

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

In the Matter of )
)
2014 Quadrennial Regulatory Review – Review of ) MB Docket No. 14-50
the Commission’s Broadcast Ownership Rules and )
Other Rules Adopted Pursuant to Section 202 of )
the Telecommunications Act of 1996 )
)
2010 Quadrennial Regulatory Review – Review of ) MB Docket No. 09-182
the Commission’s Broadcast Ownership Rules and )
Other Rules Adopted Pursuant to Section 202 of )
the Telecommunications Act of 1996 )
)
Promoting Diversification of Ownership ) MB Docket No. 07-294
In the Broadcasting Services )
)
Rules and Policies Concerning Attribution of Joint ) MB Docket No. 04-256
Sales Agreements in Local Television Markets )
)
Rules and Policies to Promote New Entry and ) MB Docket No. 17-289
Ownership Diversity in the Broadcasting Services )

ORDER

Adopted: June 4, 2021

Released: June 4, 2021

By the Chief, Media Bureau:

1. In FCC v. Prometheus Radio Project,1 the U.S. Supreme Court reversed the decision of the U.S. Court of Appeals for the Third Circuit regarding the Commission’s media ownership rules.2 The Third Circuit had vacated and remanded the Commission’s 2018 Incubator Order3 and its 2017 Order on Reconsideration4 in their entirety, as well as the definition of eligible entities adopted in the Commission’s 2016 Second Report and Order.5 Consistent with the Supreme Court’s decision, this Order reinstates the changes adopted in the Incubator Order and Order on Reconsideration and the eligible entity definition as adopted in the Second Report and Order. As such, the Newspaper/Broadcast Cross-Ownership Rule, the Radio/Television Cross-Ownership Rule, and the Television Joint Sales Agreement Attribution Rule are eliminated, and the Local Television Ownership Rule and Local Radio Ownership

1 FCC v. Prometheus Radio Project, 141 S.Ct. 1150 (2021).

2 See Prometheus Radio Project v. FCC, 939 F.3d 567 (3rd Cir. 2019).

3 Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services, MB Docket No. 17-289, Report and Order, 33 FCC Rcd 7911 (2018) (Incubator Order).

4 2014 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 et al., MB Docket No. 14-50, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802 (2017) (Order on Reconsideration).

5 2014 Quadrennial Review Order – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al., MB Docket No. 14-50, Second Report and Order, 31 FCC Rcd 9864, 9960-10008, paras. 234-336 (2016) (Second Report and Order).

Rule are reinstated as adopted in the *Order on Reconsideration*.<sup>6</sup> In addition, the eligible entity standard and its application to regulatory measures as set forth in the *Second Report and Order* are reinstated.<sup>7</sup> Finally, the regulatory measures adopted in the *Incubator Order* are reinstated.

2. The Bureau finds that notice and comment are unnecessary for these rule amendments under 5 U.S.C. § 553(b) because this ministerial order merely implements the decision of the U.S. Supreme Court.<sup>8</sup> Because this Order is being adopted without notice and comment, the Regulatory Flexibility Act<sup>9</sup> does not apply.

3. Accordingly, **IT IS ORDERED** that Section 73.3555 of the Commission's rules, 47 CFR § 73.3555, is amended as set forth in the Appendix, effective upon publication in the Federal Register.<sup>10</sup>

4. This action is taken pursuant to the authority contained in sections 1, 2(a), 4(i) and (j), 5(c), 257, 303, 307, 308, 309, 310, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 154(j), 155(c), 257, 303, 307, 308, 309, 310, and 403, section 202(h) of the Telecommunications Act of 1996, and sections 0.61 and 0.283 of the Commission's rules, 47 CFR §§ 0.61, 0.283.

5. The Bureau has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs that these rules are non-major under the

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<sup>6</sup> The presumption under the Local Radio Ownership Rule that would apply a two-prong test for waiver requests involving existing parent markets with multiple embedded markets is reinstated. See *Order on Reconsideration*, 32 FCC Rcd at 9841-46, paras. 86-95. Note 5 to Section 73.3555 is reinstated to the version as amended when the Commission adopted the streamlined procedures in March 2019 for reauthorizing television satellite stations when such stations are assigned or transferred. See *Streamlined Reauthorization Procedures for Assigned or Transferred Television Satellite Stations, Modernization of Media Regulation Initiative*, MB Docket No. 18-63, Report and Order, 34 FCC Rcd 1539 (2019). The *Order on Reconsideration* revised section 73.3613(d)(2) of the Commission's rules regarding the filing requirement for joint sales agreements. Because that filing requirement has since been eliminated, the revision to section 73.3613(d)(2) adopted in the *Order on Reconsideration* is not reinstated. See *Amendment of Section 73.3613 of the Commission's Rules Regarding Filing of Contracts, Modernization of Media Regulation Initiative*, MB Docket Nos. 18-4 and 17-105, Report and Order, 33 FCC Rcd 10381, 10386, para. 8 (2018).

<sup>7</sup> See *Second Report and Order*, 31 FCC Rcd 9960-10008, paras. 234-336.

<sup>8</sup> 5 U.S.C. § 553(b)(B); see also *EME Homer City Generation LP v. EPA*, 795 F.3d 118, 134 (D.C. Cir. 2015) (affirming agency good cause determination that notice and comment were unnecessary when a court order invalidated a rule and "commentators could not have said anything during a notice and comment period that would have changed that fact"); *Amendment of Part 95*, Order, 3 FCC Rcd 5032, 1988 WL 488084 \*2 (1988) (notice and comment unnecessary when revisions in an order "merely...delete redundant or obsolete rules").

<sup>9</sup> 5 U.S.C. §§ 601, *et seq.*

<sup>10</sup> Because of the need during the current broadcast station license renewal cycle to alert prospective applicants to the current, applicable rules, there is "good cause" under 5 U.S.C. § 553(d) to make the rules effective immediately upon publication in the Federal Register. See 5 U.S.C. § 553(d)(3) (stating that publication of a "substantive" rule shall be made not less than 30 days before its effective date, "except . . . as otherwise provided by the agency for good cause found and published with the rule"). Consistent with the decision of the Supreme Court and the changes implemented by this Order, we are in the process of revising the following Schedules to Form 2100: Schedule 314 (Assignment Application), Schedule 315 (Transfer of Control Application), and Schedule 301-FM (Commercial FM Construction Permit Application).

Congressional Review Act, 5 U.S.C. § 804(2). The Commission will send a copy of this Order to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey  
Chief, Media Bureau

## APPENDIX

## Final Rule Changes

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

## PART 73—RADIO BROADCAST SERVICES

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

AUTHORITY: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336 and 339.

2. Amend § 73.3555 by revising paragraph (b); removing and reserving paragraphs (c) and (d); revising Note 2, Note 4, Note 5, Note 6, Note 7, and Note 9; and removing Note 12:

**§ 73.3555 Multiple ownership.**

\* \* \* \* \*

(b) *Local television multiple ownership rule.* (1) An entity may directly or indirectly own, operate, or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research or any successor entity) if:

(i) The digital noise limited service contours of the stations (computed in accordance with § 73.622(e)) do not overlap; or

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

(b)(2) Paragraph (b)(1)(ii) (Top-Four Prohibition) of this section shall not apply in cases where, at the request of the applicant, the Commission makes a finding that permitting an entity to directly or indirectly own, operate, or control two television stations licensed in the same DMA would serve the public interest, convenience, and necessity. The Commission will consider showings that the Top-Four Prohibition should not apply due to specific circumstances in a local market or with respect to a specific transaction on a case-by-case basis.

(c) [Reserved]

(d) [Reserved]

\* \* \* \* \*

**Note 2 to § 73.3555:**

In applying the provisions of this section, ownership and other interests in broadcast licensees will be attributed to their holders and deemed cognizable pursuant to the following criteria:

a. Except as otherwise provided herein, partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate broadcast licensee will be cognizable;

b. Investment companies, as defined in 15 U.S.C. 80a-3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 20% or more of the outstanding voting stock of a corporate broadcast licensee, or if any of the officers or directors of the broadcast licensee are representatives of the investment company, insurance company or bank concerned. Holdings by a bank or insurance company will be aggregated if the bank or insurance company has any right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

c. Attribution of ownership interests in a broadcast licensee that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. For purposes of paragraph i. of this note, attribution of ownership interests in a broadcast licensee that are held indirectly by any party through one or more intervening organizations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, and the ownership percentage for any link in the chain that exceeds 50% shall be included for purposes of this multiplication. [For example, except for purposes of paragraph (i) of this note, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of "Licensee," then X's interest in "Licensee" would be 25% (the same as Y's interest because X's interest in Y exceeds 50%), and A's interest in "Licensee" would be 2.5% ( $0.1 \times 0.25$ ). Under the 5% attribution benchmark, X's interest in "Licensee" would be cognizable, while A's interest would not be cognizable. For purposes of paragraph i. of this note, X's interest in "Licensee" would be 15% ( $0.6 \times 0.25$ ) and A's interest in "Licensee" would be 1.5% ( $0.1 \times 0.6 \times 0.25$ ). Neither interest would be attributed under paragraph i. of this note.]

d. Voting stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust. An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant broadcast licensee are subject to said trust.

\* \* \*

g. Officers and directors of a broadcast licensee are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in businesses in addition to its primary business of broadcasting, it may request the Commission to waive attribution for any officer or director whose duties and responsibilities are wholly unrelated to its primary business. The officers and directors of a parent company of a broadcast licensee, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the broadcast licensee, and a statement properly documenting this fact is submitted to the Commission. [This statement may be included on the appropriate Ownership Report.] The officers and directors of a sister corporation of a broadcast licensee shall not be attributed with ownership of that licensee by virtue of such status.

h. Discrete ownership interests will be aggregated in determining whether or not an interest is cognizable under this section. An individual or entity will be deemed to have a cognizable investment if:

1. The sum of the interests held by or through “passive investors” is equal to or exceeds 20 percent; or
2. The sum of the interests other than those held by or through “passive investors” is equal to or exceeds 5 percent; or
3. The sum of the interests computed under paragraph h. 1. of this note plus the sum of the interests computed under paragraph h. 2. of this note is equal to or exceeds 20 percent.

i.1. Notwithstanding paragraphs e. and f. of this Note, the holder of an equity or debt interest or interests in a broadcast licensee subject to the broadcast multiple ownership rules (“interest holder”) shall have that interest attributed if:

A. 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 asset value, defined as the aggregate of all equity plus all debt, of that broadcast licensee; and

B.(i) The interest holder also holds an interest in a broadcast licensee in the same market that is subject to the broadcast multiple 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 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.

2. Notwithstanding paragraph i.1. of this Note, the interest holder may exceed the 33 percent threshold therein without triggering attribution where holding such interest would enable an eligible entity to acquire a broadcast station, provided that:

- i. The combined equity and debt of the interest holder in the eligible entity is less than 50 percent, or
- ii. 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. For purposes of this paragraph i.2, 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 CFR 121.201, at the time the transaction is approved by the FCC, and holds:

A. 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

B. 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

C. 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.

j. “Time brokerage” (also known as “local marketing”) is the sale by a licensee of discrete blocks of time to a “broker” that supplies the programming to fill that time and sells the commercial spot announcements in it.

1. Where two radio stations are both located in the same market, as defined for purposes of the local radio ownership rule contained in paragraph (a) of this section, and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraph (a) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

2. Where two television stations are both located in the same market, as defined in the local television ownership rule contained in paragraph (b) of this section, and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (b) and (e) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

3. Every time brokerage agreement of the type described in this Note shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities including, specifically, control over station finances, personnel and programming, and by the brokering station that the agreement complies with the provisions of paragraph (b) of this section if the brokering station is a television station or with paragraph (a) of this section if the brokering station is a radio station.

k. “Joint Sales Agreement” is an agreement with a licensee of a “brokered station” that authorizes a “broker” to sell advertising time for the “brokered station.”

1. Where two radio stations are both located in the same market, as defined for purposes of the local radio ownership rule contained in paragraph (a) of this section, and a party (including all parties under common control) with a cognizable interest in one such station sells more than 15 percent of the advertising time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraph (a) of this section.

2. Every joint sales agreement of the type described in this Note shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities, including, specifically, control over station finances, personnel and programming, and by the brokering station that the agreement complies with the limitations set forth in paragraph (a) of this section if the brokering station is a radio station.

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**Note 4 to § 73.3555:**

Paragraphs (a) and (b) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities, and will not apply to applications for assignment of license or transfer of control filed in accordance with §73.3540(f) or §73.3541(b), or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy, or to FM or AM broadcast minor modification applications for intra-market community of license changes, if no new or increased concentration of ownership would be created among commonly owned, operated or controlled broadcast stations. Paragraphs (a) and (b) of this section will apply to all applications for new stations, to all other

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

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**Note 5 to § 73.3555:**

Paragraphs (b) and (e) of this section will not be applied to cases involving television stations that are “satellite” operations. Such cases will be considered in accordance with the analysis set forth in the Report and Order in MM Docket No. 87-8, FCC 91-182 (released July 8, 1991), as further explained by the Report and Order in MB Docket No. 18-63, FCC 19-17, (released March 12, 2019), in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. An authorized and operating “satellite” television station, the digital noise limited service contour of which overlaps that of a commonly owned, operated, or controlled “non-satellite” parent television broadcast station may subsequently become a “non-satellite” station under the circumstances described in the aforementioned Report and Order in MM Docket No. 87-8. However, such commonly owned, operated, or controlled “non-satellite” television stations may not be transferred or assigned to a single person, group, or entity except as provided in Note 4 of this section.

**Note 6 to § 73.3555:**

Requests submitted pursuant to paragraph (b)(2) will be considered in accordance with the analysis set forth in the Order on Reconsideration in MB Docket Nos. 14-50, et al. (FCC 17-156).

**Note 7 to § 73.3555:**

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

We will entertain waiver requests as follows:

1. If one of the broadcast stations involved is a “failed” station that has not been in operation due to financial distress for at least four consecutive months immediately prior to the application, or is a debtor in an involuntary bankruptcy or insolvency proceeding at the time of the application.
2. If one of the television stations involved is a “failing” station that has an all-day audience share of no more than four per cent; the station has had negative cash flow for three consecutive years immediately prior to the application; and consolidation of the two stations would result in tangible and verifiable public interest benefits that outweigh any harm to competition and diversity.

3. If the combination will result in the construction of an unbuilt station. The permittee of the unbuilt station must demonstrate that it has made reasonable efforts to construct but has been unable to do so.

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**Note 9 to § 73.3555**

Paragraph (a)(1) of this section will not apply to an application for an AM station license in the 1605-1705 kHz band where grant of such application will result in the overlap of the 5 mV/m groundwave contours of the proposed station and that of another AM station in the 535-1605 kHz band that is commonly owned, operated or controlled.

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