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

In the Matter of	)	
	)	
Elimination of Experimental Broadcast	)	
Ownership Restrictions	)	MM Docket No. 00-105
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REPORT AND ORDER

Adopted: March 22, 2001 **Released:** March 28, 2001

By the Commission:

I. INTRODUCTION

1. By this Report and Order we eliminate the experimental broadcast multiple ownership rule, Section 74.134 of the Commission's Rules.[1] That rule provides that no entity may control more than one experimental license absent a showing of need.[2] We are convinced that this rule is no longer necessary to achieve the goals of competition and diversity in the broadcast market, and that elimination of the rule would serve the public interest.

II. BACKGROUND

2. Experimental stations are "licensed for experimental or developmental transmissions of radio telephony, television, facsimile, or other types of telecommunication services intended for reception and use by the general public."[3] Under this licensing scheme, stations can carry on research and experimentation for the development of new broadcast technology, equipment, systems, or services that could not be accomplished using other licensed broadcast stations. Section 74.134 generally limits a licensee's ability to hold experimental station licenses to a single license, except in cases where a showing was "made that the program of research requires a licensing of two or more separate stations."

3. The Commission initiated consideration of its rule concerning the ability of a broadcaster to hold more than one license for an experimental broadcast station when it issued a Notice of Inquiry ("NOI")[4] as the first step in its Biennial Ownership Review of the broadcast ownership and other rules as required by § 202(h) of the Telecommunications Act of 1996 ("1996 Act").[5] In the NOI, the Commission

[1] 47 CFR § 74.134.
[2] For a discussion of the rule's history see Biennial Review Report in MM Docket No. 98-35, 15 FCC Rcd 11058, 11066-70, 11119 (2000) ("Biennial Review Report").
[3] 47 CFR § 74.101.
[4] Notice of Inquiry in MM Docket No. 98-35, 13 FCC Rcd 11276 (1998) ("NOI").
[5] Pub. L. No. 104-104, 110 Stat. 56 (1996).

sought comment on whether the experimental broadcast station multiple ownership rule remained in the public interest.

4. In response to the NOI, the Commission received one comment. The National Association of Broadcasters ("NAB") recommended the repeal of the experimental station multiple ownership rule. NAB argued that regulatory change and dislocation faced by broadcast auxiliary facilities create a need for more responsible use of experimental stations.[6]

5. In its May 26, 2000 Biennial Review Report,[7] the Commission addressed the continued need for the rule, focusing on the purposes for licensing experimental broadcast stations and the restrictions placed on them by our rules.[8] After reviewing the experimental station multiple ownership rule, the Commission tentatively concluded that the rule, adopted in 1946 and re-designated in 1963 as § 74.134,[9] may no longer serve the public interest.

6. As a consequence of the tentative conclusions reached in the Biennial Review Report, we issued the Notice of Proposed Rule Making ("NPRM")[10] in this proceeding proposing to eliminate the multiple ownership rule for experimental stations.[11] There, we stated that the experimental broadcast station multiple ownership rule no longer appeared necessary because of safeguards established by other existing rules pertaining to experimental stations. These rules, we noted, prevent experimental licensees from charging for the production or transmission of any programming, from transmitting program material unless it is necessary to the experiments being conducted or, indeed, from providing any regular broadcast service.[12] Additionally, we pointed out that other experimental broadcast station rules prohibit a licensee from making exclusive use of a single frequency. We stated that these stations, by their nature, do not exert influence on the competitive marketplace and that allowing a party to have more than one experimental broadcast station license might permit efficiencies to be realized in the operation of such stations. This would further our statutory charge pursuant to Section 303(g) of the Communications Act of 1934, as amended, to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."[13] Accordingly, we issued the NPRM in this proceeding seeking comment on whether this rule remains in the public interest. Also, we encouraged commenters to offer alternative proposals involving less than the outright repeal of the rule.[14]

III. DISCUSSION

7. Section 74.134 was intended to limit experimental licensees to the minimum spectrum use necessary to enable them to carry out research and experimentation that might not otherwise be possible under regular broadcasting licensing schemes. The rule also prevented such licensees from aggregating enough stations to enable them to operate a commercial service under the guise of experimentation. The Commission believes the experimental station multiple ownership limitation is no longer necessary given

[6] NAB Comments to NOI at 16.
[7] Biennial Review Report, supra.
[8] Id. at 11119-20.
[9] 28 FR 13706, Dec. 14, 1963.
[10] Notice of Proposed Rule Making in MM Docket No. 00-105, 15 FCC Rcd 11196 (2000)("NPRM").
[11] Section 202(h) of the 1996 Act requires the Commission to "repeal or modify any regulation it determines to be no longer in the public interest" in its Biennial Reviews.
[12] Notice, supra at 11198; see also 47 CFR §§ 74.182(a) and (b).
[13] 47 U.S.C. § 303(g).
[14] Id. at 11196.

that other rules and requirements will adequately assure the goals of § 74.134 are met.

8. NAB, the sole commenter responding to the NPRM, supports the Commission's proposal, urging it to eliminate what NAB characterizes as an "unnecessary and outdated restriction on the multiple ownership of experimental broadcast stations." NAB notes that current requirements[15] and limitations are "sufficient to ensure that they [experimental broadcast stations] are used only for bona fide experimental purposes, rather than for commercial broadcast purposes [and] accordingly, the repeal of the rule strictly limiting ownership of experimental stations should not affect the competitiveness or the diversity of the commercial broadcast marketplace."[16]

9. We agree. Repeal of the experimental station multiple ownership rule will not affect the Commission's ability to ensure that experimental stations are used specifically for bona fide experimental purposes and not for commercial purposes, as the Commission can continue to do so under Section 74.182. Nor will experimental stations be able to tie up excessive spectrum even absent § 74.134 because, under other Commission rules, experimental licensees are limited to the minimum frequencies necessary to conduct their experimental operations and an experimental license does not grant the licensee exclusive use of a frequency.[17] If interference would be caused by simultaneous operation of stations licensed experimentally, our rules require that the parties arrange a satisfactory time division of the frequency or frequencies involved.[18] Accordingly, we have determined that these ownership limits for experimental broadcast stations are no longer necessary.

10. We believe that granting more than one experimental broadcast station license to qualified applicants may, in fact, allow resources to be devoted to research more efficiently during the operation of such stations. As noted above, such an expanded licensing scheme would also promote the Commission's statutory responsibilities under Section 303(g) of the Communications Act.[19]

IV. CONCLUSION

11. In view of the foregoing, we conclude that the experimental station multiple ownership rule is unnecessary to achieving the purposes for which it was adopted. Other rules prevent the use of experimental licenses for commercial purposes or for controlling more spectrum than is needed for experimental purposes. It is hereby repealed as indicated in Appendix B.

V. ADMINISTRATIVE MATTERS

12. Paperwork Reduction Act of 1995 Analysis. This Report and Order has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose no new reporting requirements on the public.

13. Regulatory Flexibility Analysis. Pursuant to the Regulative Flexibility Act of 1980, as amended, 5 U.S.C. § 601 et seq., the Commission's Final Regulatory Flexibility Analysis in this Report and Order is attached as Appendix A.

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[15] 47 CFR § 74.182 [Revised as of October 1, 1999].

[16] NAB Comments to NPRM, at 1-2.

[17] 47 CFR § 74.103(b), 74.131(b).

[18] 47 CFR § 74.131(b). If they cannot reach such an agreement, the rule requires the Commission to specify a time division. Id.

[19] 47 U.S.C. § 303(g).

VI. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 4(i), 303(g) and 303(r), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g) and 303(r), Part 74 of the Commission's Rules, 47 C.F.R. Part 74 IS AMENDED as set forth in Appendix B below.

15. IT IS FURTHER ORDERED that the amendment set forth in Appendix B SHALL BE EFFECTIVE 30 days after publication in the Federal Register.

16. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

17. IT IS FURTHER ORDERED that this proceeding is terminated.

18. Additional Information. For additional information concerning this proceeding, please contact Roger Holberg, Mass Media Bureau, (202) 418-2134.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

As required by the Regulatory Flexibility Act (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rule Making in this proceeding.[2] The Commission sought written public comment on the proposals in this Notice, including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[3]

I. Need For, and Objectives of, Report and Order

In February 1996, the Telecommunications Act of 1996 ("1996 Act") was signed into law. Section 202 of the 1996 Act directed the Commission to make a number of significant revisions to its broadcast media ownership rules. Section 202(h) also requires us to review our broadcast ownership rules every two years commencing in 1998. One of the rules reviewed in our first such biennial reviews was Section 74.134, the experimental broadcast station multiple ownership rule. In our Biennial Review Report[4] we tentatively concluded that this rule was no longer necessary in the public interest. Accordingly, we issued a Notice of Proposed Rule Making proposing the elimination of this rule consistent with the goals of the 1996 Act. This Report and Order eliminates this rule on the basis that it is no longer necessary in the public interest and that other existing Commission rules are sufficient to preclude the abuse of experimental broadcast station authorizations in the absence of the rule.

II. Significant Issues Raised by the Public in Response to the Initial Analysis

No comments were received concerning the Initial Regulatory Flexibility Analysis. Indeed, only the National Association of Broadcasters ("NAB") submitted comments in this proceeding, and it did not specifically address the IRFA or the impact of the proposed rule change on small businesses more generally. It did, however, favor elimination of the subject rule.

III. DESCRIPTION AND ESTIMATE OF THE NUMBER OF SMALL ENTITIES TO WHICH THE 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.[5] The Regulatory Flexibility Act defines the term "small entity as having the same meaning as the terms "small business," "small

[1] 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).
[2] Notice of Proposed Rulemaking in MM Docket No. 00-105, 15 FCC Rcd. 11196 (2000).
[3] See 5 U.S.C. § 604.
[4] Biennial Review Report in MM Docket No. 98-35, 15 FCC Rcd 11058 (2000).
[5] 5 U.S.C. § 603(b)(3).

organization," and "small governmental jurisdiction.[6] In addition, the term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act.[7] 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.[8]

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 SBA 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. A "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." [9] Nationwide, as of 1992, there were approximately 275,801 small organizations.[10] "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000."[11] As of 1992, there were approximately 85,006 such jurisdictions in the United States.[12] This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.[13] Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities.

The Small Business Administration defines a radio broadcasting station that has $5 million or less in annual receipts as a small business.[14] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[15] Included in this industry are commercial, religious, educational, and other radio stations.[16] The 1992 Census indicates that 96 percent (5,861 of 6,127) radio station establishments produced less than $5 million in revenue in 1992. Official Commission records indicate that 11,334 individual radio stations were operating in 1992[17] 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.[18] Applying the 1992 percentage of station establishments producing less than $5 million in revenue (i.e., 96 percent) to the number of radio stations in operation, (i.e., 12,717) indicates that 12,208 of these radio stations would be considered "small businesses" or "small organizations."

The SBA defines small television broadcasting stations as television broadcasting stations with $10.5 million or less in annual receipts[19] As of September 30, 2000, there were 1,288 commercial television

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[6] Id. § 601(6).
[7] Id. § 601(3).
[8] 15 U.S.C. § 632.
[9] 5 U.S.C. § 601(4).
[10] 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).
[11] 5 U.S.C § 601(5).
[12] U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."
[13] Id.
[14] 13 C.F.R. § 121.201 (SIC Code 4832).
[15] 1992 Census, Series UC92-S-1, at Appendix A-9.
[16] Id. The definition used by the SBA also includes radio broadcasting stations which also produce radio program materials. Separate establishments that are primarily engaged in producing radio program material are classified under another SIC number, however. Id.
[17] FCC News Release, No. 31327 (January 13, 1993).
[18] FCC Press Release, Broadcast Station Totals as of September 30, 2000, (issued November 29, 2000).
[19] 13 C.F.R. § 121.201 (SIC Code 4833).

stations and 375 non-commercial educational television stations on the air.[20] According to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database, fewer than 800 commercial TV broadcast stations (65%) have revenues of less than $10.5 million dollars. We note, however, that under SBA's definition, revenues of affiliates that are not television stations should be aggregated with the television station revenues in determining whether a concern is small. Our estimate may thus overstate the number of small entities since the revenue figure on which it is based does not include or aggregate revenues from non-television affiliated companies. Accordingly, it appears that the proposed revisions would affect no more than 800 television stations that might be considered "small businesses" or "small organizations."

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

The Report and Order imposes no reporting, recordkeeping, or compliance requirements.

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

We believe that the elimination of the experimental station multiple ownership rule strikes the appropriate balance between allowing broadcast stations to realize the efficiencies of conducting research via multiple ownership of experimental stations on the one hand, and preventing experimental facilities from being used for commercial purposes or to prevent other legitimate use of broadcast spectrum on the other. Repeal of the experimental station multiple ownership rule will not affect the Commission's ability to ensure that experimental stations are used specifically for bona fide experimental purposes and not for commercial purposes, as the Commission can continue to do so under Section 74.182. Nor will experimental stations be able to tie up excessive spectrum even absent § 74.134 because, under other Commission rules, experimental licensees are limited to the minimum frequencies necessary to conduct their experimental operations and an experimental license does not grant the licensee exclusive use of a frequency. We believe that the elimination of the experimental multiple ownership rule aids all licensees, and it especially benefits small entities who will no longer incur the expensive of filing a special request should they need more than one experimental license, as would have been the case under the previous regulation.[20] Since the elimination of the subject rule in this Report and Order will in all probability confer such a benefit on smaller entities within the group of small businesses affected, the alternative of retaining the rule was not selected.

VI. Report to Congress

The Commission will send a copy of this Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of this Report and Order, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register. See 5 U.S.C. § 604(b).

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

[20] Experimental licensees would still have to make a showing of need in order to be assigned more than one frequency pursuant to Section 74.103(b) of the Commission's Rules.

APPENDIX B

RULE CHANGE

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 74 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, 307, and 554.

2. Section 74.134 is deleted.

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