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

In the Matter of	)	
	)	MM Docket No. 00-244
Definition of Radio Markets	)	

NOTICE OF PROPOSED RULE MAKING

Adopted: December 6, 2000 **Released:** December 13, 2000

Comment date: January 26, 2001
Reply Comment date: February 12, 2001

By the Commission: Chairman Kennard, and Commissioners Ness and Tristani issuing separate statements; Commissioners Furchtgott-Roth and Powell concurring and issuing separate statements.

1. We are adopting this Notice of Proposed Rule Making to seek comment on whether and how we should modify the way in which we determine the dimensions of radio markets and count the number of stations in them. We are also seeking comment on whether and how we should amend the method by which we determine the number of radio stations owned by a party in a radio market for the purpose of applying our multiple ownership rules.

Overview

2. In 1991, we commenced a proceeding to relax our local and national radio ownership rules.[1] We ultimately established two market sizes that would determine the number of radio stations in which an entity could have an attributable interest in a local area.[2] One tier included markets with 15 or more commercial radio stations. The other market tier consisted of markets with fewer than 15 stations. A party could have attributable interests in a different number of stations depending on the tier into which its market fell.[3] This decision required that we establish both how we would define a market and, because of the different treatment of markets with less than 15 stations and those with 15 or more, how we would count the number of stations in a market. We determined that:

> we will define the radio market as that area encompassed by the principal community contours (*i.e.*, predicted or measured 5 mV/m for AM stations and predicted 3.16 mV/m for FM stations) of the mutually overlapping stations proposing to have common

1 Notice of Proposed Rule Making in MM Docket 91-140, 6 FCC Rcd 3275 (1991).

[2] Report and Order in MM Docket No. 91-140, 7 FCC Rcd 2755 (1992), recon. granted in part, Memorandum Opinion and Order and Further Notice of Proposed Rule Making in MM Docket No. 91-140, 7 FCC Rcd 6387 (1992).

[3] Memorandum Opinion and Order and Further Notice of Proposed Rule Making in MM Docket No. 91-140, supra.

ownership.[4]

With regard to how we would count the number of stations in a market, we stated:

> [t]he number of stations in the market will be determined based on the principal community contours of all commercial stations whose principal community contours overlap or intersect the principal community contours of the commonly-owned stations.[5]

2. In Section 202(b)(1) of the Telecommunications Act of 1996 ("1996 Act"), Congress directed the Commission to increase the number of stations in a market in which a party could have a cognizable ownership interest, providing that in the largest markets a single entity could own up to eight stations. The number of stations in which it could have such an interest would depend upon the number of commercial stations in the market.[6] Our methods of defining a radio market and determining the number of stations in a market, however, were not altered by the 1996 Act or by our Orders implementing that statute.[7]

3. Using this methodology, we evaluate whether a proposed transaction complies with our ownership rules by first determining the boundaries of each market created by the transaction. Thus, we look to all stations that will be commonly owned after the proposed transaction is consummated and group these stations into "markets" based on which stations have mutually overlapping signal contours. A market is defined as the area within the combined contours of the stations to be commonly owned that have a common overlap. For example, suppose an applicant proposes to own stations A, B, C and D. The contours of stations A, B and C each overlap the contours of the other two stations – that is, there is some

[4] Id. at 6395.

[5] Report and Order in MM Docket No. 91-140, supra at 2778-79.

[6] Pub. L. No. 104-104, 110 Stat. 56 (1996). See Order, In the Matter of Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership), 11 FCC Rcd 12368, 12370 (1996). Section 202(b)(1) provided that:

> (A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);
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> (B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);
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> (C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and
>
> (D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

[7] See 47 CFR §73.3555(a)(3)(ii)).

area which the contours of all three stations have in common. Station D, on the other hand, overlaps the principal community contour of station A, but not those of stations B or C. Under our current definitions,

the area encompassed by the combined contours of stations A, B and C form one "market" and the area within the combined contours of stations A and D form another market.[8]

4. To determine the total number of stations "in the market," as defined above, we count all stations whose principal community contours overlap the principal community contour of any one or more of the stations whose contours define the market. Thus, in the market formed by the contours of stations A, B and C, any station whose contour overlapped the contour of A, B or C would be counted as "in the market." We use a different methodology, however, to determine the number of stations that any single entity is deemed to own in a given market. For this purpose, we only count those stations whose principal community contours overlap the common overlap area of all of the stations whose contours define the market. Thus, a station owned by the applicant that is counted as being "in the market" because its contour overlaps the contour of at least one of the stations that create the market will not be counted as a station owned by the applicant in the market unless its contour overlaps the area which the contours of all of the stations that define the market have in common. Referring to our example of the market formed by the contours of stations A, B and C, station D would be counted as "in the market" because its contour overlaps the contour of station A. But, station D would not be counted as a station owned by the applicant in the ABC market because station D's contour does not also overlap the contours of stations B and C. In short, the applicant's ownership of station D would not be counted against it in determining compliance with the ownership cap in the ABC market.

5. Our experience has led us to conclude that this framework may be having results that may frustrate the structure of the statute and that are not in the public interest. For example, under the existing policies and rules, the Commission's Mass Media Bureau recently determined that Wichita, KS, is a market containing 52 stations and granted the assignment application for station KOEZ(FM) from Kansas Radio Assets to Journal Broadcasting Corporation, giving Journal six stations, including 5 FM stations, in the Wichita market. This is well within the eight stations that a single owner would be permitted to own in a market with more than 45 stations under our rules implementing the 1996 Act. Yet Arbitron, which defines radio markets for commercial purposes, classifies Wichita as a 24-station market in which, under these rules, a single entity could only have an interest in six radio stations, no more than 4 of which could be in the same service. Similarly, under the existing policies and rules, BIA data show that one party seeks to own nine stations in Youngstown, OH.[9] Yet Arbitron data show only 23 commercial radio stations in the Youngstown metropolitan area.[10] In another transaction, using the Commission's methodology, an applicant was able to show that Ithaca, NY, was a market with at least 32 commercial radio stations. Yet Arbitron data show only 9 commercial radio stations in the Ithaca metropolitan area.[11]

6. Given such results, we question whether the use of overlapping signal contours is an appropriate means of defining market boundaries and counting the number of stations in a market. Our methodology sometimes leads to results that are completely at odds with commercial market definitions and

[8] This example assumes that stations A and D are same-service stations, and that at least one other station, B or C, is also in the same service as station A. See 47 CFR § 73.3555(a)(2)("[o]verlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service").

[9] Appendix B describes how our radio definitions and counting methodologies may be applied in Youngstown.

[10] Seventeen out-of-market commercial radio stations receive listening shares in Youngstown.

[11] Nine out-of-market commercial radio stations receive listening shares in Ithaca.

economic reality, and may undermine the structure of the statute to allow levels of ownership that increase commensurately with the size of the market. Additionally, our methodology may encourage applicants to structure transactions to fragment what are commercially considered single markets into a number of smaller markets. While a licensee may be within our ownership limit as to each of these fragmented markets, in the aggregate it owns more stations than our rules would permit were these markets considered to be a single market, as they are by commercial rating services and would be under any economically meaningful market definition.

7. The Commission has used this methodology for defining markets and counting stations in markets since 1992. While the methodology has produced some odd results since its inception, it was not until the ownership limits were substantially increased in 1996 that the methodology's potential to cause results at odds with economic reality became clearly discernible. Until then, the number of problems and their impact were constrained, by the more modest numerical ownership limits and by a 25 percent audience share cap in markets with 15 or more stations.

8. Another problem with this methodology was highlighted in the Commission's recent Pine Bluff decision.[12] In that case, Seark Radio, Inc., sought to purchase one AM and two FM stations in Pine Bluff, Arkansas. Seark already had direct or attributable interests in three other stations in Pine Bluff and environs. A petitioner (Bayou Broadcasting, Inc.) filed a Petition to Deny claiming, in part, that the relevant market contained 11 stations and that grant of the subject application would give Seark direct or attributable interests in 6 of those stations. Were this the case, it would have caused Seark to exceed the "cap" that one party can have in an 11-station market because it would give it interests in more than 5 of the stations in the market.[13] In a decision which we recently affirmed on review, the Mass Media Bureau determined that, under the Commission's method for defining markets and counting the number of stations in a market, the stations involved actually formed three separate markets. Market 3 was formed by two mutually overlapping stations attributable to Seark. Two other stations were determined to contribute to this market. One of those two stations was owned by Seark. However, because this station's principal community contour did not overlap the principal community contours of both of the stations whose overlapping principal community contours established the market, it was not counted as an attributable interest of Seark's in this market. Thus, application of our existing methodologies led to the determination that this Seark station would be counted as being "in the market" for purposes of determining the base number of stations in that market. But, the same station would not be considered to be "in the market" for the purposes of determining how many stations in the market were and would be owned by Seark,[14] and thus whether Seark complied with the numerical station caps. Accordingly, strict compliance with our precedents in this area led to the conclusion that Seark had an attributable interest in only two of the four stations in this market, notwithstanding its attributable interest in a third station which counted as a station in the market for the purpose of determining the total number of stations in the market.[15]

[12] In re Application of Pine Bluff Radio, Inc., 14 FCC Rcd 6594 (1999).

[13] See 47 C.F.R. § 73.3555(a)(1)(iv).

[14] Seark could not have owned three stations in this market because that would have given it an attributable interest in more than half of the four stations considered to be in Market 3. Section 73.3555(a)(1)(iv) allows a party to own, operate, or control up to 5 commercial stations in markets with 14 or fewer stations provided that "a party may not own, operate, or control more than 50 percent of the stations in such market."

[15] We recognized that this appeared to be an anomalous result but pointed out that it was produced by methodology that had been consistently used since 1992 and that subsequent events in the market had rendered harmless the impact of this anomaly in that case.

Options

9. Several options or approaches present themselves as possible means of addressing the definitional issues raised in the preceding discussion. With respect to the counting consistency issue exemplified by the Pine Bluff case, the most direct solution might be simply to alter our counting methodology and count against an applicant's ownership allowance in a given market **any** station that it owned[16] and that was included in determining how many stations were "in the market" for purposes of assessing compliance with the local radio ownership rules. Under this proposed approach, the applicant in the Pine Bluff case would have been charged with ownership of three stations in a four-station market, rather than two, and the transaction would not have complied with the numerical limits in our rules.[17] This would clearly and logically resolve the inconsistency in our present approach and produce more rational results. Moreover, this approach may better reflect the statute's structure, and lend consistency and predictability to the commercial marketplace. We invite comment on this approach. Alternatively, we could exclude from the count of the number of stations in a market, any stations owned by the applicant, except the commonly owned stations that form the market. We seek comment on this approach.

10. Another, broader approach might address both the counting anomaly and the discontinuity between the Commission's and commercial rating services' definition of radio markets generally. Under this approach, we would eliminate our current market definition and, instead, rely on commercially determined market definitions. For example, we could adopt Arbitron radio metro market definitions and simply rely on these commercial delineations to determine the total number of stations in any given market and how many stations an applicant would control in that market. Arbitron-defined markets have the advantage that they attempt to reflect accurately the location of a station's listeners and the identity of stations that are actually perceived by advertisers to be in a market. Additionally, the Department of Justice utilizes Arbitron markets in its competition analysis of radio station mergers. However, the use of Arbitron markets has the disadvantage that many radio stations are not in an Arbitron market. Out of 3100 counties in the United States, slightly less than 850 (containing, however, nearly 80 percent of the nation's population) are in Arbitron markets. Arbitron defines a geographic area based on county lines. We recognize that Arbitron metros do not encompass all the counties that can receive some of the radio signals of the metro radio stations. However, the radio stations included in the Arbitron metro do a significant portion of their business in the counties that are included in the Arbitron metro.[18]

11. We seek comment on whether we should use Arbitron or other commercially defined markets. How should we determine the dimensions of a market when the stations involved are not located in a

[16] The station would be counted, of course, if the applicant had any interest in it that was cognizable under our attribution criteria, whether that interest was based on ownership interests or not.

[17] See the discussion of Market 3 in the Pine Bluff decision, 14 FCC Rcd 6594, 6599 (1999).

[18] In our 1992 decision (on reconsideration) concerning radio markets we decided not to utilize Arbitron markets to define radio markets. The Commission accepted petitioners' arguments that Arbitron markets change regularly, the number of rated stations continually fluctuate and that Arbitron tends to undercount the number of stations in a market because it has minimum reporting standards or overcount them because it counts out-of-market stations with reportable shares in the market. See Memorandum Opinion and Order and Further Notice of Proposed Rule Making in MM Docket No. 91-140, supra at 6394-95. We do not believe these to be insurmountable problems and, for the reasons discussed above, we believe the use of Arbitron markets or equivalent commercial markets may result in more accurate measures of the number of stations in a market than do our current methodologies.

commercially defined market? If we use Arbitron or another commercially defined market, what should we do when a market changes? For example, population growth might result in a county that was in a single market to later be split between two markets. This could cause the number of stations in the market to drop, placing some existing ownership combinations above the local ownership limits. One approach to such changes would be to disregard them (effectively grandfathering existing combinations) until such time as a relevant application is filed, at which point we would apply the market definitions in effect at the time of the application's filing or grant. We seek comment on these and on alternative proposals.

12. Alternatively, should we determine the number of stations in a market using a different contour overlap standard? For example, we could count as being in a market only those stations whose principal community contours overlap or intersect the overlap area of the principal city contours of the stations whose ownership is to be merged. This might provide a superior gauge relative to the area with which we are most concerned in merger situations with respect to both competition and diversity. However, this standard might be too restrictive and thus inappropriately thwart the relaxation of the ownership rules that the 1996 Act contemplated. Is there some other overlap standard that might more accurately provide a count of the number of stations in a market? Perhaps counting only those stations that overlap a certain percentage of the contour of one or more of the mutually overlapping stations would provide accurate results. What percentage would be appropriate? Another option would be simply to count only those stations that are actually heard in a market. What methodology should we use in the event we adopt this option? We invite comment on all of these alternatives.

Procedural Matters

13. We do not propose that any rules and policies we adopt herein should be applied retroactively to existing ownership combinations. Those ownership arrangements were granted as being in the public interest and in accordance with applicable Commission rules and policies. There is no reason to disturb these ownership combinations.

14. Merger applications now pending or filed after the adoption of this Notice but before our final decision in this proceeding present another case. As a general matter, we will continue to process applications under the existing standards, unless and until they are changed in this proceeding. In cases raising concerns about how we count the number of stations a party owns in a market, however, we will defer decision pending resolution of that issue in this proceeding. As we concluded in the 1998 Biennial Review Report, the "shifting market definition" in our counting methodology "appears illogical and contrary to Congress' intent."[19] Given this conclusion, it would be inappropriate to continue to apply this standard to pending and newly filed applications. We believe that the harm caused by application of this standard outweighs any harm caused by the deferment of decision on these applications. We intend to act expeditiously in this proceeding to ensure that any such deferments are few in number and short in duration.

Administrative Matters

15. Comments and Reply Comments. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on before January 26, 2001, and reply comments on or before February 12, 2001. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents

[19] 1998 Biennial Review Report, FCC 00-191 (adopted May 26, 2000) at para. 67.

in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (1998).

16. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, 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 for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address." A sample form and directions will be sent in reply. 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 appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W.; TW-A325, Washington, D.C. 20554.

17. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Wanda Hardy, 445 Twelfth Street, S.W., Room, 2-C207, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using MS Word 97 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number in this case, MM Docket No. 00-244, type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 445 Twelfth Street, S.W., CY-B402, Washington, D.C. 20554.

18. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 Twelfth 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) 418-0270, (202) 418-2555 TTY, or bcline@fcc.gov. Comments and reply comments also will be available electronically at the Commission's Disabilities Issues Task Force web site: www.fcc.gov/dtf. Comments and reply comments are available electronically in ASCII text, Word 97, and Adobe Acrobat.

19. This document is available in alternative formats (computer diskette, large print, audio cassette, and Braille). Persons who need documents in such formats may contact Martha Contee at (202) 4810-0260, TTY (202) 418-2555, or mcontee@fcc.gov.

20. Ex Parte Rules. This is a permit-but-disclose notice and comment rulemaking proceeding. Ex parte presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. See generally 47 CFR Sections 1.1202, 1.1203, and 1.1206(a).

21. Initial Regulatory Flexibility Analysis. With respect to this Notice, an Initial Regulatory Flexibility Analysis ("IRFA") is contained in Appendix A. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an IRFA of the possible significant economic impact on small entities of the proposals contained in this Notice. Written public comments are requested on the

IRFA. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis, we ask a number of questions in our IRFA regarding the prevalence of small businesses in the radio broadcasting industry. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the Notice, but they must have a distinct heading designating them as responses to the IRFA.

22. Authority. This Notice is issued pursuant to authority contained in Sections 4(i), 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, and 307, and Section 202(h) of the Telecommunications Act of 1996.

Ordering Clauses

23. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310, and Section 202(h) of the Telecommunications Act of 1996, this Notice of Proposed Rulemaking is ADOPTED.

24. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),[20] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (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 provided above in paragraph 15. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). *See* 5 U.S.C. § 603(a). In addition, the Notice and the IRFA (or summaries thereof) will be published in the Federal Register. *See id*.

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

Section 202(h) of the Telecommunications Act of 1996 (1996 Act) requires the Commission to review all of its broadcast ownership rules every two years commencing in 1998, and to determine whether any of these rules are necessary in the public interest as the result of competition. The 1996 Act also requires the Commission to repeal or modify any regulation it determines to be no longer in the public interest. The Commission adopted a Notice of Inquiry in 1998 in compliance with this requirement. (13 FCC Rcd 11276). The Commission believes that its present method of determining the dimensions of radio markets and/or of counting the stations available in those markets may be having results that do not reflect the structure of the Telecommunications Act with regard to the Commission's local radio ownership rules and may not be in the public interest. Present methodology may result in radio markets whose dimensions do not reflect actual listening patterns or availability, artificially enhance the number of stations in those markets or artificially fragment what may be single individual markets into several independent smaller markets, thereby allowing a single owner to own a number of stations in a market in excess of what Congress intended. Our methodology sometimes leads to results that are completely at odds with commercial market definitions and economic reality, and thus does not advance the Telecommunications Act's structure of allowing levels of ownership that increase commensurately with the size of the market. Additionally, the Commission determined in its biennial review proceeding (MM Docket No. 98-35) that it appears that the way in which it determines the number of radio stations that a party owns in a market may have lead to unintended results. This Notice is designed to solicit comment on proposals to assure that our definitions and methodologies more closely reflect commercial realities and the intent of Congress. Because Section 202(h) of the 1996 Act directs the Commission to repeal or modify any broadcast ownership regulation it finds no longer in the public interest the Commission has adopted this Notice to solicit comment on the modification of the subject policies and rules.

B. Legal Basis

This Notice is adopted pursuant to sections 1, 2(a), 4(i), 303, 307, 309, 310, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, 310, and Section 202(h) of the

[20] See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 et seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

Telecommunications Act of 1996.

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

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.[21] The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction.[22] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[23] 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.[24]

The SBA defines a radio broadcasting station that has $5 million or less in annual receipts as a small business.[25] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[26] Included in this industry are commercial, religious, educational, and other radio stations.[27] The 1992 Census indicates that 96 percent of radio station establishments produced less than $5 million in revenue in 1992.[28] Official Commission records indicate that 11,334 individual radio stations were operating in 1992.[29] As of September 30, 2000, Commission records indicate that 12,717 radio stations (both commercial and noncommercial) were operating of which 2,140 were noncommercial educational FM radio stations.[30] (Our multiple ownership rules, however, do not apply to noncommercial educational radio stations.) Applying the 1992 percentage of station establishments producing less than $5 million in revenue (i.e., 96 percent) to the number of commercial radio stations in operation, (i.e., 10,577) indicates that 10,154 of these radio stations would be considered "small businesses" or "small organizations."

[21] 5 U.S.C. § 603(b)(3).

[22] Id. § 601(6).

[23] Id. § 601(3).

[24] 15 U.S.C. § 632.

[25] 13 CFR § 121.201, SIC code 4832.

[26] 1992 Census, Series UC92-S-1, at Appendix A-9.

[27] Id. The definition used by the SBA also includes radio broadcasting stations which also produce radio program materials, however, separate establishments that are primarily engaged in producing radio program material are classified under another SIC number. Id.

[28] The Census Bureau counts radio stations located at the same facility as one establishment. Therefore, each co-located AM/FM combination counts as one establishment.

[29] FCC News Release, No. 31327 (Jan. 13, 1993).

[30] FCC Press Release, Broadcast Station Totals as of September 30, 2000, (issued November 29, 2000).

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

There currently are no recordkeeping or other compliance requirements associated with the subject rule and policies. The Notice proposes no new recordkeeping or other compliance requirements.

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

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 entities.[31]

In fashioning its Report in the Commission's Biennial Review Proceeding (MM Docket No. 98-35) the Commission considered a number of alternatives to the subject counting methodology policy. These alternatives were: (1) retention of the existing radio market definition policy; (2) modification of the existing radio market definition policy; (3) retention of the existing rule (47 CFR § 73.3555(a)(3)(ii)) concerning counting the number of stations in the radio market; (4) modification of the existing rule concerning counting the number of stations in the radio market; (5) retention of the existing policy for counting the number of stations a party owns in a radio market; and (6) modification of the existing policy for counting the number of stations a party owns in a radio market. The Biennial Review Report tentatively concluded that the existing policy for determining radio markets and counting methodology rule and policy should be modified. An alternative considered in this item is to maintain the *status quo*. However, the Notice does propose to modify the current method of defining radio markets and to modify our station-counting methodologies. Alternatives (2), (4), and (6) may have a beneficial effect on small entities. A more accurate and predictable definition of radio markets, and improved counting methodologies may more precisely determine the size of markets and the number of stations in them and allow the Commission to achieve the results intended by Congress in passing the 1996 Act. This could result in some small radio stations facing competition from commonly owned local station groups that are more of the size Congress intended than is the case under current Commission rules and policies. Any significant alternatives presented in the comments received in response to the instant Notice will certainly be considered.

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

None.

[31] 5 U.S.C. § 603(c).

APPENDIX B

MARKET DEFINITION

This Appendix illustrates the methodology for identifying and counting stations to determine compliance with Section 73.3555(a)(1). The Commission's current definition of a radio market is "the area encompassed by the principal community contours (*i.e.*, predicted or measured 5 mV/m for AM stations and predicted 3.16 mV/m for FM stations) of the mutually overlapping stations proposed to have common ownership."[32] The number of stations in a market is considered to be "the number of commercial stations whose principal community contours overlap, in whole or in part, with the principal community contours of the stations in question."[33] This analysis examines one metropolitan area to show how stations have been and can be combined in compliance with our rules. It also illustrates how certain anomalies can occur given the Commission's definition of a radio market.

Our analysis focuses on stations in and around Youngstown, OH. Youngstown was chosen only for illustrative purposes and the combinations discussed in the illustrations comply with the current multiple ownership rules. Youngstown, OH is a medium-sized city between Cleveland, OH and Pittsburgh, PA. It is roughly 70 miles from both cities. Arbitron (a radio listening survey service) has defined the Youngstown-Warren metropolitan area (metro) as consisting of two Ohio counties, Mahoning and Trumbull. These two counties have a population of approximately 479,000 and generate retail sales of over $5.1 billion per year. The radio companies in these counties collect over $21 million per year. The Arbitron metro is ranked 104th among 277 metro areas that are identified and surveyed regularly.

A spreadsheet listing the stations identified with the Youngstown-Warren metro is provided as Attachment I. The attachment shows 23 "home market " stations, 11 FM and 12 AM stations. The spreadsheet also lists stations that have received a reportable listening share in the two Youngstown counties. These stations are identified as "Out of Market Stations" and there are 17 of those, 16 FM and 1 AM.

BIA data show that Clear Channel Communications owns (or proposes to own) [34] nine stations in the Youngstown metro (6 FM and 3 AM). At first glance this may seem inconsistent with the current radio ownership limits. In the largest markets (markets with 45 or more stations), an owner may own up to eight stations with not more than five in one service. This result occurs because the relevant market or markets for compliance with the radio rules is not the Youngstown metro area, but instead determined by radio signal contour overlaps.

To illustrate how the contour overlap rule works, we will look at the contours of the Clear Channel stations and the contours of stations owned by Cumulus Broadcasting, Inc. Attachment II shows the Clear

[32] Order, In the Matter of Implementation of Section 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership), 11 FCC Rcd 12368, 12370 (1996)

[33] 47 CFR § 73.3555(a)(3)(ii)

[34] The Clear Channel transaction is based on stations in the Youngstown Arbitron metro, as reported by BIA. Clear Channel owns four stations in the metro and has filed applications to acquire five other metro stations. On September 7, 2000, the Commission, pursuant to the request of assignor Stop 26, dismissed the application to assign Station WBTJ-FM to Clear Channel. For purposes of this illustration, however, we will consider the pre-dismissal configuration of this transaction.

Channel contours, and Attachment III shows the Cumulus contours. Each multiple ownership showing consists of unique station contours and unique contour overlaps so it is impossible to illustrate all combinations, but these two illustrate the basic process of identifying the "market."

With respect to the Youngstown stations, the Clear Channel transaction creates two markets.[35] The darkened areas on the map of Attachment II represent the common overlap (or common intersection) of the stations in each market. Eight stations have a common intersection just east of downtown Youngstown, and eight stations have a common intersection just north of downtown Youngstown. Each market has seven stations in common, WICT-FM, WTNX-FM, WMXY-FM, WBBG-FM, WRTK-AM, WKBN-AM, and WNIO-AM. Only WBTJ-FM is unique to the eastern market, and only WNCD-FM is unique to the northern market.

For Clear Channel to be able to own all nine stations, it must show that some of those stations are located in different radio markets with 45 or more stations, since otherwise it would violate the eight station cap per market. To determine which stations overlap the markets in question, and thus are counted as stations "in the market," an engineer is usually employed to determine station contours that overlap, in whole or in part, the principal community contours of the stations in question. The contours need not overlap the area of intersection described above; they only need to overlap one (or more) of the contours in question.

We do not show all 45 stations in this appendix because of the difficulty in presenting that many contours. Illustrative examples show, however, the types of stations that can be used to satisfy the 45-station count. All of the Arbitron metro stations overlap with the contours in question for Clear Channel. Including Clear Channel's nine stations, there are 23 home market stations that Clear Channel can count. In addition, Clear Channel can count stations not identified with any Arbitron market (there are nearly 5000 such stations in the U.S.) that are located in counties adjacent to and nearby Youngstown. Lastly, Clear Channel can count relatively distant signals that overlap WKBN-AM's large principal community predicted contour. Attachment IV shows the contours of five distant stations that overlap WKBN-AM. All five of these stations can be counted in satisfying the 45 stations count. These are not the only "distant" signals that can be counted; they are used here only for illustrative purposes. Three of the stations are licensed to Cleveland, and two of the stations are licensed to Pittsburgh. Only one of the five stations has a principal community contour that reaches within twenty miles of Youngstown. It can also be seen that WMMS-FM and WMJI-FM in Cleveland have contours that just touch the contour of WKBN-AM as does WXDX-FM in Pittsburgh.[36]

The Cumulus transaction also creates two markets. The darkened areas on the map of Attachment III represent the common overlap (or common intersection) of the stations in each market. Six stations have a common intersection that covers the city of Youngstown, and five stations have a common intersection between Sharon and Greenville, PA. Each market has three stations in common, WHOT-FM, WYFM-FM and WPIC-AM. WQXK-FM, WBBW-AM and WSOM-AM are unique to the six station market, and WWIZ-FM and WLLF-FM are unique to the five station market.

For Cumulus to own all eight stations in Youngstown, it must show that in its six station market there are at least 15 stations, and it must also show that there are 15 stations in the five station market,

[35] See footnote 34, supra.

[36] Clear Channel proposes to acquire this station in its merger with AM-FM Inc.

because four of the stations are FM facilities.[37] In the six station market, Cumulus may include two stations that it owns in Pennsylvania to satisfy the 15 station count. Similarly, in the five station market, Cumulus may include two stations that it owns in Salem and one station that it owns in Youngstown stations to satisfy the 15 station count.

[37] See Attachment III

SEE ATTACHMENT I

SEE ATTACHMENT II

SEE ATTACHMENT III

SEE ATTACHMENT IV

STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

Re: In the Matter of Definition of Radio Markets, Notice of Proposed Rulemaking

The Notice on the Definition of Radio Markets is a critical step in bringing the Commission's rules in line with the commercial realities of the radio marketplace.

As I stated when the Commission recently issued the first Biennial Review of the broadcast ownership rules, the Commission's current methodology for defining radio markets and counting the number of stations in a market has the potential to produce unanticipated and anti-competitive results in particular cases.

Section 202 of the Telecommunications Act directed the Commission to expand the limit on how many stations a party could own in a market. Congress specified a sliding scale of numerical limits depending on the size of the market that, for example, would allow a party to own *up to* 8 commercial radio stations in a market with 45 stations, *up to* 7 stations in a market with 30-44 stations, and so on.

In some cases, the Commission's current methodology for defining radio markets seems to be turning that statutory design on its head. It may be allowing higher levels of ownership in what commercial services consider to be much smaller markets.

Therefore, this methodology deserves a hard, careful look. Our review will assist the Commission in discharging its statutory responsibility to ascertain whether individual radio transactions comply with the law and promote the public interest.

SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS

Re: In the Matter of Definition of Radio Markets, Notice of Proposed Rulemaking

The Commission's current method of defining local radio markets suffers from a number of flaws that can and should be remedied in this proceeding. That said, I fear that the final rules we issue may be the gilded padlock on the proverbial barn door, with the horse of consolidation galloping over the horizon.

As this Notice points out, current radio market definition methods use different contour overlap schemes to define commonly owned stations, on the one hand, and total stations in a market, on the other, often leading to uneven results that bear no resemblance to market realities. For example, under our current contour overlap method, two competing groups operating in the same city may be limited by two different station caps. Since the Commission first implemented the radio ownership changes mandated by Congress, *see In Re: Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368 (1996), I have highlighted the need to remedy this problem, *see, e.g.*, Joint Statement of Commissioners Susan Ness and Gloria Tristani, *KBYB(FM), El Dorado, Arkansas*, 13 FCC Rcd 15685 (1998). Over the last four years, however, the radio broadcast industry has consolidated considerably, with transactions consummated under our current, flawed system of defining markets. I hope we can quickly conclude this proceeding so that we do not compound the problem with further delay.

I also believe that, in the spirit of improving the law, we should be mindful of the law of unintended consequences. Any remedy we adopt must be applied prospectively and fairly, with cognizance of the reasonable market expectations of parties who hold combinations lawfully assembled under our existing rules. Finally, whatever definition we adopt should be consistent with the intent of Congress in the Telecommunications Act of 1996 in relaxing radio ownership restrictions.

SEPARATE STATEMENT OF COMMISSIONER GLORIA TRISTANI

Re: In the Matter of Definition of Radio Markets, Notice of Proposed Rulemaking
MMB Docket No. 00-244

While today's Notice represents progress, it is only a small step on a long road. It has come so late, and at such great cost, that it is appropriate to reflect for a moment on the damage that the Commission's delay has inflicted on the listening public.

On August 14, 1998 – almost two and a half *years* ago – Commissioner Ness and I issued a statement raising the two identical issues that today's item implies could only recently be discerned: (1) that the Commission's rules prevent a meaningful assessment of market concentration because they do not apply a consistent definition of radio "market"; and (2) that the practice of treating any station whose principal community contour intersects with any mutually overlapping station in the proposed combination as being in the same "market" can lead to unrealistic results.[1] Since that time, I have repeatedly banged the drum that our rules denied justice to listeners and their communities.[2] Finally, in its June 20, 2000 Biennial Review Report, the Commission tentatively concluded that "our definitions and methodologies in this area may be having effects inconsistent with what Congress intended" and promised a Notice of Proposed

[1] See, e.g., Concurring Statement of Commissioner Gloria Tristani, *Re: Application of Great Empire Broadcasting, Inc. and Journal Broadcast Corp. for Transfer of Control of Omaha Great Empire Broadcasting, Inc., Licensee of WOW(AM) and WOW(FM), Omaha, Nebraska*; *File Nos. BTC-980831GH, BTCH-980831GI*, 14 FCC Rcd 11145 (1999); Press Statement of Commissioner Gloria Tristani, *Re: Mass Media Bureau Approval of Radio License Transfer in Wichita, Kansas (rel. March 24, 2000)*; Press Statement of Commissioner Gloria Tristani, *Re: Mass Media Bureau Approval of Radio License Transfers in Youngstown-Warren, Ohio and Lafayette, Louisiana (rel. March 20, 2000)*; Press Statement of Commissioner Gloria Tristani re: *Re: Mass Media Bureau's granting of applications to transfer radio licenses from Pilot Communications to Citadel Communications Corp. in Augusta-Waterville, Maine (rel. Feb. 28, 2000);* Press Statement of Commissioner Gloria Tristani *Re: Mass Media Bureau's granting of applications to transfer radio licenses from Fuller-Jeffrey Broadcasting to Citadel Broadcasting in Portland, Maine (rel. Aug. 24, 1999*); Dissenting Statement of Commissioners Susan Ness and Gloria Tristani, *In re Applications of Pine Bluff Radio, Inc. and Seark Radio, Inc. File Nos. BAL-970103EA, BALH-970103EB, BALH-970103EC (rel. April 12, 1999*); Joint Statement of Commissioners Susan Ness and Gloria Tristani, *In re Station KBYB(FM), El Dorado, Arkansas*, 13 FCC Rcd 15685 (1998).

[2] *See Biennial Review Report*, FCC 00-191 (rel. June 20, 2000) at para. 68.

Rulemaking to correct the problem.[2] Regrettably, it has taken the Commission an additional six months to issue today's 8-page Notice.

This is not simply a matter of the Commission ignoring congressional directives and common sense. Real listeners in real communities have been harmed by a consolidation of the airwaves that should not have been permitted to take place. Across America, in cities like Omaha (Nebraska), Wichita (Kansas), Youngstown (Ohio), Portland (Maine), Pine Bluff (Arkansas) and Augusta (Maine) listeners have been deprived of the broadcast diversity to which they are entitled and which the Commission is duty-bound to ensure. For those communities, today's notice of proposed rulemaking will provide cold comfort. We must now move with dispatch to spare other communities a similar fate.

SEPARATE STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH

I concur in this rulemaking for the limited aim of rationalizing our arguably arbitrary and capricious methodology of counting radio stations for purposes of section 202(b)(1). *Cf.* Joint Statement of Commissioners Ness and Tristani, *KBYB(FM), El Dorado, Arkansas,* 13 FCC Rcd 15685 (1998) (explaining that it makes no sense to count stations as in the relevant market for the denominator but not the numerator of the 202(b) calculation). My purpose is not, as this Notice of Proposed Rulemaking unfortunately suggests, to change our definition of "markets" in order to cut back on the concentration levels that Congress expressly set in the 1996 Telecommunications Act.

Nor is the NPRM correct in its suggestion that Congress could not have known or understood the accepted administrative meaning of that term, and thus the actual import of its revision of the radio limits, when it changed the radio market limits in the Communications Act. To the contrary, "it is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, 'the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *CFTC v. Schor*, 478 U.S. 833, 845 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974)); *see also FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 436-437 (1986); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457 (1978).

Based on this narrow understanding of purpose – *viz.*, to eliminate what seems to be an irrational counting methodology, not to change the definition of a "market" for results-oriented, counter-statutory purposes – I concur in this rulemaking. I take no position, however, as to how to resolve the numerator-denominator inconsistency, and I look forward to reviewing the comments on this matter.

CONCURRING STATEMENT OF COMMISSIONER MICHAEL K. POWELL

RE: IN THE MATTER OF DEFINITION OF RADIO MARKETS, NOTICE OF PROPOSED RULEMAKING

I concur in the decision today to conduct a Notice of Proposed Rulemaking (NPRM) for the limited purpose of harmonizing the counting methods we use to determine both the size, and the number of stations in a radio market that count toward the ownership cap set forth in Section 202(b)(1). To the extent that this NPRM addresses what may be an arbitrary distinction between counting methods, I support its issuance. I do, however, caution the Commission to avoid using the rulemaking process as a means to circumvent specific statutory provisions and effectuate a different result than Congress intended.

The NPRM asks whether the Commission should adopt a *different* (and more restrictive) method for determining the relevant market because our current definition "may undermine the structure of the statute" and produce results "that are not in the public interest." My single greatest problem with this proposal is one of statutory interpretation. The effect of eliminating the Commission's current methodology and replacing it with a commercially defined market (such as Arbitron) would be to shrink markets, and thereby substantially limit the number of stations one could own. When Congress adopted its radio ownership caps, Commission regulations defined these markets in a particular way. That way was the law of the land. The Arbitron market definitions were in existence, but they were not used for regulatory purposes, and Congress did not specifically incorporate them. I believe proper statutory interpretation would lead one to conclude that Congress set its numerical limits against the market definition that prevailed in regulation at the time, and not a definition that had not been used for this purpose previously.[1]

For this reason, I concur in today's decision for the sole purpose of correcting what may be an arbitrary counting methodology for determining the size and number of stations one may own in a local radio market.

[1] "It is a commonplace of statutory construction that the specific governs the general," *Morales v. Trans World Airlines*, 504 U.S. 374, 384-385 (1992) (citing, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987).