reach local audiences.

I believe it is important for the Commission continually look for ways to foster the development of independent channels and voices. The item before us today adopts rules that are designed to promote diversity by increasing and expanding broadcast ownership opportunities for small businesses, including minority and women-owned businesses. For example, we adopt a new rule that gives small businesses and new entrants that acquire expiring construction permits additional time to build out their broadcast facilities. We also revise the Commission's equity/debt attribution standard to facilitate investment in small businesses in order to promote diversity of ownership in broadcast facilities. I believe that these actions, along with others like adopting a rule barring race or gender discrimination in broadcast transactions, adopting a "zero-tolerance" policy for ownership fraud, and committing to the Commission convening an "Access-to-Capital" conference in the first half of 2008 in New York City will go to a long way towards opening up opportunities for small businesses and new entrants. All of the rules and policies that we adopt are designed to serve the public interest, providing for competition, localism, and diversity in the media.

Now, some maintain that the Commission's definition of "eligible entity" – which uses the SBA definition – is insufficient. They argue that the adoption of this definition is regressive and the Commission is better off doing nothing than adopting this definition. I disagree. First, we specifically disagree with the methodology used to argue that our definition is regressive. The item explains how even using Free Press data, we find that at least 8.5 percent, not 5.88 as Free Press claims, of commercial radio stations owned by SBA-defined small businesses are minority-owned. Moreover, their methodology does not account for the new entrants that may come in as a result of the opportunities presented by the order. Based on this, we find claims that our definition of eligible entity is regressive to be unfounded.

Second, I disagree that the public would be well-served if the Commission would to delay its consideration of these issues. The fact is that the Commission has put off these issues too long. It is far better that the Commission adopt these proposals that are geared toward promoting minority and female ownership of the airwaves than to wait for a more perfect definition of eligible entity. In this regard, I note that we have also opened up a further notice specifically considering the issue of whether a more

expansive definition should adopted. Although I admit that the legal hurdle is a high one, I remain open to considering any other definitions that are put forward. For example, I understand that the Commission's Diversity Committee is planning to examine this issue and I look forward to reviewing their findings. In the meantime, I am confident that small businesses, including minorities and small businesses will benefit from the new rules that we adopt today. Further delay in the implementation of these rules would be a mistake.

The Commission's actions today strike an appropriate balance. They carefully take into account the opportunities and challenges of today's media marketplace and, at the same time, prioritize the commitment to localism and diversity. I hope that our policies prove to have a beneficial affect on the diversity of voices in the media market.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS
CONCUR IN PART, DISSENT IN PART

Re: Promoting Diversification of Ownership in the Broadcasting Services, et al. (MB Docket Nos. 07-294, 06-121, 02-277, 01-235, 01-317, 00-244 and 04-228).

Today's decision would make George Orwell proud. We claim to be giving the news industry a shot in the arm—but the real effect is to reduce total newsgathering. We shed crocodile tears for the financial plight of newspapers—yet the truth is that newspaper profits are about double the S&P 500 average. We pat ourselves on the back for holding six field hearings across the United States—yet today's decision turns a deaf ear to the thousands of Americans who waited in long lines for an open mike to testify before us. We say we have closed loopholes—yet we have introduced new ones. We say we are guided by public comment—yet the majority's decision is overwhelmingly opposed by the public as demonstrated in our record and in public opinion surveys. We claim the mantle of scientific research—even as the experts say we've asked the wrong questions, used the wrong data, and reached the wrong conclusions.

I am not the only one disturbed by this illogical scenario. Congress and the American people have done everything but march down to Southwest DC and physically shake some sense into us. Everywhere we go, the questions are the same: Why are we rushing to encourage more media merger frenzy when we haven't addressed the demonstrated harms caused by previous media merger frenzy? Women and minorities own low single-digit per centages of America's broadcast outlets and big consolidated media continues to slam the door in their faces. It's going to take some major policy changes and a coordinated strategy to fix that. Don't look for that from this Commission.

Instead we are told to be content with baby steps to help women and minorities—but the fine print shows that the real beneficiaries will be small businesses owned by white men. So even as it becomes abundantly clear that the real cause of the disenfranchisement of women and minorities is media consolidation, we give the green light to a new round of—yes, you guessed it—media consolidation.

Local news, local music and local groups so often get shunted aside when big media comes to town. Commissioner Adelstein and I have heard the plaintive voices of thousands of citizens all across this land in dozens of town meetings and public forums. From newscasters fired by chain owners with corporate headquarters thousands of miles away to local musicians and artists denied airtime because of big media's homogenization of our music and our culture. From minorities reeling from the way big media ignores their issues and caricatures them as people to women saying the only way to redress their grievances is to give them a shot to compete for use of the people's airwaves. From public interest advocates fighting valiantly for a return of localism and diversity to small, independent broadcasters who fight an uphill battle to preserve their independence. It will require tough rules of the road to redress our localism and diversity gaps. Do you see any such rules being passed today? To the idea that license holders should give the American people high quality programming in return for free use of the public airwaves, the majority answers that we need more study of problems that have been documented and studied to death for a decade and more. Today's outcome is the same old same old: one more time, we're running the fast-break for our big media friends and the four corner stall for the public interest.

It is time for the American people to understand the game that's being played here. Big media doesn't want to tell the full story, of course, but I have heard first-hand from editorial page editors who have told me they can cover any story, save one—media consolidation, and that they have been instructed to stay away from that one. But that's another story.

Today's story is a majority decision unconnected to good policy and not even incidentally concerned with encouraging media to make our democracy stronger. We are not concerned with gathering valid data, conducting good research, or following the facts where they lead us.

Our motivations are less Olympian and our methodology far simpler—we generously ask big media to sit on Santa's knee, tell us what it wants for Christmas, and then push through whatever of these wishes are politically and practically feasible. No test to see if anyone's been naughty or nice. Just another big, shiny present for the favored few who already hold an FCC license—and a lump of coal for the rest of us. Happy holidays!

If you need convincing of just how non-expertly this expert agency has been acting lately, you couldn't have a better example than the formulation of the cross-ownership rule that the majority is adopting today. I know it's a little detailed to see how the sausage is made, but it's worth a listen.

On November 2, 2007—with just a week's notice—the FCC announced that it would hold its final media ownership hearing in Seattle. Despite the minimal warning, 1,100 citizens turned out to give intelligent and impassioned testimony on how they believed the agency should write its media ownership rules. Little did they know that the fix was already in, and that the now infamous *New York Times* op-ed was in the works announcing a highly-detailed cross-ownership proposal.

Put bluntly, those Commissioners and staff who flew out to Seattle with staff, the sixteen witnesses, the Governor, the State Attorney General and all the other public officials who came, plus the 1,100 Seattle residents who had chosen to spend their Friday night waiting in line to testify were, as Rep. Jay Inslee put it, treated like "chumps." Their comments were not going to be part of the agency's formulation of a draft rule—it was just for show, to claim that the public had been given a chance to participate. The agency had treated the public like children allowed to visit the cockpit of an airliner—not actually allowed to fly the plane, of course, but permitted for a brief, false moment to imagine that they were.

The *New York Times* op-ed appeared on November 13, the next business day after the Seattle hearing. That same day, a unilateral public notice was issued, providing just 28 days for people to comment on the specific proposal, with no opportunity for replies. The agency received over 300 comments from scholars, concerned citizens, public interest advocates, and industry associations—the overwhelming majority of which condemned the Chairman's plan. But little did these commenters know that on November 28, two weeks ***before*** their comments were even due, the draft Order on newspaper-broadcast cross ownership had already been circulated. Once again, public commenters were treated as unwitting and unwilling participants in a Kabuki theater.

Then, last night at 9:44 pm—just a little more than twelve hours before the vote was scheduled to be held and long after the Sunshine period had begun—a significantly revised version of the Order was circulated. Among other changes, the item now granted all sorts of permanent new waivers and provided a significantly-altered new justification for the 20-market limit. But the revised draft mysteriously deleted the existing discussion of the "four factors" to be considered by the FCC in examining whether a proposed combination was in the public interest. In its place, the new draft simply contained the cryptic words "[Revised discussion to come]." Although my colleagues and I were not apprised of the revisions, *USA Today* fared better because it apparently got an interview that enabled it to present the Chairman's latest thinking. Maybe we really are the Federal Newspaper Commission.

At 1:57 this morning, we received a new version of the proposed test for allowing more newspaper-broadcast combinations. I can't say that I fully appreciate the test's finer points given the lateness of the hour and the fact that there was no time afforded to parse the finer points of the new rule. But this much is clear: the new version keeps the old loopholes and includes two new one pathways to cross ownership approval. So please don't buy the line that the rule we adopt today involves fewer loopholes—it adds new ones. Finally, this morning at 11:12 a.m. as I was walking out my office door to come to this meeting, we received an e-mail containing additional changes. The gist of one of these seems to be that the Commission need not consider all of the "four factors" in all circumstances.

This is not the way to do rational, fact-based, and public interest-minded policy making. It's actually a great illustration of why administrative agencies are required to operate under the constraints of administrative process—and the problems that occur when they ignore that duty. At the end of the day, process matters. Public comment matters. Taking the time to do things right matters. A rule reached through a slipshod process, and capped by a mad rush to the finish line, will—purely on the merits—simply not pass the red face test. Not with Congress. Not with the courts. Not with the American people.

It's worth stepping back for a moment from all the detail here to look at the fundamental rationale behind today's terrible decision. Newspapers need all the help they can get, we are told. A merger with a broadcast station in the same city will give them access to a revenue stream that will let them better fulfill their newsgathering mission. At the same time, we are also assured, our rules will require "independent news judgment" (at least among consolidators outside the top 20 markets). In other words, we can have our cake and eat it too—the economic benefits of consolidation without the reduction of voices that one would ordinarily expect when two news entities combine.

But how on earth can this be? To begin with, to the extent that the two merged entities remain truly "independent," then there won't be the cost savings that were supposed to justify the merger in the first place. On the other hand, if independence merely means maintaining two organizational charts for the same newsroom, then we won't have any more reporters on the ground keeping an eye on government. Either way, we can't have our cake and eat it, too.

Also, since when do unprofitable businesses support themselves by merging with profitable ones—and then sink ***more*** resources into the money-losing division simply as a public service? Think about it this way. If any of us were employed by a struggling company, and we suddenly learned that a Wall Street financier had obtained control, would we (1) clap our hands with joy because we expect the new owner is going to throw a bunch of cash our way and tell us to keep on doing what we'd been doing, except more lavishly or (2) start to fear for our jobs and brace for a steady diet of cost cutting?

Here's my prediction on how it will really work. Mergers will be approved in both the top 20 and non-top-20 markets—towns big and small—because the set of exceptions we announce today have all the firmness of a bowl of Jell-O. Regardless of our supposed commitment to "independent news judgment" the two entities' newsrooms will be almost completely combined, with round after round of job cuts in order to cut costs. It's interesting to hear the few proponents of this rule bemoan the lost jobs that they say result from failing newspapers. Ask them this: in this era of consolidation in so many industries, isn't cutting jobs about the first thing a merged entity almost always does so it can show Wall Street it is really serious about cutting costs and polishing up the next quarterly report? These job losses are the ***result*** of consolidation. And more consolidation will mean more lost jobs. Newly-merged entities will attempt to increase their profit margins by raising advertising rates and relentless cost-cutting. Herein is the ***real*** economic justification for media consolidation within a single market.

The news isn't so good for other businesses in the consolidated market, either. Think about the other broadcast stations there. It's just like Wal-Mart coming to town—the existing news providers look around at the new reality and figure out pretty fast that they ought to head for the exit when it comes to producing news. Now, it may not be as stark as actually cancelling the evening news—it could just mean doing more sports or more weather or more ads during that half hour. But at the end of the day, the combined entity is going to have a huge advantage in producing news—and the other stations will make a reasonable calculation to substantially reduce their investment in the business. This is why, by the way, experts have been able to demonstrate—***in the record before the FCC, using the FCC's own data***—that cross ownership leads to ***less*** total newsgathering in a local market. And that has large and devastating effects on the diversity and vitality of our civic dialogue.

Let's also be careful not get too carried away with the supposed premise for all this contortionism, namely the poor state of local newspapers. The death of the traditional news business is often greatly exaggerated. The truth remains that the profit margins for the newspaper industry last year averaged around 17.8%; the figure is even higher for broadcast stations. As the head of the Newspaper Association of America put it in a Letter to the Editor of the *Washington Post* on July 2 of this year: "The reality is that newspaper companies remain solidly profitable and significant generators of free cash flow." And as Member after Member Congress has reminded us, our job is not to ensure that newspapers are profitable—which they mostly are. Our job is to protect the principles of localism, diversity and competition in our media.

Were newspapers momentarily discombobulated by the rise of the Internet? Probably so. Are they moving now to turn threat into opportunity? Yes, and with signs of success. Far from newspapers being gobbled up by the Internet, we ought to be far more concerned with the threat of big media joining forces with big broadband providers to take the wonderful Internet we know down the same road of consolidation and control by the few that has already inflicted such heavy damage on our traditional media.

In the final analysis, the real winners today are businesses that are in many cases quite healthy, and the real losers are going to be all of us who depend on the news media to learn what's happening in our communities and to keep an eye on local government. Despite all the talk you may hear today about the threat to newspapers from the Internet and new technologies, today's *Order* actually deals with something quite old-fashioned. Powerful companies are using political muscle to sneak through rule changes that let them profit at the expense of the public interest. They are seeking to improve their economic prospects by capturing a larger percentage of the news business in communities all across the United States.

Let's get beyond the weeds of corporate jockeying and inking up our rubber stamps for a new round of media consolidation to look for a moment at what we are ***not*** doing today. That's the real story, I think—that the important issues of minority and female ownership and broadcast localism and how they are being short-changed by today's rush to judgment.

Minority and Female Ownership

Racial and ethnic minorities make up 33 percent of our population. They own a scant 3 percent of all full-power commercial TV stations. And that number is plummeting. Free Press recently released a study showing that during just the past year the number of minority-owned full-power commercial television stations declined by 8.5%, and the number of African American-owned stations decreased ***by nearly 60%***. It is almost inconceivable that this shameful state of affairs could be getting worse; yet here we are.

In most places there is something approaching unanimity that this has to change. Broadcasters, citizens, Members of Congress, and every leading civil rights organization agree that the status quo is not acceptable. Each of my colleagues has recognized, I believe, that paltry levels of minority and female ownership are a reality—which makes today's decision all the more disappointing. There was a real opportunity to do something meaningful today after years of neglect, and we blew it.

It didn't have to be this way. I proposed both a process and a solution. We should have started by getting an accurate count of minority and female ownership—the one that the Congressional Research Service and the Government Accountability Office both just found that we didn't have. The fact that we don't even know how many minority and female owners there are is indicative of how low this issue is on the FCC's list of priorities. We also should have convened an independent panel proposed by Commissioner Adelstein, and endorsed by many, that would have reviewed all of the proposals before us, prioritized them, and made recommendations for implementation. We could have completed this process in ninety days or less and then would have been ready to act.

Today's item ignores the pleas of the minority community to adopt a definition of "Eligible Entity" that could actually help their plight. Instead, the majority directs their policies at general "small businesses"— a decision that groups like Rainbow/Push and the National Association of Black Owned Broadcasters assert will do little or nothing for minority owners. Similarly, MMTC and the Diversity and Competition Supporters conclude that they would rather have no package at all than one that includes this definition. Lack of a viable definition poisons the headwaters. Should we wonder why the fish are dying downstream?

So while I can certainly support the few positive changes in this item that do not depend on the definitional issue—such as the adoption of a clear non-discrimination rule—these are overshadowed by the truly wasted opportunity to give potential minority and female owners a seat at the table they have been waiting for and have deserved for far too long. My fear now is that with cross ownership done, the attentions of this Commission will turn elsewhere.

Localism

At the same time that we have shamefully ignored the need to encourage media ownership by women and minorities, we have also witnessed a dramatic deterioration of the public interest performance of all our licensees. We have witnessed the number of statehouse and city hall reporters declining decade after decade, despite an explosion in state and local lobbying. The number of channels have indeed multiplied, but there is far less local programming and reporting being produced.

Are you interested in learning about local politics from the evening news? About 8 percent of such broadcasts contain any local political coverage at all, including races for the House of Representatives, and that was during the 30 days before the last presidential election. Interested in how TV reinforces stereotypes? Consider that the local news is four times more likely to show a mug shot during a crime story if the suspect is black rather than white.

The loss of localism impacts our music and entertainment, too. Just this morning, I had an e-mail from a musician who took a trip of several hundred miles and heard the same songs played on the car radio everywhere he traveled. Local artists, independent creative artists and small businesses are paying a frightful price in lost opportunity. Big consolidated media dampens local and regional creativity, and that begins to mess around pretty seriously with the genius of our nation.

All this is a travesty. We allow the nation's broadcasters to use half a trillion dollars of spectrum—for free. In return, we require that they serve the public interest: devoting at least some

airtime for worthy programs that inform viewers, support local arts and culture, and educate our children—in other words, that aspire to something beyond just minimizing costs and maximizing revenue.

Once upon a time, the FCC actually enforced this bargain by requiring a thorough review of a licensee's performance every three years before renewing the license. But during decades of market absolutism, we pared that down to "postcard renewal," a rubber stamp every eight years with no substantive review.

To begin with, the FCC needs to reinvigorate the license-renewal process. We need to look at a station's record every three or four years. I am disappointed that the majority so cavalierly dismisses this idea. And we should be actually ***looking*** at this record. Did the station show original programs on local civic affairs? Did it broadcast political conventions? In an era where too many owners live thousands of miles away from the communities they allegedly serve, do these owners meet regularly with local leaders and the public to receive feedback? Why don't we make sure that's done ***before*** we allow more consolidation?

In 2004, the Commission opened up a Notice of Inquiry to consider ways to improve localism by better enforcing the *quid pro quo* between the nation's broadcasters and the public. The Notice addressed many of the questions raised by earlier, dormant proceedings dating from years before. Today's Localism Notice asks more questions and tees up meritorious ideas—but again my question: why the rush to vote more consolidation now, consolidation that has been the bane of localism, and why put off systematic actions to redress the harms consolidation has inflicted?

Our FCC cart is ahead of our horse. Before allowing Big Media to get even bigger—and to start the predictable cycle of layoffs and downsizing that is the inevitable result of, indeed the economic rationale for, many types of mergers—we should be enforcing clear obligations for each and every FCC licensee.

Conclusion

Those who look for substantive action on these important issues concerning localism and minorities will look in vain, I predict, once the majority works its way on cross ownership. We are told that we cannot deal with localism and minority ownership because that would require ***delay***. But these questions have been before the Commission for almost a decade—and they have been ignored year after year. These issues could have been—should have been—teed up years ago. We begged for that in 2003 when we sailed off on the calamitous rules proposed by Chairman Powell and pushed through in another mad rush to judgment. Don't tell me it can't be done. It should have been done years ago. And we had the chance again this time around. Now, because of a situation not of Commissioner Adelstein's or my making, we are accused of delaying just because we want to make things better before the majority makes them far worse. I see.

When I think about where the FCC has been and where it is today, two conclusions:

First, the consolidation we have seen so far and the decision to treat broadcasting as just another business has ***not*** produced a media system that does a better job serving most Americans. Quite the opposite. Rather than reviving the news business, it has led to ***less*** localism, ***less*** diversity of opinion and ownership, ***less*** serious political coverage, ***fewer*** jobs for journalists, and the list goes on.

Second, I think we have learned that the purest form of commercialism and high quality news make uneasy bedfellows. As my own hero, Franklin Delano Roosevelt, put it in a letter to Joseph Pulitzer, "I have always been firmly persuaded that our newspapers cannot be edited in the interests of the

general public from the counting room." So, too, for broadcast journalism. This is not to say that good journalism is incompatible with making a profit—I believe that both interests can and must be balanced. But when TV and radio stations are no longer required by law to serve their local communities, and are owned by huge national corporations dedicated to cutting costs through economies of scale, it should be no surprise that, in essence, viewers and listeners have become the products that broadcasters sell to advertisers.

We could have been—should have been—here today lauding the best efforts of government to reverse these trends and to promote a media environment that actually strengthens American democracy rather than weakens it. Instead, we are marking not just a lost opportunity but the allowance of new rules that head media democracy in exactly the wrong direction.

I take great comfort from the conclusion of another critic of the current media system, Walter Cronkite, who said, "America is a powerful and prosperous nation. We certainly should insist upon, and can afford to sustain, a media system of which we can be proud."

Now it's up to the rest of us. The situation isn't going to repair itself. Big media is not going to repair it. This Commission is not going to repair it. But the people, their elected representatives, and attentive courts ***can*** repair it. Last time the Commission went down this road, the majority heard and felt the outrage of millions of citizens and Congress and then the court. Today's decision is just as dismissive of good process as that earlier one, just as unconcerned with what the people have said, just as heedless of the advice of our oversight committees and many other Members of Congress, and just as stubborn—perhaps even more stubborn—because this time it knows, or should know, what's coming. Last time a lot of insiders were surprised by the country's reaction. This time they should be forewarned. I hope, I really hope, that today's majority decision will be consigned to the fate it deserves and that one day in the not too distant future we can look back upon it as an aberration from which we eventually recovered. We have had a dangerous, decades-long flirtation with media consolidation. I would welcome a little romance with the public interest for a change.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
CONCUR IN PART, DISSENT IN PART

Re: *Promoting Diversification of Ownership in the Broadcasting Services, et al.* (MB Docket Nos. 07-294, 06-121, 02-277, 01-235, 01-317, 00-244 and 04-228).

As the gatekeeper of the public airwaves, the Commission has a solemn obligation to ensure that all Americans have equal access and opportunity to own, operate and control broadcast outlets. Indeed, the founding charter of the FCC requires us to protect the public interest by promoting competition, localism and *diversity*. It requires us to take affirmative steps to *prevent* discrimination on the basis of race, gender, religion, and nationality. It also requires us to take affirmative steps to *promote* diversity of ownership because, in America, *ownership is the key to having your voice heard.* And if these statutory mandates are not sufficient, in section 257 of the Communications Act, Congress specifically encourages us to develop and promote policies that favor diversity of media voices.

Despite these clear and unequivocal mandates to facilitate ownership and participation by new entrants, women and people of color, the Commission has been so hesitant to act it seems to be moving in slow motion. Consequently, it has been standard operating procedure that, as we finally near completion of an item addressing women and minority ownership, so much time has gone by that the Commission has had to start all over again.

Such was the case when the Commission made a good faith attempt to respond to the Supreme Court's decision in *Adarand v. Pena*. In 2000, the Commission developed a series of empirical studies to determine the impact of Commission policy on women and minority businesses. Since that time however, the Commission has done nothing more than to "refresh the record." Interestingly, just two weeks ago in the most recent Section 257 Report, the Commission cited the mere act of refreshing the record as an important step it had taken to reduce regulatory barriers for small businesses and businesses owned by women and people of color. After years of inaction, the studies from 2000 are now too stale to serve as a basis upon which the Commission can develop specific regulatory action to promote women and minority ownership.[1]

As the Commission moved in slow motion to build the record evidence to justify specific regulatory relief for women and minority businesses, significant opportunities have gone by and, as a result, women and minority ownership of broadcast stations has fallen to embarrassingly low levels. As Free Press has shown, an examination of FCC data reveals that women and people of color own about 5 percent and 3 percent of TV stations, respectively. In radio, women and people of color own 6 percent and 8 percent of stations, respectively.

When the Commission is not moving in slow motion, it has taken steps that amount to a retreat from our statutory obligation to promote diversity. When it comes to ensuring that the ownership of the public's airwaves – which are licensed to serve the public – look like the American people, the FCC's legacy does not make us proud.

In 2003, rather than taking regulatory steps to promote diversity of ownership, this Commission took steps to specifically undermine it. The Commission repealed the only remaining policy specifically

[1] The Commission's failure to act in a timely manner in matters concerning women and minority owners was further demonstrated when the Commission launched its 2006 Quadrennial Regulatory Review and failed to discuss the very proposals that the Third Circuit instructed it to examine on remand. After this blatant omission was brought to our attention, it took the Commission over 11 months to seek public comment.

aimed at fostering diversity. As Senator Barack Obama has said, "we promoted the concept of consolidation over diversity." Luckily, the federal appellate court reversed the Commission. In a stinging indictment, the Court said: "repealing its only regulatory provision that promoted minority ownership is [] inconsistent with the Commission's obligation to make broadcast spectrum available to all people 'without discrimination on the basis of race.'"

Despite the significance of some of the reform measures we adopt today, with regard to the most fundamental measure – the definition of the class of businesses eligible for relief – the Commission has simply failed to do its homework. Once again, the Commission has taken a step back, or, under the best scenario, the Commission has taken a step to the side. In either case, the result is just the same: justice is deferred once more. And justice deferred is justice denied. The Commission seems incapable of adopting a comprehensive item that truly advances media diversity in every respect.

Today, the Commission adopts this *Report and Order* to expand broadcasting opportunities to "new entrants and small businesses, *including* minority- and women-owned businesses." This proceeding was originally intended to improve the gross under-representation of women and people of color in broadcast industry ownership. The definition of the entities eligible is so broad, however, that minority- and women-owned businesses are likely to be incidental beneficiaries at best.

It is very disappointing that we could not reach consensus on such an important issue of public and congressional concern. For months, I have encouraged this Commission to create an independent, bipartisan panel to analyze the state of women and minority ownership, review all outstanding proposals, conduct a much-needed census of stations owned by women and people of color, and make priority recommendations to the Commission. One of these priority recommendations would have been a constitutionally sustainable definition of "eligible entity" that would have maximum impact on assisting women and people of color to become owners of broadcast assets. This approach was endorsed by Senator Obama, Senator Kerry, Senator Menendez, Congressman Conyers, Congresswomen Hilda Solis and dozens of civil rights groups. This proposal also was adopted in legislation unanimously passed by the Senate Commerce Committee – our committee of jurisdiction.

Yet in reckless disregard for the creation of an independent panel and for the impact that today's item will have on women and minority ownership, the Commission adopts a revenue-based definition of the class of entities entitled to regulatory relief. Using Free Press data, the Commission predicts that approximately 8.5 percent of commercial radio stations owned by current owners that fit our "small business" definition are minority owned. However, relying on the same data, minority-owned stations make up 8 percent of all radio stations in the industry as a whole. Hence, based on the Commission's own calculation, our definition will help .5 percent more minority stations than if we did nothing at all.

The Commission has a legacy of miscounting, over-counting, under-counting and simply refusing to count minority ownership, but yet it is resting the predicted success of the regulatory relief measures adopted in this item on the basis that .5 percent more minority-owned stations are represented in the FCC's regulatory classification than throughout the entire industry. And yet still, the Commission has been unable to determine whether this definition will affirmatively benefit women-owned radio stations, or women and minority-owned television stations. Such reckless decision-making is the epitome of arbitrary and capricious action by a regulatory agency.

As the Commission knows all too well, there is no accurate census of women- and minority-owned stations. As Professors Arie Beresteanu and Paul B. Ellickson said, "the data currently being collected by the FCC is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis." Yet in spite of these observations, the Commission

is basing its decision today on the most speculative incremental benefit of .5 percent. The fact is, we do not even have enough data to determine which owners or stations will actually benefit or be harmed. For safe measure, we should not act in an area of such sensitivity until we can clearly ascertain the actual impact.

The problem of minority ownership has passed the point of crisis, and most race-neutral strategies to correct this problem have repeatedly failed. One way in which the Commission can take meaningful action to address this problem is through developing a consensus procedure to examine whether the adoption of a definition, such as a socially and economically disadvantaged business (SDB), or a process, such as full file and review, could be implemented in a constitutionally acceptable fashion.

Arguably, the Commission could develop this SDB definition based on the Supreme Court's guidance on the promotion of diverse viewpoints as a compelling government interest and the requirements for narrow tailoring. The Supreme Court has long recognized diversity as a compelling educational goal, and in *Metro Broadcasting v. FCC* the Court held that enhancing broadcast diversity is at a minimum an "important government interest."[2] Given the role of media in educating the public, diversity in broadcasting is a compelling government interest.

I dissent in part because it is highly doubtful that today's Order will appreciably help women and people of color own a great share of radio and TV stations. In fact, media diversity advocates have argued that the definition of eligible entities adopted is potentially detrimental to the goal of diversifying broadcast media ownership. I nevertheless concur in part because the *Order* adopts several important reform measures such as requiring a nondiscrimination provision in advertising sales contracts designed to avoid "no urban/no Spanish" dictates, banning discrimination in broadcast transactions, and adopting a zero tolerance standard for ownership fraud. While I believe the adoption of a bad definition undermines many of the steps we take today that are based on it, I nevertheless hope that we can improve upon that definition in the near future. In the struggle of equality, diversity and justice, you can never give up on hope.

I would like to thank David Honig from the Minority Media and Telecommunications Council, Jim Winston from the National Association of Black-Owned Broadcaster, Jesse Jackson, Rainbow Push, Free Press, Consumers Union, the Consumer Federation of America and countless other organizations across America who believe that the ownership is power and should be shared by all Americans. Thank you for your hard work and perseverance.

Today is just the first step. Let's keep hope alive.

[2] Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 566 (1991).

STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE

Re: Promoting Diversification of Ownership in the Broadcasting Services, et al. (MB Docket Nos. 07-294, 06-121, 02-277, 01-235, 01-317, 00-244 and 04-228).

One of the primary goals of this Commission should be the promotion of diverse voices in media. This means not only in terms of the number of voices, but also voices that represent *all Americans*. This Order adopts more than a dozen proposals, all aimed at the promotion of ownership by women and minorities, groups that have historically been terribly underrepresented in the leadership of this important industry.

According to a 2007 study, women own just 3.4% of the 11,884 radio stations in this country, despite the fact that women make up 51% of the population. Only 7% of the directors of the 14 largest radio companies are women. Only 4 of the 42 "Most Powerful People in Radio" are women. Television is sadly remarkably similar. There are currently 1,349 full-power commercial television stations in the United States. A paltry sixty-seven, or 4.97%, are owned by women.

The story is even more dramatic for minorities. Minorities own 3% of all broadcast television stations. Hispanics comprise 14% of the entire U.S. population, but only own a total of 15 stations, or barely over 1% percent of all stations nationwide. African Americans comprise 13% of the entire U.S. population, but only own a total of 18 stations, or 1.3% of all stations. Asians comprise 4% of the entire U.S. population, but only own a total of 6 stations, or 0.44% of total stations.

The challenge before us is not to cast blame, but to offer solutions. The time to act is now. In our hearings across the country over the past four years, it has become clear that there are three primary hurdles women and minorities face: lack of access to financing, both capital and debt; lack of access to spectrum; and lack of access to opportunity.

The Minority Media & Telecommunications Council, along with the FCC's Diversity Committee, proposed a list of initiatives with the goal of assisting women and minorities to clear these hurdles and thus enhance the diversity of voices in the media industry-- from extending the timeline for construction permits to revamping our longitudinal research studies, to requiring non-discrimination provisions in advertising contracts to the creation of a guidebook on diversity. These can have immediate and perhaps lasting impact on improving opportunities for minorities and women.

I will not go into detail on each of the proposals we adopt today, but I do want to single out two that I find appealing because of their strong chance of successful implementation and potential for prompt results.

First, we will convene an annual "Access to Capital Conference" to link potential buyers with prospective investors. This proposal was also strongly supported by the National Association of Broadcasters, which identified access to capital as "the largest roadblock to a more diverse broadcast industry." The Conference will allow for an annual dialogue between those interested in owning broadcast stations and investors or institutions that want to provide this access to capital and make a difference in the media marketplace. The initial Conference is tentatively scheduled for the first quarter of 2008. I hope this will become an annual event and I plan to lend my time and energies to helping make it a success. Perhaps it can also be held at different locations across the nation both to educate the investor community and to open more doors for ownership throughout the U.S.

The second proposal I have strongly supported is the modification of our Equity-Debt Plus attribution rule. The EDP rule was designed to resolve concerns that multiple non-attributable interests could be combined to allow the holders to exert a significant influence over licensees. In effect, the present rule has caused potential investors to cautiously avoid investments that might be combined to approach the ownership limit, which has reduced the available capital in the market. This Order does not repeal the rule entirely, but rather allows an interest holder to exceed the 33% ownership limit without triggering attribution. I hope that this change will trigger an influx of investment for women and minorities seeking to own broadcast stations.

However, let me also be clear that this Order is not the last hurdle, but rather a first step. Unfortunately, a step that has already taken this Commission too long and therefore we need to move forward expeditiously- beginning today. That is not to say that we cannot accommodate other new ideas or improve the proposals herein; in fact, we should be committed to reviewing our progress on a regular basis to consider the successes and any failures in order to continue additional constructive efforts to enhance women and minority ownership in the future.

We owe a debt of gratitude to Chairman Henry Rivera and the entire FCC Diversity Task Force; David Honig and the Minority Media & Telecommunications Council; and members of the industry for their tireless work in this important arena.

STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL

Re: *Promoting Diversification of Ownership in the Broadcasting Services, et al.* (MB Docket Nos. 07-294, 06-121, 02-277, 01-235, 01-317, 00-244 and 04-228).

In considering the important issues we decide today, we explore a vexing question: what can the FCC do to promote ownership among people of color and women? Many positive and constructive ideas before the Commission may be hobbled by Supreme Court rulings regarding race-specific remedies on one side, and a lack of statutory authority for doing much more on the other side. Like it or not, whatever the Commission does must withstand constitutional muster to succeed. What we have done in this Order is to focus on the possible -- and the legally sustainable. While perhaps imperfect and incomplete, I hope the ideas we adopt today will increase ownership of traditional media properties by women and people of color.

At the outset, we face the difficult constitutional question of how to define the groups eligible for relief under the proposals we adopt. Given the Supreme Court's decision in *Adarand v. Pena,* which prohibits distinctions based on race, in today's Order, we define these "eligible entities" as any entity that would qualify as a small business, under the Small Business Administration standards for industry grouping, based on revenue. This means that television stations with no more than $13 million in annual receipts and radio stations with no more than $6.5 million in annual receipts are eligible entities.

We have heard from many who are concerned that this definition will not benefit minority and women-owned broadcasters. I disagree. As the order explains, concerns that our definition of eligible entities would be regressive are based on flawed calculations. Large companies controlling smaller subsidiaries are <u>not</u> included in our definition, despite allegations to the contrary. Our definition does not dilute the ownership position of women and people of color, as some have suggested. Rather, the position of those most in need have been enhanced. The definition we adopt today, although not perfect, is the best option we have before us now. The record does not contain, nor has the Commission been able to develop, any race-conscious definition of a socially and economically disadvantaged business that would pass constitutional muster. The "full file review system" suggested by some parties, while intriguing and potentially beneficial, would be too vague a standard as it is written currently and extremely difficult to administer or defend on appeal. However, we invite comment on alternative definitions of an eligible entity.

I also beseech Congress to give us more statutory authority to help this situation, especially the hardest challenge which lies at the beginning of the process: gaining access to capital. But I guess we'll have to wait for that.

I thank our Diversity Committee and the Minority Media and Telecommunications Council for their tireless work developing and advocating these measures. I hope that the "small steps" measures we adopt today will spur the education, investment and economic incentives necessary to improve the state of diversity in broadcast ownership. I look forward continuing to work with you toward the day when we are free to bound ahead more boldly.

I thank the Chairman for his leadership on this issue and thank the Bureau for their hard work, into the wee hours, on this Order.