

FCC FACT SHEET*
Modernization of Media Regulation Initiative:
Duplication of Programming on Commonly Owned Radio Stations
Report and Order – MB Docket Nos. 17-105 and 19-310

Background: Section 73.3556 of the Commission’s rules (the radio duplication rule) prohibits any commercial AM or FM radio station from devoting “more than 25 percent of the total hours in its average broadcast week to programs that duplicate those of any other station in the same service (AM or FM) which is commonly owned or with which it has a time brokerage agreement if the principal community contours . . . of the stations overlap and the overlap constitutes more than 50 percent of the total principal community contour service area of either station.” The Commission has revised the radio duplication rule several times since it was first adopted in 1964 in response to changing market conditions. The current version of the radio duplication rule was adopted in 1992 to foster competition, programming diversity, and spectrum efficiency.

In November 2019, the Commission issued a Notice of Proposed Rulemaking, as a part of our continuing Modernization of Media Regulation Initiative, asking whether the radio duplication rule should be modified or eliminated in light of significant technological and marketplace changes in the radio broadcast industry since the current rule was adopted. We also sought comment on whether the rule should treat stations in the AM service and the FM service differently in light of the particular economic and technical challenges facing AM stations.

What the Report and Order Would Do:

- Eliminate the radio duplication rule for the AM service given the unique technical and economic challenges that AM broadcasters currently confront. By doing so, we would afford AM licensees greater flexibility, help facilitate a potential transition to digital broadcasting, and ultimately allow stations to improve service to their communities.

- Retain the radio duplication rule for the FM service, finding that it remains useful in furthering the goals of competition, programming diversity, and spectrum efficiency.

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

In the Matter of
Amendment of Section 73.3556 of the
Commission's Rules Regarding Duplication of
Programming on Commonly Owned Radio Stations
Modernization of Media Regulation Initiative
MB Docket No. 19-310
MB Docket No. 17-105

REPORT AND ORDER*

Adopted: []

Released: []

By the Commission:

I. INTRODUCTION

1. In this Report and Order (Order), we update section 73.3556 of the Commission's rules (the radio duplication rule) to reflect technological and marketplace changes over the past three decades. As noted in the underlying Notice of Proposed Rulemaking (NPRM), there have been significant changes in the broadcast radio industry since the current version of this rule, which restricts the duplication of programming on commonly owned stations operating in the same geographic area, was adopted in 1992.1 By today's Order, we eliminate the radio duplication rule as it pertains to AM stations, but retain the rule as applied to FM stations. This approach will afford AM broadcast licensees greater flexibility, facilitate digital broadcasting by AM stations, and ultimately allow stations to improve service to their

* This document has been circulated for tentative consideration by the Commission at its August 2020 open meeting. The issues referenced in this document and the Commission's ultimate resolutions of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairman has determined that, in the interest of promoting the public's ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The Commission's ex parte rules apply and presentations are subject to "permit-but-disclose" ex parte rules. See, e.g., 47 CFR §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission's meeting. See 47 CFR §§ 1.1200(a), 1.1203.

1 Amendment of Section 73.3556 of the Commission's Rules Regarding Duplication of Programming on Commonly Owned Radio Stations, MB Docket No. 19-310 et al., Notice of Proposed Rulemaking, 35 FCC Rcd 11544, 11544, para. 1 (2019) (2019 Radio Duplication NPRM). The current rule prohibits any commercial AM or FM radio station from devoting "more than 25 percent of the total hours in its average broadcast week to programs that duplicate those of any other station in the same service (AM or FM) which is commonly owned or with which it has a time brokerage agreement if the principal community contours . . . of the stations overlap and the overlap constitutes more than 50 percent of the total principal community contour service area of either station." 47 CFR § 73.3556. Principal community contours are defined as "predicted or measured 5 mV/m groundwave for AM stations and predicted 3.16 mV/m for FM stations." Id. A time brokerage agreement generally involves the sale by one radio licensee of blocks of time to a broker who then supplies programming to fill that time and sells the commercial spot advertising to support it. See 2019 Radio Duplication NPRM, 35 FCC Rcd at 11544, para. 1, n.1.

communities. Through this Order, we continue our efforts to modernize our rules and modify or eliminate outdated and unnecessary media regulations.²

II. BACKGROUND

2. The Commission's broadcast radio programming duplication rules have evolved over time consistent with changes in the broadcast radio market. The Commission first limited radio programming duplication by commonly owned stations serving the same local area in 1964 by prohibiting FM stations in cities with populations over 100,000 from duplicating the programming of a co-owned AM station in the same local area for more than 50% of the FM station's broadcast day.³ The Commission observed that it had never regarded program duplication as an efficient use of FM frequencies; instead, it had allowed program duplication as, "at best, . . . a temporary expedient to help establish the FM service."⁴ Accordingly, the Commission envisioned "a 'gradual' process to end programming duplication once the number of applicants seeking licenses exceeded the number of vacant FM channels available in large cities."⁵ At that time, the Commission sought to minimize the economic impact to radio broadcasters from limiting programming duplication.⁶ In particular, the rule allowed for waivers upon a showing that programming duplication would be in the public interest. It further provided that compliance would be monitored through the license renewal process.⁷

3. In 1976, the Commission tightened the radio duplication restriction to limit FM stations to duplicating only 25% of the average program week of a co-owned AM station in the same local area if either the AM or FM station operated in a community with a population of over 25,000.⁸ At that time, the Commission observed that "the public does not have to depend on non-duplication to add diversity" when new broadcasting frequencies remained available.⁹ But given "the virtually complete absence of available [FM] channels as well as the strengthened economic position of FM" stations, the Commission adopted a tighter limit, finding that "the greatly diminished availability of FM channels in communities of any substantial size" could inhibit programming diversity. It also noted again "the inherent wastefulness of duplication," *i.e.*, that duplication of programming was an inefficient use of spectrum.¹⁰

² The Commission launched its media modernization efforts in 2017. *See Commission Launches Modernization of Media Regulation Initiative*, MB Docket No. 17-105, Public Notice, 32 FCC Rcd 4406 (2017).

³ *2019 Radio Duplication NPRM*, 35 FCC Rcd at 11544-45, para. 2.

⁴ *Amendment of Part 73 of the Commission's Rules Regarding AM Station Assignment Standards and the Relationship Between the AM and FM Broadcast Services*, Docket No. 15084, Report and Order, 45 FCC 1515, 1530, para. 36 (1964) (*1964 Radio Duplication Order*).

⁵ *Id.* at 1532-33, paras. 41-42.

⁶ *Id.* at 1532, paras. 41-42.

⁷ *Id.* at 1533-34, 1537, para. 46, App. A.

⁸ *AM-FM Program Duplication*, Docket No. 20016, Report and Order, 59 F.C.C.2d 147, 151, para. 9, App. A. (1976) (*AM-FM Program Duplication Order*). Based on its 12 years of experience observing the effects of the radio duplication rule, the Commission delayed implementation of the tightened 25% limit on smaller cities for approximately four years, establishing interim limits that prohibited FM stations from duplicating more than 25% of average broadcast week programming of a commonly owned AM station in communities over 100,000 and 50% of programming of a commonly owned AM station in communities over 25,000 but under 100,000. *Id.* at 153, paras. 12-13.

⁹ *Id.* at 151, para. 9, App. A.

¹⁰ *Id.* at 151, paras. 8-9. This change also made the city size criterion apply both to the size of the city of the AM station as well as the size of the city of the FM station, rather than considering the size of the city of the FM station alone, as the previous rule had.

4. In 1986, in response to a petition for rulemaking seeking to exempt late-night hours when determining compliance with the radio duplication rule, the Commission eliminated the cross-service radio duplication rule entirely. It found that FM service had developed sufficiently to eliminate the rule and that FM stations were fully competitive, obviating the need to foster the development of an independent FM service through a requirement for separate programming.¹¹ The Commission further found that the rule was no longer necessary to promote spectrum efficiency because market forces would lead stations to provide separate programming where economically feasible and, where separate programming was not economically feasible, duplication was preferable to a station's reducing programming or going off the air entirely in order to comply with the rule.¹² In reaching this conclusion, the Commission noted that duplication could save costs for many AM stations experiencing economic difficulties due to listeners switching to FM.¹³

5. In 1992, as part of a broad proceeding reviewing its national and local radio ownership rules, the Commission adopted a new radio duplication rule limiting the duplication of programming by commonly owned stations or stations commonly operated through a time brokerage agreement in the same service (AM or FM) with substantially overlapping signals to 25% of the average broadcast week.¹⁴ The Commission saw no public benefit from allowing commonly owned same-service stations in the same local market to duplicate programming more than 25%, observing that, "when a channel is licensed to a particular community, others are prevented from using that channel and six adjacent channels at varying distances of up to hundreds of kilometers. The limited amount of available spectrum could be used more efficiently by other parties to serve competition and diversity goals."¹⁵ The Commission concluded, however, that some programming duplication had benefits, stating "we are persuaded that limited simulcasting, particularly where expensive, locally produced programming such as on-the-spot news coverage is involved, could economically benefit stations and does not so erode diversity or undercut efficient spectrum use as to warrant preclusion."¹⁶

6. As part of its continuing commitment to modernizing its media regulations, the Commission issued the *NPRM* initiating this proceeding in November 2019, seeking comment on the radio duplication rule and whether it should be retained, modified, or eliminated.¹⁷ As we noted in the *NPRM*, the broadcast industry has changed significantly since the Commission adopted the current radio programming duplication rule in 1992.¹⁸ In particular, significant growth in the number of radio

¹¹ See *Amendment of Section 73.242 of the Commission's Rules and Regulations in Regard to AM-FM Program Duplication*, Report and Order, 103 F.C.C.2d 922, 924, paras. 5, 7; see also *id.* at 925, 930, paras. 9-10, App. B (1986) (*1986 Radio Duplication Order*).

¹² *Id.* at 925, 926, 927, paras. 11, 13, 15.

¹³ *Id.* at 927-928, paras. 16-17.

¹⁴ *Revision of Radio Rules and Policies*, MM Docket No. 91-140, Report and Order, 7 FCC Rcd 2755, 2788, para. 57 (1992) (*1992 Radio Rules Order*); 47 CFR § 73.3556.

¹⁵ *1992 Radio Rules Order*, 7 FCC Rcd at 2788, para. 57 (citing *Review of The Technical Assignment Criteria for the AM Broadcast Service*, MM Docket No. 87-267, Report and Order, 6 FCC Rcd 6273, 6329-30, para. 179 (1991)); see *id.* at 2788, para. 64 (explaining that the Commission also incorporated time brokerage agreements in the rule because it was concerned about the possibility that "widespread and substantial time brokerage arrangements among stations serving the same market, in concert with increased common ownership permitted by our revised local rules, could undermine our continuing interest in broadcast competition and diversity").

¹⁶ *Id.* at 2798, para. 57.

¹⁷ See *2019 Radio Duplication NPRM*, 35 FCC Rcd at 11544, para. 1.

¹⁸ *Id.* at 11546, para. 6.

broadcasting outlets,¹⁹ the advent of digital HD Radio, and the evolution of new and varied formats in which to disseminate programming (*i.e.*, digital satellite radio, streaming via station websites, and mobile applications²⁰) have led to greater competition and programming diversity in radio broadcasting.²¹ Accordingly, we asked commenters to address several issues, including the impact of market forces on programming consolidation and the impact of the radio duplication rule on the Commission's public interest goals of localism and diversity, as well as on spectrum efficiency.²² We also sought comment on whether the Commission's prior rationale for eliminating the cross-service duplication programming rule—that duplication is preferable to curtailing programming or going off the air entirely where separate programming is not economically feasible—applies equally to the same-service duplication rule.²³ We sought input on the benefits of allowing some level of programming duplication, as well as potential modifications to the rule.²⁴ In addition, we asked whether the rule should treat stations in the AM service and the FM service differently in light of the particular economic and technical challenges facing AM stations.²⁵ Finally, we asked commenters to discuss potential costs and benefits of modifying or eliminating the rule.²⁶

7. Four parties filed comments in response to the *NPRM*²⁷ and two parties filed reply comments.²⁸ Though the number of commenters in the proceeding was small, commenters represent a cross-section of the broadcast industry and proffer a variety of arguments both supporting and opposing changing the rule.²⁹

¹⁹ *Id.* at 11546, para. 6. In 1992, there were roughly 11,700 commercial AM and FM and FM translator stations; today, there are over 19,500. See FCC, Broadcast Station Totals, <https://www.fcc.gov/document/broadcast-station-totals-june-30-2020> (last visited July 9, 2020); FCC, Broadcast Station Totals as of June 30, 2020, News Release (July 1, 2020), <https://docs.fcc.gov/public/attachments/DOC-365271A1.pdf>. There are also significantly more non-commercial/educational radio stations (4,192 versus 1,588 in 1992), as well as more than two thousand low power FM stations, all contributing to programming diversity. *Id.*

²⁰ *2019 Radio Duplication NPRM*, 35 FCC Rcd at 11546, para. 6 (citing *Communications Marketplace Report et al.*, Report, GN Docket No. 18-231 et al., 33 FCC Rcd 12558, 12632, para. 143 (2018)).

²¹ *Id.* at 11546, para. 6.

²² *Id.* at 11547-48, paras. 9-10.

²³ *Id.* at 11548, para. 11.

²⁴ *Id.* at 11548-49, paras. 12-13.

²⁵ *Id.* at 11549, para. 14.

²⁶ *Id.* at 11549, para. 15.

²⁷ The parties that submitted comments were Bryan Broadcasting Corporation (BBC Comments) (supporting, at a minimum, elimination of the rule as pertains to AM stations when one station transitions to all-digital transmission and one remains operating in analog and taking no position on the rule as pertains to the FM service), Common Frequency, Inc. (CFI Comments) (opposing elimination of the rule as to both AM and FM stations), National Association of Broadcasters (NAB Comments) (supporting elimination of the rule as pertains to both AM and FM stations), and REC Networks (REC Comments) (supporting partial elimination of the rule as pertains to AM stations and opposing elimination of the rule as pertains to FM stations).

²⁸ The parties that submitted reply comments were Common Frequency, Inc. (CFI Reply) (opposing elimination of the radio duplication rule as to both AM and FM stations) and Kern Community Radio (Kern Reply) (opposing elimination of the radio duplication rules as to both AM and FM stations and offering several proposals for strengthening the rule).

²⁹ The *NPRM* also sought comment on whether the radio duplication rule could implicate the First Amendment to the U.S. Constitution. *2019 Radio Duplication NPRM*, 35 FCC Rcd at 11549, para. 12. However, no commenters addressed this issue.

III. DISCUSSION

8. As discussed below, we modify section 73.3556 of our rules to eliminate the radio duplication rule for the AM service in order to provide broadcasters with increased flexibility in programming decisions. We find that the unique technical and economic challenges that AM broadcasters currently confront, coupled with the desire to facilitate an AM digital broadcasting transition,³⁰ warrant eliminating the rule for AM licensees in order to provide them with greater flexibility.³¹ At the same time, however, we conclude that the record does not support eliminating the radio duplication rule as applied to FM stations at this time. Rather, we find that the rule remains useful in furthering the public interest goals of competition, programming diversity, and spectrum efficiency for which it was originally enacted. In so holding, we note that FM stations may seek waivers of the radio duplication rule as needed based on individual circumstances. We also find that the record does not support tightening or expanding the scope of the rule.

9. *AM Service.* We conclude that the radio duplication rule no longer serves the public interest as applied to commonly owned AM stations in light of current marketplace conditions. As we have noted in several recent proceedings, the AM broadcasting service faces persistent interference issues that have hampered the service and frustrated both consumers and licensees. In particular, the service has faced an increase in the level of environmental and man-made noise over time, which has increased the amount of interference in the band.³² In addition, AM stations continue to be more difficult to operate and more expensive to maintain than FM stations, requiring larger and more complex physical plants, which are increasingly under pressure in urban areas.³³

10. Moreover, the AM service continues to contend with lower quality non-stereo audio and declining listenership.³⁴ The technical challenges that the AM service has long faced have been compounded in recent decades by the continued predominance of FM radio in the broadcast industry and the introduction of alternative sources of higher-quality audio signals. These technical challenges lead to economic challenges, as the interference issues and lower-quality audio endemic to analog AM radio may

³⁰ Currently, AM stations may operate in a “hybrid” mode, transmitting both an analog and a digital signal using In-Band On-Channel (IBOC) technology. IBOC refers to the method of transmitting a digital radio broadcast signal centered on the same frequency as the AM or FM station’s present frequency. Like FM band transmissions using IBOC technology, AM band transmissions place the digital signal in sidebands above and below the existing AM carrier frequency. By this means, the digital signal is transmitted in addition to the existing analog signal. In both instances, the digital emissions fall within the spectral emission mask of the station’s channel. The present IBOC system is referred to as a “hybrid” because it is neither fully analog nor fully digital. During hybrid operation, existing receivers continue to receive the analog (non-digital) signal, while newer receivers incorporate both modes of reception, automatically switching to receive either the analog or the digital signal. FCC, *Digital Radio*, <https://www.fcc.gov/media/radio/digital-radio> (last visited June 22, 2020). Recently, the Commission has proposed to permit AM stations to operate in all-digital mode, rather than requiring that they maintain an analog signal alongside the digital signal in hybrid operations. See *All-Digital AM Broadcasting* et al., MB Docket No. 19-311 et al., Notice of Proposed Rulemaking, 34 FCC Rcd 11560 (2019) (*All-Digital AM Broadcasting NPRM*). That rulemaking proceeding remains ongoing.

³¹ See, e.g., BBC Comments at 3-4 (supporting, at a minimum, elimination of the rule as pertains to AM stations when one station transitions to all-digital transmission and one remains operating in analog); NAB Comments at 4-5 (supporting elimination of the rule as pertains to AM stations); REC Comments at 3-4 (supporting relaxing the rule as to AM stations to permit two commonly owned AM stations to duplicate their programming as long as one of the AM stations is operating in analog or hybrid digital mode and the other station is operating in all-digital).

³² See generally *Revitalization of the AM Service*, MB Docket No. 13-249, First Report and Order, Further Notice of Proposed Rulemaking, and Notice of Inquiry, 30 FCC Rcd 12145 (2015).

³³ See generally *id.*

³⁴ *Id.*

drive down listenership,³⁵ further reducing stations' ability to invest in order to meet these technical challenges. Additionally, the impact of the COVID-19 pandemic is exacerbating the economic challenges that many AM stations are already confronting.³⁶ We find that permitting the additional flexibility of simulcasting may be useful to AM stations that are financially struggling. As the Commission observed in addressing this issue in the past, "where separate programming is not economically feasible, duplication of AM service is preferable to a struggling station reducing programming or going off the air entirely to comply with the rule."³⁷ Given these ongoing challenges, we conclude that the AM service would benefit from greater flexibility in making programming decisions and, in particular, from having the option to potentially repurpose costly programming on commonly owned stations.³⁸

11. Additionally, although the foregoing reasons alone provide a sufficient basis to eliminate the radio duplication rule for AM stations, we also agree with the majority of commenters in this proceeding that eliminating the radio duplication rule could help to ease the AM service transition from analog to digital broadcasting, both for stations and their audiences.³⁹

12. That is, while our decision to eliminate the radio duplication rule for AM stations is not dependent on a Commission decision to permit AM stations to operate in all-digital mode rather than hybrid mode,⁴⁰ we note that, in the event that the Commission permits all-digital AM operations, eliminating the duplication rule would permit a broadcaster with two commonly owned AM stations to simulcast the same programming on both stations, one in analog and one in digital.⁴¹ Digital radio holds significant promise for AM stations, enabling them to provide sound quality that is equivalent, or superior, to standard analog FM sound quality.⁴² Digital AM radio also provides a clear, interference-free signal in contrast to AM analog radio, which is more susceptible to interference. Furthermore, experimentation in all-digital signals has shown potential promise in signal coverage robustness.⁴³ In addition, technological innovations in all-digital radio allow for "advanced consumer-friendly features, such as real-time data and information displays, that are not available via analog AM radio."⁴⁴ Thus,

³⁵ *Id.* at 15222-23, paras. 4-6.

³⁶ See, e.g., Paul McLane, "COVID-19 Operational Concerns for Radio," Radio World (Mar. 17, 2020), <https://www.radioworld.com/news-and-business/coronavirus-operational-concerns> (noting that Sun Broadcast Group was offering free programming "to any radio stations that need to fill airtime due to the recent pandemic").

³⁷ 1986 Radio Duplication Order, 103 F.C.C.2d at 925-27; see also NAB Comments at 5.

³⁸ See, e.g., NAB Comments at 4-5.

³⁹ See *supra* notes 27 and 28. As BBC observes, allowing AM broadcasters to operate in, and experiment with, all-digital transmissions, while retaining the ability to serve both analog and digital listeners would foster the conversion of the AM service to digital "without disenfranchising the listeners of a station who do not yet own a digital AM receiver." BBC Comments at 3. Similarly, NAB and REC assert that eliminating the radio duplication rule would increase public awareness of the all-digital mode. NAB Comments at 5; REC Comments at 3-4.

⁴⁰ As noted above, the Commission has proposed to permit AM stations to operate in all-digital mode, rather than being limited to hybrid operations. See *All-Digital AM Broadcasting NPRM*.

⁴¹ We note that, should stations be permitted to make the digital transition, the technical capacity exists for them to transition from analog to hybrid to all-digital, rather than transitioning directly from analog to all-digital or simulcasting in hybrid and all-digital. See *supra* note 30.

⁴² *Communications Marketplace Report*, 33 FCC Rcd at 12631, n.402.

⁴³ *All-Digital AM Broadcasting NPRM*, 34 FCC Rcd at 11564, para. 7.

⁴⁴ *Revitalization of the AM Service*, MB Docket No. 13-249, Notice of Proposed Rulemaking, 28 FCC Rcd 15221, 15222-23, para. 4 (2013). We note that even in hybrid operations AM stations are unable to provide the same features as hybrid FM stations. Specifically, while hybrid AM stations can broadcast song title and artist name information, they lack the data capacity to offer other features provided by hybrid FM stations, such as album art, artist images, traffic and weather updates, and advertisement images.

allowing simulcasting could attract new listeners with the higher audio quality made possible by digital operations without eliminating the ability of analog listeners to continue to access the station's programming should all-digital signals ultimately be permitted.⁴⁵ And, as NAB asserts, permitting such simulcasting would serve the public interest by enabling "broadcasters to build and maintain a robust audience across the market while evaluating how best to not only survive, but thrive, in the future."⁴⁶ By eliminating the rule as applied to AM service, we would therefore eliminate a potential obstacle to a new technology that may serve to revitalize the AM industry.⁴⁷ Although IBOC hybrid operations offer some ability for AM stations to provide digital service, the IBOC technology has not been widely used by AM stations. As stations are now increasingly exploring the potential for switching from all-analog to all-digital operations, it is logical for the Commission to remove legacy rules that may serve as impediments to a possible all-digital transition. Accordingly, eliminating the radio duplication rule as to the AM service has the potential to drive adoption of this new technology, if eventually authorized by the Commission, by enabling co-owned stations to offer digital programming to the community while maintaining the programming in analog.⁴⁸

13. Although in today's Order we provide additional flexibility to AM stations, we believe that licensees will prefer to maximize the potential for their stations to reach the greatest number of listeners with the greatest amount of programming. That is, we do not believe that this will be a common practice by station owners as a substantially increased amount of duplication is unlikely to be well-received by the marketplace.⁴⁹ Rather, we anticipate that stations will likely use the ability to duplicate programming either in an effort to preserve broadcasting in the AM service or to aid in a potential digital transition. As a result, we believe that any potential negative impacts on public interest objectives—such

⁴⁵ BBC Comments at 5.

⁴⁶ NAB Comments at 5.

⁴⁷ See, e.g., *All-Digital AM Broadcasting NPRM*, 34 FCC Rcd at 11564-65, para. 8 (citing comments from proponents of all-digital AM broadcasting asserting that "the benefits of authorizing all-digital AM will be widespread for broadcasters and listeners alike" and "a voluntary transition to all-digital AM service could help to reverse [waning AM audience share and advertising revenues] by enabling broadcasters to provide a pristine signal").

⁴⁸ As detailed above, we find that elimination of the radio duplication rule completely with respect to the AM service is warranted based on the technical and economic issues AM licensees face. Thus, we decline to adopt CFI's proposals to (1) extend the programming duplication signal coverage area for AM stations and (2) assess duplication in the AM service on a case-by-case basis. See CFI Comments at 17; CFI Reply at 9. Kern also proposed that we extend the overlap areas of full-service stations. See Kern Comments at 5-6. For the same reasons, we also decline to adopt REC's proposal that the Commission impose upon AM stations entering such duplication arrangements a requirement to surrender any cross-service FM translators after a certain time period and CFI's similar proposal to limit the number of FM translators licensed to a duplicated AM station or disallow use of FM translators by a duplicated AM station. See REC Comments at 3, 4; CFI Reply at 9 (acknowledging that "this should be mulled further"). The record does not support these proposals. In particular, commenters fail to explain why their proposals would be sufficient to alleviate industry-wide pressures that make continued application of the rule overly burdensome. Additionally, having concluded that industry-wide relief from any AM non-duplication restrictions is warranted, we decline to require potentially struggling AM licensees to endure the administrative costs and burdens of seeking individual waivers that otherwise might be required were we to retain at least some radio duplication restrictions. See *infra* note 52.

⁴⁹ Some commenters note that some non-commercial educational licensees substantially duplicate programming on commonly owned NCE stations across separate markets across the country. See CFI Reply at 3-4; CFI Comments at 4-8; Kern Reply. As this programming duplication involves separate markets, these observations about non-commercial stations are inapposite to our consideration of the radio duplication rule, which addresses commonly owned commercial stations in the same market.

as a possible reduction in programming diversity and spectrum efficiency— that may result from our action will be minimal and will be outweighed by the benefits identified above.⁵⁰

14. *FM Service.* We conclude that the record does not demonstrate that eliminating the radio duplication rule as applied to the FM service would serve the public interest,⁵¹ as the FM service does not face the same persistent challenges as the AM service that eliminating the rule for AM stations is intended to mitigate. Nor, however, do we find that the record supports tightening or expanding the radio duplication rule for the FM service, as requested by some commenters.⁵² Accordingly, we retain the radio duplication rule for FM stations in its current form. In so doing, however, we recognize the existing waiver process as a method for regulatory relief where warranted.

15. Although NAB supports elimination of the rule broadly, for both the AM and FM services, we do not find there would be sufficient benefits to justify eliminating the rule for the FM service. Given that the primary considerations weighing in favor of eliminating the rule for the AM service, such as the persistent technical and economic challenges that AM broadcasters face and the potential benefits from facilitating digital broadcasting in the AM band,⁵³ do not apply to the FM service, we believe the public interest is better served by retaining the existing program duplication rule with respect to the FM service. In addition to relying on the distinctions between the two services discussed above, we find that there are likely benefits to retaining the radio duplication rule for FM stations in particular. The radio duplication rule continues to act as a useful guiderail in the FM service—where spectrum is in higher demand by consumers, advertisers, and owners⁵⁴—to encourage the diversification

⁵⁰ We also find CFI's claim that elimination of the rule will harm minority broadcasters to be speculative and unsupported by the record. CFI supposes that absent the non-duplication rule, a station that otherwise would have been "LMA'd to a minority broadcaster could simply just rebroadcast programming to another station." CFI Comments at 14. CFI provides no evidentiary support, analysis, or explanation as to why this outcome is likely. To the extent its position is that a change in the radio duplication rule will lead to more consolidation, we do not believe that this rule change will give rise to new acquisitions of AM stations solely for the purpose of replicating the programming of an incumbent AM station already serving the same local area, as such a strategy appears unlikely to be profitable. Thus, we dismiss any assertion that our rule change will result in an increase in consolidation of radio station ownership. Furthermore, as noted above, we believe that existing station owners may use programming duplication in an effort to preserve programming in the AM service or to aid in a potential digital transition, benefits that would accrue to minority as well as non-minority broadcasters.

⁵¹ Most commenters do not support eliminating the radio duplication rule as to the FM service. *See supra* notes 27 and 28.

⁵² *See, e.g.,* CFI Comments at 17 (proposing that we extend the programming duplication signal coverage area for FM stations); *see supra* note 48 (citing Kern Comments at 5-6 (proposing expansion of the radio duplication rule, including extending the overlap areas of full-service stations)). As the commenters have provided only bare assertions as to these proposals, offering no specific evidence or analysis, we reject these suggestions that we expand the existing rule. We also decline to adopt proposals to expand the radio duplication to cover translators and NCE stations, as we find these proposals to be outside the scope of this proceeding. *See* REC Comments at 3-4; CFI Comments at 15-18. We similarly decline to address various other proposals, including NAB's request to modernize the translator duplication rule, because they are likewise outside the scope of this proceeding. *See* NAB Comments at 6; CFI Reply at 8 (recommending changes to the translator rule and that broadcasters should specify the origin of programming received by satellite); Kern Reply at 5-6 (raising various suggested changes beyond the scope of the *NPRM*).

⁵³ *See All-Digital AM Broadcasting NPRM*, 34 FCC Rcd at 11576-77, para. 35 (noting that limited digital hybrid adoption in the AM service is "due to multiple factors, including reception issues with the hybrid analog signals, limited signal robustness and reception range caused by the relatively low amplitude of the digital sidebands in relation to the analog carrier, and adjacent channel interference caused by the wider bandwidth of hybrid signals" and that "the hybrid mode is more likely to require replacement of the entire antenna system than all-digital").

⁵⁴ We note the AM service's decades-long struggle with "a steady decline in listenership" can be attributed in part to the availability of higher fidelity alternatives. These includes FM broadcasting. *See id.* at 11560, para. 2 & n.4 (citing Kintronic Comments at 1, MB Docket No. 19-311 and 13-249).

of programming on commonly owned FM stations. We agree with REC that retaining the radio duplication rule for FM stations ensures “some basic level of diversity and . . . prevent[s] spectrum warehousing.”⁵⁵ Moreover, the record provides no evidence that the current limit restricting the duplication of programming to 25% of the station’s average broadcast week harms FM broadcasters. Thus, we retain the radio duplication rule for FM stations.

16. Nevertheless, should an FM station in fact “require additional flexibility”⁵⁶ and wish to repurpose programming on a commonly owned, overlapping FM station for more than 25% of the broadcast week, it may apply for a waiver of the radio duplication rule.⁵⁷ While we acknowledge NAB’s concerns about the costs imposed by a waiver process generally,⁵⁸ we conclude that the waiver process is nevertheless a more appropriate solution for FM stations with particular needs that may be served by allowing programming duplication. The waiver process allows for the consideration of factors on a case-by-case basis and is more narrowly tailored than complete elimination of the radio duplication rule for FM stations, which we find is unwarranted on the current record.

IV. PROCEDURAL MATTERS

17. *Final Regulatory Flexibility Act Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA),⁵⁹ the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) relating to this *Order*. The FRFA is set forth in Appendix B.

18. *Paperwork Reduction Analysis.* This document does not contain new or revised information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13, (44 U.S.C. §§ 3501 through 3520). In addition, therefore, it does not contain any new or modified “information burden for small business concerns with fewer than 25 employees” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, 44 U.S.C. § 3506(c)(4).

19. *Congressional Review Act.* [The Commission will submit this draft Report & Order to the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, for concurrence as to whether this rule is “major” or “non-major” under the Congressional Review Act, 5 U.S.C. § 804(2).] The Commission will send a copy of the *Order* to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

20. *Additional Information.* For additional information on this proceeding, contact Jamile Kadre, Jamile.Kadre@fcc.gov, of the Industry Analysis Division, Media Bureau, (202) 418-2245.

V. ORDERING CLAUSES

21. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in sections 1, 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 303(r), this Order **IS ADOPTED**.

⁵⁵ REC Comments at 5. Kern, a self-described “prospective non-commercial community broadcaster,” likewise emphasizes the need for spectrum for new, diverse, and hyperlocal programming in the FM service and claims that programming duplication “stifle[s] local programming, diversity of programming, and new broadcast entrants.” Kern Comments at 1, 6.

⁵⁶ NAB Comments at 5.

⁵⁷ See 47 CFR §1.3; *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C.Cir.1990) (“[W]aiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C.Cir.1969) (“An applicant for waiver faces a high hurdle even at the starting gate. ‘When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.’”) (citation omitted).

⁵⁸ See *id.* at 5.

⁵⁹ See 5 U.S.C. § 604.

22. **IT IS FURTHER ORDERED** that, pursuant to the authority found in sections 1, 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 303(r), the Commission's rules **ARE AMENDED** as set forth in Appendix A, effective as of the date of publication of a summary in the Federal Register.⁶⁰

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

24. **IT IS FURTHER ORDERED** that, pursuant to Section 801(a)(1)(A) of the Congressional Review Act, 5 U.S.C. § 801(a)(1)(A), the Commission **SHALL SEND** a copy of the *Order* to Congress and to the Government Accountability Office.

25. **IT IS FURTHER ORDERED** that, should no petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 19-310 **SHALL BE TERMINATED** and its docket closed.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶⁰ These rules serve to "reliev[e] a restriction." 5 U.S.C. § 553(d)(1).

APPENDIX A
Rule Changes

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

PART 73 – RADIO BROADCAST SERVICES

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

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

2. Amend Section 73.3556 by revising paragraph (a) to read as follows:

§73.3556 Duplication of programming on commonly owned or time brokered stations

(a) No commercial FM radio station shall operate so as to devote more than 25 percent of the total hours in its average broadcast week to programs that duplicate those of any station in the same service which is commonly owned or with which it has a time brokerage agreement if the principal community contours (predicted 3.16 mV/m) of the stations overlap and the overlap constitutes more than 50 percent of the total principal community contour service area of either station.

APPENDIX B

Final Regulatory Flexibility Act Analysis

A. Need For, and Objectives of, the Report and Order

1. The current radio duplication rule prohibits any commercial AM or FM radio station from devoting “more than 25 percent of the total hours in its average broadcast week to programs that duplicate those of any other station in the same service (AM or FM) which is commonly owned or with which it has a time brokerage agreement if the principal community contours . . . of the stations overlap and the overlap constitutes more than 50 percent of the total principal community contour service area of either station.”¹ This *Report and Order (Order)* adopts a rule change to eliminate the radio duplication rule as pertains to AM stations and retains the rule as applied to FM stations in order to better serve the public interest and respond to current marketplace realities, including the digital AM transition. We find that the unique technical and economic challenges that AM broadcasters currently confront, coupled with the desire to facilitate an AM digital broadcasting transition, warrant eliminating the rule for AM licensees in order to provide them with greater flexibility. The AM broadcasting service faces persistent interference issues that have hampered the service and frustrated both consumers and licensees. In particular, the service has faced an increase in the level of environmental and man-made noise over time, which has increased the amount of interference in the band.² In addition, AM stations continue to be more difficult to operate and more expensive to maintain than FM stations, requiring larger and more complex physical plants, which are increasingly under pressure in urban areas.³ Thus, we find that permitting a broadcaster who owns two AM stations in the same local area to duplicate programming without regard to the degree of contour overlap between the two stations will serve the public interest by affording AM broadcast licensees greater flexibility to respond to marketplace conditions and ultimately will allow stations to improve service to their communities.⁴

2. We also find that the record does not demonstrate that eliminating the radio duplication rule as applied to the FM service would serve the public interest, as the FM service does not face the same persistent challenges as the AM service that eliminating the rule for AM stations is intended to mitigate. In addition to relying on the distinctions between the two services discussed above, we find that there are likely benefits to retaining the radio duplication rule for FM stations in particular. The radio duplication rule continues to act as a useful guiderail in the FM service—where spectrum is especially scarce—to encourage the diversification of programming on commonly owned FM stations. However, we do not find that the record supports tightening or expanding the radio duplication rule for the FM service, as requested by some commenters. Accordingly, we retain the radio duplication rule for FM stations in its current form, while recognizing the existing waiver process as a method for regulatory relief where warranted by the public interest.

¹ 47 CFR § 73.3556. Principal community contours are defined as “predicted or measured 5 mV/m groundwave for AM stations and predicted 3.16 mV/m for FM stations.” *Id.* A time brokerage agreement generally involves the sale by one radio licensee of blocks of time to a broker who then supplies programming to fill that time and sells the commercial spot advertising to support it. *See 2019 Radio Duplication NPRM*, 35 FCC Rcd at 11544, para. 2, n.1.

² *See generally Revitalization of the AM Service*, First Report and Order, Further Notice of Proposed Rulemaking, and Notice of Inquiry, MB Docket No. 13-249, 30 FCC Rcd 12145 (2015).

³ *See generally id.*

⁴ *See NAB Comments at 5* (eliminating the restriction would “enable broadcasters to build and maintain a robust audience across the market while evaluating how best to not only survive, but thrive, in the future.”).

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. There were no comments to the IRFA filed.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

4. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.⁵ The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

D. Description and Estimate of the Number of Small Entities to Which the Rules 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 generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”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. The rule changes adopted herein will directly affect certain small radio broadcast stations, specifically commercial AM radio stations. Below, we provide a description of these small entities, as well as an estimate of the number of such small entities, where feasible.

7. *Radio Broadcasting.* This U.S. Economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public.”¹⁰ Programming may originate in the establishment’s own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$38.5 million or less in annual receipts.¹¹ Economic Census data for 2012 show that 2,849 firms in this category operated in that year.¹² Of that number, 2,806 operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999 million and 26 with annual receipts of \$50 million

⁵ 5 U.S.C. § 604(a)(3).

⁶ 5 U.S.C. § 603(b)(3).

⁷ *Id.* § 601(6).

⁸ *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in 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).

⁹ *Id.* § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission’s statistical account of television stations may be over-inclusive.

¹⁰ U.S. Census Bureau, 2017 NAICS Definitions, “515112 Radio Stations,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

¹¹ 13 C.F.R. § 121.201; 2017 NAICS code 515112.

¹² U.S. Census Bureau, U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515112 Radio Stations) https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515112.

or more.¹³ Based on this data, we estimate that the majority of commercial radio broadcast stations were small under the applicable SBA size standard.

8. The Commission has estimated the number of licensed commercial FM radio stations to be 6,726, the number of commercial FM translator stations to be 8,188 and the number of commercial AM radio stations to be 4,580, for a total of 19,494 commercial radio stations.¹⁴ Of this total, nine commercial radio stations had revenues of \$41.5 million or greater in 2018, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Database (BIA) on June 15, 2020. All other commercial radio stations qualify as small entities under the SBA definition. Of this total, nine commercial radio stations had revenues of \$41.5 million or greater in 2018, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Database (BIA) on June 15, 2020. All other stations qualify as small entities under the SBA definition.

9. In assessing whether a business concern qualifies as small under the above definition, business (control) affiliations¹⁵ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the estimate of small businesses to which the proposed rules may apply does not exclude any radio station from the definition of small business on this basis and is therefore possibly over-inclusive.

E. Description of Projected Reporting, Record Keeping and Other Compliance Requirements

10. The *Order* eliminates the radio duplication rule as applied to AM stations. Accordingly, the *Order* does not impose any new reporting, recordkeeping, or compliance requirements for small entities. The *Order* thus will not impose additional obligations or expenditure of resources on small businesses.

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

11. The RFA requires an agency to describe any significant, specifically small business, 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 and reporting requirements under the rule for such 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.¹⁶

12. In this proceeding, the Commission has three chief alternatives available for the radio duplication rule—eliminating the rule in its entirety, retaining the rule in its entirety, or modifying the rule in some other form. The Commission finds that the public interest and marketplace realities support modifying the rule by eliminating the restriction on radio duplication for AM stations. Further, should the Commission permit AM stations to operate in all-digital format, elimination of this rule will facilitate the

¹³ *Id.*

¹⁴ See FCC, Broadcast Station Totals as of March 31, 2020, News Release (Apr. 6, 2020), <https://www.fcc.gov/document/broadcast-station-totals-march-31-2020>.

¹⁵ “[Business concerns] are affiliates of each other when one [concern] controls or has the power to control the other, or a third party or parties controls or has to power to control both.” 13 CFR § 121.103(a)(1).

¹⁶ 5 U.S.C. § 603(c)(1)-(c)(4).

transition to all-digital broadcasting by allowing an AM station to simulcast its programming on two stations in analog and digital format. Given that most commercial broadcast stations qualify as small entities, eliminating the rule for AM stations will help small entities by providing greater flexibility for those AM stations that require it in order to continue providing programming. Specifically, eliminating the radio duplication rule for AM stations would allow AM broadcasters to repurpose programming on commonly owned stations.

13. At the same time, we find that the record does not support eliminating the radio duplication rule as applied to FM stations as the rule remains useful in furthering the public interest goals of competition, programming diversity, and spectrum efficiency for which it was originally enacted. In so holding, we note that FM stations may seek waivers of the radio duplication rule as needed based on individual circumstances. We also find that the record does not support tightening or expanding the scope of the rule.

G. Report to Congress

14. The Commission will send a copy of this *Second R&O*, including this FRFA, in a report to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.¹⁷ In addition, the Commission will send a copy of the *Second R&O*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Second R&O* and FRFA (or summaries thereof) will also be published in the *Federal Register*.¹⁸

H. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

15. None.

¹⁷ See 5 U.S.C. § 801(a)(1)(A).

¹⁸ See *id.* § 604(b).