

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

In the Matter of )
)
2010 Quadrennial Regulatory Review – Review of ) MB Docket No. 09-182
the Commission’s Broadcast Ownership Rules and )
Other Rules Adopted Pursuant to Section 202 of )
the Telecommunications Act of 1996 )
)
Promoting Diversification of Ownership ) MB Docket No. 07-294
In the Broadcasting Services )

NOTICE OF PROPOSED RULEMAKING

Adopted: December 22, 2011

Released: December 22, 2011

Comment Date: [45] days after publication in the Federal Register

Reply Comment Date: [75] days after publication in the Federal Register

By the Commission: Commissioner Copps approving in part, dissenting in part and issuing a statement;
Commissioner McDowell approving in part, concurring in part and issuing a
statement; and Commissioner Clyburn issuing a statement.

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## I. INTRODUCTION

1. Pursuant to our statutory mandate under the Telecommunications Act of 1996,<sup>1</sup> we seek comment in this Notice of Proposed Rulemaking (“*NPRM*”) on the Commission’s media ownership rules and proposed changes thereto. We are required by statute to review our media ownership rules every four years to determine whether they “are necessary in the public interest as the result of competition.”<sup>2</sup> Our challenge in this proceeding is to take account of new technologies and changing marketplace conditions while ensuring that our media ownership rules continue to serve our public interest goals of competition, localism, and diversity. We also are seeking comment on economic studies analyzing the relationship between local media market structure and the policy goals that underlie the Commission’s media ownership rules. In addition, we seek comment in this proceeding on the aspects of the Commission’s 2008 *Diversity Order*<sup>3</sup> that the Third Circuit remanded in *Prometheus Radio Project v. FCC* (“*Prometheus IP*”).<sup>4</sup>

2. The proliferation of broadband Internet and other new technologies has had a dramatic impact on the media marketplace. Consumers are increasingly turning to online and mobile platforms to access news content and audio and video programming. For example, in 2010 and in the first quarter of 2011, satellite radio and TV companies, which offer both satellite and online access to content, have

<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996) (“1996 Act”); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (“Appropriations Act”) (amending Sections 202(c) and 202(h) of the 1996 Act). The media ownership rules subject to this quadrennial review are the local television ownership rule, the local radio ownership rule, the newspaper/broadcast cross-ownership rule, the radio/television cross-ownership rule, and the dual network rule. These rules are found, respectively, at 47 C.F.R. §§73.3555(b), (a), (d), and (c) and 47 C.F.R. §73.658(g).

<sup>2</sup> Section 202(h) of the 1996 Act, 47 U.S.C. § 303 note. Section 202(h) of the 1996 Act further requires the Commission to “repeal or modify any regulation it determines to be no longer in the public interest.” *Id.* In *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (“*Prometheus I*”), the Third Circuit concluded that “necessary in the public interest” is a “‘plain public interest’ standard under which ‘necessary’ means ‘convenient,’ ‘useful,’ or ‘helpful,’ not ‘essential’ or ‘indispensable.’” *Id.* at 394. The court stated that “the first instruction [of § 202(h)] requires the Commission to take a fresh look at its regulations periodically in order to ensure that they remain ‘necessary in the public interest.’” *Id.* at 391. In 2004, Congress revised the then-biennial review requirement to require such reviews quadrennially. *See* Appropriations Act § 629, 118 Stat. at 100.

<sup>3</sup> *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008) (“*Diversity Order*” and “*Diversity Third FNPRM*”).

<sup>4</sup> *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) (“*Prometheus IP*”).

reported growth in subscribership.<sup>5</sup> Similarly, content providers are increasingly looking to the Internet and other new media platforms to bypass traditional media and reach consumers directly. Social media sites are empowering individuals to share news and information in real time, becoming tools of social interaction and revolution throughout the world.

3. For the broadcast and newspaper industries, the growth of these new technologies both challenges established business models and provides opportunities to reach new audiences and generate new revenue streams. Broadcast and newspaper consumption in traditional forms is in decline, and advertising revenues have been shrinking in recent years. Some broadcast and newspaper outlets have contracted the size of news staffs in response. These economic realities have sounded an alarm for some who are concerned that non-traditional media sources are not adequate substitutes for the provision of local news and information by broadcasters subject to public interest obligations. In voicing such concerns, some commenters have asserted that the Commission's media ownership limitations remain vitally important, as increased consolidation places control of programming choices in the hands of too few owners, limiting diversity and underserving the needs of local and minority communities.<sup>6</sup>

4. In short, the media marketplace is in transition, particularly as a result of broadband Internet; but new media are not yet available as ubiquitously as traditional broadcast media. Our nation has not yet reached universal deployment or adoption of broadband. Too much of the country is unserved or underserved by broadband, and the average broadband speed available to consumers varies in different areas and lags behind some other nations. Broadband adoption remains under 70 percent, meaning that tens of millions of Americans do not have access to news and other programming on the Internet.<sup>7</sup> Some parts of the population, including minorities, people with disabilities, and low-income Americans, have much lower rates of broadband adoption.<sup>8</sup> Access to sufficient broadband speeds is critical for consumers to take full advantage of today's online programming and applications, including access to media content through streaming technology and downloading programs. According to one estimate, more than 14 million Americans do not have access to broadband infrastructure that can support today's applications.<sup>9</sup> Much of the content available by streaming and downloads requires minimum broadband speeds. We are taking important steps to close this digital divide, but much work remains.

5. The Commission began this proceeding with a series of workshops held from November 2009 through May 2010. Participants in the workshops discussed the scope and content of the review

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<sup>5</sup> See, e.g., Martin Peers, *DirecTV's Subscriber Growth Stays Aloft*, WALL STREET JOURNAL, Nov. 12, 2010, <http://online.wsj.com/article/0,,SB10001424052748703848204575608603486967076,00.html> (stating that between 2006 and 2010, the two largest direct broadcast satellite television providers in the United States—DirecTV and Dish Network—experienced subscriber growth of 21 percent and 12 percent, respectively) (visited Oct. 12, 2011); Sirius XM Radio Inc., *SiriusXM Reports First Quarter 2011 Results* (press release), May 3, 2011 (stating that subscribership for SiriusXM, the largest satellite radio provider in the United States, reached a new high of 20.6 million in the first quarter of 2011, up nine percent over the previous year).

<sup>6</sup> See *infra* note 10 and accompanying text.

<sup>7</sup> See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 10-159, Seventh Broadband Progress Report and Order on Reconsideration, 26 FCC Rcd 8008, 8010, ¶ 2 n.9 (2011) (stating that 31.8 percent of U.S. households have not adopted broadband); OMNIBUS BROADBAND INITIATIVE, FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 167 (2010) (“NATIONAL BROADBAND PLAN”), available at <http://download.broadband.gov/plan/national-broadband-plan.pdf> (stating that the national adoption rate is 65 percent).

<sup>8</sup> NATIONAL BROADBAND PLAN at 167.

<sup>9</sup> *Id.* at 129.

process.<sup>10</sup> Thereafter the Commission released a *Notice of Inquiry* (“*NOI*”) on May 25, 2010, seeking comment on a wide range of issues to help us determine whether the current media ownership rules continue to serve our policy goals.<sup>11</sup> The *NOI* sought input on developments in the marketplace since the last review and on whether we should adopt alternatives to bright-line, sector-specific rules. It also sought comment on our fundamental goals of competition, localism, and diversity and how to balance these goals when they conflict. In response, industry participants and representatives, public interest groups, and members of the public filed a significant number of comments.

6. To provide data on the impact of market structure on the Commission’s policy goals of competition, localism, and diversity, the Commission commissioned eleven economic studies, as listed in Appendix A, which were conducted by outside researchers and Commission staff.<sup>12</sup> We previously released the studies to allow parties additional time to review the data and analyses and now are seeking formal comment on them herein.<sup>13</sup> As discussed in Section II, the Commission reaffirms that its media ownership rules are necessary to further the Commission’s longstanding policy goals of fostering competition, localism, and diversity. In particular, the Commission reaffirms that a major goal of the rules is to encourage the provision of local news, and we invite suggestions about how that goal can be further achieved.

7. In *Prometheus II*, the Court of Appeals for the Third Circuit considered appeals of the

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<sup>10</sup> The Media Bureau held six public workshops to discuss aspects of the review process. On November 2, 3, and 4, 2009, the Bureau held workshops to discuss the scope and methodology of the proceeding and the analytical framework the Commission should use for conducting its review. See Media Ownership Workshop - Policy Scholars’ Panel, <http://www.fcc.gov/ownership/workshop-110209.html>; Media Ownership Workshop - Public Interest Group Panel, <http://www.fcc.gov/ownership/workshop-110309.html>; and Media Ownership Workshop - Broadcasters & Industry Panel, <http://www.fcc.gov/ownership/workshop-110409.html>. On January 12, 2010, the Bureau held a workshop to examine current financial and economic conditions and marketplace factors affecting the media industry and how the FCC should take them into account in establishing its ownership framework. See Media Ownership Workshop - Financial & Marketplace Issues, <http://www.fcc.gov/ownership/workshop-011210.html>. On January 27, 2010, the Bureau held a workshop to examine how the media ownership rules affect the Commission’s goal of promoting minority and female ownership and other issues relating to diversity in broadcasting. See Media Ownership Workshop – Minority & Female Ownership, <http://www.fcc.gov/ownership/workshop-012710.html>. On February 23, 2010, the Bureau held a workshop in Columbia, South Carolina on the state of local radio and television. See Media Ownership Workshop – Local Television & Radio Marketplace Issues, <http://www.fcc.gov/ownership/workshop-022310.html>. On April 20, 2010, the Bureau held a workshop in Tampa, Florida on the impact of newspaper/broadcast cross-ownership in the media marketplace. See Media Ownership Workshop – Newspaper/Broadcast Cross-Ownership Impact on Competition and Diversity in the Media Marketplace, <http://www.fcc.gov/ownership/workshop-042010.html>. On May 21, 2010, the Bureau held a workshop in Palo Alto, California to discuss the impact of new media on broadcast stations. See Media Ownership Workshop – The Impact of New Media on Broadcast Stations, <http://www.fcc.gov/ownership/workshop-052110.html>. Webcasts of these workshops and comments received in connection with them are included in the record of this proceeding and are available on the Commission’s media ownership website.

<sup>11</sup> See *2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182, Notice of Inquiry, 25 FCC Rcd 6086 (2010) (“*NOI*”).

<sup>12</sup> *Media Bureau Announces the Release of Requests for Quotation for Media Ownership Studies and Seeks Suggestions for Additional Studies in Media Ownership Proceeding*, MB Docket No. 09-182, Public Notice, 25 FCC Rcd 7514 (Med. Bur. 2010).

<sup>13</sup> *FCC Releases Five Research Studies on Media Ownership and Adopts Procedures For Public Access to Underlying Data Sets*, MB Docket No. 09-182, Public Notice, 26 FCC Rcd 8472 (Med. Bur. 2011); *FCC Releases Three Additional Research Studies on Media Ownership*, MB Docket No. 09-182, Public Notice, 26 FCC Rcd 10240 (Med. Bur. 2011); *FCC Releases the Final Three Research Studies on Media Ownership*, MB Docket No. 09-182, Public Notice, 26 FCC Rcd 10380 (Med. Bur. 2011).

Commission's review of the media ownership rules in the 2006 *Quadrennial Review Order*.<sup>14</sup> As discussed in more detail below, the court affirmed the Commission's decision to retain the local television and radio rules to protect competition in local media markets.<sup>15</sup> The court also affirmed the Commission's decision to retain the dual network rule based on potential harm to competition that would result from mergers of the top four networks.<sup>16</sup> The court also affirmed the Commission's conclusion to retain the radio/television cross-ownership rule as well as, in part, to retain the local radio rule based on the benefits to the Commission's diversity goal.<sup>17</sup> Moreover, the Third Circuit vacated and remanded the newspaper/broadcast cross-ownership rule as modified by the Commission in the 2006 *Quadrennial Review Order*, concluding that the Commission failed to comply with the notice and comment provisions of the Administrative Procedures Act.<sup>18</sup> As discussed in more detail below, the court also vacated and remanded a number of measures adopted in the Commission's 2008 *Diversity Order*, which we now address in this proceeding.<sup>19</sup>

8. As discussed in detail in Section III, as part of its regular review of broadcast ownership rules required by the Communications Act, the Commission proposes the elimination of one rule and suggests leaving the others largely unchanged. We believe that the public interest is best served by these modest, incremental changes to our rules.<sup>20</sup> Recognizing current market realities, we seek comment on the following proposals:

- *Local Television Ownership Rule.* We tentatively conclude that we should retain the current local television ownership rule with minor modifications. Specifically, we propose to eliminate the Grade B contour overlap provision of the current rule. We tentatively conclude that we should retain the prohibition against mergers among the top-four-rated stations, the eight-voices test, and the existing numerical limits. In addition, we seek comment on whether to adopt a waiver standard applicable to small markets, as well as appropriate criteria for any such standard. Also, we seek comment on whether multicasting should be a factor in determining the television ownership limits.
- *Local Radio Ownership Rule.* We propose to retain the current local radio ownership rule. We also seek comment on modifications to the rule and whether and how the rule should account for other audio platforms. We propose to also retain the AM/FM subcaps, and seek comment on the impact of the introduction of digital radio. We seek comment on whether to adopt a waiver standard and on specific criteria to adopt.
- *Newspaper/Broadcast Cross-Ownership Rule.* We tentatively conclude that some newspaper/broadcast cross-ownership restrictions continue to be necessary to protect and promote viewpoint diversity. We propose to use Nielsen Designated Market Area ("DMA") definitions to determine the relevant market area for television stations, given the lack of a digital equivalent to the analog Grade A service contour. We propose to adopt a rule that includes elements of the 2006 rule, including the top 20 DMA demarcation point, the top-four

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<sup>14</sup> *Prometheus II*, 652 F.3d at 437.

<sup>15</sup> *Id.* at 460-61, 462-63.

<sup>16</sup> *Id.* at 463-64.

<sup>17</sup> *Id.* at 456-58, 463.

<sup>18</sup> *Id.* at 453. The court did not address the Commission's substantive modifications to the rule.

<sup>19</sup> *Id.* at 471.

<sup>20</sup> The ownership rules discussed in this paragraph, are found, respectively, at 47 C.F.R. §§ 73.3555(b), (a), (d), and (c), and 47 C.F.R. § 73.658(g).

television station restriction, and the eight remaining voices test. We seek comment on these proposals and whether to incorporate other specific elements and factors of the 2006 rule.

- *Radio/Television Cross-Ownership Rule.* We propose to eliminate the radio/television cross-ownership rule in favor of reliance on the local radio rule and local television rule. We believe that the local radio and television ownership rules adequately protect our localism and diversity goals and seek comment on this proposal.
- *Dual Network Rule.* We tentatively conclude that the dual network rule remains necessary in the public interest to promote competition and localism and should be retained without modification.

9. *Minority and Female Ownership.* As noted above, we seek comment in this proceeding on the aspects of the Commission's 2008 *Diversity Order* that the Third Circuit remanded in *Prometheus II*. Specifically, the court vacated and remanded a number of measures adopted in the *Diversity Order* that were designed to increase ownership opportunities for "eligible entities," including minority- and women-owned entities, because it determined that the Commission's revenue-based eligible entity definition was arbitrary and capricious.<sup>21</sup> The court directed the Commission to address this issue in the course of the 2010 Quadrennial Review. As directed by the court, the Commission invites views on how its ownership rules and policies can promote greater minority and women ownership of broadcast stations. The Commission will explore a broad range of potential actions it might take to that end, consistent with judicial precedent.<sup>22</sup>

## II. POLICY GOALS

10. We reaffirm that media ownership rules are necessary to further the Commission's longstanding policy goals of fostering competition, localism, and diversity. In the *NOI*, the Commission sought comment on how these goals should be defined and measured and on whether there are additional goals we should consider.<sup>23</sup> We did not receive many specific comments on defining, measuring, and evaluating the performance of our policy goals, and we invite such comment again. In particular, in Section V below, we describe and seek comment on the Commission's 11 Media Ownership studies that evaluate the impact of local media market structure on our policy goals.<sup>24</sup> In addition, we invite parties to submit their own studies evaluating the impact of particular market structures on our goals. Below, we discuss the Commission's competition, localism, diversity, and other policy goals. We also discuss how we should evaluate the costs and benefits of our media ownership rules.

11. *Competition.* As the Commission noted in the *NOI*, because broadcast content is available for free to end users, broadcast competition cannot be assessed in the same manner as in many other markets. Specifically, the Commission cannot examine changes in price to assess the impact of different levels of ownership concentration.<sup>25</sup> Accordingly, the Commission sought comment on a variety of potential ways to assess competition in the media marketplace.<sup>26</sup> The Commission discussed whether competition among broadcast outlets is likely to benefit consumers by making available programming that satisfies consumer preferences.<sup>27</sup>

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<sup>21</sup> *Prometheus II*, 652 F.3d at 471.

<sup>22</sup> See *infra* ¶ 147.

<sup>23</sup> *NOI*, 25 FCC Rcd at 6097-98, ¶ 30.

<sup>24</sup> The Commission released the studies between June 15 and July 26. See *infra* note 415 and accompanying text.

<sup>25</sup> *NOI*, 25 FCC Rcd at 6098, ¶ 33.

<sup>26</sup> *Id.* at 6098-6100, ¶¶ 34-43.

<sup>27</sup> *Id.* at 6098-99, ¶ 34.

12. We reaffirm our longstanding commitment to ensure that media markets are competitive.<sup>28</sup> The Commission strives to set ownership rules that create a marketplace in which broadcast programming meets the needs of consumers, and we believe competition is a key means to that end. Moreover, we reaffirm the Commission's previous findings that our local ownership rules should be analyzed in the context of local markets.<sup>29</sup> We find however that for the Dual Network rule, competition is appropriately analyzed in the national advertising and programming markets.

13. *Localism.* In the *NOI*, the Commission sought comment generally on how to define and promote localism in the context of the media ownership rules, including whether our traditional localism goal needs to be redefined in light of today's media marketplace.<sup>30</sup>

14. We reaffirm our commitment to promote localism through our media ownership rules.<sup>31</sup> At its core, localism policy is "designed to ensure that each station treats the significant needs and issues of the community that it is licensed to serve with the programming that it offers."<sup>32</sup> Our media ownership rules, as part of the Commission's overall regulatory framework, seek to promote a marketplace in which broadcast stations "respond to the unique concerns and interests of the audiences within the stations' respective service areas."<sup>33</sup> We continue to evaluate the extent of localism in broadcasting markets by determining whether programming is responsive to local needs and interests. Our focus continues to be on news and public information programming.<sup>34</sup> We continue to believe that these types of programming are relevant to evaluating the extent of localism as it exists in local markets. While our core commitment to promoting localism in media remains undiminished, we also recognize that changes in the marketplace and changes in consumer preferences may impact aspects of localism in today's marketplace. Thus, we believe that the appropriate definition of localism today, in the digital age, may not be the same definition as in decades past.

15. As a result of the growing availability of the Internet and the proliferation of wireless technology, consumers are accessing news and public affairs programming through their computers and electronic devices. Moreover, the potential for hyper-local websites and blogs to provide consumers with local news and information, such as neighborhood-specific news and events, may contribute to meeting the current or future needs and interests of local communities. As consumers continue to rely more and more on additional, multiple sources of local news, we seek comment on whether, and how, to reevaluate localism to account for changes in the way consumers get local news.

16. *Diversity.* In the *NOI*, the Commission sought comment on how to define and measure

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<sup>28</sup> 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 06-121, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2016-17, ¶ 9 (2008) ("2006 Quadrennial Review Order").

<sup>29</sup> See, e.g., 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 *passim* (2003) ("2002 Biennial Review Order"); 2006 Quadrennial Review Order, 23 FCC Rcd at *passim*.

<sup>30</sup> *NOI*, 25 FCC Rcd at 6103, ¶ 54.

<sup>31</sup> See 2002 Biennial Review Order, 18 FCC Rcd at 13643, ¶ 73.

<sup>32</sup> *Broadcast Localism*, MB Docket No. 04-233, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, 1327, ¶ 4 (2008) ("*Broadcast Localism Report*") (citing *FCC Chairman Powell Launches "Localism in Broadcasting" Initiative*, News Release (Aug. 20, 2003), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-238057A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-238057A1.pdf)).

<sup>33</sup> *Broadcast Localism Report*, 23 FCC Rcd at 1327, ¶ 6.

<sup>34</sup> 2002 Biennial Review Order, 18 FCC Rcd at 13644, ¶ 78; *Broadcast Localism Report*, 23 FCC Rcd at 1326, ¶ 2.

diversity in today's marketplace to determine whether our current media ownership rules are meeting our diversity goal. The Commission has relied on its media ownership rules to ensure that diverse viewpoints and perspectives are available to the American people in the content they receive over the broadcast airwaves.<sup>35</sup> The policy is premised on the First Amendment, which "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."<sup>36</sup> The Commission historically has approached the diversity goal from five perspectives: viewpoint, outlet, program, source, and minority and female ownership diversity.<sup>37</sup> The Commission has regulated media ownership as a means of enhancing viewpoint diversity based on the premise that diffuse ownership among media outlets promotes the presentation of a larger number of viewpoints in broadcast content than would be available in the case of a more concentrated ownership structure.<sup>38</sup>

17. We reaffirm our belief that media ownership limits are necessary to preserve and promote viewpoint diversity. Furthermore, we also reaffirm our conclusion that viewpoint diversity is generally promoted by competition among independently owned media outlets.<sup>39</sup> We believe that a key measure of how well the Commission's current rules promote our overall diversity goal is the availability of local news and information, and we examine that availability as it relates to local ownership structure and the level of civil engagement in Section V.

18. *Minority and Female Ownership.* In the *NOI*, the Commission sought comment on a variety of questions regarding the impact of our ownership rules on minorities and females, including minority and female ownership of broadcast stations. The Commission asked how our localism goal should be defined and measured as applied to historically underserved minority communities.<sup>40</sup> The Commission sought comment on what aspects of localism are most relevant specifically to minority communities, as well as on the effect of consolidated ownership on the availability of a variety of diverse viewpoints to women and minority consumers. The *NOI* asked if women and minorities are increasing

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<sup>35</sup> See, e.g., *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Docket No. 18110, Second Report and Order, 50 FCC 2d 1046, 1048, ¶ 9 (1975) ("1975 Second Report and Order").

<sup>36</sup> *Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 87-8, Further Notice of Proposed Rule Making, 10 FCC Rcd 3524, 3547, ¶ 57 (1995) ("1995 TV Broadcasting NPRM") (quoting *Assoc'd Press v. United States*, 326 U.S. 1, 20 (1945)).

<sup>37</sup> See, e.g., *2002 Biennial Review Order*, 18 FCC Rcd at 13627-37, ¶¶ 18-52. In the *2002 Biennial Review Order*, the Commission concluded that program diversity is best achieved by reliance on competition among delivery systems rather than by government regulation and that our media ownership rules ensure competition in local markets. *Id.* at 13632, ¶ 37. In addition, the Commission concluded that source diversity was not one of the diversity goal objectives of the media ownership rules. *Id.* at 13633, ¶ 43. We reaffirm those conclusions.

<sup>38</sup> The Commission previously has discussed two schools of thought on the relationship between ownership and diversity. On one side is the notion that the more independently owned outlets there are, the greater the viewpoint diversity. The concept is that 51 station owners will provide more diverse viewpoints than 50 station owners. *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Docket No. 18110, First Report and Order, 22 FCC 2d 306, 311, ¶ 21 (1970). The second school of thought is that concentrated ownership will provide an opportunity for diverse content. According to this view, an owner of multiple stations in a local market will provide a variety of programming and viewpoints in order to gain the widest audience and market share. See *1995 TV Broadcasting NPRM*, 10 FCC Rcd at 3550-51, ¶ 63. It can be questioned whether the latter approach is as likely to provide the public with information from "diverse and antagonistic sources," *Assoc'd Press*, 326 U.S. at 20. We seek comment on this issue and on how we should account for this aspect of our diversity goal in any rules we might adopt.

<sup>39</sup> See *2002 Biennial Review Order*, 18 FCC Rcd at 13631-32, ¶¶ 36-37.

<sup>40</sup> *NOI*, 25 FCC Rcd at 6104-05, ¶ 59.



their ownership shares in companies that are content providers or in other aspects of media production aside from station ownership.<sup>41</sup>

19. There were only limited comments on these issues. According to Diversity and Competition Supporters (“DCS”), significant barriers to entry for minority ownership remain in both the traditional and new media industries.<sup>42</sup> DCS states that minority-owned stations are more likely than non-minority owned stations to provide programming geared toward minority audiences and that minority communities are underserved as a result of the lack of minority media ownership.<sup>43</sup> DCS supports measures that facilitate minority media ownership.<sup>44</sup>

20. We tentatively conclude that our policy goals of competition, localism, and diversity are the appropriate framework within which to evaluate and address minority and female interests as they relate to our media ownership rules. We seek comment on this tentative conclusion. We also seek additional comment on how the proposed framework for each of our media ownership rules, as explained herein, would affect minority and female ownership opportunities.

21. *Additional Policy Goals.* In the *NOI*, the Commission sought comment on whether we should consider any other formal policy goals, in addition to our competition, diversity, and localism goals, in determining ownership limits in this proceeding.<sup>45</sup> Specifically, we sought comment on whether to consider the impact of our media ownership rules on the availability to all Americans of news and information, including national news and information.<sup>46</sup> We also sought comment on whether we should consider the impact of our rules on investigative journalism, and whether any specific aspects of the National Broadband Plan, including issues related to broadband access, are relevant to our media ownership rules. We tentatively conclude not to adopt any other formal policy goals in this proceeding. As described above, our longstanding policy goals of competition, localism, and diversity are broadly defined to promote the core responsibilities of broadcast licensees. We note that our media ownership rules seek to further consumer welfare by promoting the availability of community-responsive news and public affairs programming from a variety of sources. We seek comment on our tentative conclusion not to adopt any policy goals other than competition, localism, and diversity in this proceeding.

22. *Balancing the Costs and Benefits of Limiting Media Combinations.* We seek information that will help us balance the positive benefits of our ownership limits in promoting our policy goals against the costs that specific limits may impose on consumers and firms. We have discussed in broad terms in this section the policy goals we seek to promote. Section V presents the studies that we commissioned to quantify the influence of our rules on the policy goals. In particular, Media Ownership Study 2 quantifies the benefits and costs of particular media market structures on consumers.<sup>47</sup> We seek comment on the appropriate use of this study in quantifying the impact of our rules on consumers and

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<sup>41</sup> *Id.* at 6108, ¶ 72.

<sup>42</sup> DCS Comments at 3-5, 7-9.

<sup>43</sup> *Id.* at 11-14; *see also id.* at 12 (citing Catherine Sandoval *et al.*, *Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity and Service in the Public Interest* (Nov. 2, 2009) (“Sandoval *et al.* *Minority Commercial Radio Ownership in 2009*”)) (“A study published in 2009 shows that approximately 73 percent of minority-owned stations serve the community by broadcasting minority oriented programming . . .”).

<sup>44</sup> DCS Comments at 18-20.

<sup>45</sup> *NOI*, 25 FCC Rcd at 6109-10, ¶ 78.

<sup>46</sup> *Id.*

<sup>47</sup> Media Ownership Study 2, *Consumer Valuation of Media as a Function of Local Market Structure*, by Scott J. Savage and Donald M. Waldman (“Media Ownership Study 2”).

balancing the positive effects on consumers with any adverse effects on firms.

23. Our studies do not address the direct impact ownership limits have on media outlets. We seek detailed information on the benefits that would accrue to media outlets from entering into combinations that currently are impermissible. What are the cost-savings associated with a combination of two TV stations in markets where duopolies are not currently permitted? What are the sources of those cost savings? Are the savings a one-time event or are they recurring? Do they vary by the size of the market or the popularity of the TV station? We seek similar detailed estimates of cost savings for the combination of radio stations as well as cross-media combinations between newspapers, TV stations, and radio stations. Commenters should document to the extent possible the sources and methods of their estimates.

24. How should we balance the effects of our rules on consumers with those on firms, in particular, media outlets? Should each receive equal weight? How should we account for situations in which the costs and the benefits of a change in the rules occur at different points in time? We encourage commenters to provide examples of the suggested balancing of our rules.

### III. MEDIA OWNERSHIP RULE PROPOSALS

#### A. Local Television Ownership Rule

##### 1. Introduction

25. As discussed in the *NOI*, in the *2006 Quadrennial Review Order*, the Commission determined that the then long-standing local television ownership rule promotes competition within local television markets.<sup>48</sup> Consistent with this conclusion, the Commission retained that rule. The rule allows an entity to own two television stations in the same DMA (“duopoly rule”) only if there is no Grade B contour overlap between the commonly owned stations, or at least one of the commonly owned stations is not ranked among the top-four stations in the market (“top-four prohibition”) and at least eight independently owned television stations remain in the DMA after ownership of the two stations is combined (“eight-voices test”). The court in *Prometheus II* upheld the Commission’s decision in the *2006 Quadrennial Order* to retain the local television ownership rule, specifically concluding that the Commission was justified in retaining the top-four prohibition, the eight-voices test, and the duopoly rule.<sup>49</sup>

26. Based on the record in this proceeding, we tentatively conclude that the local television ownership rule, with certain modifications discussed below, remains necessary in the public interest as a result of competition.<sup>50</sup> We tentatively agree with the Commission’s previous determination that the local television ownership rule is necessary to promote competition.<sup>51</sup> While we propose to adopt a local television ownership rule to advance our competition goal, we seek comment on whether our proposed rule also is necessary to promote our localism and viewpoint diversity goals.

27. As discussed in greater detail below, we propose to eliminate the Grade B contour overlap provision of the current rule and seek comment on this proposal. We tentatively conclude that we should retain the prohibition against mergers among the top-four-rated stations. We propose to also retain the

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<sup>48</sup> *NOI*, 25 FCC Rcd at 6093, ¶19; see also *2006 Quadrennial Review Order*, 23 FCC Rcd at 2064, 2066, ¶¶ 97, 101. The Commission also found that the local television ownership rule was not necessary to foster diversity because there were other outlets for diversity of viewpoint in local markets. *2006 Quadrennial Review Order*, 23 FCC Rcd at 2065-66, ¶ 100.

<sup>49</sup> *Prometheus II*, 652 F.3d at 458-61.

<sup>50</sup> Section 202(h) of the 1996 Act, 47 U.S.C. § 303 note.

<sup>51</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2060, ¶ 87.

eight-voices test and the existing numerical limits, but seek comment on whether modifications to either the voice test or numerical limits is warranted. In addition, we seek comment on whether to adopt a waiver standard applicable to small markets, as well as appropriate criteria for any such standard. Also, we seek comment on whether and how the digital transition and multicasting may impact television ownership limitations. Finally, we seek comment on the impact of our proposed rule on minority and female ownership.

## 2. Background

28. In the *NOI*, the Commission sought comment on whether to retain the current rule, including the eight-voices test, the top-four prohibition, and the contour overlap definition.<sup>52</sup> It also asked whether relaxation of the rule is warranted in small markets to help broadcasters achieve efficiencies sufficient to compete with other video programming providers.<sup>53</sup>

29. Television broadcasters generally support relaxing the local television ownership rule, asserting that they face decreased revenues, as a result of both increased competition from nonbroadcast video programming providers and the recent economic downturn. Broadcasters assert that the efficiencies gained from combined ownership will allow them to compete better in today's changing marketplace.<sup>54</sup> According to broadcasters, common ownership can increase viewpoint diversity, as owners of multiple stations seek to capture the greatest possible audience share by diversifying their news and public interest program offerings among co-owned properties.<sup>55</sup> In addition, they contend that the cost savings generated by common ownership allow stations to add local newscasts and other locally oriented programming.<sup>56</sup>

30. Public advocacy groups, on the other hand, caution the Commission against using current economic conditions as a justification for relaxing the local television ownership rule.<sup>57</sup> *UCC et al.*, for example, assert that every U.S. industry was impacted by the declining economy and that signs suggest that the broadcast television industry has emerged from the downturn.<sup>58</sup> Moreover, they contend that, if certain stations cannot survive in the current economic climate, then the public interest is best served by allowing new entrants to become broadcasters or finding new uses for the broadcast spectrum.<sup>59</sup> In addition, public advocacy groups assert that further consolidation will reduce viewpoint diversity through reductions in female and minority ownership and the loss of independent news operations.<sup>60</sup> Contrary to the broadcasters' assertion, the public advocacy commenters cite to studies that have found that consolidation does not lead to increases in local programming, suggesting that additional consolidation

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<sup>52</sup> *NOI*, 25 FCC Rcd at 6111, ¶ 83.

<sup>53</sup> *Id.* at 6112, ¶ 84.

<sup>54</sup> *See, e.g.*, Nexstar Comments at 12; Belo Comments at 2.

<sup>55</sup> *See, e.g.*, NAB Comments at 29-30 (citing Matthew Spitzer, *Television Mergers and Diversity in Small Markets*, 6 J. COMPETITION L. & ECON. 705 (2010) ("Spitzer Study")); Nexstar Comments at 11; Coalition of Smaller Market Television Stations ("Small Market Coalition") Comments Ex. 2, Spitzer Study.

<sup>56</sup> *See, e.g.*, Belo Comments at 7. Belo provides examples of increases in local news, politics, sports, and public affairs programming that it has been able to implement as a result of efficiencies generated by its duopolies in the Tucson and Seattle-Tacoma markets. *Id.* at 6-9.

<sup>57</sup> *See* Free Press Comments at 7; *UCC et al.* Comments at 5-6.

<sup>58</sup> *UCC et al.* Comments at 5-6.

<sup>59</sup> *Id.* at 6-7.

<sup>60</sup> *See, e.g.*, CWA Comments at 15-19.

would not serve our localism goal.<sup>61</sup>

31. In our studies, we sought data to help us determine how best to structure a local television ownership rule to satisfy our policy goals. Particularly relevant to the local television rule, Media Ownership Study 1 examines whether common ownership of stations affects the amount of local news provided by television stations in the local market.<sup>62</sup> The study does not find significant evidence that common ownership affects local media usage or programming.<sup>63</sup> In addition, Media Ownership Study 4 analyzes, at both the market level and the station level, the relationship between media ownership and the amount of local news and public affairs programming provided in a local television market.<sup>64</sup> The study suggests that multiple ownership in a local market does not impact the amount of local information programming at the market level or at the station level.<sup>65</sup> Media Ownership Study 9 provides a theoretical analysis of the impact of media ownership structure on viewpoint diversity, finding that more independent outlets can increase viewpoint diversity in a market.<sup>66</sup>

### 3. Discussion

32. *Market.* Broadcasters generally assert that they are facing increased competition from new technologies, which has led, at least in part, to a reduction in advertising revenues, which could threaten the financial viability of local television stations.<sup>67</sup> Broadcasters contend, therefore, that we should modify our local television ownership rule to permit increased common ownership in local markets.<sup>68</sup>

33. We propose that our local television ownership rule continue to focus on promoting competition among broadcast television stations in local television viewing markets. We tentatively conclude that the video programming market is distinct from the radio listening market.<sup>69</sup> We find that local broadcast television stations compete directly with each other, particularly during the parts of the day in which these stations do not transmit the programming of affiliated broadcast networks. We note that the Commission previously has determined that the video programming market includes both broadcast television stations and cable networks.<sup>70</sup> Moreover, we recognize that viewers are increasingly able to

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<sup>61</sup> Free Press Comments at 6 (citing Consumer Union *et al.* Jan. 16, 2007 Reply, MB Docket No. 06-121, at 95; Danilo Yanich, Ownership Matters: Localism, Local Television News, and the FCC (May 20, 2009) (presented at the International Communication Association annual meeting)); AFTRA Comments at 13-14 (citing The Impact of the FCC's TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations, 1999-2006, at 2-3, by Allen S. Hammond, IV, Barbara O'Connor, and Tracy Westen (2007) (Ownership Study 8 in the 2006 quadrennial review proceeding)). However, NAB asserts that additional research conducted by Consumers Union *et al.* reached a different conclusion, finding that "duopolies may lead to more local news and public affairs." NAB Reply at 17 (citing Consumers Union *et al.* Oct. 22, 2007 Further Comments, MB Docket No. 06-121, at 98).

<sup>62</sup> Media Ownership Study 1, Local Media Ownership and Media Quality, by Adam D. Rennhoff and Kenneth C. Wilbur ("Media Ownership Study 1").

<sup>63</sup> *Id.* at 1.

<sup>64</sup> Media Ownership Study 4, Local Information Programming and the Structure of Television Markets, by Jack Erb ("Media Ownership Study 4").

<sup>65</sup> *Id.* at 28.

<sup>66</sup> Media Ownership Study 9, A Theoretical Analysis of the Impact of Local Market Structure on the Range of Viewpoints Supplied 2-3, by Isabelle Brocas, Juan D. Carrillo, and Simon Wilkie ("Media Ownership Study 9").

<sup>67</sup> NAB Comments at 63-66, 69-70.

<sup>68</sup> *Id.* at 85-86.

<sup>69</sup> See 2006 Quadrennial Review Order, 23 FCC Rcd at 2064, ¶ 97.

<sup>70</sup> 2002 Biennial Review Order, 18 FCC Rcd at 13673, ¶ 143; see also 2006 Quadrennial Review Order, 23 FCC Rcd at 2064, ¶ 97.

access current network programming (both broadcast and cable) and an increasing array of video programming alternatives via the Internet, including on mobile devices. However, competition between local television stations and cable networks may be of limited relevance, because national cable networks generally do not alter their programming decisions based on the actions of individual local television stations.<sup>71</sup> Competition in local markets among local television stations and programming alternatives available via the Internet may be similarly limited, as these alternatives compete largely in national markets and are not likely to respond to conditions in local markets. We seek comment on whether the development of local and hyperlocal websites should alter this analysis. We seek data in support of alternative conclusions, for example, that nonbroadcast video programmers modify programming decisions based on the actions of individual local television stations.

34. We also seek comment on the impact of alternative video platforms on the continued viability of broadcast television stations. While the growth of MVPDs and Internet delivery of video programming is undeniable, the impact of this growth on the broadcast television industry is unclear. While broadcast television's share of television viewing has been on the decline, broadcast network programming remains popular.<sup>72</sup> Viewership, however, appears to be fractured between local affiliates, the Internet, and other mobile platforms. Is there evidence that viewers find broadcast television stations to be interchangeable with new technologies, or is broadcast television unique? If it is unique, what characteristics define it as such? Should we determine that, contrary to our tentative conclusion, our local television ownership rule should focus on promoting competition among broadcast television stations and alternatives to broadcast television stations in local markets, we seek comment below on whether and how to include these alternatives in the rule, either in the eight-voices test or any alternate framework we may adopt for determining whether to permit common ownership in a local market.

35. Moreover, we seek comment on whether the product market for review of the local television rule should include more than video programming. For instance, some of the alternative sources of locally oriented content, such as websites and blogs, may not be entirely in video form. Is the relevant product market expanding from a video-only market to one that also contains non-video sources of local news and information? We tentatively conclude that, although the relevant product market may expand beyond video programming over time, it has not done so at this point. Evidence suggests that, in the aggregate, Internet-only websites provide only a small amount of local news content.<sup>73</sup> We have not seen evidence that non-video information sources modify programming decisions based on the actions of local television stations or vice versa. We seek comment on these tentative conclusions.

36. *Contour Overlap.* The current local television ownership rule employs a Grade B contour overlap test for determining whether to allow common ownership of television stations. The Grade B contour is an analog contour that is no longer relevant now that television stations have completed the

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<sup>71</sup> 2002 Biennial Review Order, 18 FCC Rcd at 13673, ¶ 145; 2006 Quadrennial Review Order, 23 FCC Rcd at 2064, ¶ 97.

<sup>72</sup> For example, in the 2002-03 television season, broadcast television stations achieved a 49 share of primetime viewing and nonbroadcast channels achieved 51 share of primetime viewing. THE NIELSEN CO., TELEVISION AUDIENCE 2009, at 14 (2010). In the 2008-09 television season, the broadcast stations' primetime audience share fell to a 38, while nonbroadcast channels' primetime audience share grew to a 62. *Id.* A share is the percent of all households using television during the time period that are viewing the specified station(s) or network(s). Due to simultaneous multiple-set viewing, Nielsen reports audience shares that exceed 100 percent when totaled. We have normalized the reported audience shares by recalculating them on a base (or denominator) equaling 100 percent, and adjusting the numerators accordingly.

<sup>73</sup> Media Ownership Study 6, Less of the Same: The Lack of Local News on the Internet 23-24, by Matthew Hindman ("Media Ownership Study 6").

digital transition and ceased broadcasting in analog.<sup>74</sup> We sought comment in the *NOI* on whether an overlap provision or some reliance on contours in the local television ownership rule was still necessary or whether we should rely on geographic areas, such as a television DMAs.<sup>75</sup> NAB asserts that we should, to the extent feasible, maintain a contour-based approach for our local television ownership rule.<sup>76</sup> Grant Group asks the Commission to grandfather existing combinations in the event an alternate approach is adopted and to permit the sale of grandfathered combinations to a single party.<sup>77</sup>

37. We believe that eliminating the contour approach is necessary to be consistent with today's marketplace realities. Therefore, we tentatively conclude that we will eliminate the Grade B contour approach and rely solely on Nielsen DMAs. Because of the Commission's mandatory carriage requirements,<sup>78</sup> MVPDs generally will carry all the broadcast stations assigned to the DMA in which they are located. These MVPDs are also likely to carry most major cable networks. Therefore, the DMA most accurately captures the universe of broadcast and MVPD video programming available to viewers. As such, any combination of stations in a particular DMA could have an impact on the levels of competition in that local market. However, our current rule permits certain mergers between stations that compete in the same market simply because of a lack of Grade B contour overlap – a factor that may not have any significant impact on the level of competition between those stations. Therefore, we tentatively conclude that eliminating the contour-overlap requirement in favor of the DMA-based approach would result in a more consistent application of our local television ownership rule. Moreover, we believe that the grandfathering provisions discussed below will preserve existing ownership combinations, thus avoiding disruption of settled expectations and alleviating any negative impact this change could have on the provision of television service in rural areas. We seek comment on these tentative conclusions.

38. We note that the Commission previously adopted a geographic market definition for the local radio rule. In the radio context, Arbitron Metro market definitions were found to be an industry standard and to represent a reasonable definition of the geographic market within which radio stations compete.<sup>79</sup> Adopting Arbitron Metro markets was found to improve the Commission's ability to preserve and promote competition by more accurately identifying actual geographic markets; more accurately measuring concentration levels in local markets; and providing for a more consistent application of the local radio ownership rule.<sup>80</sup> We have long recognized in our television ownership rule that DMAs are the relevant geographic market in which television stations compete, and we expect that a DMA-based approach here will achieve benefits similar to those found in adopting the Arbitron Metro market standard

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<sup>74</sup> We recognize that the Commission has developed a digital contour (NLSC), 47 C.F.R. § 73.622(e), to approximate the same probability of service as the Grade B contour and has stated that the two are roughly equivalent. *NOI*, 25 FCC Rcd at 6117, ¶ 103. However, the Commission has not adopted a digital contour that is equivalent to the Grade A contour, which is currently used for purposes of determining compliance with the radio/television and the newspaper/television ownership rules. For further discussion on digital contours, see *id.* at 6116-18, ¶¶ 102-03.

<sup>75</sup> *Id.* at 6111, 6116-18, ¶¶ 83, 101-05.

<sup>76</sup> NAB Comments at 94.

<sup>77</sup> Grant Group Comments at 14-16.

<sup>78</sup> 47 C.F.R. § 76.56.

<sup>79</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13725, ¶ 276.

<sup>80</sup> *Id.* at 13712-13, 13720, ¶¶ 239, 258-60. We recognize however, that radio Metros and DMAs are not similar geographic market definitions to the extent that only television stations may rely on MVPD carriage to extend their coverage beyond their signal contour to an entire DMA service area. That is not the case for radio stations in Arbitron markets, which are over-the-air signals.

in the radio context.<sup>81</sup> Finally, unlike Arbitron Metro markets, which do not cover large portions of the United States and its territories, the DMA-based approach covers the entire country and includes all television stations.<sup>82</sup>

39. We recognize, however, that a DMA-based approach may disproportionately impact certain DMAs that have unique characteristics. For instance, in a geographically large DMA two stations may be so far removed from one another that the stations do not actually compete over-the-air (though they are both carried by MVPDs throughout the DMA). While the Grade B provision of the existing rule allowed common ownership of those stations, a DMA-based approach could prohibit common ownership. Therefore, we seek comment on whether and how to accommodate such a situation and other types of situations in which the Grade B provision allowed ownership of stations but a DMA-based rule would prohibit common ownership. We seek comment on how frequently such situations arise. We tentatively conclude to grandfather ownership of existing combinations of television stations that would exceed the ownership limit under the proposed local television ownership rule by virtue of the change to a DMA-based approach. Compulsory divestiture is disruptive to the industry and a hardship for individual owners, and any benefits to our policy goals would likely be outweighed by these countervailing considerations.<sup>83</sup> Consistent with the Commission's previous decisions, we seek comment regarding whether to allow the sale of combinations only if the station groups comply with the local television ownership rule in place at the time the transfer of control or assignment application is filed.<sup>84</sup> Are our policy goals served by allowing grandfathered combinations to be freely transferable in perpetuity, irrespective of whether the combination complies with the local television ownership rule?<sup>85</sup> What is the effect on the stations if they are sold separately? Is it possible that such a rule could have the unintended consequence of causing a station to close? We seek comment on these tentative conclusions.

40. *Top-Four Prohibition.* The top-four prohibition prevents mergers between two of the top-four-rated stations in a local market, subject to the other provisions of the local television ownership rule. In the previous media ownership proceeding, the Commission retained the top-four prohibition because mergers between these stations "would be the most deleterious to competition."<sup>86</sup> Such mergers would often result in a single firm obtaining a significantly larger market share than other firms in the market and would reduce incentives for local stations to improve programming that appeals to mass audiences.<sup>87</sup> The Commission also found that a significant "cushion" of audience share continued to separate the top-four stations from the fifth-ranked station.<sup>88</sup> We tentatively conclude that retaining the top-four prohibition is

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<sup>81</sup> See *2006 Quadrennial Review Order*, 23 FCC Rcd at 2067-68, ¶ 104; *2002 Biennial Review Order*, 18 FCC Rcd at 13673-74, 13691-92, ¶¶ 146, 187.

<sup>82</sup> In instances where a station's community of license is located in one DMA but the station is assigned by Nielsen to another DMA the station will be considered to be within the DMA assigned by Nielsen for purposes of this rule. In addition, Puerto Rico, Guam, and the U.S. Virgin Islands, which are not assigned a DMA by Nielsen, each will be considered a single DMA.

<sup>83</sup> See, e.g., *1975 Second Report and Order*, 50 FCC 2d at 1080, ¶ 112 (stating that "divestiture should be limited to use in only the most egregious cases"); see also *2002 Biennial Review Order*, 18 FCC Rcd at 13808, ¶ 484.

<sup>84</sup> See, e.g., *2002 Biennial Review Order*, 18 FCC Rcd at 13809-10, ¶ 487.

<sup>85</sup> *1975 Second Report and Order*, 50 FCC 2d at 1076, ¶ 103; see also *2002 Biennial Review Order*, 18 FCC Rcd at 13809-10, ¶ 487. We would continue to allow *pro-forma* changes in ownership and involuntary changes of ownership due to death or legal disability of the licensee. *1975 Second Report and Order*, 50 FCC 2d at 1076, ¶ 103.

<sup>86</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2066, ¶ 102.

<sup>87</sup> *Id.* (citing *2002 Biennial Review Order*, 18 FCC Rcd at 13695, ¶ 194).

necessary to promote competition for the reasons set forth in the *2006 Quadrennial Review Order*.<sup>89</sup> We continue to believe that this rationale supports retention of the top-four prohibition, and we seek comment on these tentative conclusions.

41. We seek comment also on the impact of the top-four prohibition on our localism goal. NAB supports mergers among the top-four stations in a local market because it argues that many of these stations cannot afford to produce local news independently.<sup>90</sup> Allowing these stations to combine, they argue, could lead to increased news offerings.<sup>91</sup> We note, however, that evidence suggests that the majority of top-four stations are already originating substantial amounts of local news.<sup>92</sup> Moreover, there is generally a drop off between the fourth- and fifth-rated station in the market in the amount of local news broadcast.<sup>93</sup> Based on this evidence, it is not clear that permitting mergers among top-four stations generally would result in additional local news or other local programming.<sup>94</sup> We seek comment on these issues. We also seek information regarding whether the amount of local news provided between the top four stations and any others depends upon the size of the market and a community's ability to support multiple news outlets.

42. In addition, we seek comment on whether we should retain the top-four prohibition to also promote our viewpoint diversity goal. Media Ownership Study 9's theoretical analysis shows that a market structure with four firms — two firms presenting each viewpoint — provides efficient information transmission, and the experimental work confirms the value of competition among outlets with similar

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<sup>88</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2067, ¶ 102. The Commission also found that mergers involving two top-four stations would harm competition in the local broadcast television advertising market. *Id.* We tentatively conclude that this market does not have a direct impact on consumers and should not be a focus of our inquiry. We seek comment on these tentative conclusions.

<sup>89</sup> *Id.* at 2066-67, ¶ 102.

<sup>90</sup> See NAB Reply at 14-15 (citing NAB Oct. 23, 2006 Comments, MB Docket No. 06-121, at 105-06). In its 2006 comments, NAB cited to filings in the 2002 ownership review proceeding that claimed that many markets outside of the top 50 DMAs were served by less than four local newscasts. NAB Oct. 23, 2006 Comments, MB Docket No. 06-121, at 105 (citing Nexstar Sept. 4, 2003 Petition for Reconsideration, MB Docket No. 02-277, at 9-10 (providing results of phone survey performed by Nexstar that found that “[i]n markets below the top fifty DMAs, 69 of the number four ranked stations do not produce their own news, and in markets below the top ninety DMAs, 44 of the number three ranked stations do not produce their own local news. Even worse, in DMAs 157 and below, 15 of the number two ranked stations are not producing local news.”); LIN & Raycom Sept. 4, 2003 Petition for Reconsideration, MB Docket No. 02-277, at 9-10 (asserting that the study relied on by the Commission in 2002 biennial ownership proceeding to uphold the top-four prohibition actually demonstrated that many top-four rated stations outside the largest markets are not providing local news)).

<sup>91</sup> See NAB Reply at 14-16.

<sup>92</sup> For instance, according to FCC staff analysis of scheduling data from Tribune Media Service (“TMS”), in 58.1 percent of television markets, four or more stations are providing at least 30 minutes of local news per day. Furthermore, based on this analysis, of the 1614 full-power television stations in the TMS database, 849 (or 50.4 percent) provide at least 30 minutes of local news per day.

<sup>93</sup> For example, across all Nielsen Markets, the number four rated station provides an average of 177 local news minutes per day, while the number five rated station provides only 87 local news minutes per day. FCC staff analysis of TMS data for the period Nov. 1, 2009 through Nov. 14, 2009 and Nielsen data for the period Oct. 29, 2009 through Nov. 25, 2009.

<sup>94</sup> As discussed in greater detail below, with respect to a potential waiver standard applicable to small markets, we seek comment on whether permitting common ownership in small markets, even between top-four stations, would promote additional local news. See *infra* ¶ 53.



viewpoints.<sup>95</sup> Although we recognize the limitations of this finding for our analysis, since a top-four prohibition does not guarantee the theoretical result,<sup>96</sup> Media Ownership Study 9 provides some support for maintaining at least four strong independent outlets. Furthermore, we recognize that, in some instances, there may be other significant sources of viewpoint diversity in a market (*e.g.*, local newspapers or local radio stations). Nonetheless, because evidence suggests a link between more independent television outlets and increased viewpoint diversity in a market and given the significance of television as a source of local news and information, retaining the top-four prohibition should advance our viewpoint diversity goal. We seek comment on Media Ownership Study 9's findings, as well as how the top-four prohibition impacts our viewpoint diversity goal.

43. Furthermore, we invite commenters to provide evidence demonstrating why a different criterion might be more appropriate. For example, would it be more appropriate to impose a top-five or the top-six prohibition in all markets or in certain markets? If so, why?

44. Unlike the other ownership rules we discuss here, the top-four component of the Commission's local television ownership rule relies on the in-market ranking of the stations to be commonly owned, and this is subject to change over time.<sup>97</sup> Accordingly, the rule specifies that the ranks of the stations are to be determined "[a]t the time of application to acquire or construct the station(s)...." If, at that time, both stations are ranked among the top-four stations in the market, common ownership would not be permitted. The Commission's local television ownership rule intends, then, to prohibit an entity from *acquiring* two top-four stations.<sup>98</sup> However, a broadcaster that owns two television stations located in the same market will not be required to divest a station "if the two merged stations subsequently are both ranked among the top four stations in the market."<sup>99</sup> The Commission adopted this approach to encourage licensees to improve the quality of the programming and operations of their stations and so not to constrain commercial activity that is designed to effect such improvements.<sup>100</sup>

45. The point of applicability of the top-four prohibition at the time of an application to the Commission creates a potential for evading the intent of the rule. Accordingly, we seek comment on whether and, if so, how we should address circumstances in which a licensee obtains two in-market stations, both of which are ranked among the top-four stations in the market through agreements that may be considered the functional equivalent of a transfer of control or assignment of license in the context of this rule, but that do not require an application or prior Commission approval. For example, an existing licensee with two stations, one of which is among the top four stations in the market, purchases the network affiliation of another top-four-ranked market station and airs that network's programming on its second, lower-ranked station. The licensee's party to this transaction also exchange call signs. As a consequence, the second, lower-ranked station becomes a top-four-ranked station and the licensee now

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<sup>95</sup> Media Ownership Study 9 at 26-27.

<sup>96</sup> For example, a top-four prohibition does not guarantee competing pairs of firms — two firms presenting each viewpoint — because, even with the prohibition in place, three or four firms could have the same viewpoint. Additionally, there are many issues, and it is unlikely that media outlet viewpoints are perfectly correlated across all of them.

<sup>97</sup> The dual network rule, 47 C.F.R. § 73.658(g), which prohibits ownership of two top-four-ranked television networks, relies on ranking, but the ranking is national in nature and is not subject to change over time; it is fixed based on a date certain. The local radio rule does not consider the in-market rank of the commonly owned stations to which it applies, nor do the cross-ownership provisions of the radio-television and newspaper-broadcast rules.

<sup>98</sup> 47 C.F.R. § 73.3555(b)(1)(i).

<sup>99</sup> *Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 91-221, Report and Order, 14 FCC Rcd 12903, 12933, ¶ 64 (1999) ("1999 Ownership Order").

<sup>100</sup> *Id.* at 12933-34, ¶¶ 64-66.

controls two top-four-ranked stations in the market, but no application has been filed and none was required. How, if at all, should the Commission address such circumstances? Should we amend the top-four prohibition to apply to these types of transactions? Should we focus on instances where licensees swap network affiliations, regardless of whether other types of agreements that impact station operation are also executed? How, if at all, should we address situations where a network offers an existing duopoly owner (one top-four station and one station ranked outside the top four) a top-four-rated affiliation for the lower-rated station, perhaps because the network is no longer satisfied with the existing affiliate station and the duopoly owner has demonstrated superior station operation (*i.e.*, earned the affiliation on merit)? Does such a transaction undermine our local ownership rules or goals? If so, how would we craft a rule to address such circumstances, while at the same time not unduly constraining beneficial commercial activities?

46. *Eight-Voices Test.* Under the eight-voices test, a merger between two in-market stations will not be permitted unless there are at least eight independently owned commercial and noncommercial television stations remaining in the market post merger, subject also to the top-four prohibition.<sup>101</sup> The Commission, in the previous media ownership proceeding, determined that it was necessary to retain the eight-voices test in order to promote competition.<sup>102</sup> Specifically, the Commission determined that maintaining a minimum of eight independently owned-and-operated television stations in a market would ensure that each market includes the four major networks (*i.e.*, ABC, NBC, CBS, and Fox) and four independent competitors, and thus would spur competition in program offerings, including local news and public affairs programming.<sup>103</sup> The Commission found that maintaining four independent competitors was necessary to offset the competitive advantage generally held by the top four stations in a market.<sup>104</sup> In addition, the Commission continued to count only full-power television stations as voices “because the local television ownership rule is designed to preserve competition in the local television market.”<sup>105</sup> We propose to retain the eight-voices test for the reasons set forth in the *2006 Quadrennial Review Order* and seek comment on this proposal.<sup>106</sup> Do any changes in the television marketplace warrant modification of the eight-voices test? For example, would adopting a six- or seven-voices test better promote our competition goal while allowing for additional common ownership?

47. Though we propose to retain the eight-voices test, including the decision to exclude nonbroadcast television media from the voice count, in the event we determine it is appropriate to consider alternative sources of video programming in the local television ownership rule, we seek comment specifically on whether market conditions have changed since the 2006 quadrennial proceeding such that we should consider alternative sources of video programming in the voice count. If we should consider additional sources of video programming, how should we account for those sources in the local market? Should noncommercial stations be included in figuring out the number of voices in the market? Or should we consider as an additional voice video programming delivered via MVPDs or Internet video

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<sup>101</sup> We note that neither the top-four prohibition nor the eight-voices test would apply under the existing rule if there is no Grade B contour overlap between the stations in the proposed duopoly. *See* 47 C.F.R. § 73.3555(b).

<sup>102</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2065, ¶ 99.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 2057, ¶ 80 n.259.

<sup>106</sup> *Id.* at 2065, ¶ 99. We note that the current eight-voices test relies on Grade B contour overlap to determine whether a voice is counted. Consistent with our decision to eliminate the Grade B contour overlap provision from the local television ownership rule, we propose to also eliminate the Grade B contour overlap criterion from the eight-voices test and rely instead on stations’ inclusion in the same DMA as a basis for applying the rule. We seek comment on this proposal.

programming if such programming is available to a certain portion of the local market? If so, what should the threshold be and what source or sources of data should we rely on in determining whether the threshold is met? Should we consider adoption rates? Should we consider, and if so how, the local or non-local nature of the voice?

48. As an alternative to the eight-voices test, we seek comment on whether to adopt a different framework for determining whether to permit common ownership in a local market. For example, we could adopt a tiered approach, similar to the local radio ownership rule, in which numerical ownership limits are based on market rankings, such as the number of full-power television stations in the DMA or the Nielsen DMA rank (based on television households). As discussed below, we tentatively propose to retain the duopoly rule; therefore, any tiered approach we may adopt would be limited to two tiers (*i.e.*, markets where an entity could own up to two stations and markets where an entity could own only one station). Under such a tiered approach, how should we determine the number of stations/Nielsen DMA rank associated with each tier? Do markets with similar numbers of television stations share particular characteristics and, if so, what are those characteristics? Do DMAs of a similar Nielsen rank share certain characteristics even though there may be a significant difference in the number of television stations? For example, the Commission has previously determined that the top 20 DMAs are more vibrant and have more media outlets than lower-ranked DMAs.<sup>107</sup> What would be the benefits and/or drawbacks of such an approach in the television ownership rule?

49. If we were to adopt an approach other than the eight-voices test and determine that it is appropriate to consider alternative sources of video programming, should we include alternative sources of video programming in the new test, and, if so, how? For example, could video programming delivered via MVPDs or the Internet be considered an additional market participant (*i.e.*, the same as an additional broadcast television station) so long as a certain portion of the market has access to one or more of these services? In that case, what should that threshold be and what source or sources of data should we rely on in determining whether the threshold is met? Should adoption also be considered? If we were to rely on Nielsen DMA rank, how would we incorporate these alternative sources into our rule, as Nielsen's ranking system does not take such sources into account? Do DMAs of a certain size share certain characteristics with respect to deployment and adoption of MVPDs and broadband Internet service?

50. *Numerical Limits.* Under the current rule, a licensee can own up to two stations (*i.e.*, a duopoly) in a market, subject to the requirements discussed above. The Commission concluded in the *2006 Quadrennial Review Order* that the duopoly rule remained necessary in the public interest to protect competition despite the increase in media outlets within the last decade.<sup>108</sup> The Commission also declined to tighten the ownership limits, finding that the potential significant benefits from joint ownership permitted under the current rule outweighed claims of harm to diversity and competition.<sup>109</sup>

51. We propose to retain the current numerical limits. Based on the record in this proceeding, we have not observed sufficient changes in the marketplace to allow an entity to own more than two television stations in a local market. Moreover, we note that not every licensee owns the maximum number of stations permissible under the existing duopoly rule. Therefore, if the owner of a single station (or, singleton) believes the potential benefits of common ownership are necessary to compete effectively in a market where additional duopolies are permitted; there are opportunities to combine with other singletons under the existing rule. In addition, we do not believe that the record in this proceeding

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<sup>107</sup> *Id.* at 2041, 2064, ¶¶ 55, 64. For additional discussion of our findings regarding the top 20 DMAs in the context of the Newspaper/Broadcast Cross-Ownership Rule, see *infra* ¶ 105.

<sup>108</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2064, ¶ 97.

<sup>109</sup> *Id.* at 2064-65, ¶ 98.

supports limiting ownership to a single station in all local television markets.<sup>110</sup> We seek comment on these tentative conclusions. For example, is there evidence that the current rule has produced actual harms to our policy goals such that tightening the numerical ownership limits would be justified? Alternatively, is there evidence that existing duopolies in the largest markets require additional common ownership to compete effectively, or that there are additional benefits in allowing existing duopolies to acquire additional stations?

52. *Market Size Waivers.* Commenters have raised concerns that prohibiting all mergers in small markets could prevent broadcasters in these markets that may be facing severe competitive pressures from realizing potential efficiencies that could be achieved through allowing common ownership, even of top-rated stations, which could in turn promote our fundamental policy goals.<sup>111</sup> Therefore, we seek comment on whether we should adopt a waiver standard for stations in markets where our proposed rule would limit station ownership to a single station for all licensees in the market and how such a standard would affect our policy goals. In the event we determine such a waiver standard is appropriate, we seek comment below on how such a standard should be structured.

53. We seek comment specifically on whether allowing certain combinations in small markets, even between top-four stations, would promote additional local news. The Local TV Coalition asserts that outside of the largest markets often only a few dominant stations can afford an independent news operation because stations in these markets earn less revenue than stations in large markets.<sup>112</sup> Sainte Sepulveda, which owns one station in a small market and entered into sharing agreements with another in-market station, asserts that the savings generated by these sharing agreements are insufficient to implement a local newsgathering and production facility.<sup>113</sup> According to NAB, stations in small markets are earning less profit than stations in large markets.<sup>114</sup> In addition, NAB provides data that stations in small- and medium- sized markets spend less on their news operations than stations in large markets both in absolute terms and as a percentage of total station budget.<sup>115</sup> NAB also submits data demonstrating that these stations provide less local news content and devote less station staff to news production than stations in large markets.<sup>116</sup> We seek comment on whether adopting a waiver standard for small markets would

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<sup>110</sup> However, as discussed in greater detail below in paragraph 57 we seek comment on whether the ability to multicast supports tightening of the numerical ownership limits.

<sup>111</sup> See NAB Comments at 79-80; Coalition to Preserve Local TV Broadcasting (“Local TV Coalition”) Reply at 7-9, 24; Small Market Coalition Comments at 1-2.

<sup>112</sup> Local TV Coalition Reply at 9-10 (stating that in the Springfield, Missouri market (DMA 74), two of the big four affiliates would likely lose money if they maintained independent news operations).

<sup>113</sup> Sainte Sepulveda Comments at 5. Sainte Sepulveda is the licensee of KBVU-TV, Eureka, California. *Id.* at 1.

<sup>114</sup> For instance, NAB states that the average pre-tax profits for stations in small- and medium-sized markets (DMAs 50-210) declined 63.7 percent from 1998-2008; by contrast, according to NAB, average pre-tax profits declined 50.8 percent in DMAs 1-49, though the most significant declines were sustained in DMAs 50-99 (67.1 percent) and DMAs 150-210 (62.9 percent), with DMAs 100-149 fairsing better, relatively speaking, with average declines of 39.7 percent. NAB Comments Att. C at 5, 8, 11, 14, 17.

<sup>115</sup> NAB data indicate that stations in DMAs 1-25 spend an average of \$10,830,833 (36.7 percent of total budget) on news operations, while stations in DMAs 26-50 spend an average of \$6,476,046 (28.3 percent of total budget). NAB Comments Att. B, Mark J. Prak *et al.*, The Economic Realities of Local Television News 2010 at 13 (“NAB Comments Att. B”).

<sup>116</sup> According to NAB data, in DMAs 1-25, stations on average provide 35.8 hours per week of local news programming and devote 58 percent of station staff to news production; stations in DMAs 26-50 provide an average of 29.3 hours per week of local news programming and 53 percent of station staff is involved in news production. *Id.* at 11, 14. The data show a continuing decline in DMAs 51-100 (26.6 hours per week and 52 percent of station staff), DMAs 101-150 (20.5 hours per week and 49 percent of station staff), and DMAs 151-210 (19.5 hours per

promote more news offerings in these markets. In particular, we note that there is some evidence to suggest that markets with six or fewer stations may be less able to support four local television news operations.<sup>117</sup> Should a market size waiver standard take this information into account? Would allowing mergers under this proposed standard result in a loss of viewpoint diversity in those markets? If so, would such mergers produce sufficient gains in competition and/or localism to overcome the reduction in viewpoint diversity?

54. We request comment also on the criteria we should adopt for any market size waiver standard. Should we adopt some or all of our current failed/failing station waiver policy?<sup>118</sup> What financial documentation should we require? Alternatively, should we adopt a standard based simply on structural considerations – the size of the market and the number of outlets? For example, should we permit a combination if the number of independent media owners in the market post merger would be at least two or three? If so, what independent media owners should we consider? Would this approach create a race to merge that would reward the first to do so and foreclose other market stations from achieving similar competitive advantages? Should we consider the combined market share of the stations seeking to combine ownership? For example, should one of the criteria for a waiver be that the proposed station combination would not exceed a certain percent of the audience or revenue share in the local market? Should we require the applicants to make affirmative commitments to initiate/increase local news offerings? If so, should we require the station owner to demonstrate compliance with that commitment and for how long? Should we adopt specific penalties for noncompliance? What other factors should we consider?

55. Finally, should we consider alternative definitions of the markets in which this waiver approach would apply? For example, should we adopt a less restrictive definition of those “small markets” in which the rule would apply, perhaps by including those markets where a single duopoly would be permitted under the proposed rule? We invite comment on whether these markets might benefit if top-four combinations were permitted, with some restrictions, so that sufficient critical mass could be achieved to support more and/or better local news and public affairs programming. For example, it may be that in such markets the top four stations do not all produce local news and that only two or three news operations could be supported by the market. In these circumstances, should we consider permitting mergers among top-four stations but not between the number one and number two stations, or some variant thereof, if such an outcome would increase the quantity and quality of local programming provided? We seek comment on this approach and on the practical components of any rules to govern such situations.

56. *Multicasting.* The digital television transition was completed on June 12, 2009.<sup>119</sup> As a result, all full-power television stations are now broadcasting in digital and have the ability to use their

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week and 40 percent of station staff). *Id.* According to NAB data, in terms of actual staff size, stations in DMAs 1-25 have an average news staff of 95 employees and stations in DMAs 26-50 have on average 74 news employees. *Id.* at 14. The data also show a significant reduction in the average news staff in small and medium sized markets (45 employees in DMAs 51-100; 36 employees in DMAs 101-150; and 20 employees in DMAs 151-210). *Id.*

<sup>117</sup> For instance, according to FCC staff analysis of scheduling data from TMS, four or more stations each provide at least 30 minutes of local news per day in 89.3 percent of markets with seven or more stations, as compared to only 22.5 percent of markets with six or fewer stations.

<sup>118</sup> 47 C.F.R. § 73.3555, Note 7.

<sup>119</sup> The court in *Prometheus II* rejected Citizen Petitioners’ claim that the Commission’s decision not to consider the digital transition in the 2006 quadrennial proceeding was arbitrary and capricious. *Prometheus II*, 652 F.3d at 461. The court noted that the transition was not complete at the issuance of the 2006 *Quadrennial Review Order* and that the Commission based its decision to retain the duopoly rule on a finding that the rule has not harmed competition in local markets. *Id.* The court also noted that Citizen Petitioners were free to raise the issue in the 2010 quadrennial proceeding, when the transition was complete. *Id.*

available spectrum to broadcast not only their main program stream but also, if they choose, additional program streams, an activity commonly referred to as multicasting. UCC *et al.* argue that the ability to multicast justifies a return to the Commission's previous single-station rule.<sup>120</sup> According to UCC *et al.*, multicasting allows broadcast stations to provide multiple program streams without acquiring an additional in-market station.<sup>121</sup> Furthermore, Time Warner Cable ("TWC") argues that multicasting permits stations to create "virtual duopolies" by affiliating with multiple networks and multicasting their programming.<sup>122</sup> TWC identified a report asserting that 68 instances of dual affiliation exist that involve the Big Four networks.<sup>123</sup> On the other hand, Belo and NAB argue that multicasting is not a substitute for duopoly ownership and does not justify retaining or tightening the local television ownership rule.<sup>124</sup> They note that multicast channels have difficulty attracting advertisers because these channels are not entitled to must-carry rights and typically lack established programming line-ups.<sup>125</sup> Furthermore, not all stations will elect to air multiple program streams, instead using the available spectrum to provide mobile video, high-quality, high-definition ("HD") programming, or other innovative services.<sup>126</sup>

57. With the digital transition complete, we seek comment on whether the transition has eliminated the need for the local television ownership rule to permit common ownership in local television markets. Specifically, does multicasting replicate the potential benefits to station owners and viewers associated with owning a second in-market station (*e.g.*, efficiency gains and improved programming) or are there benefits unique to common ownership that cannot be replicated by multicasting? If we find that multicasting does replicate the potential benefits of common ownership, both to station owners and viewers, should we continue to permit common ownership? Should we limit the ability of station owners to form dual affiliations involving certain networks? We seek comment on specific instances of dual affiliation and on how such situations have impacted the markets where they occur. We note that broadcasters are not required to use their additional spectrum to multicast, and that some stations will instead elect to use their additional spectrum to offer other services (*e.g.*, mobile video). How, if at all, should that affect our decision regarding whether multicasting justifies a tightening of the duopoly rule? We also seek comment on how multicasting is affecting stations in small markets, including specifically whether stations in small markets have been successful in negotiating for MVPD carriage of their subchannels and what revenue and viewer benefits these channels generate. We seek comment on whether and how to consider multicasting with regard to any waiver standard in small markets.

58. We note that Media Ownership Study 10, which studies the impact of the ownership rules on multicasting, found some evidence to suggest that variations in ownership structure have little effect on the extent of multicasting.<sup>127</sup> Media Ownership Study 10 finds that other market characteristics, such as

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<sup>120</sup> UCC *et al.* Comments at 7 (referring to the pre-1999 local television ownership rule that limited ownership to a single full-power television station in all television markets).

<sup>121</sup> *Id.* at 7-8.

<sup>122</sup> Letter from Mathew A. Brill, Latham & Watkins LLP, Counsel for Time Warner Cable ("TWC"), to Marlene H. Dortch, Secretary, FCC, at 4 (Aug. 3, 2011).

<sup>123</sup> *Id.* at n.15 (citing Price Colman, *D2 Offers A1 Opportunity for Big Four Nets*, TVNewsCheck, Apr. 20, 2011, available at <http://www.tvnewscheck.com/article/2011/04/20/50699/d2-offer-a1-opportunity-for-big-four-nets>.)

<sup>124</sup> Belo Comments at 9-10; NAB Reply at 17-18; *but see* Hearst Comments at 1 (asserting that multicast channels should be considered voices).

<sup>125</sup> Belo Comments at 10; NAB Reply at 17-18.

<sup>126</sup> Belo Comments at 10-12; NAB Reply at 18.

<sup>127</sup> Media Ownership Study 10, Broadcast Ownership Rules and Innovation 54, by Andrew S. Wise ("Media Ownership Study 10").

market size and the number of television stations operating in a market, may have a greater impact on the extent of multicasting than ownership structure.<sup>128</sup> We seek comment on the findings of Media Ownership Study 10.

59. *Minority and Female Ownership.* According to DCS, there are still significant barriers to entry by minority owners in both the traditional and new media industries; DCS supports measures to facilitate minority media ownership.<sup>129</sup> DCS states that minority-owned stations are more likely to provide programming geared toward minority audiences and that minority communities are underserved as a result of the lack of minority media ownership.<sup>130</sup> We seek comment on how the proposed local television rule would affect minority and female ownership opportunities. We seek comment on how promotion of diverse television ownership promotes viewpoint diversity. We request commenters to provide additional data supporting their positions.

## **B. Local Radio Ownership Rule**

### **1. Introduction**

60. The Commission has intended the local radio ownership rule to promote competition, diversity, and to some degree localism.<sup>131</sup> The current local radio ownership rule, retained without modification in the previous media ownership proceeding, allows an entity to own: (1) up to eight commercial radio stations in radio markets with 45 or more radio stations, no more than five of which can be in the same service (AM or FM), (2) up to seven commercial radio stations in radio markets with 30-44 radio stations, no more than four of which can be in the same service (AM or FM), (3) up to six commercial radio stations in radio markets with 15-29 radio stations, no more than four of which can be in the same service (AM or FM), and (4) up to five commercial radio stations in radio markets with 14 or fewer radio stations, no more than three of which can be in the same service (AM or FM), provided that an entity may not own more than 50 percent of the stations in such a market, except that an entity may always own a single AM and single FM station combination.<sup>132</sup> In *Prometheus II*, the Court upheld the Commission's decision in the last media ownership proceeding to retain the local radio ownership rule, specifically concluding that the Commission was justified in retaining the existing numerical limits and the AM/FM subcaps.<sup>133</sup>

61. Based on the record in this proceeding, we tentatively conclude that the current local radio ownership rule remains necessary in the public interest as a result of competition.<sup>134</sup> We tentatively agree with the Commission's previous determination that competition-based radio ownership limits promote viewpoint diversity "by ensuring a sufficient number of independent radio voices and by preserving a

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<sup>128</sup> *Id.*

<sup>129</sup> DCS Comments at 3-5, 7-9, 18-20.

<sup>130</sup> *Id.* at 11-14; *see also id.* at 12 (citing Sandoval *et al.* Minority Commercial Radio Ownership in 2009) ("A study published in 2009 shows that approximately 73 percent of minority-owned stations serve the community by broadcasting minority oriented programming . . .").

<sup>131</sup> 2006 *Quadrennial Review Order*, 23 FCC Rcd at 2072, 2075, 2077 ¶¶ 117, 124, 127; *see also NOI*, 25 FCC Rcd at 6094, ¶ 21.

<sup>132</sup> 47 C.F.R. § 73.3555(a).

<sup>133</sup> *Prometheus II*, 652 F.3d at 462-63. With respect to the AM/FM subcaps, the Court also concluded that the Commission was "justified in declining to rely on [the transition to digital radio] in evaluating the [subcaps]." *Id.* at 463.

<sup>134</sup> Section 202(h) of the 1996 Act, 47 U.S.C. § 303 note.

market structure that facilitates and encourages new entry into the local media market.”<sup>135</sup> We also tentatively agree with the Commission’s previous determination that a competitive local radio market helps to promote localism, as a competitive marketplace will lead to the selection of programming that is responsive to the needs and interests of the local community.<sup>136</sup> We seek comment on these tentative conclusions.

62. As discussed in greater detail below, we tentatively conclude that we should retain the existing numerical ownership limits and market tiers, but still seek comment on whether to change the existing numerical limits and/or market tiers. We also propose to retain the AM/FM subcaps, but seek comment on the impact of the ongoing digital radio transition on the differences between AM and FM stations. In addition, we seek comment on whether to adopt a specific waiver standard and, if so, what criteria to apply. Finally, we seek comment on the impact of our local radio ownership rule on minority and female ownership.

## 2. Background

63. In the *NOI*, we sought comment on whether the current local radio numerical ownership limits are appropriate to achieve our policy goals and whether to account for other sources of audio programming in the rule.<sup>137</sup>

64. Broadcasters generally support loosening the ownership limits, contending that common ownership of radio stations in the same market does not harm competition, as consolidation has been shown to have no effect on advertising rates.<sup>138</sup> In addition, broadcasters assert that radio stations can, and do, change formats with ease, which they claim should make the possibility of coordinated behavior among owners an insignificant concern to the Commission.<sup>139</sup> Moreover, broadcasters argue that radio ownership limits are not necessary to foster program diversity or localism.<sup>140</sup> According to Clear Channel, econometric analysis from the 2006 quadrennial review shows that group ownership of radio stations has enhanced diversity of programs and music formats and substantially increased radio broadcasters’ ability to serve the local needs and interests of their communities.<sup>141</sup> Clear Channel states that the company’s experience demonstrates that group owners have natural incentives to counter-

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<sup>135</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2077, ¶ 127 (citing *2002 Biennial Review Order*, 18 FCC Rcd at 13739, ¶¶ 305-06).

<sup>136</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2075, ¶ 124; *2002 Biennial Review Order*, 18 FCC Rcd at 13738, ¶ 304 (citing generally *Revision of Radio Rules and Policies*, MM Docket No. 91-140, Report and Order, 7 FCC Rcd 2755 (1992) (“*1992 Radio Ownership Order*”); *Amendment of Section 73.3555 of the Commission’s Rules, the Broadcast Multiple Ownership Rules*, MM Docket No. 87-7, First Report and Order, 4 FCC Rcd 1723 (1989)).

<sup>137</sup> *NOI*, 25 FCC Rcd at 6112, ¶ 86.

<sup>138</sup> See, e.g., NAB Comments at 86-90; NAB Reply at 20-22.

<sup>139</sup> See Clear Channel Comments at 14-18.

<sup>140</sup> See *id.* at 21; NAB Comments at 30.

<sup>141</sup> Clear Channel Comments at 21-22; see also NAB Comments at 31-34, 87; NAB Reply at 22. Clear Channel’s econometric analysis relates to the impact of common ownership on format diversity. The Commission has previously “declined to rely on format diversity to justify the local radio ownership rule.” *2006 Quadrennial Review Order*, 23 FCC Rcd at 2077, 2078, ¶¶ 127, 129; see also *2002 Biennial Review Order*, 18 FCC Rcd at 13742, ¶ 315. In this proceeding, we tentatively conclude that we should focus our analysis on viewpoint diversity. We seek comment on this tentative conclusion.



program their stations and that there are efficiencies and economies associated with higher levels of common ownership.<sup>142</sup>

65. Public interest groups urge the Commission to retain the local radio ownership rule and argue that radio station ownership caps are key to preventing the concentration of economic, social, and political power.<sup>143</sup> Communications Workers of America (“CWA”) states that “in 1996, there were 10,257 commercial radio stations and 5,133 radio owners.”<sup>144</sup> In 2010, “there [were] 11,202 commercial radio stations and 3,143 owners, representing a 39 percent decrease in the number of owners since 1996.”<sup>145</sup> Future of Media Coalition (“FMC”) argues that consolidation in the radio industry “has no demonstrable public benefit” and that “[r]adio programming from the largest station groups remains focused on just a few formats — many of which overlap with each other, creating further homogenization.”<sup>146</sup>

66. In our studies we sought data to help us determine how best to structure a local radio ownership rule to satisfy our policy goals. Particularly relevant to the local radio rule, Media Ownership Study 5 analyzes the quantity of radio stations that are classified as news-formatted stations in the top 300 Arbitron metro areas.<sup>147</sup> Media Ownership Study 7 addresses radio station ownership structure and minority-targeted programming using data on radio station formats.<sup>148</sup>

### 3. Discussion

67. *Market.* Broadcasters generally assert that they are facing increased competition from new audio platforms and that this increased competition has led, at least in part, to a reduction in advertising revenues, which could threaten the continued viability of the broadcast radio industry.<sup>149</sup> Broadcasters contend that Internet-based audio platforms such as Pandora and Apple’s iTunes have “transitioned — in just a few years — from new market entrants to full-fledged competitors of terrestrial radio broadcasters.”<sup>150</sup> Broadcasters assert that none of the new competitors to free, over-the-air radio broadcasting are constrained by government-imposed limits on the number of outlets that can be owned, and therefore, limiting ownership of broadcast stations places broadcasters at a disadvantage.<sup>151</sup> For this reason, according to broadcasters, we should modify our local radio ownership rule to permit increased common ownership in local markets.<sup>152</sup>

68. We tentatively conclude that broadcast radio stations compete in the radio listening market and that it is not appropriate, at this time, to expand the relevant market to include nonbroadcast sources

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<sup>142</sup> Clear Channel Comments at 21.

<sup>143</sup> FMC Comments at 15-17; *see also* CWA Comments at 35-36; UCC *et al.* Comments at 9.

<sup>144</sup> CWA Comments at 35.

<sup>145</sup> *Id.* at 35-36.

<sup>146</sup> FMC Comments at 5.

<sup>147</sup> Media Ownership Study 5, Station Ownership and the Provision and Consumption of Radio News, by Joel Waldfogel (“Media Ownership Study 5”).

<sup>148</sup> Media Ownership Study 7, Radio Station Ownership Structure and the Provision of Programming to Minority Audiences: Evidence from 2005-2009, by Joel Waldfogel (“Media Ownership Study 7”).

<sup>149</sup> *See* Clear Channel Comments at 8-11, 35-37; NAB Comments at 63-64, 90.

<sup>150</sup> Clear Channel Comments at 9.

<sup>151</sup> *See, e.g.*, NAB Comments at 5.

<sup>152</sup> *See* Clear Channel Comments at 1; NAB Comments at 90.

of audio programming.<sup>153</sup> We note that the current record suggests that the audio marketplace has changed since the last media ownership review in terms of the number of choices consumers have to access audio programming, the number of audio programming providers, and audio programming choices. For instance, satellite radio subscribership has grown significantly, and millions of listeners now access audio content via the Internet.<sup>154</sup> However, satellite radio still only serves a small portion of all radio listeners and millions of listeners do not have broadband Internet access. Moreover, these audio programming alternatives are national platforms that are not likely to respond to conditions in local markets. Therefore, we propose that our local radio ownership rule continue to focus on promoting competition among broadcast radio stations in local radio listening markets. We seek comment on these tentative conclusions.

69. These tentative conclusions notwithstanding, we seek additional comment on the impact of new audio technologies on the continued viability of broadcast radio stations. Broadcast radio audiences appear stable, the recent decline in advertising has been replaced by gains in 2010, and overall advertising revenue share is predicted to decline only slightly through 2019.<sup>155</sup> Does the apparent resiliency of the broadcast radio industry despite the growth of new technologies suggest that broadcast radio is unique? If so, what characteristics of broadcast radio make it unique, and is it appropriate to consider other technologies in our local radio ownership rule? How, if at all, do nonbroadcast sources of audio programming contribute to our policy goals? For example, do these alternatives to broadcast radio make programming and/or business decisions based on competitive considerations in local markets? Should we determine that, contrary to our tentative conclusion, our local radio ownership rule should focus on promoting competition among broadcast radio stations and alternatives to broadcast radio stations in local radio markets, we seek comment below on whether and how to include these sources in the rule, either in determining market size or in setting the numerical limits.

70. *Market Size Tiers.* We propose to retain the current approach of numerical ownership limits based on market size tiers. Based on the Commission's years of experience in applying the rule, we believe that the existing framework best ensures that the local radio ownership rule serves our policy goals and that limiting common ownership helps to prevent the formation of market power in local markets by ensuring that a few owners cannot "lock up" the available—limited—radio spectrum in a local market. Moreover, this bright-line approach provides transaction participants with a clear understanding

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<sup>153</sup> This tentative conclusion is consistent with previous Commission decisions to not expand the relevant market to include satellite radio and Internet audio streaming. See *2006 Quadrennial Review Order*, 23 FCC Rcd at 2071, ¶ 114; *2002 Biennial Review Order*, 18 FCC Rcd at 13715, ¶ 245. The Commission has also found previously that radio broadcasters compete in the radio advertising and radio program production markets. *2006 Quadrennial Review Order*, 23 FCC Rcd at 2071, ¶ 114; *2002 Biennial Review Order*, 18 FCC Rcd at 13713-15, 13716, ¶¶ 243-244, 247. We tentatively conclude that these markets do not have a direct impact on consumers and should not be the focus of our inquiry. We seek comment on these tentative conclusions.

<sup>154</sup> ARBITRON & EDISON RESEARCH, *THE INFINITE DIAL 2010: DIGITAL PLATFORMS AND THE FUTURE OF RADIO 18-19* (2010), available at [http://www.edisonresearch.com/infinite\\_dial\\_presentation\\_2010\\_revb.pdf](http://www.edisonresearch.com/infinite_dial_presentation_2010_revb.pdf) (finding that as of February 2010, over half the population had listened to online radio, with a weekly online radio audience of approximately 43 million people); Sirius XM Radio Inc., *SEC Form 10-K for the Year Ended December 31, 2010*, at 34 (stating that as of December 31, 2010, there were 20,190,964 satellite radio subscribers, of which 13,104,972 were automobile subscribers).

<sup>155</sup> See PEW CENTER'S PROJECT FOR EXCELLENCE IN JOURNALISM, *THE STATE OF THE NEWS MEDIA 2011: AN ANNUAL REPORT ON AMERICAN JOURNALISM, Key Findings* (2011) ("STATE OF THE NEWS MEDIA 2011"), available at <http://stateofthemediamedia.org> (stating that 93 percent of Americans listened to at least some radio in an average week in 2010, only a 3 percent drop in the last decade); Radio Advertising Bureau, *Radio Revenue Trends*, <http://www.rab.com/public/pr/yearly.cfm> (showing a 6 percent increase in broadcast radio revenue in 2010) (visited Oct. 19, 2011); SNL KAGAN ADVERTISING FORECASTS 2010 at 21, 126 (predicting revenue growth in 2010 and small loss in total market share through 2019).

of which transactions comply with the ownership limitations and allows for timely processing of assignment/transfer applications. We seek comment on these tentative conclusions.

71. We tentatively conclude that we will continue to determine market size based on the number of commercial and noncommercial radio stations in the relevant local market.<sup>156</sup> This tentative conclusion is consistent with our goal of promoting competition among local broadcast radio stations and the Commission's decisions in the previous two media ownership proceedings not to consider nonbroadcast programming in the rule itself.<sup>157</sup> However, to the extent we determine it is appropriate to consider these alternative sources in our rule, we seek comment on whether to count these alternative sources in defining market size to determine how many stations an entity may own, and, if so, how. To what extent does the presence of these alternatives vary by market (*e.g.*, Internet-based audio services) or remain constant across markets (*e.g.*, satellite radio)? Should we consider broadband deployment and/or adoption in a particular local market when determining whether to count Internet-based audio services? Should we consider fixed or wireless broadband, or both? How much online radio listening is devoted to streams of broadcast radio stations, and how should this amount impact the weight of the impact of internet audio streaming in local markets? Should we consider availability and/or adoption of satellite radio in local markets?

72. *Numerical Limits.* We tentatively conclude that we should retain the existing numerical ownership limits for each existing market size tier. The Commission retained these numerical limits in the last media ownership proceeding, finding that public interest would not be served either by relaxing the numerical limits or by making the numerical limits more restrictive.<sup>158</sup> In light of the degree of consolidation in the broadcast radio market following the relaxation of the local radio ownership limits in the 1996 Act, we continue to believe that further relaxation of the numerical limits is not appropriate. Furthermore, we continue to believe that making the limits more restrictive would be inconsistent with Congress's decision to relax the ownership limits and too disruptive to the radio marketplace. In light of these considerations, we tentatively conclude that it is appropriate to continue to retain the numerical ownership limits adopted by Congress in the 1996 Act.

73. We seek comment, however, on whether to adopt any changes to the numerical ownership limits. Is there evidence that the existing limits no longer serve our policy goals or have caused specific harm to the radio broadcast industry? Do changes in the marketplace require modification of these limits, or do the characteristics of certain markets justify increasing the ownership limits in those markets? For example, should we allow additional common ownership in markets with substantially more than 45 stations, now the top tier? Some larger radio markets may contain more than 100 stations, yet the ownership limit is the same – eight stations – in each. Should we, as Clear Channel suggests, allow for increased common ownership in larger markets by creating additional tiers?<sup>159</sup>

74. As an alternative to considering nonbroadcast audio programming in determining the size of a radio market, to the extent we determine it is appropriate to consider these sources in our rule, we seek comment on whether to include these sources when setting the numerical limits and, if so, how we would do so. For example, we could allow for ownership of an additional station in markets where

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<sup>156</sup> See 2002 Biennial Review Order, 18 FCC Rcd at 13726-28, ¶¶ 279-86 (providing geographic market definitions for Arbitron Metros and areas not located in Arbitron Metros).

<sup>157</sup> See 2006 Quadrennial Review Order, 23 FCC Rcd at 2071, ¶ 114; 2002 Biennial Review Order, 18 FCC Rcd at 13715, ¶ 245.

<sup>158</sup> 2006 Quadrennial Review Order, 23 FCC Rcd at 2072, ¶ 117.

<sup>159</sup> Clear Channel suggests an increase from eight to ten in the number of stations a single entity may own in markets with between 55 and 64 stations and from eight to twelve the number of stations that a single entity may own in markets with 65 or more stations. Clear Channel Comments at 33.

alternative sources of audio programming are available, even though the market tier was established solely by the number of broadcast radio stations in the market. If we do so, how should we determine whether such sources are available? For example, are Internet-based audio services consistently available across markets of similar sizes? Should we take adoption rates into account? For example, satellite radio is generally consistently available across a local market, but the number of subscribers remains low compared to the total number of radio listeners. How should this factor into our consideration of the impact of satellite radio in local markets?

75. *AM/FM Subcaps*. In the *NOI*, we sought comment on whether to retain the AM/FM subcaps.<sup>160</sup> The Commission previously concluded that retaining the subcaps serves the public interest by promoting new entry into broadcast radio ownership, particularly by small businesses, including minority- and women-owned businesses.<sup>161</sup> The Commission also concluded that technical and marketplace differences between AM and FM stations supported retention of the subcaps, consistent with the Commission's goal to protect competition in local radio markets.<sup>162</sup>

76. Those advocating elimination of the subcaps argue that recent advances in technology, including online streaming, HD radio technology, and the use of FM translators to augment AM station broadcast signals, have improved the ability of AM radio to compete in the marketplace.<sup>163</sup> In addition, they assert that many of the top stations in large and small markets are AM stations, which undercuts any argument that AM radio will flounder if the subcaps are removed.<sup>164</sup> Some broadcasters also assert that lifting the subcaps will create new ownership opportunities of divested station for entities, which include minorities, women, and small businesses, because broadcasters will buy and sell certain in-market stations to strengthen existing station clusters.<sup>165</sup> In addition, they state that the owners of these station clusters would then be in better financial positions to devote additional resources to local programming.<sup>166</sup> Mt. Wilson, however, asserts that subcaps remain necessary to promote competition in local radio markets.<sup>167</sup>

77. We propose to retain the current AM/FM subcaps for the reasons set forth in the *2006 Quadrennial Review Order*.<sup>168</sup> We continue to believe that this rationale supports retention of the subcaps, and we seek comment on this proposal.

78. In addition, we seek comment on the impact, if any, of the ongoing introduction of digital radio on the AM/FM subcaps. AM stations face unique technical limitations with respect to FM stations, such as lesser bandwidth and inferior audio signal fidelity. In addition, unlike FM signals, AM signal propagation varies with the time of day (*i.e.*, AM signals travel much farther at night than during the day), and many AM stations are required to cease operation at sunset. As a result, FM stations tend to have greater listenership and revenues than AM stations, though this is not necessarily true of all stations in all

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<sup>160</sup> *NOI*, 25 FCC Rcd at 6112, ¶ 86.

<sup>161</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2079-80, ¶ 133.

<sup>162</sup> *Id.* at 2080, ¶ 134.

<sup>163</sup> See, e.g., Entercom Reply at 1-2; Alpha Broadcasting *et al.* Reply at 3-4; Letter from Lawrence R. Sidman, Representative of Clear Channel, to Marlene H. Dortch, Secretary, FCC (Oct. 11, 2011) (Clear Channel Oct. 11 Ex Parte).

<sup>164</sup> Entercom Reply at 2; see also Monterey Comments at 2, 5-6; Galaxy Reply at 4.

<sup>165</sup> Alpha Broadcasting *et al.* Reply at 5-6; Clear Channel Oct. 11 Ex Parte Letter at 1.

<sup>166</sup> *Id.*

<sup>167</sup> Mt. Wilson Reply at 9-10. Indeed, Mt. Wilson suggests that even more restrictive subcaps, along with divestitures, should be adopted. *Id.*

<sup>168</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2078-80, ¶¶ 130-34.

markets. The Commission has previously stated that digital radio may help AM stations to even the playing field with FM stations.<sup>169</sup>

79. What is the impact of digital radio on the technological and economic differences between AM and FM stations? We note that, unlike the digital television transition, radio stations have no obligation to operate in digital mode.<sup>170</sup> At present, far more FM stations have provided the Commission with a notice of commencement of digital operations than AM stations, though the vast majority of stations in both services have not provided such notice.<sup>171</sup> How, if at all, should these facts inform our analysis of the impact of digital operations on the AM/FM subcaps? At this stage, has digital radio helped address the technical disadvantages of AM stations, such as fidelity and signal propagation, and led to a more balanced competition between AM and FM stations generally? Is it premature to consider the impact of digital radio, given the lack of widespread digital radio options (both AM and FM)? How, if at all, should the lack of a deadline to operate in digital affect this decision? Should we also consider the level of consumer adoption when determining the impact of digital operations on the subcaps? What are the current levels of commercial availability and consumer adoption of radios capable of receiving digital signals?

80. Some broadcasters support elimination of the subcaps so they can acquire additional AM stations in order to aggregate AM stations to provide full signal coverage in large geographic areas or in areas with mountainous terrain.<sup>172</sup> We note that the Commission recently changed the FM translator rules “to allow AM stations to use currently authorized FM translator stations to retransmit their AM service within their AM stations’ current coverage areas.”<sup>173</sup> Approximately 500 AM stations are currently retransmitting their signals via FM translators, which has allowed some AM stations to operate at night for the first time and – according to anecdotal reports – has allowed certain AM stations to more effectively serve their communities.<sup>174</sup> In light of this success, we recently sought comment on whether to extend this rebroadcast authority to new FM translators with applications for authorization on file as of May 1, 2009.<sup>175</sup> What has been the impact of the revised FM translator rule on the ability of AM stations to provide expanded coverage in their service areas without the need to acquire additional AM stations? If these stations are now able to provide expanded coverage in their service areas without acquiring additional AM stations, is elimination of the AM/FM subcaps also necessary to address signal coverage

<sup>169</sup> See, e.g., 2002 Biennial Review Order, 18 FCC Rcd at 13734, ¶ 294 n.628.

<sup>170</sup> *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, MM Docket No. 99-325, Second Report and Order First Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 10344, 10351, ¶ 15 (2007).

<sup>171</sup> Of the 9,950 licensed FM stations (commercial and educational), 1,667 have notified the Commission that they have commenced digital operations (approximately 16.8 percent), while only 296 of the 4778 licensed AM stations have filed such notifications (approximately 6.2 percent). FCC staff analysis of current CDBS data and broadcast station totals as of December 31, 2010 reported in *Broadcast Station Totals as of March 31, 2011*, Press Release (MB, rel. May 16, 2011) (“*March 31, 2011 Broadcast Station Totals Press Release*”), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-306575A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-306575A1.pdf).

<sup>172</sup> See, e.g., Entercom Reply at 2.

<sup>173</sup> *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, MB Docket No. 07-172, Report and Order, 24 FCC Rcd 9642, 9642, ¶ 1 (2009).

<sup>174</sup> *Creation of a Low Power Radio Service*, MM Docket No. 99-25, Third Further Notice of Proposed Rulemaking, 26 FCC Rcd 9986, 10000, ¶ 36 (2011) (“providing hundreds of these [AM] stations with their first nighttime authority and the opportunity to operate viably at night. Anecdotal reports from many AM licensees repeatedly emphasize their vastly increased ability to cover local community, governmental and school events, and, generally, to better serve the needs of their communities.”).

<sup>175</sup> *Id.* at 10000-01, ¶ 37.

concerns? Why or why not? How, if at all, has this rule change impacted other AM technical/competition concerns, aside from the signal coverage issue raised by some broadcasters?

81. *Market Size Waivers.* The Commission has previously declined to adopt a specific waiver standard for the local radio ownership rule; instead, parties “may seek a waiver under the ‘good cause’ waiver standard in [the Commission’s] rules.”<sup>176</sup> Given the significant amount of common ownership currently permitted, is a specific waiver standard warranted, or should applicants continue to be required to justify a waiver of the rule under our general waiver standard? If we determine that a specific waiver standard is warranted, what are appropriate waiver criteria? Should such a waiver standard apply equally to all markets, regardless of size, or should we adopt different standards based on market size? Should we limit the waiver standard to smaller markets? If so, what characteristics of those markets establish the need for a specific waiver standard (to the exclusion of larger markets)?

82. *Minority and Female Ownership.* As noted above, DCS suggests that significant barriers to entry for minority ownership remain in both the traditional and new media industries. We seek comment on DCS’ assertion that minority communities are underserved as a result of the lack of minority media ownership, specifically as it relates to the radio market.<sup>177</sup> Moreover, we seek comment on how the local radio rule affects minority and female ownership opportunities. We ask that commenters be as specific as possible when identifying particular aspects of the rule that may impact the opportunity for minority and female entry into the radio business and ownership of broadcast stations. How is any such impact relevant to our goals, in particular promoting viewpoint diversity?

83. Media Ownership Study 7 analyzes the relationship between ownership structure and the provision of radio programming targeted to African-American and Hispanic audiences.<sup>178</sup> Acknowledging that Black and Hispanic listeners have different viewing preferences from the majority White population, the data suggest that there is a positive relationship between minority ownership of radio stations and the total amount of minority radio programming available in the market.<sup>179</sup> The data do not indicate a clear relationship between ownership concentration and programming variety, although the cross-sectional analysis does suggest that concentration promotes variety.<sup>180</sup> A minority-owned radio station may not be more popular with minority audiences than a non-minority-owned radio station providing the same minority-targeted format.<sup>181</sup> If minority-owned stations have smaller coverage areas they will necessarily have lower ratings and therefore appear less popular even though they may be more popular among those consumers that can receive the signal.<sup>182</sup> We seek comment on the methodology and conclusions of Media Ownership Study 7 and how its conclusions should influence our decisions on the proposed local radio rule. We request commenters to provide additional data supporting their positions.

## **C. Newspaper/Broadcast Cross-Ownership Rule**

### **1. Introduction**

84. Newspaper/broadcast cross-ownership was first prohibited in 1975 to preserve viewpoint

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<sup>176</sup> 2002 Biennial Review Order, 18 FCC Rcd at 13746-47, ¶ 326 (citing 47 C.F.R. § 1.3).

<sup>177</sup> DCS Comments at 11-15.

<sup>178</sup> Media Ownership Study 7 at 1.

<sup>179</sup> *Id.* at 13, 24.

<sup>180</sup> *Id.* at 25.

<sup>181</sup> *See id.* at 13.

<sup>182</sup> *See id.*

diversity in local markets.<sup>183</sup> In the 2006 Quadrennial proceeding, the Commission concluded that some limitations on newspaper/broadcast cross-ownership continued to be necessary to promote viewpoint diversity.<sup>184</sup> The Commission recognized, however, that certain newspaper/broadcast combinations may promote its localism goal.<sup>185</sup> It found that the opportunity for sharing newsgathering resources and for realizing other efficiencies derived from economies of scale and scope may improve the ability of commonly owned media outlets to provide local news and information.<sup>186</sup> In the *2002 Biennial Review Order*, the Commission determined that a ban on newspaper/broadcast cross-ownership was not necessary to promote its competition goal.<sup>187</sup> The Commission concluded that most advertisers do not consider newspapers, television stations, and radio stations to be close substitutes for each other, and that therefore newspapers and broadcast stations do not compete in the same product market.<sup>188</sup>

85. The newspaper/broadcast cross-ownership rule prohibits common ownership of a full-service broadcast station and a daily newspaper if: (1) a television station's Grade A service contour completely encompasses the newspaper's city of publication; (2) the predicted or measured 2 mV/m contour of an AM station completely encompasses the newspaper's city of publication; or (3) the predicted 1 mV/m contour for an FM station completely encompasses the newspaper's city of publication.<sup>189</sup> In the 2006 Quadrennial proceeding, the Commission concluded that an absolute prohibition on newspaper/broadcast combinations is overly broad.<sup>190</sup> It added waiver provisions to the rule whereby a waiver would be presumed to be not inconsistent with the public interest if a daily newspaper in a top 20 DMA sought to combine with: (1) a radio station or (2) a television station, and (a) the television station was not ranked among the top four stations in the DMA and (b) at least eight independently owned and operated "major media voices" would remain in the DMA after the combination.<sup>191</sup> For purposes of the newspaper/television combinations, major media voices would include full-power commercial and noncommercial television stations and major newspapers.<sup>192</sup> For

<sup>183</sup> *1975 Second Report and Order*, 50 FCC 2d at 1075, 1076, 1079-81, ¶¶ 101, 104, 111-12.

<sup>184</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2038-39, ¶¶ 47-49; *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13793-94, 13797-804, ¶¶ 440, 442, 452-69 (protecting diversity by prohibiting newspaper/broadcast cross-ownership in "at-risk" markets and limiting newspaper/television cross-ownership in small- to medium-sized markets). In 2004, the Third Circuit found that the Commission had "reasonably concluded" that restrictions on newspaper/broadcast cross-ownership are necessary to promote diversity. *Prometheus I*, 373 F.3d at 400-01.

<sup>185</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2038, ¶ 46 (finding that "the weight of evidence indicates that cross-ownership can promote localism by increasing the amount of news and information transmitted by the co-owned outlets"); *2002 Biennial Review Order*, 18 FCC Rcd at 13753-60, 13760-61, ¶¶ 342-54, 356-58 (citing evidence that broadcast stations owned by newspapers generally produce more and better overall local news programming).

<sup>186</sup> *See 2006 Quadrennial Review Order*, 23 FCC Rcd at 2032-33, ¶ 39 (noting that "[n]umerous media owners provide examples of cost savings and shared resources leading to more local coverage and better quality news coverage"); *2002 Biennial Review Order*, 18 FCC Rcd at 13756-57, ¶¶ 347-49 (describing how sharing news staffs and operational expenses can translate into improved local service). *See also* Media General Comments at 11 (attributing its winning a Pulitzer Prize to its ownership of both a newspaper and a television station in Bristol, Virginia). *But see* AFTRA Comments at 10 (arguing that Tribune's combining of news staffs in Hartford, Connecticut diminished the journalistic standards of its commonly-owned newspaper and television station).

<sup>187</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13753, ¶ 341.

<sup>188</sup> *Id.* at 13748-53, ¶¶ 331-41; *2006 Quadrennial Review Order*, 23 FCC Rcd at 2032, ¶ 39 n.131.

<sup>189</sup> 47 C.F.R. § 73.3555(d)(1).

<sup>190</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2021-22, 2039, ¶¶ 18-19, 50.

<sup>191</sup> 47 C.F.R. § 73.3555(d)(3).

markets below the top 20 DMAs, the Commission would presume a waiver of the newspaper/broadcast cross-ownership rule to be inconsistent with the public interest.<sup>193</sup>

86. Under the 2006 rule, a waiver applicant could overcome this negative presumption by demonstrating, with clear and convincing evidence, that the merged entity would increase the diversity of independent news outlets and the level of competition among independent news sources in the relevant market.<sup>194</sup> The Commission would reverse the negative presumption in two limited circumstances: (1) when the proposed combination involved a failed/failing station or newspaper, or (2) when the proposed combination was with a broadcast station that was not offering local newscasts prior to the combination, and the station would initiate at least seven hours per week of local news after the combination.<sup>195</sup>

87. Under both presumptions, the following four factors would inform the Commission's review of a proposed combination: (1) the extent to which cross-ownership would serve to increase the amount of local news disseminated through the affected media outlets in the combination; (2) the ability of each affected media outlet in the combination to employ its own staff exercise its own independent news judgment; (3) the level of concentration in the DMA; and (4) the financial condition of the newspaper or broadcast station, and if the newspaper or broadcast station was in financial distress, the owner's commitment to invest significantly in newsroom operations.<sup>196</sup>

88. In *Prometheus II*, the Third Circuit vacated and remanded the newspaper/broadcast cross-ownership rule as modified by the Commission in the 2006 Quadrennial proceeding.<sup>197</sup> The court based its decision on its conclusion that the Commission failed to comply with the notice and comment provisions of the Administrative Procedures Act.<sup>198</sup> The court did not address the Commission's substantive modifications to the rule.<sup>199</sup> Because the court reinstated the former rule, the absolute ban on newspaper/broadcast cross-ownership remains in effect, with no specific provision for waivers.<sup>200</sup>

89. Consistent with previous Commission findings, we tentatively conclude that some newspaper/broadcast cross-ownership restrictions continue to be necessary to protect and promote viewpoint diversity. Research shows that newspapers and local television stations, and their affiliated websites, are the primary sources that consumers rely on for local news.<sup>201</sup> We continue to believe,

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<sup>192</sup> *Id.* at § 73.3555(d)(3)(ii); *see also NOI*, 25 FCC Rcd at 6095, ¶ 23.

<sup>193</sup> 47 C.F.R. § 73.3555(d)(4); *see also NOI*, 25 FCC Rcd at 6095-96, ¶ 24.

<sup>194</sup> 47 C.F.R. § 73.3555(d)(6).

<sup>195</sup> *Id.* at § 73.3555(d)(7).

<sup>196</sup> *Id.* at § 73.3555(d)(5).

<sup>197</sup> *Prometheus II*, 652 F.3d at 453.

<sup>198</sup> *Id.* at 445, 453.

<sup>199</sup> *Id.* at 445.

<sup>200</sup> *Id.* at 453 n.25.

<sup>201</sup> *See* PEW RESEARCH CENTER'S PROJECT FOR EXCELLENCE IN JOURNALISM, PEW INTERNET & AMERICAN LIFE PROJECT, AND THE KNIGHT FOUNDATION, HOW PEOPLE LEARN ABOUT THEIR LOCAL COMMUNITY (2011) ("HOW PEOPLE LEARN ABOUT THEIR LOCAL COMMUNITY"), *available at* [http://www.knightfoundation.org/media/uploads/publication\\_pdfs/Pew\\_Knight\\_Local\\_News\\_Report\\_FINAL.pdf](http://www.knightfoundation.org/media/uploads/publication_pdfs/Pew_Knight_Local_News_Report_FINAL.pdf). The survey asked consumers which source they rely upon most for news and information regarding 16 local topics. *Id.* at 2, Figure 1. Newspapers ranked first, or tied for first, for 11 of the 16 topics. *Id.* at 1, 14-15. Newspapers and local television stations together ranked first, or tied for first, for 14 out of 16 topics. *Id.* at 14-15, 17. The survey also found that 74 percent of American adults say they get local information at least weekly from a local television



however, that a blanket prohibition on newspaper/broadcast combinations is overly broad and does not allow for certain cross-ownership that may carry public interest benefits.<sup>202</sup> We tentatively affirm our earlier findings that the opportunity to share newsgathering resources and realize other efficiencies derived from economies of scale and scope may improve the ability of commonly owned media outlets to provide local news and information,<sup>203</sup> and we seek comment on how cross-ownership may promote our localism goal.<sup>204</sup> We tentatively conclude, as the Commission found in previous ownership reviews, that newspapers and broadcast stations do not compete in the same product market and, therefore, that the rule is not necessary to promote our competition goal.<sup>205</sup>

90. We continue to believe that the nation's largest markets can accommodate some cross-ownership without unduly harming viewpoint diversity.<sup>206</sup> For reasons set forth below, we propose to adopt a rule that includes elements of the 2006 rule, including the top 20 DMA demarcation point, the

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news station broadcast, and/or the station's website, the most of any source measured in the survey. *Id.* at 13. In comparison, radio and local newspapers were each listed by about half of the survey respondents. *Id.*

<sup>202</sup> *Prometheus I*, 373 F.3d at 398-400 (affirming that a blanket prohibition on newspaper/broadcast cross-ownership is not necessary to protect diversity and may hinder opportunities to advance localism goals).

<sup>203</sup> See *2006 Quadrennial Review Order*, 23 FCC Rcd at 2032-33, ¶ 39 (noting that “[n]umerous media owners provide examples of cost savings and shared resources leading to more local coverage and better quality news coverage”); *2002 Biennial Review Order*, 18 FCC Rcd at 13756-57, ¶¶ 347-49 (describing how sharing news staffs and operational expenses can translate into improved local service). Media General contends that its newspaper in Bristol, Virginia, won a Pulitzer Prize in part because of shared resources with Media General's television station in that market. See Media General Comments at 11; Letter from M. Anne Swanson, Dow Lohnes PLLC, Counsel for Media General, Inc., to Marlene H. Dortch, Secretary, FCC, at 1-2 (May 20, 2010); Letter from M. Anne Swanson, Dow Lohnes PLLC, Counsel for Media General, Inc., to Marlene H. Dortch, Secretary, FCC, at 1 (Apr. 26, 2010) (“Media General Apr. 26 *Ex Parte* Letter”). See also Media General Apr. 26 *Ex Parte* Letter at 2 (providing examples of how cross-ownership in Tampa, Florida, “has helped improve the delivery of breaking news, enterprise reporting, and investigative reporting”). But see AFTRA Comments at 10 (arguing that Tribune's combining of news staffs in Hartford, Connecticut diminished the journalistic standards of its commonly-owned newspaper and television station); Letter from Jim Haigh, Mid-Atlantic Community Papers Association, to Marlene H. Dortch, Secretary, FCC, at 1 (Oct. 2, 2010) (warning that “the worst possible outcome for [the community paper] industry, the truly local communities they serve and the greater public interest, would be the widespread formation of outsized cross-media entities leveraging traditional advantages”).

<sup>204</sup> We note here the observations of the Information Needs of Communities Report with regard to newspaper/broadcast cross-ownership. STEVE WALDMAN AND THE WORKING GROUP ON INFORMATION NEEDS OF COMMUNITIES, FCC, THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE 349 (2011) (“INFORMATION NEEDS OF COMMUNITIES”), available at [http://transition.fcc.gov/osp/inc-report/The\\_Information\\_Needs\\_of\\_Communities.pdf](http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf). The report was written by an ongoing, informal working group that consisted of Commission staff, industry scholars, and consultants. *Id.* at 362. As noted in the report, the views expressed in the report “do not necessarily represent the views of the Federal Communications Commission, its Commissioners or any individual Bureaus or Offices.” *Id.* The report observes that newspaper/television cross-ownership “could lead to efficiencies and improved business models that might result in more reporting resources,” thereby promoting the Commission's localism goal. *Id.* at 349. The report cautioned, however, that cross-ownership may instead “simply improve the bottom line of a combined company without actually increasing the resources devoted to local newsgathering.” *Id.* (emphasis in original).

<sup>205</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13748-53, ¶¶ 331-41; *2006 Quadrennial Review Order*, 23 FCC Rcd at 2032, ¶ 39 n.131.

<sup>206</sup> The Information Needs of Communities Report found that more television stations offer local news in large markets than in medium and small markets. INFORMATION NEEDS OF COMMUNITIES at 100-01. It determined that 91 of the 92 markets that produced 500 minutes or less of local television news per day (when combining all the stations) were medium or small markets. *Id.* at 101.

top-four television station restriction, and the eight remaining voices test. We tentatively conclude that viewpoint diversity is best achieved by analyzing these elements for proposed newspaper/broadcast combinations on a case-by-case basis. We seek comment on whether alternative approaches or different demarcations and restrictions would promote our diversity goal more effectively. For newspaper/television combinations, we propose to use Nielsen DMA definitions to determine when the rule is triggered, given the lack of a digital equivalent to the analog Grade A service contour.

91. The 2006 rule contained some elements that may not be necessary to promote the public interest. Specifically, as explained below, we seek comment on whether the detailed elements describing what showings are required to overcome the rule's stated presumptions and the showings required of all applicants unnecessarily increased the rule's subjectivity and complexity. We also seek comment on whether to retain some or all of the factors the Commission adopted under the 2006 rule to consider in cross-ownership transactions.<sup>207</sup> We also solicit input on whether to formulate a specific waiver provision that relies on clear, objective, and enforceable standards and a burden of proof standard for waiver requests. Finally, we seek comment on the impact of our newspaper/broadcast cross-ownership proposals on minority and female ownership opportunities.

## 2. Background

92. In the *NOI*, we asked whether newspaper/television combinations should be treated differently from newspaper/radio combinations, as they are in the 2006 rule.<sup>208</sup> We sought comment on the impact of marketplace changes in the newspaper industry, which has seen increased competition for audiences and declining revenues. We elicited input on the extent to which relaxing the rule could benefit newspapers and result in a net gain of local news and information.<sup>209</sup> In the *NOI*, we noted that consumers are increasingly getting their news from online and mobile platforms and asked about the significance of this trend for the newspaper industry.<sup>210</sup> We sought comment on whether relief from the 2006 rule, if any, should be provided through a revised rule or a waiver standard, and the factors that should apply under either approach.<sup>211</sup> For example, we asked whether distinctions should be drawn based on market size and the number of voices remaining post-transaction.<sup>212</sup> We sought comment also on how to evaluate the efficacy of the rule in terms of our goals and the effects on the market participants.<sup>213</sup>

93. Among the commenters responding to the *NOI*, newspaper and broadcast owners recommend repeal or relaxation of the rule, and public advocacy groups support the rule's retention. Supporters of repeal or relaxation of the rule argue that cross-ownership enhances localism and supports diverse points of view.<sup>214</sup> They describe an evolution of the marketplace, including introduction of the

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<sup>207</sup> See *supra* ¶¶ 86-87.

<sup>208</sup> *NOI*, 25 FCC Rcd at 6112-13, ¶ 87.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> See Media General Comments at 11-12 (contending that greater resources available because of Media General's multiple news outlets, including television stations and newspapers, permit multi-part award-winning series while also covering other important local developments and noting launch of additional Spanish-language publication); see also A. H. Belo Comments at 8-13 (detailing benefits derived from cross-ownership through its experience as owner of a newspaper/broadcast combination in Dallas-Fort Worth); Tribune Comments at 18-68 (detailing benefits derived from cross-ownership through its experience as owner of newspaper/broadcast combinations in five media

Internet and other non-traditional media, such as iPhone applications, that they assert provide local and diverse content.<sup>215</sup> They describe serious economic challenges faced by newspapers and suggest that the only way for them to survive is by entering combinations and creating economies of scale.<sup>216</sup>

Commenters state that: newspaper circulation is in a downward spiral since 2008, reaching its lowest point in nearly 70 years in October 2009; advertising revenues, which traditionally make up 80 percent of overall newspaper revenues, have dropped 43 percent from 2007 through 2009; and several newspaper publishers have sought bankruptcy protection, while others have ended their print editions.<sup>217</sup> They state that the newspapers that remain in business have closed domestic and foreign bureaus, laying off thousands of journalists.<sup>218</sup> Newspaper Association of America (“NAA”) cites to Project for Excellence in Journalism’s (“PEJ”) recent estimate that newspapers will devote \$1.6 billion less annually to news reporting in 2010 than they were able to do just three years ago.<sup>219</sup>

94. Supporters of the 2006 rule– or a strengthened rule– assert that restrictions remain necessary to protect against further concentration in an industry already characterized by concentrated vertical ownership and consolidated local ownership.<sup>220</sup> They argue that the 2006 rule provides flexibility where cross-ownership efficiencies might benefit the public interest and permit combinations in failing business situations, while requiring maintenance of separate newsrooms for the purpose of diversity.<sup>221</sup> They argue that the only benefits of cross-ownership are financial benefits for the owners, which they assert arise at the cost of diversity and localism for citizens.<sup>222</sup>

95. In our studies, we sought data to help us analyze questions related to the relevance of the newspaper/broadcast cross-ownership rule to our policy goals. Particularly, we measured whether the presence of cross-owned stations affects the amount of local news provided at the local market level and at the individual station level. We also measured localism by analyzing consumer satisfaction with the amount of local news available in markets. In addition, we studied the impact of cross-ownership on viewpoint diversity in media markets. We seek comment on the extent to which our proposed approaches for newspaper/television combinations are supported by data from our studies or other available data.

### 3. Discussion

96. We tentatively conclude that some restrictions on newspaper/broadcast combinations continue to be necessary to promote viewpoint diversity within local markets. We seek comment on this tentative conclusion. There is evidence that Americans continue to rely on local television stations and

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markets); Letter from M. Anne Swanson, Dow Lohnes PLLC, Counsel for Media General, Inc., to Marlene H. Dortch, Secretary, FCC, Att. 3 at 2 (July 21, 2011) (“Media General July 21 *Ex Parte* Letter”) (arguing that the “voluminous” record on these issues over the past decade, including numerous studies, “show definite quantitative and qualitative improvements in news performance by cross-owned TV stations”).

<sup>215</sup> See Tribune Comments at 11, 73, 75, 81; see also Media General Comments at 13-16.

<sup>216</sup> See Tribune Comments at 86-92; see also Media General Comments at 19; NAA Comments at 12-13, 16-17; A.H. Belo Comments at 17-18; Media General July 21 *Ex Parte* Letter Att. 3 at 1-2.

<sup>217</sup> Media General Comments at 18-19; Tribune Comments at 86; A. H. Belo Comments at 16-17.

<sup>218</sup> A. H. Belo Comments at 17; Media General Comments at 18; NAA Comments at 16.

<sup>219</sup> NAA Comments at 16 (citing PEW RESEARCH CENTER’S PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2010: AN ANNUAL REPORT ON AMERICAN JOURNALISM, Newspapers – Summary Essay (2010) (“STATE OF THE NEWS MEDIA 2010”), available at <http://stateofthemedias.org/2010/>).

<sup>220</sup> See CWA Comments at 30.

<sup>221</sup> *Id.*

<sup>222</sup> AFTRA Comments at 2, 9.

newspapers for the majority of their local news, despite the rising popularity of the Internet as a platform for access to news.<sup>223</sup> Studies have found that approximately three-quarters of Americans obtain news from a local television station.<sup>224</sup> In addition, although newspaper readership has declined in recent years, in 2010, 37 percent of Americans reported reading a newspaper the preceding day.<sup>225</sup>

97. Although consumers are turning increasingly to the Internet for news and information generally and seeking new platforms on which to access local news, the websites most frequently viewed for news and information are affiliated with legacy media. In the fall of 2009, among the top roughly 200 news websites based on traffic, 67 percent were associated with legacy media, and 48 percent were associated with newspapers in particular.<sup>226</sup> More recently, the Information Needs of Communities Report concluded that “from a traffic perspective, newspapers have come to dominate the Internet on the local level.”<sup>227</sup> Along with newspaper websites, local television news websites rank among the most popular news websites.<sup>228</sup> Indeed, Media Ownership Study 6 looks at online local news content and finds very little that is not affiliated with a newspaper or television or radio station.<sup>229</sup> Other websites offering local news presently receive little traffic. Even where there are Internet-only local news outlets, the study suggests that the aggregate weekly quantity of such content is about equal to a single page of a full-size daily newspaper.<sup>230</sup> The PEW Research Center’s Baltimore Study similarly finds that the majority of local news content on websites unaffiliated with newspapers or broadcast stations contains only

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<sup>223</sup> HOW PEOPLE LEARN ABOUT THEIR LOCAL COMMUNITY at 14-15, 17. Overall, the survey found that local television stations, together with their websites, are the most frequently used source for local news. *Id.* at 13.

<sup>224</sup> *Id.* at 13 (finding that 74 percent of American adults say they get local news at least weekly from a local television station and/or its website); KRISTEN PURCELL *ET AL.*, PEW RESEARCH CENTER’S PROJECT FOR EXCELLENCE IN JOURNALISM, UNDERSTANDING THE PARTICIPATORY NEWS CONSUMER: HOW INTERNET AND CELL PHONE USERS HAVE TURNED NEWS INTO A SOCIAL EXPERIENCE (2010) (“PEW PARTICIPATORY NEWS CONSUMER”), *available at* [http://www.journalism.org/sites/journalism.org/files/Participatory\\_News\\_Consumer.pdf](http://www.journalism.org/sites/journalism.org/files/Participatory_News_Consumer.pdf) (finding that 78 percent of Americans obtain news from a local television station on a typical day). Furthermore, according to the Information Needs of Communities Report, 50 percent of all Americans claim to watch local television news “regularly.” INFORMATION NEEDS OF COMMUNITIES at 76. In addition, the amount of local news aired on television stations has increased 35 percent in the past seven years, according to a 2010 RTDNA/Hofstra University Annual Survey. *Id.* at 77.

<sup>225</sup> STATE OF THE NEWS MEDIA 2011 at Newspapers Essay. The study notes that this figure is down from 39 percent in 2008 and 43 percent in 2006. *Id.*

<sup>226</sup> STATE OF THE NEWS MEDIA 2010 at Nielsen Analysis. Similarly, as we noted in the *NOI*, in 2008, 20 of the 25 most-visited news websites were co-owned with a cable television, broadcast television, or newspaper property. *NOI*, 25 FCC Rcd at 6088-89, ¶ 6.

<sup>227</sup> INFORMATION NEEDS OF COMMUNITIES at 55-56. A study of three cities revealed that, in each case, the city’s long-standing newspaper was the most popular online source of local news. *Id.* We note that although the websites of newspapers and local television stations rank highly in terms of online traffic, one recent survey found that relative to other news sources, including other online sources, they do not rank among the top sources that respondents say they rely upon for local news and information. HOW PEOPLE LEARN ABOUT THEIR LOCAL COMMUNITY at 5, 27-28.

<sup>228</sup> INFORMATION NEEDS OF COMMUNITIES at 76. The Report found that “[a]lthough newspapers still produce the number one websites in most large markets, local TV stations lay claim to the top local sites in 14 markets, including Minneapolis, Pittsburgh, Raleigh-Durham, and Salt Lake City.” *Id.* at 81. In addition, the Report noted the proliferation of “hyperlocal” community websites that have been launched by local television stations. *Id.*

<sup>229</sup> Media Ownership Study 6 at 11, 15.

<sup>230</sup> *Id.* at 23-24.

commentary on the stories and features that originated from traditional media outlets.<sup>231</sup> Given the continuing prevalence of broadcast stations and newspapers as news sources consumers rely on the most, we tentatively find that some newspaper/broadcast restrictions remain necessary to protect viewpoint diversity. We will continue to monitor and assess the Internet's role in the marketplace for local news and information in this regard. We seek comment on these tentative conclusions.

98. The Commission has found evidence previously that some newspaper/broadcast cross-ownership may produce increased local news.<sup>232</sup> What benefits and efficiencies accrue from cross ownership? Media Ownership Study 4 examines the impact of newspaper/television cross-ownership on the amount of local television news at both the station and the market level.<sup>233</sup> The study finds that, other things being equal, a station that is cross-owned with a daily newspaper produces more local news than a stand alone station. However, when the analysis is done at the market level, other things being equal, a market with a cross-owned station offers somewhat less local news than a market without a cross-owned station. Because there was little variation in the extent of newspaper-television cross-ownership during the period studied, the author recognizes that the conclusions of the statistical analysis must be treated with caution. We seek comment on how to weigh the Media Ownership Study 4 findings and how those findings should affect our analysis. Has this rule resulted in the reduction of local news, the loss of journalism positions, and the failure of newspapers? What challenges have newspapers faced because of the current economy and the changing marketplace?

99. *Nielsen DMAs.* As an initial matter, for television stations, we propose to apply any ownership combination restrictions to daily newspapers and stations within the same DMA.<sup>234</sup> We seek comment on our tentative conclusion that we will use Nielsen DMA definitions to determine when the cross-ownership rule is triggered, as there is no digital equivalent contour for the analog Grade A contour specified by the current rule.<sup>235</sup> We seek comment on the impact of changing from a contour-based rule to a DMA-based rule. For any proposed rule, would many more newspaper/television station combinations be implicated by the cross-ownership rule under a DMA-based approach as compared to a contour-based approach? Are there negative consequences to switching to a DMA-based rule? What are the benefits? Our preliminary view is that DMA market definitions would reflect circulation and viewing areas more accurately than the current approach. However, given the large size of some DMAs, we seek comment on whether the rule instead should be triggered only if the newspaper's circulation extends to the community of license of the television station.

100. To the extent the rule relies on DMAs, we propose to grandfather ownership of existing combinations of television stations and newspapers that would conflict with the newspaper/broadcast cross-ownership rule by virtue of the change to a DMA-based approach. Compulsory divestiture is disruptive to the industry and a hardship for individual owners, and any benefits to our policy goals would

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<sup>231</sup> PEW RESEARCH CENTER'S PROJECT FOR EXCELLENCE IN JOURNALISM, HOW NEWS HAPPENS: A STUDY OF THE NEWS ECOSYSTEM OF ONE AMERICAN CITY (2010), available at [http://www.journalism.org/sites/journalism.org/files/Baltimore%20Study\\_Jan2010\\_0.pdf](http://www.journalism.org/sites/journalism.org/files/Baltimore%20Study_Jan2010_0.pdf); see also INFORMATION NEEDS OF COMMUNITIES at 123-24 (referencing several studies to support the conclusion that "the growing number of web outlets relies on a relatively fixed, or declining, pool of original reporting provided by traditional media").

<sup>232</sup> 2002 Biennial Review Order, 18 FCC Rcd at 13753-60, 13760-61, ¶¶ 342-54, 356-58; 2006 Quadrennial Review Order, 23 FCC Rcd at 2038, ¶ 46.

<sup>233</sup> Media Ownership Study 4 at 12.

<sup>234</sup> This is consistent with our tentative conclusion to eliminate the use of Grade B contours in conjunction with the local television ownership rule in favor of Nielsen DMAs. See *supra* ¶¶ 36-39.

<sup>235</sup> For further discussion of digital contours, see *NOI*, 25 FCC Rcd at 6116-18, ¶¶ 102-05.

likely be outweighed by these countervailing considerations.<sup>236</sup> We seek comment on these tentative conclusions. Are our policy goals served by allowing grandfathered combinations to be freely transferable in perpetuity, irrespective of whether the combination complies with the newspaper/broadcast cross-ownership rule? What is the effect on the entities if they are sold separately? Is it possible that such a rule could have the unintended consequence of causing a station or newspaper to close?

101. *Proposed Rule.* In taking a fresh look at the rule, we tentatively find that a blanket rule prohibiting all newspaper/broadcast cross-ownership within the same service area is unnecessarily broad. We tentatively conclude that the top 20 DMA demarcation point, the top-four television station restriction, and the eight remaining major media voices test for television/newspaper combinations contained in the 2006 rule are the fundamental elements of a rule that will protect and promote viewpoint diversity while also properly supporting localism most effectively. We note that these criteria are objective standards that can be applied and enforced consistently and fairly, with low cost to the applicants and Commission. We seek comment generally on the benefits of adopting these criteria and specifically on their individual aspects, as detailed below.

102. We propose a rule that prohibits common ownership of a daily newspaper and (1) a full-power commercial television station within the same DMA, (2) an AM station with a predicted or measured 2 mV/m contour service area that encompasses the newspaper's city of publication; or (3) an FM station with a predicted 1 mV/m contour service area that encompasses the newspaper's city of publication.<sup>237</sup> The proposed rule would presume a waiver to be consistent with the public interest if: (1) a daily newspaper in a top 20 DMA sought to combine with a radio station, or (2) a daily newspaper sought to combine with a full-power commercial television station in the same top 20 DMA, and: (a) the television station is not ranked among the top four television stations in the DMA and (b) at least eight independently owned and operated "major media voices" would remain in the DMA after the combination.<sup>238</sup> The rule would presume a waiver to be inconsistent with the public interest in all other circumstances. Below we seek comment on alternative demarcation points for these three key elements of the proposed rule (top-four television station restriction, eight remaining major media voices criterion, top 20 DMA cutoff) and on how in practice these three constraints interact with one another.

103. We tentatively conclude that the case-by-case approach adopted as part of the 2006 rule to consider requests for waivers of the newspaper/broadcast cross-ownership rule would best serve our goal of promoting viewpoint diversity. This approach should provide an appropriate amount of flexibility to allow the Commission to consider specific, individual circumstances. Presumptions either in favor of or against a waiver can be overcome when specific facts so warrant. Under this approach, opponents to a waiver request, even in the largest markets, maintain the ability to argue that specific circumstances overcome a favorable presumption. In addition, parties requesting a waiver in smaller markets are not precluded from demonstrating the benefits of that particular combination in the individual market. We seek comment on these tentative conclusions.

104. Alternatively, we seek comment on whether a bright-line rule addressing newspaper/broadcast cross-ownership would be preferable. Such a rule would allow common ownership of (1) one daily newspaper in a top 20 DMA and one commercial radio station, or (2) one daily newspaper and one full-power commercial television station in a top 20 DMA under the circumstances in

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<sup>236</sup> See, e.g., *1975 Second Report and Order*, 50 FCC 2d at 1080, ¶ 112 (stating that "divestiture should be limited to use in only the most egregious cases"); see also *2002 Biennial Review Order*, 18 FCC Rcd at 13808, ¶ 484.

<sup>237</sup> See Appendix B for the proposed rule.

<sup>238</sup> For purposes of the waiver, major media voices would include full-power commercial and noncommercial television stations and major newspapers. See 47 C.F.R. § 73.3555(d)(3)(ii); *NOI*, 25 FCC Rcd at 6095, ¶ 23.

which the case-by-case approach proposed above would establish a favorable presumption.<sup>239</sup> Other combinations would be prohibited. The purpose of a bright-line rule is to create a clear-cut, readily enforceable standard that provides consistency and certainty to the marketplace. We seek comment on whether this approach would result in a simplified rule that would preserve essentially the same levels of local viewpoint diversity as a case-by-case approach but reduce applicants' costs and make the Commission's review of transfer and assignment applications more objective, predictable, and expeditious. Is a bright-line formula too blunt a tool to account for variable conditions that may exist when considering newspaper/broadcast cross-ownership waivers, even in similarly sized markets? We note that even utilizing a bright-line rule, petitions to deny an application would not be precluded even for a newspaper/broadcast combination within a top 20 DMA or a waiver request in other markets.<sup>240</sup> Would including the determinative criteria in a governing rule alleviate the need to undergo a potentially lengthy and expensive waiver process for applications presumed to be in the public interest? If the results are likely to be the same in most cases, is the flexibility of a tailored review process worth the additional time and expense? We seek comment on the extent to which the structure of the bright-line approach would diminish the likelihood of successfully opposing such a merger. Under a bright line approach, should we adopt specific standards for waivers or rely on our generally applicable waiver standards?

105. *Market Tiers.* We propose to differentiate between markets in the top 20 DMAs and markets below the top 20 DMAs. In the last review of this rule, the Commission found a "notable difference between the top 20 markets and all other DMAs," citing the range of media outlets available in the top 20 DMAs and concluding that "[t]he diversity in the number and types of traditional media outlets in the largest markets ensures that the public is well served by antagonistic viewpoints. Markets outside of the top 20 DMAs do not feature diversity to such an extent."<sup>241</sup> We continue to believe that the top 20 DMAs are notably different from other markets, both in terms of voices and in terms of television and radio households.<sup>242</sup> Based on the range of media outlets available in the top 20 DMAs, we tentatively conclude that diversity in those largest markets is healthy and vibrant in comparison to other DMAs. For example, while there are at least 10 independently owned, commercial television stations in 15 of the top 20 DMAs, none of the DMAs ranked 21 through 25 has even eight independently owned, commercial television stations. Additionally, while 15 of the top 20 DMAs have at least two newspapers with a circulation of at least five percent of the households in that DMA, four of the five DMAs ranked 21 through 25 have only one such newspaper. Moreover, the top 20 markets, on average, have 16 independently owned television stations and major newspapers and approximately 2.5 million television households.<sup>243</sup> By comparison, DMAs 21 through 30 have on average nine major voices and fewer than 1.2 million television households, representing drops of 44 percent and 52 percent from the top 20 markets, respectively. DMAs 31 through 50 have average numbers of voices for each category similar to markets 21 through 30, but even fewer television households on average, 856,700 and 694,500, respectively. DMAs 51 through 210 show even more dramatic drops, with, on average, seven major voices and approximately 236,000 television households, representing drops of 56 percent and 91 percent from the top 20 DMAs, respectively. The diversity in the number and types of traditional media outlets in the largest markets ensures that the public is well served by a variety of viewpoints. Markets outside of the top 20 DMAs do not feature diversity to such an extent.

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<sup>239</sup> For purposes of the rule, major media voices would include full-power commercial and noncommercial television stations and major newspapers. See 47 C.F.R. § 73.3555(d)(3)(ii); *NOI*, 25 FCC Rcd at 6095, ¶ 23.

<sup>240</sup> See 47 U.S.C. § 309(d)(1).

<sup>241</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2041-42, ¶ 56.

<sup>242</sup> Staff analysis of BIA/Kelsey data for Dec. 31, 2009.

<sup>243</sup> *Id.*

106. We seek comment on this analysis of the distinction between the top 20 DMAs and others and on our tentative conclusion that the viewpoint diversity level in the 20 largest DMAs is sufficient to consider adopting a regulatory framework that would accommodate a limited amount of newspaper/broadcast cross-ownership in those markets. We also seek comment on our continued belief that markets below the top 20 DMAs cannot accommodate any such cross-ownership, absent particular circumstances warranting a waiver. We ask commenters to address separately market structure characteristics, such as the number of independent media voices, and market size characteristics, *e.g.*, the number of television households in the market. Market structure characteristics are directly and separately addressed by the proposed top four television station restriction and the proposed eight remaining major media voices criterion. Due to the high fixed costs of television program production (including local programming in general and local news programming in particular), the number of television households in the market affects the revenue base available to support local programming and hence affects the quantity, quality, and diversity of local programming produced in the market, independent of the number of media voices.<sup>244</sup>

107. In addition, we seek comment on whether a different demarcation point would more effectively protect and promote our viewpoint diversity and localism goals. For example, would differential treatment be warranted for newspaper/broadcast combinations in the top 30 DMAs, top 40 DMAs, top 50 DMAs, or at a different market size? Please provide specific market data to support the proposed demarcation point. If we were to maintain the prohibition on combinations involving the top four television stations and the requirement to retain eight major media voices in the market, what is the impact on permitted combinations of varying the demarcation point?

108. *Newspaper/Television Station Combinations: Top-Four Restriction.* We propose to prevent a daily newspaper from combining with a television station that is ranked among the top four television stations in the DMA. We propose that the current criteria would continue to apply when determining what qualifies as a daily newspaper<sup>245</sup> and what qualifies as a television station ranked among the top four stations.<sup>246</sup> We believe that allowing a top-four station to merge with a daily newspaper would create the greatest risk of losing an independent voice in that market. Our analysis shows that there is a decrease in the amount of local news broadcast between the fourth and fifth ranked stations.<sup>247</sup> In larger markets, the fifth ranked station generally provides no more than half the amount of local news of the fourth ranked station.<sup>248</sup> We seek comment on this analysis and on its application to our

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<sup>244</sup> For a theoretical discussion of the relationship between product quality and market size in the presence of fixed costs and an application to newspapers, see Berry, Steven and Joel Waldfogel; “*Product Quality and Market Size*” 58 *Journal of Industrial Economics*: 1-31 (March 2010). For a discussion in the context of local television programming, see Oberholzer-Gee, Felix and Joel Waldfogel; “*Media Markets and Localism: Does News En Espanol Boost Hispanic Voter Turnout?*” National Bureau of Economic Research Working Paper 12317 (June 2006); revised version published 99 *American Economic Review*: 2120-2128 (December 2009).

<sup>245</sup> 47 C.F.R. § 73.3555, Note 6 (a daily newspaper must be published at least four days a week, written in the dominant language in the market, and circulated generally in the community of publication).

<sup>246</sup> *Id.* at § 73.3555(d)(3)(i) (a television station’s ranking is determined by “the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service”). We note that with regard to the TV duopoly rule, the ranking is determined at the time the application to acquire or construct the station is filed. *Id.* at § 73.3555(b)(1)(i).

<sup>247</sup> We have some evidence that the amount of local news drops off on the fifth-ranked television station and does so more dramatically in higher ranked DMAs. FCC staff analysis of TMS data for the period Nov. 1, 2009 through Nov. 14, 2009 and Nielsen data for the period Oct. 29, 2009 through Nov. 25, 2009.

<sup>248</sup> *Id.* This is not to say that the absolute amount of local news provided by the fifth ranked station is insignificant in all cases.



proposed approaches.

109. Furthermore, we note the dominance of the four major television networks in most local television markets. How commonly are the top four stations in a market affiliated with the four major broadcast networks? We seek comment on the findings in Media Ownership Study 4 that television stations affiliated with one of the four major broadcast networks tend to air more local news than other stations and that there are about 35 additional minutes of local news programming in the market for each additional station in the market that is affiliated with one of the four major broadcast networks.<sup>249</sup> We seek comment on our presumption that, therefore, the top four television stations generally contribute the most local news and information among the television stations within a market.

110. Alternatively, we seek comment on whether a different limit is appropriate. For example, is there evidence to support a cross-ownership restriction between newspapers and the top-five or the top-six television stations in some markets? If so, why? Is there support to prevent combinations between newspapers and stations affiliated with one of the four major broadcast networks? If so, why? Could such combinations potentially harm diversity more than other combinations? Is there evidence that these stations provide more diversity in local markets?

111. *Newspaper/Television Station Combinations: Eight Major Media Voices Restriction.* We tentatively propose to prohibit transactions where less than eight independently owned and operated “major media voices” would remain in the DMA after a transaction. We seek comment, however, on the potential impact of eliminating this voices test. Our examination of the top 20 DMAs indicates there would be no impact in these markets. Under the existing ownership patterns in the top 20 markets, even if all daily newspapers combined with television stations, at least eight major media voices would remain in the market. The existence of the eight voices test in the local television ownership rule also helps retain independent major media voices by limiting commercial consolidation once only eight independent television stations remain in the market. As long as these eight independent television voices remain in the market, consolidation between newspapers and television stations will not reduce the number of major media voices below eight. Is our assessment accurate, and if so, is there any reason to incorporate the eight voices test into a new rule or waiver provision? Is there a reason to require a different number of voices to remain in the DMA, and if so, how would that number better protect our diversity goal? Should our analysis change if we do not distinguish the top 20 DMAs but adopt a different demarcation point? For example, would there be an impact on the market if we eliminate the eight voices test and create a separate tier for the top 30 DMAs?

112. *Newspaper/Radio Station Combinations.* As an alternative to our proposal above to retain the restriction on newspaper/radio combinations,<sup>250</sup> we also seek comment on whether we should eliminate the newspaper/radio restriction in all markets or otherwise relax the restriction.<sup>251</sup> We tentatively conclude that radio stations are not the primary outlets that contribute to local viewpoint diversity. Media Ownership Study 5 finds that at least one commercial radio station with a news and talk

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<sup>249</sup> Media Ownership Study 4 at 25; *see also* INFORMATION NEEDS OF COMMUNITIES at 100 (finding that most of the television stations that do not offer local news are not affiliated with a broadcast network).

<sup>250</sup> *See supra* ¶¶ 101-103.

<sup>251</sup> We note that Minority Media and Telecommunications Council (“MMTC”) no longer opposes newspaper/broadcast cross-ownership given the economic hardships facing so many newspapers. Transcript of Jan. 27, 2010, Media Ownership Workshop, MB Docket No. 09-182, at 206-07 (“Jan. 27 Workshop Transcript”) (remarks of David Honig, President and Executive Director, MMTC; filed in MB Docket No. 09-182 on February 26, 2010); *see also* Morris Comments at 2-3 (arguing that newspaper/radio combinations raise fewer concerns than newspaper/television combinations); CWA Comments at 25-26 (citing evidence that newspapers and television stations remain the dominant sources of local news and information).

format serves most markets and that a public news radio station serves about 40 percent of markets.<sup>252</sup> Research shows, nevertheless, that consumers' main sources for local news and information are television stations, newspapers, and their affiliated websites.<sup>253</sup> Moreover, we tentatively conclude that a substantial amount of news and talk show programming on radio stations is nationally syndicated. We seek comment on our tentative conclusion that radio stations generally are not the dominant source consumers turn to for local news and information, as compared to newspapers and television stations. We seek comment on whether, to the extent radio stations serve as sources of local news and information, viewpoint diversity would be adequately protected by our proposed local radio limits. Because consumers in markets of all sizes rely most heavily on other types of news outlets for local news and information, is there any reason to distinguish between markets in the top 20 DMAs and those below the top 20 DMAs for purposes of newspaper/radio combinations? Would the removal of prohibitions against newspaper/radio combinations have any impact on the ownership, or contribution to local viewpoint diversity, of noncommercial educational FM broadcast stations, given the restriction that they may be licensed only to nonprofit educational organizations?<sup>254</sup> Would common ownership between a radio station and a newspaper increase the quality and quantity of local news programming available on radio stations due to shared newsgathering expertise and resources?<sup>255</sup> Could such combinations provide an opportunity for both radio stations and newspapers that are struggling financially to become more vital participants in the news and information marketplace and what is the likelihood of this outcome? Should we consider a rule that prohibits newspaper-radio combinations in certain markets only when the radio station is among the largest four in the market by audience share?

113. The proposed newspaper/broadcast cross-ownership rule retains the use of radio contours to determine when the rule is triggered. As discussed in Section III.B, Arbitron market definitions are used to delineate a market's geographic boundaries for purposes of the local radio limits and we propose to use DMAs for purposes of triggering the local TV ownership rule and the newspaper/television aspect of the cross-ownership rule. Should we continue to use contours to determine whether the newspaper/broadcast cross-ownership rule is triggered for newspaper/radio combinations? What are the benefits of continuing to rely on contours only for this portion of the rule? Can retaining a contour approach to newspaper/radio combinations be reconciled with our proposed use of geographic market definitions for newspaper/television combinations? Alternatively, should we replace radio contours with Arbitron market definitions for purposes of determining whether the newspaper/broadcast cross-ownership rule is triggered for newspaper/radio combinations? Are there any specific concerns about moving to an Arbitron market definition for this rule? Would more or fewer newspaper/radio station combinations be implicated by the cross-ownership rule under an Arbitron-based approach as compared to a contour-based approach? How would we handle non-Arbitron radio markets? We seek comment.

114. To the extent the rule relies on a different market area, we propose to grandfather ownership of existing combinations of radio stations and newspapers that would conflict with the newspaper/broadcast cross-ownership rule by virtue of the change. Compulsory divestiture is disruptive

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<sup>252</sup> Media Ownership Study 5 at 4-5; *but see* INFORMATION NEEDS OF COMMUNITIES at 231 (stating that the number of cities with "all-news radio stations dropped from 50 in the 1980s to 30 in 2010").

<sup>253</sup> *NOI*, 25 FCC Rcd at 6088, ¶ 6 (citing PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, AUDIENCE SEGMENTS IN A CHANGING NEWS ENVIRONMENT 3 (2008), available at <http://peoplepress.org/files/legacy-pdf/444.pdf>).

<sup>254</sup> 47 C.F.R. § 73.503(a).

<sup>255</sup> *See 2006 Quadrennial Review Order*, 23 FCC Rcd at 2038, ¶ 46 (finding that "the weight of evidence indicates that cross-ownership can promote localism by increasing the amount of news and information transmitted by the co-owned outlets"); *2002 Biennial Review Order*, 18 FCC Rcd at 13753-60, 13760-61, ¶¶ 342-54, 356-58 (citing evidence that broadcast stations owned by newspapers generally produce more and better overall local news programming).

to the industry and a hardship for individual owners, and any benefits to our policy goals would likely be outweighed by these countervailing considerations.<sup>256</sup> We seek comment on these tentative conclusions. Are our policy goals served by allowing grandfathered combinations to be freely transferable in perpetuity, irrespective of whether the combination complies with the newspaper/radio cross-ownership rule? What is the effect on the stations if they are sold separately? Is it possible that such a rule could have the unintended consequence of causing a station or newspaper to close?

115. *Factor Tests.* The 2006 rule included a list of four factors for the Commission to analyze when deciding whether a specific newspaper/broadcast ownership combination was in the public interest. We seek comment on whether we should retain those factors. In 2006, the Commission stated that the factors were intended to address “the need to support the availability and sustainability of local news while not significantly increasing local concentration or harming diversity.”<sup>257</sup> Specifically, the 2006 rule required applicants to make showings regarding: (1) the amount of local news that would be produced post-transaction; (2) the extent to which the affected media outlets would exercise independent news judgment; (3) the level of concentration in the DMA; and (4) the financial condition of the applicant, and if financially distressed, the applicant’s commitment to invest in newsroom operations.<sup>258</sup> Do the factors provide useful predictability or clarity for applicants applying for a waiver of the newspaper/broadcast cross-ownership rule? Do factors provide specific benefits to the Commission staff reviewing applications and waiver requests? Alternatively, are any of the factors, such as the first two factors, too subjective, or focused on future behavior that may be too difficult to predict or enforce? Do specific factors create unnecessary delay in the application and review process? Should the Commission exclude all of these elements from the new rule and consider applications on a more case by case basis? If so, should the presumptions included in the rule be interpreted as establishing a *prima facie* case in favor of or against a transaction and, once established, shifting the burden of proof regarding the Commission’s treatment of an application to those that may seek to overcome the presumption? If so, what should that burden of proof be?<sup>259</sup> Would a well defined exception or waiver standard, as discussed below, sufficiently support the Commission’s consideration of specific factual scenarios related to a proposed transaction, including for instance, the financial condition of the entities involved and/or the availability of local news, such that the specification of these additional factors is not necessary? We seek comment.

116. *Exception or Waiver.* We also seek comment on whether to retain or abolish the factors adopted in 2006 to overcome or reverse a negative presumption. Is it better to remove all factors from the rule and rely on the Commission’s general waiver standard?<sup>260</sup> Under the 2006 rule, a waiver applicant could overcome a negative presumption by demonstrating, with clear and convincing evidence, that the merged entity would increase the diversity of independent news outlets and the level of competition among independent news sources in the relevant market.<sup>261</sup> Is such a standard sufficiently objective and quantifiable? The 2006 rule further stated that the Commission would reverse the negative presumption

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<sup>256</sup> See, e.g., 1975 *Second Report and Order*, 50 FCC 2d at 1080, ¶ 112 (stating that “divestiture should be limited to use in only the most egregious cases”); see also 2002 *Biennial Review Order*, 18 FCC Rcd at 13808, ¶ 484.

<sup>257</sup> 2006 *Quadrennial Review Order*, 23 FCC Rcd at 2018-19, ¶ 13.

<sup>258</sup> *Id.* at 2049, ¶ 68.

<sup>259</sup> In the 2006 *Quadrennial Review Order*, the Commission stated that “[w]e will require any applicant attempting to overcome a negative presumption about a major newspaper and television station combination to demonstrate by clear and convincing evidence that, post-merger, the merged entity will increase the diversity of independent news outlets (e.g., separate editorial and news coverage decisions) and increase competition among independent news sources in the relevant market.” *Id.* at 2049, ¶ 68.

<sup>260</sup> See 47 C.F.R. § 1.3.

<sup>261</sup> *Id.* at § 73.3555(d)(6).

in two limited circumstances: (1) when the proposed combination involved a failed/failing station or newspaper, or (2) when the proposed combination was with a broadcast station that was not offering local newscasts prior to the combination, and the station would initiate at least seven hours per week of local news after the combination.<sup>262</sup> Is such a standard sufficiently objective and quantifiable? Should we give special consideration to a transaction that involves a station or newspaper that is failed or failing? If so, what showing should an applicant be required to make to qualify as failed or failing? Is a requirement that a waiver applicant show that a proposed combination would increase the number of hours of local news programming overly focused on future behavior that may be too difficult to predict or enforce? Are there other factors that the Commission should adopt that would be more objective or easier to enforce than those adopted in 2006? If so, what would be the benefits of adopting any other proposed factors and what would be the harms? We also seek comment on whether it may be appropriate to adopt specific factors to consider in instance in which an applicant is seeking a waiver of the restriction on combinations involving a top-four television station or the eight voice test.<sup>263</sup> Finally, we seek comment on whether and why such provisions are needed given that filing a waiver petition is always an option under section 1.3 of the Commission's rules?<sup>264</sup>

117. *Minority and Female Ownership.* According to DCS, there are still significant barriers to entry by minority owners in both the traditional and new media industries; DCS supports measures to facilitate minority media ownership.<sup>265</sup> DCS states that minority-owned stations are more likely to provide programming geared towards minority audiences and that minority communities are underserved as a result of the lack of minority media ownership.<sup>266</sup> We seek comment on how the proposed newspaper/broadcast cross-ownership rule could affect minority and female ownership opportunities. We seek comment on how promotion of diverse ownership promotes viewpoint diversity. We request that commenters provide additional data supporting their positions.

## **D. Radio/Television Cross-Ownership Rule**

### **1. Introduction**

118. The current radio/television cross-ownership rule limits the number of commercial radio and television stations an entity may own in the same market, with the degree of common ownership permitted varying depending on the size of the relevant market.<sup>267</sup> The rule allows common ownership of at least two television stations and one radio station in the smallest markets, while in larger markets, a single entity may own additional stations depending on the number of media owners in the market.<sup>268</sup>

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<sup>262</sup> *Id.* at § 73.3555(d)(7).

<sup>263</sup> We note that MMTC no longer opposes newspaper/broadcast cross-ownership given the economic hardships facing so many newspapers. Jan. 27 Workshop Transcript at 206-07 (remarks of David Honig, President and Executive Director, MMTC).

<sup>264</sup> *See* 47 C.F.R. § 1.3.

<sup>265</sup> DCS Comments at 3-5, 7-9, 18-20.

<sup>266</sup> *Id.* at 11-14; *see also id.* at 12 (citing Sandoval *et al.* Minority Commercial Radio Ownership in 2009) (“A study published in 2009 shows that approximately 73 percent of minority-owned stations serve the community by broadcasting minority oriented programming . . .”).

<sup>267</sup> An entity may own up to two television stations and four radio stations in a market, as long as at least 10 independently owned media voices would remain post-merger, and a single entity may own up to two television stations and six radio stations, or one television station and seven radio stations, in a market as long as at least 20 independently owned media voices would remain post-merger. In all instances, entities must comply with the local radio and local television ownership limits. 47 C.F.R. § 73.3555(c)(2).

<sup>268</sup> The following media are counted for determining the number of voices for the purpose of applying the radio/television cross-ownership rule: (i) all “independently owned and operating full-power broadcast TV stations

The Commission retained the radio/television cross-ownership rule in the 2006 *Quadrennial Review Order* to ensure diversity in local markets.<sup>269</sup> In *Prometheus II*, the Third Circuit upheld the Commission's decision to retain the rule, based in part on the Commission's assertion in the 2006 *Quadrennial Review Order* that the rule benefited viewpoint diversity.<sup>270</sup> It noted that the Commission supported retention of the rule in the 2006 Quadrennial proceeding with some evidence that commonly owned stations can share the same viewpoint.<sup>271</sup>

119. Pursuant to our statutory mandate, we consider whether the radio/television cross-ownership rule continues to be necessary to promote the public interest. We tentatively conclude that it does not. We believe that repeal of the radio/television cross-ownership rule is not likely to increase significantly consolidation of broadcast facilities. To the extent that repeal does allow additional consolidation, we seek comment on whether such consolidation would result in greater efficiencies, to be passed through to consumers in the form of enhanced programming choices or other consumer welfare benefits. Moreover, as discussed further below, data suggest that radio/television cross-ownership does not negatively impact the amount of local news available to consumers or the diversity of such programming. Finally, we are persuaded by the evidence from our studies and the changes in the marketplace that the rule is not necessary to ensure sufficient diversity in local markets. Accordingly, we tentatively conclude that in the current media market, our goals of localism and diversity will be adequately protected by the local radio and television ownership rules without this additional limitation. We seek comment on these tentative conclusions. We also seek comment on whether there are any reasons to retain the rule.

## 2. Background

120. The Commission first restricted combined ownership of radio and television stations in local markets in 1970 to foster competition and promote diversification of programming sources and viewpoints.<sup>272</sup> As discussed in the *NOI*, in 1999 the Commission relaxed the rule to balance diversity and competition concerns against the desire to permit broadcasters and the public to realize the benefits of common ownership.<sup>273</sup> In the 2006 *Quadrennial Review Order*, the Commission retained the radio/television cross-ownership rule, based in part on the concern that the local television and radio rules were not sufficient to protect diversity in the media marketplace.<sup>274</sup> After reviewing the record, the Commission determined that radio and television both contributed to the "marketplace of ideas" and thus competed in providing diversity.<sup>275</sup> At the same time, the Commission acknowledged that newspapers

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within the DMA of the TV station's (or stations') community (or communities) of license that have Grade B signal contours that overlap with the Grade B signal contour(s) of the TV station(s) at issue;" (ii) all independently owned and operating primary broadcast radio stations that are either licensed to a community within the Arbitron radio Metro market in which the community of license of the television station in question is located or radio stations outside the radio Metro market that Arbitron or another nationally recognized audience rating service lists as having a reportable share in the Metro market; (iii) all independently owned daily newspapers that are published at least four days a week in the DMA at issue and that have a circulation exceeding five percent of the households in the DMA; and (iv) cable systems, which count as a single voice, provided cable service is generally available to television households in the DMA. *Id.* at § 73.3555(c)(3)(i)-(iv).

<sup>269</sup> 2006 *Quadrennial Review Order*, 23 FCC Rcd at 2058, ¶ 82.

<sup>270</sup> *Prometheus II*, 652 F.3d 456-58.

<sup>271</sup> *Id.* at 35 (citing 2006 *Quadrennial Review Order*, 23 FCC Rcd at 2038-39, ¶ 49)

<sup>272</sup> 2002 *Biennial Review Order*, 18 FCC Rcd at 13768, ¶ 372.

<sup>273</sup> *NOI*, 25 FCC Rcd at 6096, ¶ 26; see also 1999 *Ownership Order* at 12948, ¶ 102.

<sup>274</sup> 2006 *Quadrennial Review Order*, 23 FCC Rcd at 2059-60, ¶ 84.

<sup>275</sup> *Id.*

and television were “far and away the most important sources” of news and information, with radio “a distant third.”<sup>276</sup> On review, the Third Circuit upheld the Commission’s decision to retain the rule finding that the rule continues “to ensure that viewpoint diversity is adequately protected.”<sup>277</sup>

121. In the *NOI*, the Commission sought comment on whether the current rule continues to be necessary in the public interest. NAB supports repeal of the radio/television cross-ownership rule because it believes that additional cross-ownership will allow broadcasters to better compete for advertising and viewers with the new media sources entering the market<sup>278</sup> and will allow them to invest more in local news and information.<sup>279</sup> Fox also suggests that allowing more common ownership of different types of media in a single market could enhance localism.<sup>280</sup> NAB, Fox, and CBS argue that, in light of the explosion of media outlets and Internet-related media in all markets, and the resulting fragmentation of the local audience, “repeal of the [radio/television cross-ownership] rule will not adversely affect the availability of diverse audio and video programming and viewpoints.”<sup>281</sup> Fox contends that in the Internet age “all outlets have an equal capacity to reach the vast majority of citizens (especially now that three-quarters of all American adults use the Internet).”<sup>282</sup> In contrast, AFTRA argues that we should maintain the radio/television cross-ownership rule to prevent further consolidation and promote localism and diversity.<sup>283</sup> AFTRA points out that, between 1996 and 2010, “the number of commercial radio stations increased by about 10 percent . . . [while] the number of station owners fell by about 40 percent.”<sup>284</sup> AFTRA further asserts that, during the same period, “the number of commercial television stations increased by about 15 percent . . . [while] the number of station owners fell by 33 percent.”<sup>285</sup>

122. In our economic studies, which we discuss in more detail in Section V below, we sought data to help us analyze questions related to the relevance of the radio/television cross-ownership rule to our policy goals. Particularly, we measured whether the presence of radio/television cross-ownership affects the amount of local news provided at the local market level and at the individual station level. We

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<sup>276</sup> *Id.* at 2060, ¶ 84 n.279.

<sup>277</sup> *Prometheus II*, 652 F.3d at 457.

<sup>278</sup> NAB Comments at 46, 63-72.

<sup>279</sup> *Id.* at 63-72.

<sup>280</sup> Fox Comments Att. 1 at 26 (citing *Prometheus I*, 373 F.3d at 398).

<sup>281</sup> NAB Comments at 77-78 (also arguing that previous ownership studies showed benefits from radio/television cross-ownership); Fox Comments Att. 1 at 27-28; CBS Reply Att. at 27; *see also* CBS Reply Att. at 23-27 (outlining changes in the media marketplace).

<sup>282</sup> Fox Comments Att. 1 at 27. CBS and NAB similarly point to widespread Internet use as ground for repealing the rule. CBS Reply Att. at 24 (“the number of adult Americans using the Internet rose to more than twice the level of usage that existed five years earlier; [the number of] web pages indexed by Google has increased 537 [percent] since 2004,” and the development of the blog has added to the variety of new media alternatives); NAB Comments at 16-17, 21 (a recent study shows “that between 2004 and 2009, the number of hours per week that Americans use the Internet increased by 117 percent, while radio use decreased by 18 percent, . . . and television viewing remained constant,” and argues that this supports their assertion that there are a “number of alternative outlets offering information and entertainment to consumers”).

<sup>283</sup> AFTRA Comments at 2-3; *see generally* NABOB Comments (arguing that relaxation of any of the media ownership rules would contribute to consolidation of ownership in the broadcast industry, which would in turn “exacerbate the lack . . . of minority ownership”).

<sup>284</sup> AFTRA Comments at 3.

<sup>285</sup> *Id.* at 4.

also measured localism by analyzing consumer satisfaction with the amount of locally oriented programming available in markets. In addition, we studied the impact of radio/television cross-ownership on the amount of diverse viewpoints available in media markets.

### 3. Discussion

123. *Competition.* As the Commission has held in the past, we do not believe this rule is necessary to promote competition. Previously, the Commission has concluded that most advertisers do not consider radio and television stations to be good substitutes for their advertising needs, and, therefore, combinations of radio and television stations would not harm competition in local media markets.<sup>286</sup> This conclusion was based in part on Department of Justice assertions that radio advertising constitutes a separate antitrust market.<sup>287</sup> We continue to believe that radio and television are not good substitutes in the advertising market.<sup>288</sup> We seek comment on this tentative conclusion.

124. Similarly, we tentatively conclude that most consumers do not consider radio and television stations to be substitutes for one another. That is, we believe that consumers are not likely to switch between television viewing and radio listening based on the program content of radio and television stations. Nor do we believe it likely that radio or television stations adjust their content in response to changes in the other medium's programming. Accordingly, we believe that repealing the radio/television cross-ownership rule will not negatively impact our competition goals and seek comment on this tentative conclusion.

125. As stated above, broadcasters argue that lifting the radio/television cross-ownership restriction will enable them to compete better in today's marketplace. We seek comment on whether repealing the restriction would allow greater efficiencies through joint operations that can be passed on to consumers through investment in programming. In addition, we seek comment on whether allowing additional radio-television combinations would lead to consumer benefits in the form of additional investment in radio or television news rooms, increased editorial staffs, or additional local news coverage on radio stations.

126. We do not anticipate, however, that eliminating the radio/television cross-ownership rule would significantly contribute to broadcast consolidation. Pursuant to the existing radio/television cross-ownership rule, in the largest markets, entities currently may own, in combination, either two television stations and six radio stations or one television station and seven radio stations. The local radio ownership rule permits an entity to own a maximum of eight radio stations in a single market. Therefore, in the largest markets, absent the current radio/television cross-ownership rule, an entity approaching the limits of the existing cap could acquire only one additional radio station and remain in compliance with the local radio rule. Likewise, an entity with one television station already could acquire only one additional station in the largest markets under the current local television rule. Thus, we believe that the effect of eliminating the radio/television cross-ownership rule will be small, and that the local radio and local television rules will continue to prevent a significant increase in the consolidation of broadcast facilities. We seek comment on these issues. What impact is the proposed action likely to have in small and mid-sized markets? Are there specific examples of markets where repeal of the rule may

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<sup>286</sup> 2002 Biennial Review Order, 18 FCC Rcd at 13770-71, ¶ 377.

<sup>287</sup> *Id.* at 13714, ¶ 243 (citing Complaint at ¶¶ 11-14, *United States v. Clear Channel Comm'ns, Inc.*, No. 1:00CV02063 (D.D.C. Aug. 29, 2000); Complaint at ¶ 12, *United States v. EZ Comm'ns, Inc.*, No. 1:97CV00406 (D.D.C. Feb. 27, 1997)).

<sup>288</sup> 2002 Biennial Review Order, 18 FCC Rcd at 13672-76, ¶¶ 142-52 (observing that the record suggests that television viewers do not consider non-video entertainment alternatives to be good substitutes for watching television, and that advertisers do not consider radio to a substitute for reaching consumers through the medium of television); *see also* CBS Reply Att. at 28-29.

substantially contribute to broadcast consolidation?

127. *Localism.* As the Commission has held in the past, we do not believe this rule is necessary to promote localism.<sup>289</sup> We tentatively conclude that repealing the radio/television cross-ownership rule will not negatively impact our localism goal. Again, we believe that the local television and local radio rules, as well as the newspaper/broadcast cross-ownership rule, will sufficiently promote and protect our localism goals. Radio and television broadcasters would continue to have the same obligation to serve their local communities in the absence of a radio/television cross-ownership restriction. We also recognize that consumers primarily rely on television and newspapers, and their affiliated websites, for their local news.<sup>290</sup> Moreover, audiences of traditional news sources have moved toward new media, with both Internet and cable news sources growing.<sup>291</sup> We recognize that radio stations that air nationally syndicated news or talk show programming contribute to the overall amount of news and information within their local market. We note that lifting the radio/television cross-ownership rule will not impact the availability of non-commercial news radio stations. We seek comment on our tentative conclusions.

128. In the media ownership studies, we sought to develop data to inform our analysis of whether the radio/television cross-ownership rule promotes localism. In particular, both Media Ownership Study 1 and Media Ownership Study 4 look at whether the level of radio/television cross-ownership in a market is associated with the amount of local television programming provided. Evidence from the studies is mixed with respect to this question.

129. Media Ownership Study 1 examines how cross-ownership is associated with localism, as measured by the amount of local news provided in the market.<sup>292</sup> The study finds that cross-ownership decreases local television news hours but raises ratings, which leads to ambiguous results.<sup>293</sup> We seek comment on these findings and their relevance to our analysis of whether the radio/television cross-ownership rule is necessary to promote our localism goal.

130. Media Ownership Study 4 finds that, at the station level, radio/television cross-owned stations appear to air more local news on average, though the impact is marginal.<sup>294</sup> According to the study, for every additional in-market radio station a parent owns, the television station will air 3.7 more minutes of local news.<sup>295</sup> We seek comment on these study findings and how they should affect our analysis. At the local market level, however, Media Ownership Study 4 finds that increases in radio/television cross-ownership correlate to decreases in the total amount of news minutes provided in the market.<sup>296</sup> As the study notes, however, due to economies of scale, this negative correlation is partially mitigated as the average number of broadcast outlets per cross-owned station group in the market

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<sup>289</sup> 2002 Biennial Review Order, 18 FCC Rcd at 13772-73, ¶¶ 383-85.

<sup>290</sup> PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, PRESS ACCURACY RATING HITS TWO DECADE LOW, PUBLIC EVALUATIONS OF THE NEWS MEDIA: 1985-2009, at 4 (2009) (“PEW PRESS ACCURACY REPORT”), available at <http://people-press.org/files/legacy-pdf/543.pdf> (18 percent of respondents get most of their local news from radio, compared to 64 percent for television).

<sup>291</sup> NOI, 25 FCC Rcd at 6088, ¶ 6 (citing PEW PARTICIPATORY NEWS CONSUMER). We note that while cable news ratings have generally increased over the last decade, the audience for cable news declined in 2010. STATE OF THE NEWS MEDIA 2011 at Key Findings.

<sup>292</sup> Media Ownership Study 1 at 1.

<sup>293</sup> *Id.* at 16, 21, Table 3.

<sup>294</sup> Media Ownership Study 4 at 28.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 24, 49.



increases.<sup>297</sup>

131. *Diversity.* We tentatively conclude that the radio/television cross-ownership rule is no longer necessary to promote the Commission's goal of encouraging viewpoint diversity. We seek comment on this tentative conclusion, as well as our tentative conclusion that the proposed local television and radio rules and the newspaper/broadcast cross-ownership rule will suffice to protect and promote our diversity goal. We also seek comment on alternatives to this tentative conclusion, including whether or not it is necessary to retain the radio/television cross-ownership rule for diversity purposes. We seek data to support retention of the rule, including any data that the cross-ownership rule is necessary to ensure diverse viewpoints in local markets.

132. Overall, the media ownership studies provide little evidence that cross-ownership, to the degree currently allowed under the radio/television cross-ownership rule, has an effect on viewpoint diversity. Media Ownership Study 8A analyzes the impact of radio/television cross-ownership on viewpoint diversity available in local markets by examining how consumers react to the content delivered to them.<sup>298</sup> The study utilizes variations in viewing patterns of local television news programs as compared to local viewing patterns for national television news programs to develop a measure of diversity of content on local news programs, and relates changes in viewing patterns to changes in local media cross-ownership.<sup>299</sup> The study finds that, in general, radio/television cross-ownership has a negligible effect on viewpoint diversity.<sup>300</sup> Media Ownership Study 8B examines the impact of media ownership, including radio/television cross-ownership, on the amount of programming provided in television news programs in three categories: politics, local programming, and issue diversity (diversity in coverage of news topics).<sup>301</sup> Overall, the study finds little evidence that market structure influences diversity.<sup>302</sup> Nonetheless, with respect to one of the three types of diversity—issue diversity—the study finds that, for the majority of topics for which cross-ownership is statistically significant, increases in cross-ownership are associated with greater diversity.<sup>303</sup> We seek comment on the findings presented in Media Ownership Study 8A and Media Ownership Study 8B. Specifically, we seek comment on how these findings should inform our analysis of whether the radio/television cross-ownership rule remains necessary to promote viewpoint diversity.

133. While consumers continue to rely on television and newspapers, and their affiliated websites, for their local news,<sup>304</sup> they increasingly turn to new media, both the Internet and cable, as news sources.<sup>305</sup> The recent Information Needs of Communities Report finds that the Internet has created more diversity and choice in news and information, and that most communities have seen a rise in the number

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<sup>297</sup> *Id.*

<sup>298</sup> Media Ownership Study 8A, Local Media Ownership and Viewpoint Diversity in Local Television News, by Adam D. Rennhoff and Kenneth C. Wilbur (“Media Ownership Study 8A”).

<sup>299</sup> *Id.* at 6-8.

<sup>300</sup> *Id.* at 22.

<sup>301</sup> Media Ownership Study 8B, Diversity in Local Television News 5-10, by Lisa M. George and Felix Oberholzer-Gee (“Media Ownership Study 8B”).

<sup>302</sup> *Id.* at 18.

<sup>303</sup> *Id.* at 15.

<sup>304</sup> PEW PRESS ACCURACY REPORT at 4.

<sup>305</sup> *NOI*, 25 FCC Rcd at 6088, ¶ 6 (citing PEW PARTICIPATORY NEWS CONSUMER). We note that while cable news ratings have generally increased over the last decade, the audience for cable news declined in 2010. STATE OF THE NEWS MEDIA 2011 at Key Findings.

and diversity of outlets, as well as more diversity in commentary and analysis.<sup>306</sup> We seek comment on whether these sources contribute significantly to the diversity of news sources available to consumers. As the Third Circuit noted, the traditional media continue to be an important news source.<sup>307</sup> Nonetheless, Internet adoption rates continue to grow, leading to changes in how consumers get their news. Because the primary marketplace for news is shifting, we seek comment on whether the shift in consumption of news supports elimination of the rule. For instance, does the increase in the diversity of news outlets provided by the Internet contribute enough to the marketplace of ideas to ensure that viewpoint diversity would be adequately protected absent this rule? We also note that the Commission previously has rejected the argument that the use of common facilities by cross-owned stations to gather news, traffic, and weather would be harmful to diversity, because such cost-cutting measures allow the vital information to be available to the public through a greater number of outlets.<sup>308</sup> We seek comment on how other changes in the media marketplace affect diversity.

134. We also seek comment on how elimination of the radio/television cross-ownership rule would affect minority and female ownership opportunities. As noted, DCS asserts that significant entry barriers continue to exist for minorities and women in both the traditional and new media industries.<sup>309</sup> Would elimination of the radio/television cross-ownership rule have any effect on such barriers? DCS also states that minority-owned stations are more likely to provide programming geared towards minority audiences and that minority communities are underserved as a result of the lack of minority media ownership.<sup>310</sup> Would elimination of the radio/television cross-ownership rule have any effect on programming geared toward minority audiences?

135. *Digital Transition.* We observe that, following the digital transition for full-power television broadcasters in 2009, the current radio/television cross-ownership rule became at least partially obsolete. The rule relies on analog broadcast television contours as one of its criteria.<sup>311</sup> As broadcast television stations have completed the transition to digital television service and ceased broadcasting in analog, the analog contours are no longer relevant, and comparable digital contours do not exist for all of the analog contours previously employed in the media ownership rules.<sup>312</sup> As discussed in the *NOI*, while the Commission has found the digital noise limited service contour to approximate the larger Grade B contour, the Commission has not found an equivalent for the smaller Grade A contour, which is used to trigger the radio/television cross-ownership rule.<sup>313</sup> If the Commission were to apply the larger Grade B contour, we could allow entities to own more broadcast stations than was the case with the analog

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<sup>306</sup> INFORMATION NEEDS OF COMMUNITIES at 119-20.

<sup>307</sup> *Prometheus II*, 652 F.3d at 457.

<sup>308</sup> See *Applications of NewCity Communications, Inc. and Cox Radio, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 3929 (1997).

<sup>309</sup> DCS Comments at 3-5, 7-9.

<sup>310</sup> *Id.* at 11-14; see also *id.* at 12 (citing Sandoval *et al.* Minority Commercial Radio Ownership in 2009) (“A study published in 2009 shows that approximately 73 percent of minority-owned stations serve the community by broadcasting minority oriented programming . . .”).

<sup>311</sup> For example, the radio/television cross-ownership rule is triggered if the Grade A contour of a TV station encompasses the entire community of license of an FM or AM station. 47 C.F.R. § 73.3555(c)(1)(i)-(ii). In addition, for purposes of determining the number of voices that would remain in the market post-merger, the rule counts TV stations if they are “independently owned and operating full-power broadcast TV stations within the DMA of the TV station’s (or stations’) community (or communities) of license that have Grade B signal contours that overlap with the Grade B signal contour(s) of the TV station(s) at issue . . .” *Id.* at § 73.3555(c)(3)(i).

<sup>312</sup> *NOI*, 25 FCC Rcd at 6116-17, ¶ 102.

<sup>313</sup> *Id.* at 6116-18, ¶¶ 102-03.

contours.<sup>314</sup> We received no suggestions in filed comments about how to address this problem. Although we do not base our decision to repeal the rule on the rule's use of analog contours and the lack of digital equivalents, the difficulty of creating a consistent rule in the digital age is a factor we have considered. We seek comment on how we could overcome this difficulty to the extent commenters propose to maintain restrictions on radio/television cross-ownership. In particular, if commenters favor retaining a contour-based rule, we seek comment on what contour to utilize and how the rule should be applied.

## E. Dual Network Rule

### 1. Introduction

136. Historically, the Commission has concluded that the dual network rule is necessary in the public interest to promote competition and localism.<sup>315</sup> In order to promote these goals, the current dual network rule permits common ownership of multiple broadcast networks, but prohibits a merger between or among the “top four” networks (ABC, CBS, Fox, and NBC).<sup>316</sup> The Commission concluded in the *2002 Biennial Review Order* that, given the level of vertical integration of each of the top four networks, as well as their continued operation as a “strategic group” in the national advertising market, a top-four-network merger would give rise to competitive concerns that the merged firm would be able to reduce its program purchases and/or the price it pays for programming.<sup>317</sup> The Commission reasoned that these competitive harms would reduce program output, choices, quality, and innovation to the detriment of viewers. The Commission also concluded that allowing a merger of any of the top four networks would harm localism by reducing the ability of affiliates to bargain with their networks for favorable terms of affiliation, diminishing affiliates' influence on network programming, and thus harming the ability of the affiliates to serve their communities.<sup>318</sup> In the *2006 Quadrennial Review Order*, the Commission concluded that the dual network rule continued to be necessary in the public interest to promote competition and localism.<sup>319</sup> The U.S. Court of Appeals for the Third Circuit upheld the Commission's decision to retain the rule, finding that the Commission reasonably relied on several unique features of the top four broadcast networks, such as their vertical integration and their ability to reach a larger audience than other networks.<sup>320</sup> The Court also found that the Commission's description of the media marketplace as “dynamic” and “competitive” was not inconsistent with its decision to retain the rule, in part, to avoid the damage to competition that a merger of the top four networks would cause.<sup>321</sup>

137. We note that since our last review significant changes have taken place in the television marketplace. In particular, the number and popularity of non-broadcast sources for video programming continue to grow. Nonetheless, we tentatively find that the top four broadcast networks continue to

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<sup>314</sup> *Id.* at 6117-18, ¶ 103.

<sup>315</sup> *See id.* at 6096-97, ¶ 27; *see also 2006 Quadrennial Review Order*, 23 FCC Rcd at 2082, ¶ 139; *2002 Biennial Review Order*, 18 FCC Rcd at 13858, ¶ 621.

<sup>316</sup> The rule provides that “[a] television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations *unless* such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were ‘networks’ as defined in [Section] 73.3613(a)(1) of the Commission's regulations . . . .” 47 C.F.R. § 73.658(g) (emphasis in original).

<sup>317</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13850, ¶ 601. A “strategic group” refers to a cluster of independent firms within an industry that pursue similar business strategies. *Id.* at 13850, ¶ 601 n.1248.

<sup>318</sup> *Id.* at 13855, ¶ 611.

<sup>319</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2084, ¶ 141.

<sup>320</sup> *Prometheus II*, 652 F.3d at 464.

<sup>321</sup> *Id.*

possess characteristics that distinguish them from other broadcast and cable networks and therefore still serve a unique role in the electronic media that justifies retaining a rule specific to them. As discussed in more detail below, the top four broadcast networks, as compared to other broadcast and cable networks, achieve substantially larger primetime audiences, which can then be sold at a premium to advertisers that want to reach large, nationwide audiences. Accordingly, we tentatively find that a top-four network merger would restrict the availability, price, and quality of primetime entertainment programming to the detriment of consumers. We also tentatively find that a top-four network merger would substantially lessen competition for advertising dollars in the national advertising market, which would reduce the incentives for the networks to compete against each other for viewers by providing innovative, high quality programming. For these reasons, we tentatively conclude that the dual network rule remains necessary in the public interest to promote competition and should be retained without modification. We seek comment on this tentative conclusion. We also seek comment on whether allowing a merger of any of the top four networks would harm localism by reducing the bargaining power of affiliates, which would consequently lessen their ability to influence network programming in ways that serve their local communities. We also seek comment on whether allowing a merger of any of the top four networks would promote localism.

## 2. Background

138. In the *NOI*, the Commission sought comment on issues related to the dual network rule, including whether the rule remains necessary to protect competition in the program acquisition and national advertising markets.<sup>322</sup> In the current proceeding, very few parties have addressed these issues. Several parties suggest that the dual network rule remains important to promoting the Commission's policy goals.<sup>323</sup> By contrast, both CBS and Fox assert that, in light of changes in the marketplace, the dual network rule is no longer justified and should be eliminated.<sup>324</sup> Specifically, CBS contends that the Commission has failed to identify the distinguishing characteristics of the top four networks that justify a rule specific to those networks, and that greater audience share in comparison to other broadcast and cable networks does not adequately explain why the top four networks should be specifically singled out.<sup>325</sup>

## 3. Discussion

139. *Competition.* Broadcast networks serve in multiple roles as an intermediary between content creators, advertisers, and local broadcast stations. As a result, we tentatively find that the top four broadcasters participate, and can affect competition, in more than one market. Specifically, we consider the implications of a top-four network merger for competition in the provision of primetime entertainment programming and competition in the sale of national advertising time.

140. Primetime network programming is generally designed to attract a mass audience, and financing such programming, in turn, requires the substantial revenue that only a mass audience can provide. The top four broadcast networks supply their affiliated local stations with primetime entertainment programming intended to attract mass audiences and the advertisers that want to reach such large, nationwide audiences. By contrast, other broadcast networks target more specialized, niche

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<sup>322</sup> *NOI*, 25 FCC Rcd at 6113, ¶ 89.

<sup>323</sup> See, e.g., CWA Comments at 31 (stating that the Commission “correctly maintained the Dual Network Rule” in the 2006 quadrennial review proceeding); Free Press Comments at 2-4, 13-14 (urging the Commission not to relax any of its current ownership limits); Jan. 27 Workshop Transcript at 206 (remarks of David Honig, President and Executive Director, MMTC, in opposition to modification of the dual network rule, among other rules, except to the extent the Commission might consider adding a public interest waiver process).

<sup>324</sup> CBS Reply Att. at 46-52; Fox Comments Att. 1 at 17 n.62.

<sup>325</sup> CBS Reply Att. at 47-48; but see *Prometheus II*, 652 F.3d at 464 (finding the FCC adequately identified several unique features of the four networks, including vertical integration and operation as a strategic group).

audiences similar to many cable television networks.<sup>326</sup> We recognize that, in general, consumers substitute between broadcast and cable networks, and that cable networks earn substantial advertising revenues. Nevertheless, we tentatively find that the primetime entertainment programming supplied by the top four broadcast networks is a distinct product, the provision of which could be restricted if two of the four major networks were to merge.

141. First, the audience size for primetime entertainment programming provided by each of the top four broadcast networks remains unmatched by that of any other broadcast or cable network. The primetime audience for all cable networks taken together is greater than that of the broadcast networks<sup>327</sup> and that the gap in size between broadcast and cable network audiences has been narrowing over time.<sup>328</sup> Nonetheless, the average audience size for each of the top four broadcast networks remains significantly larger than the audience size for even the most popular cable networks. For example, over an 11-month period in 2009-2010, the average primetime audience across the four broadcast networks was 8.61 million.<sup>329</sup> During the same period, the highest rated cable networks were USA Network, Nickelodeon, Disney Channel, and ESPN. Their average primetime audience was approximately 2.79 million.<sup>330</sup> Thus, the average broadcast network audience was more than three times larger than the average audience for the highest rated cable networks. Additionally, during the same period, the fifth highest rated broadcast network was Univision, which provides Spanish-language programming, and which had an average primetime audience of 3.62 million.<sup>331</sup> The next highest rated English-language broadcast network was the CW, which ranked sixth overall, with an average primetime audience of 1.78 million.<sup>332</sup> Thus, the average primetime audience for the top four broadcast networks was more than twice as large as that of the fifth highest rated broadcast network, and nearly five times larger than that of the next highest rated English-language broadcast network.

142. Similarly, among individual primetime entertainment programs, the audiences for the top four broadcast networks remain substantially larger than those for other broadcast and cable networks. With the exception of certain individual sports events, cable network programs do not regularly rank among the highest rated television programs. For instance, during the first three months of 2011, the highest rated single episode of a non-sports primetime program on a cable network was an episode of *Jersey Shore*, which achieved an audience of 8.87 million when it appeared on MTV during the week of

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<sup>326</sup> For example, Univision targets Hispanic viewers, and the CW network targets women between the ages of 18 and 34. See Univision Communications Inc., *Media Properties – Univision Network*, <http://www.univision.net/corp/en/univision.jsp> (visited Oct. 19, 2011); The CW Television Network, *About The CW*, <http://www.cwtv.com/thecw/about-the-cw> (visited Oct. 19, 2011).

<sup>327</sup> For example, according to data from the first 28 weeks of the 2010-2011 television season (*i.e.*, through April 3, 2011), ad-supported cable networks had a household primetime share of 60 percent, while broadcasters had a share of 36 percent. See INFORMATION NEEDS OF COMMUNITIES at 73.

<sup>328</sup> For example, according to FCC staff analysis of data from SNL Kagan, the difference in average primetime rating between the top four broadcast networks and the top four cable networks was 3.41 in 2007, 3.17 in 2008, and 2.65 in 2009. Average primetime rating refers to the average percent of the universe of households viewing a network in primetime during the average minute according to Nielsen Media Research.

<sup>329</sup> FCC staff analysis of Nielsen data for the period Sept. 29, 2009 through Aug. 22, 2010. NBC was the lowest rated of the top four broadcast networks, with an average audience of 7.67 million viewers.

<sup>330</sup> FCC staff analysis of Nielsen data for the period Sept. 29, 2009 through Aug. 22, 2010. USA Network had an average of 3.38 million viewers, Nickelodeon had 2.74 million, Disney Channel had 2.56 million, and ESPN had 2.46 million.

<sup>331</sup> *Id.* We note that Univision is a Spanish-language network and may not significantly compete with the four major broadcast networks for their viewers.

<sup>332</sup> *Id.*

January 17-23, 2011.<sup>333</sup> Despite this sizable audience, for the week, a total of 21 non-sports programs that aired on top-four broadcast networks achieved larger audiences.<sup>334</sup> Primetime programs on broadcast networks outside the top four likewise generally achieve smaller audiences than primetime programs carried on the top four networks. For instance, for the 2009-2010 television season, no program from any non-top-four broadcast network ranked among the 100 highest rated broadcast programs.<sup>335</sup>

143. Another indicator of the distinctiveness of the top four broadcast networks is the wide disparity in advertising prices between the top four broadcast networks and cable networks. Some advertisers are willing to pay a premium per viewer for programs that attract larger audiences. As the Information Needs of Communities Report notes, despite a fragmented audience, broadcast television networks still retain some clout, relative to most cable networks, as an effective way for advertisers to reach large audiences.<sup>336</sup> As evidence of this, the top four broadcast networks generally earn higher advertising rates than cable networks. In 2009, among the top four broadcast networks, CBS had the lowest average advertising rate, as measured in cost per thousand views (referred to as cost per mille or “CPM”), but its CPM was still 38 percent higher than the highest CPM among non-sports cable networks (MTV) and 178 percent higher than the CPM for the highest rated cable network (USA).<sup>337</sup> The appeal of the top four broadcast networks to advertisers seeking large, national audiences is also reflected in data on net advertising revenues. The top-four broadcast network with the lowest net advertising revenue in 2009 was Fox, but it still received more than three times that of any non-top four broadcast network.<sup>338</sup> It also

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<sup>333</sup> FCC staff analysis of week-by-week cable television ratings data from Nielsen, as provided on the website TV by the Numbers, for the period Jan. 3, 2011 through Mar. 27, 2011. Over the entire three month period, Jersey Shore was consistently the highest rated program on cable with an average of nearly 8 million viewers.

<sup>334</sup> See Robert Seidman, *TV Ratings Broadcast Top 25: Jets-Steelers, American Idol, Hawaii Five-O, NCIS, Modern Family Top Week 18 Viewing*, TV BY THE NUMBERS, Jan. 25, 2011, <http://tvbythenumbers.zap2it.com/2011/01/25/tv-ratings-broadcast-top-25-jets-steelers-american-idol-hawaii-five-0-ncis-modern-family-top-week-18-viewing/80030/> (visited Oct. 19, 2011).

<sup>335</sup> See Bill Gorman, *Final 2009-10 Broadcast Primetime Show Average Viewership*, TV BY THE NUMBERS, June 16, 2010, <http://tvbythenumbers.zap2it.com/2010/06/16/final-2009-10-broadcast-primetime-show-average-viewership/54336/> (visited Oct. 19, 2011). According to Nielsen ratings data, as reported by the website TV by the Numbers, the highest rated broadcast show that did not air on a top four network was The Vampire Diaries, which aired on the CW network and was the 118th rated broadcast show, with an average of 3.6 million viewers during the season. *Id.*

<sup>336</sup> INFORMATION NEEDS OF COMMUNITIES at 75.

<sup>337</sup> FCC staff analysis of data from SNL Kagan. CBS had an average CPM of \$14.62, while MTV’s average was \$10.62. The highest rated cable networks, USA and Nickelodeon, had CPMs of \$5.07 and \$5.23, respectively. Among the top four broadcast networks, the highest CPM belonged to Fox, with an average CPM of \$27.90. The cable network with the highest CPM was ESPN, with an average CPM of \$14.07. See also SNL Kagan, *Cable Network Ad Revenue Growth Back on Track*, ECONOMICS OF ADVERTISING, Oct. 1, 2010. The average CPM for cable networks in 2009 was \$5.13, which still lagged behind the broadcast networks (*i.e.*, it is about a third of CBS’s average CPM). CPM data for other broadcast networks is either not available, or it is not comparable because of their more limited schedules. For instance, the CW had a much higher reported CPM of \$43.18, but its schedule did not include the near 24-hour programming schedule of the major broadcast and cable networks. We note that advertising rates tend to be higher during primetime.

<sup>338</sup> FCC staff analysis of data from SNL Kagan; see also SNL KAGAN ADVERTISING FORECASTS 2010 at 30. Fox had \$2.34 billion in net advertising revenues in 2009, while NBC had the highest revenues among the top four networks, with \$3.94 billion. We note that Fox has a more limited schedule of programming, which reduces its total advertising revenues. Meanwhile, Univision ranked fifth among broadcast networks, with \$0.75 billion in net advertising revenues, and the CW network ranked sixth with \$0.56 billion.

received double that of the highest rated non-sports cable network (USA).<sup>339</sup>

144. We disagree with the assertion by CBS that greater audience share in comparison to other broadcast and cable networks does not justify a rule specific to the top four networks. We find that the top four broadcast networks have a distinctive ability to attract larger primetime audiences regularly relative to other broadcast and cable networks, which enables them to earn higher rates from advertisers that are willing to pay a premium for such audiences. Thus, a combination between top-four broadcast networks would reduce the choices available to advertisers seeking large, national audiences, which could substantially lessen competition and lead the networks to pay less attention to viewer demand for innovative, high quality programming. We therefore tentatively conclude that primetime network entertainment programming and national television advertising are each distinctive products, the availability, price, and quality of which could be restricted, to the detriment of consumers, if two of the top four networks were to merge. Accordingly, we tentatively conclude that the dual network rule remains necessary to foster competition in the provision of primetime entertainment programming and the sale of national advertising time. We seek comment on these tentative conclusions. In particular, we seek comment on whether the top four networks face competition from any other sources that are also capable of delivering a large, national audience to advertisers, such that they provide a reasonable substitute for the top four networks in the national advertising market. We also seek comment as to whether the dual network rule is necessary to promote and protect competition in the primetime network entertainment programming and national television advertising markets, or if antitrust laws and our public interest standard are sufficient for reviewing any possible merger between the four networks.

145. We also seek comment on whether a merger between top-four broadcast networks would give rise to any other potential competitive concerns. For instance, we seek comment on whether, as the Commission has previously determined, the level of vertical integration of each of the top four networks is such that a top-four-network merger would give rise to competitive concerns that the merged firm would be able to reduce its program purchases and/or the price it pays for programming.<sup>340</sup> In addition, we seek comment on the role that the top four broadcast networks play in the provision of national news content.<sup>341</sup> As the Information Needs of Communities Report notes, despite their declining audiences, the three broadcast network evening newscasts (ABC, CBS, and NBC) still draw 22 million viewers—five times the number tuning in to the three major cable news networks (CNN, FOX, and MSNBC) during primetime.<sup>342</sup> We seek comment on whether a merger among the top four broadcast networks would

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<sup>339</sup> FCC staff analysis of data from SNL Kagan; *see also* SNL KAGAN ADVERTISING FORECASTS 2010 at 30, 50-60. Nickelodeon received \$1.0 billion, and USA received \$0.89 billion. ESPN received the most of any cable network, with \$1.37 billion.

<sup>340</sup> *See 2006 Quadrennial Review Order*, 23 FCC Rcd at 2082-84, ¶¶ 139-41; *2002 Biennial Review Order*, 18 FCC Rcd at 13850, ¶ 601.

<sup>341</sup> Three of the top four networks (ABC, CBS, and NBC) provide a national early evening newscast, and all provide Sunday morning news and analysis. In addition, Univision and Telemundo (which is affiliated with NBC) provide Spanish-language network evening news programming. Fox and the CW network do not provide network evening news programming. Furthermore, some cable news networks are owned by broadcast network companies. For example, among the top four broadcast networks, both NBC and Fox are affiliated with cable news networks. NBC is affiliated with CNBC and MSNBC, and Fox is affiliated with Fox News.

<sup>342</sup> INFORMATION NEEDS OF COMMUNITIES at 104 (citing STATE OF THE NEWS MEDIA 2010 at Local TV Summary Essay). Similarly, the evening newscasts of ABC, CBS, and NBC achieve much larger audiences than those of any other broadcast network. For example, as measured by the percentage of U.S. households for their average audiences on Monday through Friday during the first quarter of 2011, NBC Nightly News, ABC World News Tonight, and the CBS Evening News achieved audiences of 6.3, 5.7, and 4.1, respectively. TVB Local Media Marketing Solutions, *Broadcast Network News Ratings Trend*, <http://www.tvb.org/measurement/4748> (select “National News Comparison” for audience data) (visited Oct. 19, 2011). By contrast, Noticiero Univision and Noticiero Telemundo achieved audiences of 1.1 and 0.4, respectively. *Id.*

significantly restrict the availability of diverse sources of national television news. We also seek comment on whether other sources of news—including cable television, newspapers, and the Internet—are sufficient to ensure a diverse and competitive market for national news, or whether the dual network rule remains necessary to protect against excessive concentration in this market. We also seek comment as to whether the dual network rule is necessary to promote and protect competition in a national news market and purchasing or pricing of such programming, or if antitrust laws and our public interest standard are sufficient for reviewing any possible merger between the four networks.

146. *Localism.* We seek comment on the continued validity of the Commission’s previous finding that the dual network rule is necessary to foster localism.<sup>343</sup> In particular, we seek comment on potential ways in which a merger among the top four broadcast networks would impair the ability of their affiliates to serve the interests of their local communities. Specifically, does the rule remain necessary to preserve the balance of bargaining power between the top-four networks and their affiliates? Would a top-four network merger reduce the ability of a TV station, in bargaining with its affiliated network, to use the availability of other top independently owned networks as a bargaining tool? Furthermore, would the availability of fewer alternatives give an affiliate less influence on network programming decisions? For instance, would it reduce the ability of an affiliate to engage in a dialogue with a network over the suitability for local audiences of either the content or scheduling of network programming? We also seek comment as to whether the dual network rule is necessary to ensure options and preserve the bargaining power and independence of affiliates, or if antitrust laws, our public interest standard, and other Commission rules are sufficient for reviewing any possible merger between the four networks. In addition, we seek comment on whether the growth of alternate sources for local content should have any impact on our decision whether the dual network rule remains necessary to promote localism.

#### IV. DIVERSITY ORDER REMAND/ELIGIBLE ENTITY DEFINITION

147. We seek comment in this NPRM on issues that previously were being addressed in a separate rulemaking proceeding focused on enhancing the diversity of ownership in the broadcast industry, including by increasing ownership opportunities for minorities and women (the “Diversity” proceeding). As explained below, the Third Circuit in *Prometheus II* remanded the measures adopted in the Commission’s 2008 *Diversity Order* that relied on a revenue-based “eligible entity” standard and emphasized that the actions required on remand from the *Diversity Order* should be completed “within the course of the Commission’s 2010 Quadrennial Review of its media ownership rules.”<sup>344</sup> Accordingly, we seek comment in this proceeding on how the Commission should respond to the court’s remand and on other actions we should consider to increase the level of broadcast station ownership by minorities and women.

148. *Current Diversity Initiatives.* The Commission believes that promoting diversity of ownership among broadcast licensees<sup>345</sup> and expanding opportunities for minorities and women to

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<sup>343</sup> See 2006 Quadrennial Review Order, 23 FCC Rcd at 2082-84, ¶¶ 139-41; 2002 Biennial Review Order, 18 FCC Rcd at 13855-56, ¶¶ 611-15.

<sup>344</sup> *Prometheus II*, 652 F.3d at 472.

<sup>345</sup> As the Supreme Court has recognized, “[s]afeguarding the public’s right to receive a diversity of views and information over the airwaves is . . . an integral component of the FCC’s mission.” *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990), *overruled in part on other grounds by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); see also *Turner Broadcasting Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 663-64 (1994) (“[I]t has long been a basic tenet of national communications policy that ‘the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.’”) (quoting *U.S. v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972); see also 47 U.S.C. § 257(b) (directing the Commission to “promote the policies and purposes of [this Act] favoring diversity of media voices” in carrying out its responsibilities under Section 257(a) of the Communications Act to eliminate market barriers for entrepreneurs and small businesses); *Diversity Order*, 23



participate in the broadcast industry are important parts of our mission under the Communications Act.<sup>346</sup> We currently have a number of rules and initiatives in place that are designed to advance these objectives. For example, although the Third Circuit remanded the provisions adopted in the *Diversity Order* that relied on the eligible entity definition, it expressly upheld a number of other actions the Commission has taken to promote diversity of ownership.<sup>347</sup> These actions include, among others, a ban on discrimination in broadcast transactions,<sup>348</sup> a “zero tolerance” policy for ownership fraud,<sup>349</sup> and a requirement that non-discrimination provisions be included in advertising sales contracts.<sup>350</sup> Similarly, the *Prometheus II* opinion did not question the Commission’s decision to reinstate the failed station solicitation rule (“FSSR”), which is intended to provide out-of-market buyers, including minorities and women, with notice of a sale and an opportunity to bid on stations.<sup>351</sup> Accordingly, these measures remain in place.

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FCC Rcd at 5924, ¶ 2 (“By broadening participation in the broadcast industry, we seek to strengthen the diverse and robust marketplace of ideas that is essential to our democracy.”).

<sup>346</sup> See 47 U.S.C. § 309(j)(3)(B) (directing the Commission in designing systems of competitive bidding to “disseminat[e] licenses among a wide variety of applicants, including small businesses . . . and businesses owned by members of minority groups and women”); 47 U.S.C. § 309(j)(4)(D) (directing the Commission in prescribing regulations concerning competitive bidding systems to “ensure that . . . businesses owned by members of minority groups and women are given the opportunity to participate in . . . spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures”); see also generally Omnibus Reconciliation Act of 1993, H.R. REP. NO. 111, at 255 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 582 (stating that “the Commission should adopt regulations pursuant to this section to ensure that businesses owned by members of minority groups and women are not in any way excluded from the competitive bidding process”); 47 U.S.C. § 151 (directing the Commission to regulate interstate and foreign communications services so that they are “available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex”); *Diversity Order*, 23 FCC Rcd at 5924, ¶ 1 (seeking to expand opportunities for “new entrants and small businesses, including minority- and women-owned businesses” to own broadcasting outlets).

<sup>347</sup> *Prometheus II*, 652 F.3d at 471 n.41.

<sup>348</sup> *Diversity Order*, 23 FCC Rcd at 5939-40, ¶¶ 40-42 (adopting “a rule that bars discrimination on the basis of race or gender and related protected categories in broadcast transactions” and requiring certification of compliance); see also 47 C.F.R. § 73.2090.

<sup>349</sup> *Diversity Order*, 23 FCC Rcd at 5940-42, ¶¶ 43-50 (explaining that the Commission will show no tolerance for applications seeking a preference that are not complete and correct or that “creat[e] an appearance of qualification that does not accord with reality[,]” will address such violations on a “fast track” basis, and will provide, when permissible, confidentiality to whistleblowers).

<sup>350</sup> *Id.* at 5940-42, ¶¶ 43-50; see also *id.* at 5941-42, ¶¶ 49-50 (requiring broadcasters renewing their licenses to certify that their advertising sales contracts contain nondiscrimination clauses that prohibit all forms of discrimination). The Commission has revised its Form 303-S license renewal application form to include this certification requirement. FCC Form 303-S, Section II, Item 7; see also *Media Bureau Announces Revisions to License Renewal Procedures and Form 303-S; Radio License Renewal Cycle to Commence on May 2, 2011*, Public Notice, 26 FCC Rcd 3809 (Med. Bur. 2011). The court also expressly upheld several other measures adopted by the Commission in the *Diversity Order*, including the commissioning of longitudinal research on minority and women ownership trends, enabling the Commission’s Office of Communications Business Opportunities to coordinate with the Small Business Administration to encourage local and regional banks to make loans through SBA’s guaranteed loan programs, the holding of “Access to Capital” conferences, and the creation of a guidebook on diversity. *Prometheus II*, 652 F.3d at 471 n.41; see also *Diversity Order*, 23 FCC Rcd at 5939-45, ¶¶ 40-64.

<sup>351</sup> The FSSR provides that, before selling a station to an in-market buyer, an applicant for a waiver of the local television ownership rule or the radio/television cross-ownership rule must demonstrate that the in-market buyer is the only entity ready, willing, and able to operate the station, and that sale to a buyer outside the market would result in an artificially depressed price. 47 C.F.R. § 73.3555, Note 7; see also *2006 Quadrennial Review Order*, 23 FCC Rcd at 2069, ¶ 109; *1999 Ownership Order*, 14 FCC Rcd at 12396-97, ¶ 74. In the *2002 Biennial Review Order*, the

149. Over the past several years, the Commission also has implemented recommendations from the Advisory Committee on Diversity for Communications in the Digital Age (“Advisory Committee”) designed to enhance opportunities for minorities, women, and other underrepresented groups to participate in the broadcast industry.<sup>352</sup> For example, based on a recommendation from the Advisory Committee, the Commission’s Office of Communications Business Opportunities (“OCBO”) hosts annual capitalization strategies workshops in order to facilitate lending to and investment in minority- and women-owned entities.<sup>353</sup> Most recently, OCBO convened a Capitalization Strategies Workshop that focused on capital acquisition for small, women- and minority-owned businesses in broadcasting, telecommunications, and related fields.<sup>354</sup> In addition, as explained further below, the Commission currently is considering a recommendation from the Advisory Committee to afford bidding credits in license auctions to persons or entities that have overcome substantial disadvantage.<sup>355</sup> We seek input in this NPRM on how the Commission most effectively can expand upon its diversity initiatives at the same time that we address the Third Circuit’s concerns and other legal considerations, including potential impediments to affording licensing preferences to minorities and women under current standards of constitutional law.<sup>356</sup>

150. *Eligible Entity Standard and Prometheus II Remand.* Aside from implementing the initiatives noted above, the Commission also has sought to promote diversity through the measures adopted in the *Diversity Order* that incorporated the eligible entity definition. As discussed below, the Third Circuit in *Prometheus II* vacated and remanded each of these measures.<sup>357</sup> Accordingly, we seek comment on how the Commission should respond to the court’s criticisms of our previous eligibility standard, how we should proceed with respect to the measures that previously relied on that standard, and any other actions we should consider to advance our diversity objectives.

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Commission eliminated the FSSR, finding that the buyer most likely to deliver public interest benefits by using the failed, failing, or unbuilt station will be the owner of another station in the same market. 18 FCC Rcd at 13708, ¶ 225. The *Prometheus I* court remanded the issue on the basis that the Commission did not consider the potential impact on minority owners when it eliminated the rule. 373 F.3d at 420-21. In the *2006 Quadrennial Review Order*, the Commission reinstated the FSSR to ensure that potential minority owners would not be negatively impacted. 23 FCC Rcd at 2068, ¶ 105.

<sup>352</sup> The Advisory Committee was created in 2003. Its mission is “to make recommendations to the Commission regarding policies and practices that will further enhance the ability of minorities and women to participate in telecommunications and related industries. See FCC, *Advisory Committee for Diversity in the Digital Age*, <http://transition.fcc.gov/DiversityFAC/> (visited Oct. 19, 2011).

<sup>353</sup> See Letter from Julius Genachowski, Chairman, FCC, to Henry Rivera, Chairman, Advisory Committee for Diversity in the Digital Age (Jan. 5, 2010), available at <http://transition.fcc.gov/DiversityFAC/120309/genachowski-letter.pdf>.

<sup>354</sup> The November 2010 workshop featured panel discussions with finance experts that examined capitalization strategies for a range of media sectors, including broadband, cable, radio and television broadcast, wireless, and wireline. *Capitalization Strategies Workshop For Small, Minority- And Women-Owned Businesses Friday, November 12, 2010, 9:00 A.M. - 5:00 P.M.*, Public Notice (OCBO, rel. Nov. 1, 2010), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2010/db1101/DOC-302517A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2010/db1101/DOC-302517A1.pdf).

<sup>355</sup> *Media and Wireless Telecommunications Bureaus Seek Comment on Recommendation of the Advisory Committee on Diversity for Communications in the Digital Age for a New Auction Preference for Overcoming Disadvantage*, GN Docket No. 10-244, Public Notice, 25 FCC Rcd 16854 (Med. Bur./Wireless Tel. Bur. 2010) (“*Auction Preference PN*”).

<sup>356</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (holding that “strict scrutiny” applies to “all racial classifications”); *Nev. Dep’t. of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (applying intermediate scrutiny to gender-based classifications).

<sup>357</sup> *Prometheus II*, 652 F.3d at 471.

151. As defined in the *Diversity Order*, an “eligible entity” is any entity that qualifies as a small business under revenue-based standards that have been established by the Small Business Administration (“SBA”).<sup>358</sup> In adopting measures based on this definition, the Commission concluded that it would “be effective in creating new opportunities for broadcast ownership by a variety of small businesses and new entrants, including minorities and women.”<sup>359</sup> The Commission also noted that adopting this “race- and gender-neutral definition” would avoid the “constitutional difficulties” associated with a race-conscious definition “that might create impediments to the timely implementation” of the measures adopted in the *Diversity Order*.<sup>360</sup> In response to commenters’ requests that the Commission take direct action to increase minority and female ownership of broadcast stations,<sup>361</sup> however, the Commission asked for comment in the *Third Further Notice of Proposed Rulemaking to the Diversity Order* (the “*Diversity Third FNPRM*”) on whether it should adopt an alternative, race-conscious eligibility definition as well as other potential definitions.<sup>362</sup> The alternative definitions proposed in the *Diversity Third FNPRM* are discussed below in paragraphs 163 and 164.

152. In *Prometheus II*, the Third Circuit held that the Commission’s revenue-based eligible entity definition was arbitrary and capricious.<sup>363</sup> While noting that other actions in the *Diversity Order* “take a strong stance against discrimination and are no doubt positive,” the court found that the Commission failed to show that measures based on the eligible entity definition “will enhance significantly minority and female ownership, which was a stated goal of” the rulemaking proceeding in question.<sup>364</sup> The court further observed that, in discussing its decision to adopt this definition, the Commission had referred “only to ‘small businesses,’ and occasionally ‘new entrants,’ as expected beneficiaries.”<sup>365</sup> In addition, the court expressed doubt that the Commission would be able to provide an adequate explanation on remand of how “measures using this definition would achieve the stated goal” of increasing broadcast ownership by minorities and women.<sup>366</sup> In particular, the court pointed to data cited by the Commission showing that “minorities comprise 8.5 percent of commercial radio station owners that qualify as small businesses, but 7.78 percent of commercial radio stations as a whole — a difference of less than 1 percent.”<sup>367</sup> The court also noted that, in adopting the eligible entity standard, “[t]he Commission referenced no data on television ownership by minorities or women and no data regarding

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<sup>358</sup> *Diversity Order*, 23 FCC Rcd at 5925, ¶ 6; see also 13 C.F.R. § 121.201. At present, the SBA defines a small business to include a television broadcasting station that has no more than \$14 million in annual receipts and a radio broadcasting entity that has no more than \$7 million in annual receipts. 13 C.F.R. § 121.201. The Commission originally adopted this eligible entity definition in the *2002 Biennial Review Order*, 18 FCC Rcd at 13810-11, ¶¶ 488-89.

<sup>359</sup> *Diversity Order*, 23 FCC Rcd at 5927, ¶ 9.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> See *Diversity Third FNPRM*, 23 FCC Rcd at 5951-52, ¶¶ 81-85.

<sup>363</sup> *Prometheus II*, 652 F.3d at 471.

<sup>364</sup> *Id.*; see also *id.* at 470 (finding that the Commission had failed to “explain how the eligible entity definition adopted [in the *Diversity Order*] would increase broadcast ownership by minorities and women”); *id.* at 471 (finding that the eligible entity definition “lacks a sufficient analytical connection to the primary issue that Order was intended to address”).

<sup>365</sup> *Id.* at 470.

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

commercial radio ownership by women.”<sup>368</sup>

153. Finding that the Commission had not provided a “sufficiently reasoned basis for deferring consideration” of the alternative definitions proposed in the *Diversity Third FNPRM*, the court specifically directed it to consider those proposals within the course of the 2010 Quadrennial Review.<sup>369</sup> The Third Circuit also admonished that the Commission could not further delay its consideration of its prior proposals simply because of the constitutional difficulties they may present.<sup>370</sup> To the extent that the Commission “requires more and better data” in order to complete its analysis, the court directed the Commission to “get [such] data and conduct up-to-date studies.”<sup>371</sup>

154. *Data Collection Concerning Minority and Female Ownership*. Since the adoption of the *Diversity Order*, the Commission actively has sought to improve the broadcast ownership information available to it and has gathered additional data regarding the current levels of minority ownership of broadcast stations. In 2009, the Commission implemented a number of changes to its Form 323 ownership reports to further its goal that the data reported in the form, including data regarding minority and female broadcast ownership, are reliable, accurate, searchable, and aggregable.<sup>372</sup> In addition, the Commission set a new uniform biennial filing deadline for the Form 323 and expanded the class of entities required to file the form.<sup>373</sup> The Commission requires all full power commercial broadcast stations and all low power television stations, including Class A stations, to file the new form biennially. It also eliminated the exemption from the biennial reporting requirement that formerly applied to sole proprietorships and partnerships of natural persons that are commercial broadcast licensees.<sup>374</sup> In addition, all attributable interest holders must now obtain unique FCC registration numbers for purposes of filing the form in order to facilitate cross-referencing of reported ownership interests.<sup>375</sup>

155. The Commission’s first data collection that incorporates these changes reflects ownership interests as of November 1, 2009. The deadline for filing the data with the Commission was July 8, 2010, and on February 28, 2011 the Commission released to the public a data set compiling all of the ownership reports that were filed.<sup>376</sup> That release included descriptions of the data and instructions on accessing

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<sup>368</sup> *Id.*

<sup>369</sup> *Id.* at 471.

<sup>370</sup> *Id.* at 471 n.42 (“Stating that the task is difficult in light of *Adarand* does not constitute ‘considering’ proposals using an SDB definition.”).

<sup>371</sup> *Id.*

<sup>372</sup> See *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294, Report and Order and Fourth FNPRM, 24 FCC Rcd 5896 (2009) (“*323 Order*” and “*Diversity Fourth FNPRM*”), *recon. granted in part*, Memorandum Opinion and Order and Fifth Further Notice of Proposed Rulemaking, 24 FCC Rcd 13040 (2009) (“*323 MO&O*” and “*Diversity Fifth FNPRM*”). The *Diversity Fourth FNPRM* sought comment on modifications to the Form 323-E ownership report for noncommercial broadcast stations to gather minority and gender ownership data for non-commercial broadcast stations, including low power FM stations, and related matters. See 24 FCC Rcd at 5910-11, ¶¶ 27-30. In the *323 MO&O and Diversity Fifth FNPRM*, the Commission subsequently reconsidered its decision to require licensees to report certain nonattributable interests and sought comment on the issue. 24 FCC Rcd at 13045-47, 13049-50, ¶¶ 12-15, 22-24.

<sup>373</sup> *323 Order and Diversity Fourth FNPRM*, 24 FCC Rcd at 5904-05, 5909-09, ¶¶ 14-16, 22.

<sup>374</sup> *323 Order* at 5905, ¶ 16.

<sup>375</sup> *Id.* at 5908, ¶ 21.

<sup>376</sup> See *Media Bureau Announces Availability of 2009 Biennial Ownership Data Set For Commercial Broadcast Licensees*, MB Docket No. 07-294, Public Notice, 26 FCC Rcd 2024 (Med. Bur. 2011).

them to permit interested parties to analyze and manipulate the data.<sup>377</sup> This data set represents the first “snapshot” of broadcast ownership data in a series of planned biennial reviews that collectively should provide a reliable basis for analyzing ownership trends in the industry, including ownership by minorities and women.

156. Commission staff has reviewed the 2009 biennial ownership filings of full power commercial broadcast television stations in order to determine the number of stations controlled by reported racial and ethnic categories.<sup>378</sup> There were 1,394 full-power commercial television stations in the United States as of November 1, 2009, the information collection date.<sup>379</sup> According to the Commission’s review of the 2009 data, 29 of these stations, or 2.1 percent, are minority owned. Of those 29 stations, 9 have Black or African-American owners, accounting for 0.6 percent of all stations. American Indian or Alaska Native owners control 10 stations, or 0.7 percent, while Asian owners control nine stations, or 0.6 percent. Native Hawaiian or Pacific Islanders own one station, or 0.1 percent. Hispanic or Latino owners control 36 stations, or 2.6 percent. By comparison, our review showed that non-Hispanic White owners control 1,021 stations, or 73.2 percent of the total stations. In addition, the Commission was not able to categorize the race or ethnicity of the ownership for 244 stations, representing 17.5 percent of the total stations, because at least 50 percent of the ownership of these stations was not reportable via the Form 323. Information was unavailable for 64 stations, or 4.6 percent.

157. Several of the Media Ownership Studies provide additional analysis of these subjects. These and other studies are discussed more fully in Section V herein. Media Ownership Study 7 considers the relationship between ownership structure and the provision of radio programming targeted to African-American and Hispanic audiences.<sup>380</sup> The study finds that Black and Hispanic listeners have very different listening preferences from the White population.<sup>381</sup> The study also finds that although most minority-targeted stations are not minority-owned, most minority-owned stations target minority listeners,<sup>382</sup> and the presence of minority-owned stations in a market appears to raise the amount of minority-targeted programming.<sup>383</sup> Media Ownership Study 2 concludes that consumers value diversity of opinion and community news to varying degrees that generally increase with age, education, and income.<sup>384</sup> The study also examined the value listeners place on multiculturalism, however, which was found to decrease with age. The study further concludes that White male consumers generally do not value multiculturalism.<sup>385</sup>

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<sup>377</sup> *Id.*

<sup>378</sup> For purposes of this analysis, the Commission examined the race or ethnicity of owners with attributable voting interests in the entity that ultimately owns the station license and defined a controlling interest as an interest that exceeds 50 percent alone or in the aggregate.

<sup>379</sup> *March 31, 2011 Broadcast Station Totals Press Release.*

<sup>380</sup> Media Ownership Study 7.

<sup>381</sup> *Id.* at 8-9, 24. For example, urban stations attract 51.2 percent of Black listeners, but less than five percent of non-Black listeners. *Id.* at 8. Furthermore, Spanish-language stations account for 48 percent of Hispanic listening and negligible amounts of non-Hispanic listening. *Id.* at 9. Overall, Spanish-language station audiences are 96 percent Hispanic. *Id.*

<sup>382</sup> *Id.* at 10, 24.

<sup>383</sup> *Id.* at 21, 24. Specifically, the study finds that markets with an additional station with a Black owner have roughly 0.1-0.4 additional stations targeted at Black listeners, while markets with an additional station with a Hispanic owner have roughly 0.2-0.45 additional stations targeted at Hispanic listeners.

<sup>384</sup> *See* Media Ownership Study 2 at 2.

<sup>385</sup> *Id.*

158. We recognize that the data currently in the record of this proceeding are not complete and are likely insufficient either to address the concerns raised in *Prometheus II* or to support race- or gender-based actions by the Commission. Although we would prefer to be able to propose specific actions in response to the Third Circuit's remand of the measures relying on the eligible entity definition in this NPRM, we believe that making legally sound proposals would not be possible based on the record before us at this time. Accordingly, we plan to undertake the following actions in preparation for the 2014 broadcast ownership review to establish with the requisite foundation and clarity what additional policies can be implemented promoting greater broadcast ownership diversity, including female and minority ownership: 1) Continue to improve our data collection so that we and the public may more easily identify the diverse range of broadcast owners, including women and minorities, in all services we license; 2) Commission appropriately-tailored research and analysis on diversity of ownership; and 3) Conduct workshops on the opportunities and challenges facing diverse populations in broadcast ownership. In addition, we ask interested parties to supplement the record and provide any and all data available that can complete a picture of the current state of ownership diversity, including minority and female ownership in the broadcast industry and to justify any prospective actions the Commission may take on remand.

159. *Options for Reconsideration of the Eligible Entity Standard.* We seek comment herein on a number of actions we could take with respect to the remanded eligible entity definition. With respect to these proposals and any others that may be suggested, we emphasize that interested parties should squarely address the potential legal impediments to any specific approach. We ask commenters to explain the constitutional law analysis that would apply to, as well as the potential constitutional problems with, any proposals for a new eligibility definition. Commenters should explain in detail, based on relevant case law, whether and how the Commission could overcome the application of strict or intermediate constitutional scrutiny to any race- or gender-based standard. Commenters also should explain whether and how proposals can be supported by data and whether they can be applied in a consistent and rational manner.

160. As an initial matter, we invite comment regarding the possibility of reinstating the preexisting eligible entity definition. Recognizing the Third Circuit's apparent skepticism that the Commission would be able to demonstrate on remand that the revenue-based eligibility definition serves our goal of increasing broadcast ownership by minorities and women,<sup>386</sup> we ask commenters to address whether or not there is additional evidence available that would show a stronger connection between according licenses preferences to small businesses and promoting this goal. Is there evidence demonstrating that there are now more small businesses, particularly those that are owned by minorities or women, that own broadcast outlets than there were when the eligible entity standard was put in place? We strongly encourage parties to supply any such information to the Commission. We also note the Third Circuit's statement that "it is hard to understand how measures using [the eligible entity] definition would achieve the stated goal" of increasing broadcast ownership by minorities and women in light of Commission data showing that "minorities comprise 8.5 % of commercial radio station owners that qualify as small businesses, but 7.78 % of the commercial radio industry as a whole . . ."<sup>387</sup> We seek comment on whether this comparison of minority representation in different segments of the radio industry accurately reflects the potential impact of the eligible entity standard on minority and female ownership. In addition, we invite input on whether it is possible that the preexisting definition would have a more substantial impact on minority and female station ownership if we modify the licensing preferences to which the definition applies. As discussed in more detail in paragraphs 168 through 170, we invite commenters to propose changes to these preferences and to explain how such changes would promote our minority and female ownership objectives.

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<sup>386</sup> *Prometheus II*, 652 F.3d at 470.

<sup>387</sup> *See id.*

161. Alternatively, should we consider reinstating the eligible entity definition to support other policy objectives aside from the promotion of minority and female station ownership? For example, should increasing station ownership by small businesses be considered an independent policy goal in this proceeding and, if so, would readopting the preexisting eligibility definition be a reasonable and effective means of promoting this objective?<sup>388</sup> We also ask commenters to consider whether creating opportunities for small businesses to participate in the broadcast industry via the eligible entity standard would serve our traditional goals of fostering viewpoint diversity, localism, and competition. In the *Diversity Order*, the Commission suggested that the use of the eligible entity standard would “result in a wider array of programming services, including some that are responsive to local needs and interests and audiences that are underserved.”<sup>389</sup> In this regard, the Commission “anticipate[d] that small businesses will be more likely than large corporations to have ties to the communities that they serve, and thus be more attuned to local needs and interests.”<sup>390</sup> We seek comment on this prediction and on other ways in which the continued use of the eligible entity definition could serve our traditional policy objectives.

162. We also seek comment on whether there are other race- and gender-neutral standards for defining eligible entities that we should consider for the measures adopted in the *Diversity Order* and any others we may implement in the future. Given the Third Circuit’s conclusion that the Commission failed to demonstrate a connection between the previous revenue-based definition and our stated diversity goals, commenters should supply specific evidence demonstrating why a proposed definition is likely to serve our policy objectives, especially our goal of increasing station ownership by minorities and women. In addition, we ask commenters to discuss any potential legal problems as well as any administrative issues associated with their proposals.

163. In the *Diversity Third FNPRM*, the Commission sought comment on replacing the eligible entity standard with a standard based on the SBA’s definition of socially and economically disadvantaged businesses (“SDBs”) used for purposes of its Business Development Program.<sup>391</sup> African Americans, Hispanic Americans, Asian Pacific Americans, Subcontinent Pacific Americans, and Native Americans are presumed to qualify for the Business Development Program, and other individuals may qualify for the program if they can show by a preponderance of the evidence that they are disadvantaged.<sup>392</sup> We again seek comment on this proposal in this proceeding.<sup>393</sup> In addition, we seek comment on whether there is an alternative race-conscious and/or gender-specific standard that we should adopt.

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<sup>388</sup> Several provisions of the Communications Act require the Commission to promote the interests of small businesses. *See, e.g.*, 47 U.S.C. § 309(j)(3)(B) (obligating the Commission to “disseminat[e] licenses among a wide variety of applicants, including small businesses” in authorizing the Commission to award licenses via competitive bidding); *see also* 47 U.S.C. § 257(a) (directing the Commission to identify and eliminate “market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services . . .”); 47 U.S.C. § 614(a)(i) (establishing a “Telecommunications Development Fund” to, among other purposes, “promote access to capital for small businesses in order to enhance competition in the telecommunications industry”).

<sup>389</sup> *Diversity Order*, 23 FCC Rcd at 5926, ¶ 7.

<sup>390</sup> *Id.*

<sup>391</sup> *Diversity Third FNPRM*, 23 FCC Rcd at 5950, ¶ 81.

<sup>392</sup> 13 C.F.R. §§ 124.103(b)-(c), 124.104(a). To qualify for this program, a small business must be at least 51 percent owned and controlled by a socially and economically disadvantaged individual or individuals. *See id.* at § 124.105; *see also* U.S. Small Business Administration, 8(a) Business Development, <http://www.sba.gov/content/8a-business-development-0> (visited Oct. 19, 2011).

<sup>393</sup> *See Prometheus II*, 652 F.3d at 471, 472 (directing the Commission to seek comment on “proposed SDB definitions” in the *Diversity Third FNPRM* on remand).

164. To be lawful, race-based and gender-based governmental action must satisfy the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Supreme Court has established that race-based classifications are subject to strict scrutiny and may be upheld “only if they are narrowly tailored measures that further compelling governmental interests.”<sup>394</sup> Gender classifications are subject to intermediate scrutiny, under which the government’s actions must be substantially related to the achievement of an important objective.<sup>395</sup> Commenters advocating a race-conscious classification, therefore, should explain, based on relevant judicial precedent and empirical data, how such a classification would satisfy the strictest level of constitutional scrutiny. To justify the adoption of a race-conscious standard, would it be possible for the Commission to demonstrate a compelling interest in fostering viewpoint diversity,<sup>396</sup> redressing past discrimination,<sup>397</sup> or some other interest? If the Commission could establish such an interest, how could we demonstrate that a race-based standard would be a narrowly tailored means of achieving this interest? Similarly, could the Commission meet the relevant constitutional standards for a gender-specific standard? Commenters also should explain what data we would need in order to adequately support a race- and/or gender-based definition. Commenters should provide relevant data and are encouraged to submit peer-reviewed studies.

165. The Commission also sought comment in the *Diversity Third FNPRM* on an “individualized full-file review” approach to awarding the preferences adopted in the *Diversity Order*.<sup>398</sup> Under this proposal, applicants would be accorded licensing preferences if they could demonstrate that they have overcome “significant social and economic disadvantages.”<sup>399</sup> After the release of the *Diversity Third FNPRM*, the Media and Wireless Bureaus sought comment on a proposal made by the Advisory Committee to award bidding credits in licensing auctions to applicants that demonstrate that they have overcome a “substantial disadvantage.”<sup>400</sup> We seek comment on the use of this type of standard for purposes of the licensing preferences adopted in the *Diversity Order*. Would these standards, both of which are based on individualized reviews to determine whether applicants have overcome considerable disadvantages, be subject to strict judicial scrutiny and would they be able to survive this level of constitutional analysis? Alternatively, would it be feasible for the Commission to conduct such reviews in a race- and gender-neutral manner that would be subject to a lower level of constitutional scrutiny? If so, would the Commission be able to satisfy the Third Circuit’s concern that the use of a race- and gender-neutral approach may not materially advance our minority and female ownership goals? In addition, we ask commenters to consider how we could ensure that the highly individualized reviews of broadcast applications that would be required under a substantial disadvantage standard could be administered in a sufficiently objective and consistent manner as well as in accordance with First Amendment values. We also would like interested parties to comment on the Commission resources that would be required to conduct, as a matter of course, highly fact-specific reviews of this nature. What data

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<sup>394</sup> *Adarand*, 515 U.S. at 227; see also *Grutter*, 539 U.S. at 326 (quoting *Richmond v. J.A. Cronson Co.*, 488 U.S. 469, 493 (1989)) (“We apply strict scrutiny to all racial classifications to ‘smoke out’ illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.”).

<sup>395</sup> *Hibbs*, 538 U.S. at 721.

<sup>396</sup> See generally *Grutter*, 539 U.S. 306.

<sup>397</sup> See generally *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986).

<sup>398</sup> *Diversity Third FNPRM*, 23 FCC Rcd at 5951-52, ¶¶ 84-85.

<sup>399</sup> See *id.* With regard to this proposal, which is intended to be analogous to that used by certain state university admissions departments, the Commission noted that the overcoming of significant disadvantages could be “predictive of success in a challenging industry and of the promotion of diversity of information and perspectives and satisfaction of unmet needs in the industry.” *Id.* at 5951, ¶ 84.

<sup>400</sup> See *Auction Preference PN*, 25 FCC Rcd at 16854.



would we need to support the adoption of this type of standard? We seek comment as to the practicability of implementing such a standard and what information would be required by the Commission to determine potential eligibility. What privacy concerns, if any, are raised by collecting such information? Would the Commission have statutory authority to adopt it? To the extent that additional data are needed, commenters are encouraged to provide such information.

166. In addition, we seek comment on any other approaches we should consider. Commenters advocating alternative proposals should explain how the proposal would satisfy the applicable level of constitutional scrutiny, how it would advance our policy goals, how the Commission could address any administrative burdens or practical considerations inherent in the proposed approach, and what data the Commission would need in order to justify it. Again, commenters are strongly encouraged to supply any relevant data to the Commission.

167. Finally, we ask commenters to consider whether we should decline to adopt any new eligibility standard specifically aimed at increasing minority and female station ownership in light of the record in front of the Commission in this proceeding. In particular, we ask parties to consider, on the one hand, the Third Circuit's dissatisfaction with our prior race- and gender-neutral approach. On the other hand, we ask parties to consider the high constitutional hurdles the Commission would face if it were to adopt an expressly race- or gender-based standard on remand and the data that would be necessary to justify such a standard prior to the completion of the 2010 Quadrennial Review. While we continue to believe that promoting minority and female ownership is an important goal, we also recognize that implementing a program expressly aimed at this goal in the context of this proceeding would require the support of a substantial evidentiary record that the Commission has not yet been able to amass. Accordingly, we seek comment on how the Commission most effectively could continue to pursue its longstanding goals of promoting diversity among broadcast licensees, and especially of fostering broadcast ownership by minorities and women, in the event that the Commission determines that it is unable to support a new eligibility standard in this proceeding.

168. *Measures Relying on Eligible Entity Standard.* In addition to seeking comment on the eligible entity definition, we also seek comment on how the Commission should proceed with respect to the licensing preferences that previously relied on this definition, each of which was remanded in *Prometheus II*. As numbered in the *Diversity Order*, these measures include: (1) Revision of Rules Regarding Construction Permit Deadlines;<sup>401</sup> (2) Modification of Attribution Rule;<sup>402</sup> (3) Distress Sale

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<sup>401</sup> *Diversity Order*, 23 FCC Rcd at 5931, ¶ 15 (revising construction permit rules to allow the sale of expiring construction permits to eligible entities that agree to complete construction within the time remaining on the permit or within 18 months, whichever period is greater). In response to the *Prometheus II* decision, on July 25, 2011, the Media Bureau issued a Public Notice announcing the suspension of the eligible entity revisions to the construction permit rules. *Media Bureau Provides Notice of Suspension of Eligible Entity Rule Changes and Guidance on The Assignment of Broadcast Station Construction Permits to Eligible Entities*, Public Notice, 26 FCC Rcd 10370 (Med. Bur. 2011). The Bureau provided guidance on the treatment of final application grants, non-final application grants, and pending applications involving the assignment of broadcast construction permits to eligible entities. MMTC has requested that the Commission further modify this rule change by clarifying that eligible entities also will be afforded up to 18 months for construction under expired permits for "major modifications of authorized facilities." Letter from David Honig, President and Executive Director, MMTC, to Marlene H. Dortch, Secretary, FCC, Att. at 3 (July 12, 2011) (MMTC July 12 *Ex Parte* Letter).

<sup>402</sup> *Diversity Order*, 23 FCC Rcd at 5936, ¶ 31 (relaxing the equity/debt plus (EDP) attribution standard for interest holders in eligible entities by "allow[ing] the holder of an equity or debt interest in a media outlet subject to the media ownership rules to exceed the 33 percent threshold set forth in [the EDP standard] without triggering attribution where such investment would enable an eligible entity to acquire a broadcast station provided: (1) the combined equity and debt of the interest holder in the eligible entity is less than 50 percent, or (2) the total debt of the interest holder in the eligible entity does not exceed 80 percent of the asset value of the station being acquired by

Policy;<sup>403</sup> (4) Duopoly Priority for Companies that Finance or Incubate an Eligible Entity;<sup>404</sup> (5) Extension of Divestiture Deadline in Certain Mergers;<sup>405</sup> and (6) Transfer of Grandfathered Radio Station Combinations to Non-Eligible Entities.<sup>406</sup> We seek comment on whether or not the Commission, either in this proceeding or a separate rulemaking, should attempt to reinstate any of these measures. In particular, if the Commission decides to readopt the preexisting eligible entity definition on remand, should it also reinstate each of the measures that rely on this definition? Alternatively, if the Commission adopts a new standard to replace or supplement the eligible entity definition, should we apply that revised standard to each of the above-listed measures, but otherwise reinstate them in their current form? Are there reasons why we should either decline to readopt any of these measures on remand or make any changes to them if we implement a new eligibility standard? We also seek comment on whether reinstating these measures, either in their current form or with proposed changes, would be an effective means of advancing our policy goals and whether such action would be consistent with applicable constitutional law standards. We further invite comment on whether the Commission would need additional data in order to justify the readoption of any of these measures and, if so, we request that such data be submitted to the Commission.<sup>407</sup>

169. The Commission also sought comment on a number of additional measures intended to promote diversity among broadcast licensees in the *Diversity Third FNPRM*.<sup>408</sup> Several of these proposals rely on the now vacated eligible entity definition or another proposed eligibility standard. As set forth in the FNPRM, these proposals include: (1) Share-Time Proposals;<sup>409</sup> (2) Retention of AM Expanded Band Owners' Station if One Station Is Sold to an Eligible Entity;<sup>410</sup> (3) Structural Waivers for

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the eligible entity and the interest holder does not hold any equity interest, option, or promise to acquire an equity interest in the eligible entity or any related entity”).

<sup>403</sup> *Id.* at 5939, ¶ 39 (modifying the distress sale policy by allowing a licensee that has been designated for a revocation hearing or has a renewal application that has been designated for hearing on basic qualification issues to sell the station to an eligible entity prior to the hearing).

<sup>404</sup> *Id.* at 5943, ¶ 56 (giving an applicant for a duopoly that agrees to finance or incubate an eligible entity priority over other applicants in the event that competing duopoly applications simultaneously are filed in the same market).

<sup>405</sup> *Id.* at 5943-44, ¶¶ 57-60 (agreeing to consider requests to extend divestiture deadlines when applicants actively have solicited bids for divested properties from eligible entities and further stating that entities granted such an extension must sell the divested property to an eligible entity by the extended deadline or have the property placed in an irrevocable trust for sale by an independent trustee to an eligible entity).

<sup>406</sup> *Id.* at 5944-45, ¶ 61 (permitting the assignment or transfer of a grandfathered radio station combination intact to any buyer, and not just an eligible entity as previously allowed, so long as the buyer files an application to assign the excess stations to an eligible entity or to an irrevocable divestiture trust for the ultimate assignment to an eligible entity within 12 months after consummation of the purchase of the grandfathered stations).

<sup>407</sup> By contrast, if the Commission decides that it is not feasible to replace the eligible entity definition and therefore declines to adopt any new definition on remand, then, absent further action by the Commission, each of the measures vacated by the court would remain void. Accordingly, these measures would be rescinded by the Commission.

<sup>408</sup> *Diversity Third FNPRM*, 23 FCC Rcd at 5952-57, ¶¶ 87-101.

<sup>409</sup> *Id.* at 5953, ¶ 87 (seeking comment on a proposal to grant “FM licensees that broadcast in HD using IBOC technology the voluntary option of assigning the right to operate an HD radio stream to an SDB” and seeking comment on a plan “to use share-time procedures to permit the bifurcation of a single channel, analog FM station into an ‘Entertainment Station’ and a ‘Free Speech Station’ ” where the “‘Free Speech Station’ would be independently owned by an SDB”).

<sup>410</sup> *Id.* at 5953, ¶¶ 90-91 (seeking comment on a proposal to extend the period during which AM licensees have been permitted to operate on an expanded band pursuant to Section 73.3555, Notes 9 and 10 of the Commission’s rules,

Creating Incubator Programs;<sup>411</sup> and (4) Proposals of the National Association of Black Owned Broadcasters and the Rainbow/PUSH Coalition.<sup>412</sup> A number of parties filed comments on these proposals in response to the *Diversity Third FNPRM*.<sup>413</sup> With regard to the third proposal, MMTC recently has urged the Commission to take action on a similar Minority Ownership Incubation Proposal.<sup>414</sup> In light of the Third Circuit's remand, we again seek comment on the proposals in the *Diversity Third FNPRM*, as well as those that have been suggested more recently, in this proceeding. In

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47 CFR § 73.355, Notes 9 and 10, and to allow licensees, before a specified disposition date, to assign or transfer control of one of the paired AM stations to a radio broadcaster that qualifies as a small business as defined by the SBA).

<sup>411</sup> *Id.* at 5955-56, ¶ 97 (seeking comment on a two-year "Trial Incubation Plan" that would allow entities that create and maintain an incubator program for SDBs to receive a waiver of the local radio ownership rule for the acquisition of one additional station above the existing caps rules in large markets). MMTC recently has urged the Commission to take action on a similar Minority Ownership Incubation Proposal. *See* MMTC July 12 *Ex Parte* Letter Att. at 1.

<sup>412</sup> "Specifically, the Rainbow/PUSH Coalition has proposed that the Commission (1) examine assignment and transfer applications to discern potential impact on minority ownership; (2) decline to grant temporary waivers of local ownership rules to parties proposing a transaction that would create station combinations that exceed the ownership caps; (3) treat local marketing agreements as attributable interests; and (4) allow minorities to own station combinations equal to the largest combination in a market in order to counterbalance the economic impact of grandfathered holdings." *Diversity Third FNPRM*, 23 FCC Rcd at 5956-57, ¶ 101; *see also infra* Section V.

<sup>413</sup> *See, e.g.*, DCS July 30, 2008 Comments, MB Docket No. 07-294, at 15 (stating that the Commission should afford minorities a head start by initially limiting share-time rule assignments of FM HD and DTV sub-channels to SDBs); NPR July 30, 2008 Comments, MB Docket No. 07-294, at 5-6 (stating that that the Commission should reject the proposal to give an existing FM licensee the ability to assign a portion of its digital bit stream to an independent third party); St. Thomas More Foundation July 30, 2008 Comments, MB Docket No. 07-294, at 4 (supporting the AM expanded band proposal and advocating for inclusion of non-profit organizations as entities eligible for pairing under this proposal); Bryan Broadcasting *et al.* July 30, 2008 Comments, MB Docket No. 07-294, at 2-6 (stating that a broadcaster operating in the expanded band should be required to transfer one of the paired stations at the close of its five year transition period or two years from the date the Commission grants authority for current holders of expanded band licenses to transfer one of their licenses to designated entities, whichever is later); NAB July 30, 2008 Comments, MB Docket No. 07-294, at 4-5 (stating that the Commission should not limit any waiver policy for incubating stations to radio stations in large markets); Venture Technologies Group July 30, 2008 Comments, MB Docket No. 07-294, at 2-3 (stating that a waiver policy for incubating stations will decrease diversity by allowing large radio groups to avoid ownership limits); *see also* DCS July 30, 2008 Comments, MB Docket No. 07-294, at 27-28 (supporting the proposals of NABOB and the Rainbow/PUSH Coalition); NAB July 30, 2008 Comments, MB Docket No. 07-294, at 12 (stating that the NABOB and Rainbow/PUSH proposal would be vulnerable to court challenge as a race-based rule and suggesting an alternative model).

<sup>414</sup> *See* MMTC July 12 *Ex Parte* Letter Att. at 1. Specifically, MMTC has proposed an incubation program pursuant to which the local radio ownership rule would be waived for radio broadcasters that engage in one of six "Qualifying Activities," including (1) selling or donating a commercial radio station to a qualified entity; (2) entering into a local marketing agreement with an independent programmer for a five year period for the use of an FM HD-2 or HD-3 channel; (3) financing one year of operations and providing in-kind technical and engineering assistance or equipment that enables an eligible entity to reactivate and restore to full service a dark commercial or noncommercial broadcast station; (4) donating a commercial or noncommercial station to an Historically Black College or University, an Hispanic Serving Institution, an Asian American Serving Institution, or a Native American Serving Institution; (5) "providing loans, loan guarantees, lines of credit, equity investments or other direct financial assistance to a qualified entity to cover more than 50 [percent] of the purchase price of a radio station"; or (6) engaging in another action that is "likely to enhance radio station ownership opportunities for qualified entities." *Id.* at 1-2. Under MMTC's proposal, the Qualifying Activity must occur in either the same market as or a larger market than the market for which the waiver is requested. *Id.* at 1. Radio broadcasters that engage in Qualifying Activities would be eligible to receive an unlimited number of waivers of the AM and FM subcaps and a specified number of waivers of the local radio ownership caps based on market size. *Id.* at 3.

particular, we ask for input on how the court's remand of the provisions relying on the eligible entity definition should impact our consideration of each of these proposals. We also seek comment on whether the adoption of these measures would advance our policy objectives and on the legal implications of implementing these proposals. Further, we invite parties to comment on whether the Commission would need additional data in order to justify any of these measures and encourage parties to provide any data that may be helpful to our analysis.

170. *Additional Measures to Further the Commission's Diversity of Ownership Goals.* We also seek comment on any other measures we should consider that would advance our longstanding goal of having a wide diversity of broadcast licensees and, more specifically, of increasing the number of minority- and women-owned broadcast stations. In addition to the measures noted above, the *Diversity Third FNPRM* sought comment on several other proposals designed to increase participation in the broadcast industry by new entrants and small businesses, including minority- and women-owned businesses.<sup>415</sup> These proposals include: (1) Opening FM Spectrum for New Entrants;<sup>416</sup> (2) Must-Carry for New Class A Television Stations;<sup>417</sup> and (3) Reallocation of TV Channels 5 and 6 for FM service.<sup>418</sup> We seek to refresh the record on these proposals in this proceeding. We also ask commenters to suggest any additional actions the Commission should consider to advance our important diversity objectives.<sup>419</sup> We ask commenters specifically to explain how their proposals would serve our goals and whether they would satisfy relevant constitutional law standards.

## V. MEDIA OWNERSHIP STUDIES

171. To provide data on the impact of market structure on the Commission's policy goals of competition, localism and diversity, the Commission has commissioned eleven Media Ownership Studies, which are listed in Appendix A and have now been completed. The economic studies were completed and subject to formal peer review during the period January to July 2011. The studies, peer reviews, and author comments on the peer reviews are available on the Commission's media ownership website at <http://www.fcc.gov/encyclopedia/2010-media-ownership-studies>.<sup>420</sup> We invite interested parties to submit any comments on the studies on the same comment dates indicated on the first page of this document.

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<sup>415</sup> *Diversity Order*, 23 FCC Rcd at 5924, ¶ 1.

<sup>416</sup> *Diversity Third FNPRM*, 23 FCC Rcd at 5956, ¶ 98 (seeking comment on a proposal to authorize FM stations to change their community of license to any community within the same market, provided that if the community being vacated has no other full power AM or FM station or an LPFM station that originates local programming for at least 15 percent of its airtime (a "Local Service LPFM"), then the licensee that is vacating the original community must underwrite the cost of licensing, construction, and one full year of operation of a new Local Service LPFM to be licensed to the original community).

<sup>417</sup> *Id.* at 5956, ¶ 99 (seeking comment on whether the Commission has authority to adopt rules requiring cable carriage of Class A television stations).

<sup>418</sup> *Id.* at 5956, ¶ 100 (seeking comment on a proposal to reallocate TV Channels 5 and 6 for FM broadcasting); *see also* MMTC July 12 *Ex Parte* Letter Att. at 3.

<sup>419</sup> For example, MMTC has suggested that the Commission seek to reinstate and expand its previous Tax Certificate Policy by coordinating with the White House on draft legislation. *See, e.g.*, MMTC July 12 *Ex Parte* Letter Att. at 2.

<sup>420</sup> We have provided the public with access to the underlying data or source material for the studies, subject to the procedures set forth in the June 15, 2011 Protective Order. *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182, Protective Order, 26 FCC Rcd 8474 (Med. Bur. 2011) ("*2010 Quadrennial Review Protective Order*").

172. As discussed below, each of these studies defines a relevant performance metric with respect to one or more of the three policy goals and examines how results vary across markets with differing ownership structures. Generally, the research was designed to relate relevant performance metrics directly to changes in ownership of broadcast facilities in local markets, the attribute of the market that our rules directly affect. In some cases the studies found useful and important correlations. In other cases variations were found across markets but with little correlation to local market ownership structure. We seek comment on how to interpret and apply these results. Are there other statistical studies available that we should consider that relate relevant performance metrics to market structure using statistical analysis of a reasonably large sample of markets? Are there individual market case studies available that are relevant and, if so, what role should they have in our deliberations?

#### A. Studies Relating to Competition

173. With standard private goods, a study of competitive performance would normally begin with an examination of the relationship between price and marginal cost. Broadcast television and radio programming do not have end user prices, so this approach cannot be implemented here. This leaves two other options. First, we can examine television viewing and radio listening on the assumption that, other things being equal, higher viewing and listening levels in a market are associated with higher consumer satisfaction (we value competition because it provides high levels of consumer satisfaction). Second, we can survey consumers about their valuation of the media environment. Competition can benefit consumers not only by delivering a valued mix of programming at a point in time, but also by promoting innovation. Our slate of studies included both approaches to the direct assessment of consumer satisfaction and also examines one manifestation of innovation. We tentatively conclude that these metrics are appropriate to analyze competition and seek comment on that conclusion, as well as the structure and conclusions of the studies described below.

174. Media Ownership Study 1 examines television audience ratings during parts of the day when programming is locally selected (in particular, dayparts other than prime time, because most prime time programming is network selected).<sup>421</sup> The study found no significant relationship between variations in viewing and variations in market structure across markets.<sup>422</sup> We seek comment on the use of these metrics to measure competition, as well as the results of Media Ownership Study 1.

175. Media Ownership Studies 5 and 7 each provide some analysis of variations across markets in radio listening. Media Ownership Study 5 examines listening to news radio stations.<sup>423</sup> It finds no significant correlation between market structure and listening, although it does find that the addition of a public news station has a significant impact on news listening.<sup>424</sup> In many if not most markets, there is not more than one public news station, so the results are plausibly understood as suggesting that adding the first public news station in a market has a significant effect. It is not clear that adding additional public news stations would have the same effect. We seek comment on the structure and conclusions of Media Ownership Study 5, including how we should consider the impact of public news stations on competition given the results of the study.

176. Media Ownership Study 7 focuses on the provision of radio programming to minority audiences.<sup>425</sup> It first documents the significant differences in listening patterns across the Black and

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<sup>421</sup> Media Ownership Study 1.

<sup>422</sup> *Id.* at 15.

<sup>423</sup> Media Ownership Study 5.

<sup>424</sup> *Id.* at 17.

<sup>425</sup> Media Ownership Study 7.

White and across the Hispanic and non-Hispanic demographic groups.<sup>426</sup> The study also examines the impact of market structure on listening with inconclusive results.<sup>427</sup> We seek comment on the design of Media Ownership Study 7, as well as its results with respect to radio listening, and what, if anything, those results can contribute to our analysis.

177. Media Ownership Study 2 utilizes survey data as a basis for estimating consumers' willingness to pay for (*i.e.*, valuation of) various characteristics of their media environment (diversity of opinion, community news, multiculturalism, and advertising).<sup>428</sup> The portion of the Media Ownership Study 2 analysis most directly related to competition is the study of advertising and consumers' revealed willingness to pay for reductions in it. Some past research has interpreted the amount of advertising as a kind of "price" that consumers must pay to receive television programming.<sup>429</sup> The market structure analysis in Media Ownership Study 2 focuses on the number of television voices in the market, and the results appear to show that an increase raises the amount of advertising.<sup>430</sup> We seek comment on whether the characteristics used in Media Ownership Study 2 to measure consumer satisfaction adequately measure total consumer satisfaction. In particular, we seek comment on the extent to which correlations between market structure and the amount of advertising in a market provide a useful proxy for competition in the marketplace. Commenters who argue that important elements of the media environment are missing from the study are requested to indicate how consumer satisfaction is affected by the missing elements as well as how the missing elements are likely to be correlated with the elements of the media market structure our ownership rules can influence.

178. Media Ownership Study 10 examines how the structure of the television market has influenced the increase in television stations' use of multicasting.<sup>431</sup> Innovation as evidenced by the spread of technological advances is another area where competition in our media markets can be observed. One could view increases in multicasting as the result of competition among television stations in a market. The study offers two measures of multicasting: the total number of multicast channels in the market and the average number of multicast channels per television station in the market.<sup>432</sup> The study finds little evidence that variations in ownership structure affect the extent of multicasting.<sup>433</sup> Rather it appears that other market characteristics, such as the market size and the number of television stations operating in the market, are more relevant factors.<sup>434</sup> We seek comment on the use of multicasting as a metric to study innovation and competition in the market, including whether one measure used in Media Ownership Study 10 is a more appropriate one than the other.

## B. Studies Relating to Localism

179. We sought to measure localism, in part, by looking at the effect of local market structure on the quantity of local news and public affairs programming provided at both the market level and the

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<sup>426</sup> *Id.* at 8-9.

<sup>427</sup> *Id.* at 23.

<sup>428</sup> Media Ownership Study 2.

<sup>429</sup> See, e.g., Television Station Ownership Structure and the Quantity and Quality of TV Programming, by Gregory S. Crawford (2007) (Ownership Study 3 in the 2006 quadrennial review proceeding).

<sup>430</sup> See Media Ownership Study 2 at 88, Table 20.

<sup>431</sup> Media Ownership Study 10.

<sup>432</sup> *Id.* at 33-34.

<sup>433</sup> *Id.* at 54.

<sup>434</sup> *Id.*

station level.<sup>435</sup> Media Ownership Study 1 examines a number of factors relating to the quantity and quality of local information and correlates that information with the structure of the local media market. In this study, quality is measured by using ratings as the variables to determine how much people prefer certain types of programming, including local news programming.<sup>436</sup> The study does not identify a relationship between ownership structure and local news ratings or hours of programming.<sup>437</sup> We seek comment on how well Media Ownership Study 1 measures the degree to which the localism needs of the local population are being served. The study defines television ratings, restricted to the evening time period, as a reasonable measure for the quality of the local television content in the market.<sup>438</sup> Does a measure of the rating of local news provide a better measure of localism than a measure of all content viewing during this period? Should our localism metric necessarily rely on consumer preference? Media Ownership Study 1 also examines three measures of the amount of news available in the market: the number of news formatted radio stations, the number of hours of local news, and daily newspaper circulation.<sup>439</sup> Is the number of news formatted radio stations an appropriate measure of localism in the absence of information on the type of news carried by the stations? Would one expect the amount of local news on a news formatted station to vary across markets in a predictable manner? Is the circulation of daily newspapers in a market a reasonable measure of the availability of local content? How should it be interpreted? What, if anything, does a high newspaper circulation level indicate about local content on television and radio stations in the same market?

180. Media Ownership Study 4 also provides an analysis of the quantity of local television news and public affairs programming.<sup>440</sup> Media Ownership Study 4 finds that local news and public affairs minutes provided in a market increases with the number of television stations and the number of Big Four (ABC, NBC, CBS, Fox) affiliates in the market.<sup>441</sup> The presence of a newspaper-television combination in a market appears to reduce total local news minutes in the market, even though the cross-owned station itself produces more local news than otherwise comparable stations.<sup>442</sup> At the station level, Media Ownership Study 4 finds that radio-television cross-ownership appears to increase local news.<sup>443</sup> Superficially Media Ownership Study 1 and Media Ownership Study 4 appear similar because each measures the quantity of local news. We note, however, that the sources each study uses to catalog the amount of news are different. In addition, the empirical models differ. How should the Commission weigh each of these studies? Is one data source superior to another? Media Ownership Study 4 examines individual station and market behavior. How should we weigh conflicting results between market outcomes and station behavior?

181. Media Ownership Study 5 examines the prevalence of news formatted radio stations and the listenership of those stations.<sup>444</sup> The data for this study do not separate local and national news

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<sup>435</sup> We note that our studies do not address local content that is locally-originated, but not news related. To the extent that locally-originated, non-news content may contribute to localism, such content is not evaluated in the media ownership studies.

<sup>436</sup> Media Ownership Study 1 at 11-12.

<sup>437</sup> *Id.* at 15-16.

<sup>438</sup> *Id.* at 11.

<sup>439</sup> *Id.*

<sup>440</sup> Media Ownership Study 4.

<sup>441</sup> *Id.* at 25.

<sup>442</sup> *Id.* at 27-28.

<sup>443</sup> *Id.* at 28.

<sup>444</sup> Media Ownership Study 5 at 1-2.

programming or account for news programming on stations that are not designated as news formatted. Is the news content of news-formatted stations sufficiently local that we can use the number of such stations as a reliable metric for the amount of localism in a radio market? The study also analyzes usage of news, via the overall ratings of the news-formatted radio stations. Are ratings a sufficient measure of the quality of the local content provided by the station? We note that the study examines only radio markets defined by Arbitron, which tend to be in the more populous areas of the country. Should we expect the more rural areas to differ? The study concludes there are few significant relationships between news formatted stations and ownership structure.<sup>445</sup> The study does provide weak evidence, however, that an increase in the size of the largest local owner group is associated with an increase in the number of news stations and the number of different news formats offered in the market.<sup>446</sup> We seek comment on these conclusions.

182. Media Ownership Study 6 examines the state of local news on the Internet to determine whether the Internet provides a net increase to media diversity in local markets.<sup>447</sup> Media Ownership Study 6 first determines which news sites are not affiliated with a traditional media outlet such that they can be considered a new or independent news source.<sup>448</sup> The study provides data on online local news sites within the top 100 U.S. television markets that reach more than a minimum threshold of traffic. Media Ownership Study 6 concludes that there is a very limited amount of local news on the Internet that is provided by organizations that are not broadcasters or print media organizations.<sup>449</sup> We tentatively conclude from Media Ownership Study 6 that, while the potential of the Internet for local, or even hyper-local, news is great, very few such sites today reach a significant audience, at least in the top 100 markets. We seek comment on that tentative conclusion. We also note that the analysis is based upon the most widely visited sites. Is it possible that a sufficient number of lightly visited sites carrying content produced by non-traditional media exist such that they act as a reservoir of local content available to consumers? If not, are the barriers to entry into web publishing sufficiently low such that a failure by broadcasters to provide consumers with their desired level of local news and information will attract competitors? Does the current relative absence of competitors provide any indication of how well the traditional media are serving the needs of consumers?

183. Media Ownership Study 3 examines public knowledge and civic participation to determine whether consolidation results in a more or less informed public.<sup>450</sup> Media Ownership Study 3 considers several metrics of civic engagement, including knowledge of political candidates and issues, as potential indicators of how well the media environment supplies information about local issues.<sup>451</sup> It finds little relationship between media market structure and consumers' knowledge about presidential and congressional candidates, interest in politics, or turnout at the polls.<sup>452</sup> The peer reviewer raised several

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<sup>445</sup> *Id.* at 11-17.

<sup>446</sup> *Id.* at 14.

<sup>447</sup> Media Ownership Study 6.

<sup>448</sup> *Id.* at 15-19.

<sup>449</sup> *Id.* at 29-30.

<sup>450</sup> Media Ownership Study 3, *How the Ownership Structure of Media Markets affects Civic Engagement and Political Knowledge, 2006-2008*, by Lynn Vavreck, Simon Jackman, and Jeffrey B. Lewis ("Media Ownership Study 3").

<sup>451</sup> *Id.* at 17-20, 54-55.

<sup>452</sup> *Id.* at 51-53, 78-79.



questions about the usefulness of these particular measures of civic knowledge and engagement.<sup>453</sup> Are the metrics reliable indicators of such characteristics? The study does find a relationship between political participation and political advertising on television.<sup>454</sup> Could there be a connection that Media Ownership Study 3 did not measure between market structure and a political candidate's decision to advertise in that market, which influenced civic knowledge and participation? We seek comment on these issues.

184. Finally, Media Ownership Study 2, discussed above in the Competition section, provides the Commission with information on the relative value consumers place on our diversity and localism goals. When examining the influence of market structure on consumer valuation, the study finds that the number of television voices does not have an impact on the consumer's perception of the amount of community news provided.<sup>455</sup> We note that the average consumer places a higher value on opinion diversity and local news content than on content diversity.<sup>456</sup> How should the Commission evaluate this trade-off? Is the valuation by the average consumer the most appropriate measure or should we look at the valuations broken down by demographic groups?

### C. Studies Relating to Diversity

185. In commissioning ownership studies on diversity, the Commission elected to measure the availability of news and civic engagement in local markets as it relates to local market structure in a variety of ways, as described below. We tentatively conclude that these metrics are appropriate to analyze diversity and seek comment on that conclusion, as well as the individual studies described below. Media Ownership Study 5 examines whether ownership structure impacts the availability and listenership of radio stations with a news format in local radio markets, as discussed above. Markets with more news formatted radio stations would be considered to have a greater level of program diversity. The study concludes there is no evidence that newspaper-radio cross-ownership increases news variety or listening.<sup>457</sup> As discussed above, the study provides weak evidence that an increase in the size of the largest local owner group is associated with an increase in the number of news stations and the number of commercial news varieties present in the market.<sup>458</sup> Are these format categories for news and information useful measures of program diversity?

186. We also assessed diversity in Media Ownership Study 2. The study analyzes the existing and preferred quantity of information of interest specifically to women and minorities, which it refers to as multiculturalism.<sup>459</sup> Analysis of the survey results allowed the researchers to estimate the value consumers place on increased amounts of this media market characteristic.<sup>460</sup> We tentatively conclude that what the study labeled as multiculturalism is a useful, though not singular, indicator of the level of program diversity in the market. The survey asked consumers about their media environments overall rather than the characteristics of a particular medium such as radio or television. When examining the

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<sup>453</sup> Peer Review of Study 3 of the FCC Media Ownership Studies, "Report to the FCC: How the Ownership Structure of Media Markets Affects Civic Engagement and Political Knowledge, 2006-2008," at 4, 6-8, by Scott L. Althaus.

<sup>454</sup> Media Ownership Study 3 at 51-53.

<sup>455</sup> See Media Ownership Study 2 at 88, Table 20.

<sup>456</sup> *Id.* at 40.

<sup>457</sup> Media Ownership Study 5 at 17.

<sup>458</sup> *Id.* at 14.

<sup>459</sup> Media Ownership Study 2 at 35-41.

<sup>460</sup> *Id.* at 40-41.

influence of market structure on consumer valuation, the study finds that the number of television voices has a significantly positive impact on consumers' valuation of opinion diversity and multiculturalism, even after accounting for the number of stations in the market.<sup>461</sup> Examining the effect of a combination of two television stations in a market, the study finds such a combination leads to a loss in average consumer welfare which is greater in smaller markets.<sup>462</sup> The study finds that the combination does benefit consumers due to a reduction in the perceived amount of advertising.<sup>463</sup> While the changes in consumer welfare from such a transaction vary significantly by market size for opinion diversity and advertising, the effect on multiculturalism varies substantially less by market size.<sup>464</sup> How should we assess consumers' satisfaction against the overall media environment when balancing the benefits of program diversity with any possible countervailing effects?

187. Media Ownership Study 8B directly measures the diversity of content by measuring the diversity of viewpoints discussed on local television news programs.<sup>465</sup> The study catalogs words used in broadcasts and then measures variation among stations in a market.<sup>466</sup> Viewpoint diversity in this study is considered in terms of diversity in discussions of political figures, issues, and local regions.<sup>467</sup> How should each of these measures of content diversity be weighted? The analysis is based on the content available in 37 large markets.<sup>468</sup> Would the results of this study likely hold in smaller markets? Can the findings for television news be generalized to other sources of news, such as radio and newspapers?

188. Media Ownership Study 9 is a theoretical and experimental study of the impact of market structure on the incentives of media outlets to withhold information from citizens when withholding could benefit the policy position the media owner favors.<sup>469</sup> In the past, many analyses of market structure and diversity have focused on the idea that, to ensure a wide range of viewpoints are provided, it is important to have multiple independent media outlets. The underlying presumption is that with many independent outlets it is likely that the decision makers for content transmission will have varying points of view and so varying points of view will be disseminated.

189. Media Ownership Study 9 emphasizes the importance for information transmission of having multiple outlets with the same viewpoint, with rivalry among outlets with similar viewpoints serving to prevent information withholding.<sup>470</sup> The theoretical model is an abstraction, beginning with two outlets and a single policy issue on which they can have differing viewpoints and adding additional outlets. One conclusion is that "competition within viewpoints dramatically enhances information revelation."<sup>471</sup> In the real world, there are of course multiple issues and likely more than two alternative viewpoints per issue. Nevertheless, the analysis is valuable because it provides strong support for having at least four independent media voices, since every issue has at least two viewpoints and two outlets per

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<sup>461</sup> See *id.* at 88, Table 20.

<sup>462</sup> *Id.* at 50-51.

<sup>463</sup> *Id.*

<sup>464</sup> See *id.* at 90, Table 22.

<sup>465</sup> Media Ownership Study 8B.

<sup>466</sup> *Id.* at 5.

<sup>467</sup> *Id.* at 5-8.

<sup>468</sup> *Id.* at 5.

<sup>469</sup> Media Ownership Study 9.

<sup>470</sup> *Id.* at 2, 45-47.

<sup>471</sup> *Id.* at 47.

viewpoint are needed in the model to ensure information regarding a viewpoint is not withheld. The experimental results are also suggestive, first because, broadly speaking, they confirm the theoretical predictions, but also because they indicate the market performance improves with additional media outlets, but that the marginal value (for information transmission) of additional outlets declines as the number of outlets increases. We seek comment on the validity of the theoretical model and the extent to which inferences based on it are relevant to our diversity analysis.

190. While Media Ownership Studies 5 and 8B focus on diversity measures relating to the content of the medium, Media Ownership Study 8A measures diversity of content by observing how consumers react to the content delivered to them.<sup>472</sup> Can consumer behavior provide a reliable indicator of the level of diversity? The study utilizes variations in viewing patterns of local television news programs as compared to local viewing patterns for national television news programs to develop a measure of diversity of content on local news programs.<sup>473</sup> The study compares the dispersion of the market shares of national news programs to the dispersion of the market shares of local news to benchmark the diversity offered by local news in a market.<sup>474</sup> It finds little correlation between viewpoint diversity and local market ownership structure.<sup>475</sup> We seek comment on these results.

191. Media Ownership Studies 1 and 5 measure the market share of local television news programs and news-formatted radio stations, respectively. Media Ownership Study 1 examines variations in viewing of local television news programming but finds little relationship to market structure.<sup>476</sup> Can these metrics also provide information about the diversity of content provided by the media in addition to satisfaction with the media? Will diverse content necessarily attract a larger audience than less diverse content, or is the effect contingent on the diversity of the population within the market? We seek comment on whether these two studies can provide additional information on the level of diversity in a local market.

192. Measures of civic engagement also can be used to assess the level of viewpoint diversity in a market. For instance, if media outlets in a market supply programming with a diverse range of viewpoints, consumers may be better informed, which can lead to increased local civic participation. As noted above, Media Ownership Study 3 provides data relevant to this analysis. It measures civic participation and knowledge. Does this metric also provide useful information about the level of viewpoint diversity in the market? Several measures examined by the study may have relevance to diversity depending on how consumers react to hearing diverse viewpoints. The study measures consumers' recognition of politicians.<sup>477</sup> Is it reasonable to conclude that markets where consumers are more likely to recognize the positions held by various politicians are markets in which more diverse information is available? We seek comment on the relevance of civic participation for measuring the level of viewpoint diversity in the market.

#### **D. Study Relating to Minority and Women Ownership Issues**

193. Media Ownership Study 7 considers the relationship between ownership structure and the provision of radio programming targeted to African-American and Hispanic audiences.<sup>478</sup> It provides

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<sup>472</sup> Media Ownership Study 8A.

<sup>473</sup> *Id.* at 8-13.

<sup>474</sup> *Id.*

<sup>475</sup> *Id.* at 22.

<sup>476</sup> Media Ownership Study 1 at 15.

<sup>477</sup> Media Ownership Study 3 at 54-78.

<sup>478</sup> Media Ownership Study 7 at 1.

mixed evidence on whether minority-owned radio stations better serve minority populations. This study looks at the provision of radio programming to minority (African-American and Hispanic) audiences, as reflected in the choices of radio stations to select formats that are popular with minority audiences.<sup>479</sup> It reflects that minority audiences—specifically Black and Hispanic listeners—have very different listening preferences from the majority non-Hispanic, White population.<sup>480</sup> For example, the study shows that a single programming format, Urban- attracts half of black listening, while it attracts less than five percent of nonblack listening.<sup>481</sup> The data also suggest that there is a positive relationship between minority ownership of radio stations and the total amount of minority-targeted radio programming available in a market— in other words, that minority-owned stations are more likely to provide programming targeted to minorities than are non-minority owned stations.<sup>482</sup> The data do not indicate a clear relationship between ownership concentration and the number of different radio formats in each market, although the cross-sectional analysis does suggest that ownership concentration promotes a greater number of formats in the market.<sup>483</sup> We seek comment on this study and on the appropriate application of its analysis to our policy goals. Are there other statistical studies available that we should consider, relating market structure and the promotion of content that is specifically of interest to minorities and women? Do such studies use statistical analysis of a reasonably large sample of markets? Are there individual market case studies available that are relevant and, if so, what role is there for such case studies in our deliberations?

## VI. ATTRIBUTION MATTERS

194. The Commission’s broadcast attribution rules define which financial or other interests in a licensee must be counted in applying the broadcast ownership rules. They seek to identify those interests in licensees that confer on their holders a degree of “influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions.”<sup>484</sup> Although we did not seek comment on attribution issues in the *NOI*, we do so now in order to address issues raised in the record regarding the impact, both positive and negative, of certain agreements on our ownership rules and fundamental policy goals.

195. We seek comment in particular regarding local news service (“LNS”) agreements and shared service agreements (“SSAs”). An LNS agreement is defined by commenters as an agreement in which multiple local broadcast television stations contribute certain news staff and equipment to a joint news gathering effort coordinated by a single managing editor.<sup>485</sup> According to commenters, an SSA is

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<sup>479</sup> *Id.*

<sup>480</sup> *Id.* at 8-9.

<sup>481</sup> *Id.* at 8.

<sup>482</sup> *Id.* 20-21, 24.

<sup>483</sup> *Id.* 22-23, 25.

<sup>484</sup> *Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, Report and Order, 14 FCC Rcd 12559, 12560, ¶ 1 (1999) (“1999 Attribution Order”), *recon. granted in part*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1097 (2001), *stayed*, Order, 16 FCC Rcd 22310 (2001).

<sup>485</sup> CWA Comments at 23; CWA Reply App. 1.1, CWA May 7, 2010 Comments, GN Docket No. 10-25, at 12 (“CWA Reply App. 1.1”); Free Press Comments at 10. CWA explains that under such an agreement a managing editor will determine which stories the LNS will cover and the resulting story produced by the LNS is then available for use by the participating stations. CWA Reply App. 1.1 at 12-13. CWA bases its description of LNSs on its review of a redacted copy of a Fox/CBS LNS agreement in the Boston market and a Fox/ABC LNS agreement in the Detroit market. *Id.* at 12. CWA believes these agreements to be representative of LNS agreements in general as Fox is a party to twelve of the seventeen LNSs identified by CWA. *Id.* CWA distinguishes these arrangements

an agreement, or series of agreements, in which one in-market station provides operational support and programming for another in-market station.<sup>486</sup> Public interest commenters contend that LNS agreements and SSAs result in fewer independent voices and less local news content and could be used to circumvent our rules.<sup>487</sup> On the other hand, broadcasters assert that these agreements facilitate greater collaboration between media outlets and permit stations to sustain labor intensive journalism, thereby offering more communities access to local news content than could otherwise be achieved.<sup>488</sup>

196. *Background.* Our attribution rules currently make attributable certain local marketing agreements (“LMAs”), also referred to as time brokerage agreements (“TBAs”), in which a broker purchases discrete blocks of time from a licensee and supplies programming and sells advertising for the purchased time.<sup>489</sup> Certain joint sales agreements (“JSAs”), which “involve primarily the sale of advertising time and not decisions concerning programming,” are also subject to attribution.<sup>490</sup> These agreements are not precluded by any Commission rule or policy as long as the Commission’s ownership rules are not violated and the participating licensees maintain ultimate control over their facilities.

197. The Commission first adopted attribution rules for same-market radio LMAs in 1992.<sup>491</sup> The Commission was concerned that absent such rules significant time brokerage under such agreements, combined with increased common ownership permitted by revised local radio ownership rules, could undermine the Commission’s competition and diversity goals.<sup>492</sup> In 1999, the Commission adopted attribution rules for television LMAs, finding that the rationale for attributing same-market radio LMAs applied equally to same-market television LMAs, but declined to adopt attribution rules for radio or television JSAs.<sup>493</sup> However, the Commission, in its *2002 Biennial Report and Order*, adopted attribution rules for same-market radio JSAs, finding that JSAs may convey sufficient influence and control over advertising to merit attribution.<sup>494</sup> Subsequently, in 2004, the Commission initiated a rulemaking to determine whether or not to adopt attribution rules for television JSAs; the Commission tentatively

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from, and does not have issue with, traditional “pool” coverage of events, which is done to accommodate a lack of physical space for multiple news crews. *Id.* at 13.

<sup>486</sup> CWA Reply App. 1.1 at 3; Free Press Comments at 10-11.

<sup>487</sup> CWA Comments at 32-33; CWA Reply App. 1.1 at 18-19.

<sup>488</sup> *See, e.g.*, Gray Comments at 14; Local TV Coalition Reply at 7; NAB Comments at 84; Nexstar Comments at 19.

<sup>489</sup> 47 C.F.R. § 73.3555, Note 2(j); *see also Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, MB Docket No. 04-256, Notice of Proposed Rulemaking, 19 FCC Rcd 15238, 15239, ¶ 4 n.7 (2004) (“*2004 TV JSA Attribution NPRM*”).

<sup>490</sup> 47 C.F.R. § 73.3555, Note 2(k); *see also Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, MM Docket No. 01-317, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19861, 19894, ¶ 82 (2001) (“*Multiple Ownership of Radio Broadcast Stations in Local Markets*”).

<sup>491</sup> *1992 Radio Ownership Order*, 7 FCC Rcd at 2788-89, ¶¶ 64-67.

<sup>492</sup> *Id.* at 2788-89, ¶¶ 64-66.

<sup>493</sup> *1999 Attribution Order*, 14 FCC Rcd at 12597, 12612, ¶¶ 83, 122.

<sup>494</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13745, ¶¶ 321-322. Comment on attribution of radio JSAs was not sought as part of the then biennial media ownership review proceeding, instead it had been sought in a separate proceeding regarding the local radio ownership rules (MM Docket No. 01-317) that was subsequently consolidated with the 2002 biennial media ownership review proceeding. *Id.* at 13743, ¶ 316 n.688; *see also Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd at 19894, ¶ 83. Since no comment had been sought on attribution of television JSAs, the Commission declined to adopt any attribution rules for television JSAs in the *2002 Biennial Review Order*. *2002 Biennial Review Order*, 18 FCC Rcd at 13743, ¶ 316 n.688.

concluded that it should.<sup>495</sup> No decision has been issued in that proceeding.<sup>496</sup>

198. *Potential Concerns.* CWA and Free Press object to LNS agreements because they believe that collaboration under LNS agreements harms competition and reduces the amount of independently produced local news programming available to consumers.<sup>497</sup> These commenters are concerned that stations will be unable to devote sufficient resources to independent journalism as a result of the staff reductions and resource sharing resulting from the creation of an LNS.<sup>498</sup> CWA also is concerned that consolidating newsgathering and editorial control reduces diversity and in-depth coverage of local news.<sup>499</sup> Because stations are reporting the same story, CWA argues, viewers are exposed only to a single perspective on every story covered by the LNS.<sup>500</sup> Moreover, CWA suggests that increased communication between stations could lead to antitrust law violations.<sup>501</sup>

199. CWA and Free Press also object to SSAs, particularly those that allow a single station to produce the news content for multiple stations in a local market.<sup>502</sup> According to these commenters, such agreements result in “re-run” content being broadcast over multiple newscasts, thereby reducing the number of independent voices available in the local community.<sup>503</sup> Furthermore, these commenters assert that the staff reductions that typically accompany SSAs reduce the quality, quantity, and diversity of local news coverage.<sup>504</sup>

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<sup>495</sup> 2004 TV JSA Attribution NPRM, 19 FCC Rcd at 15239, ¶ 2.

<sup>496</sup> We also note that changes to certain other of the Commission’s cable and broadcast attribution rules, not impacted here, are currently under consideration in a separate proceeding. See *The Commission’s Cable Horizontal and Vertical Ownership Limits*, MM Docket No. 92-264, Fourth Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, 2136, ¶ 3 (2008) (“seek[ing] further comment on (1) whether to retain the single majority shareholder attribution exemption, which currently applies to the cable and broadcast ownership rules; (2) whether, under the cable attribution rules, a limited partner may sell programming to the partnership and retain insulation; and (3) whether the Commission should clarify certain aspects of the cable Equity Debt (“ED”) attribution rule, as it did for the broadcast Equity/Debt Plus attribution rule”).

<sup>497</sup> CWA Comments at 19; CWA Reply App. 1.1 at 9-11, 14-17; Free Press Comments at 10-12. CWA recommends we adopt certain disclosure requirements for LNS agreements. CWA Reply App. 1.1 at 24-26.

<sup>498</sup> CWA Comments at 24-25; CWA Reply App. 1.1 at 14; Free Press Comments at 9-12. In the Philadelphia, Pennsylvania market, for example, CWA cites to a Fox/NBC LNS, in which the stations contribute 25 newsroom staff to the LNS, approximately 20 percent of the available personnel in each station’s newsroom. CWA Reply App. 1.1 at 14-15. Moreover, CWA claims that local Fox station, KTTV, dismissed 120 people when the station commenced its LNS in the Los Angeles, California market. CWA Comments at 23; CWA Reply App. 1.1 at 11.

<sup>499</sup> CWA Comments at 24-25; CWA Reply App. 1.1 at 15.

<sup>500</sup> CWA Reply App. 1.1 at 16. In the Austin, Texas market, CWA criticizes an LNS, which consists of the local affiliates of ABC, CBS, NBC, Fox, and MyNetwork. *Id.* at 15-16. CWA also cites to a recent finding that the overall depth of coverage on routine stories – those typically covered by LNSs – is on the decline; CWA is concerned that an increase in reliance on LNSs will accelerate this decline to the detriment of local viewers. *Id.* at 16.

<sup>501</sup> *Id.* at 15-16.

<sup>502</sup> CWA Comments at 22-23; CWA Reply App. 1.1 at 9-10; Free Press Comments at 10-11. CWA asks the Commission to adopt changes to the attribution rules to make SSAs, particularly those that involve outsourcing local news operations, attributable and to act on pending matters involving SSAs and allegations of unauthorized transfer of control. CWA Reply App. 1.1 at 19-24.

<sup>503</sup> CWA Comments at 22-23; CWA Reply App. 1.1 at 9-10; Free Press Comments at 10-11.

<sup>504</sup> CWA Comments at 22; CWA Reply App. 1.1 at 10; Free Press Comments at 11-12. They note that significant layoffs occurred following the execution of SSAs in the Honolulu, Syracuse, and Peoria-Bloomington markets.

200. CWA and Free Press object to SSAs also because they believe broadcasters may be using them to circumvent the Commission's multiple ownership rules.<sup>505</sup> CWA suggests that SSAs contain very similar provisions to LMAs and JSAs, which are attributable under certain conditions under the Commission's multiple ownership rules.<sup>506</sup> For instance, like many LMAs and JSAs, SSAs may involve the sharing of facilities, advertising sales personnel, news production, and certain station operations, and options to purchase the brokered station.<sup>507</sup> CWA opposes broadcasters using SSAs to outsource (or broker) newscasts, in asserted circumvention of the Commission's attribution rules.<sup>508</sup> According to CWA, news programming accounts for an average of 45 percent of a station's revenue; therefore, a brokering station can unfairly acquire a significant portion of the economic benefit generated by the brokered station without triggering the attribution rules.<sup>509</sup> In addition, the American Cable Association ("ACA") argues that both SSAs and LMAs harm local competition particularly when they permit stations to jointly negotiate retransmission consent. ACA argues that such arrangements permit local broadcast stations to exercise additional leverage with respect to MVPDs leading to higher fees for signal carriage, which are passed on to consumers in the form of higher rates.<sup>510</sup> ACA suggests that broadcasters should be precluded from including collective negotiation of retransmission consent in SSAs or LMAs, particularly with respect to the four top-rated local stations.<sup>511</sup>

201. *Potential Benefits.* On the other hand, broadcasters assert that sharing arrangements (including LNS agreements, LMAs, SSAs, and JSAs) are beneficial to local media markets, generating local news and other services that would not be possible otherwise.<sup>512</sup> Gray asserts that, because of the considerable cost savings associated with its sharing agreements, it can invest in the development of multicast programming streams, mobile video applications, and other uses of the broadcast spectrum.<sup>513</sup>

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CWA Comments at 22; CWA Reply App. 1.1 at 9-10. In addition, in the Honolulu market, CWA asserts that pursuant to an SSA, the NBC, CBS, and MyNetwork local broadcast affiliates do not originate any news programming, but obtain news from Raycom Media. CWA Comments at 21; CWA Reply App. 1.1 at 7. Professor Danilo Yanich conducted a study of the Honolulu market to determine the impact of this SSA on the newscasts in the local market. See Danilo Yanich, Local TV & Shared Services Agreements: Examining News Content in Honolulu (Feb. 2011), available at <http://mediacouncil.org/wp/resources/SharedServicesStudy.pdf>. By comparing newscasts from before and after the SSA was implemented in October 2009, Professor Yanich determined that the SSA resulted in a reduction in independent news voices in the market (as multiple stations now simulcast the same newscasts) and that the claimed increases in news content from common operation did not materialize. *Id.* at 28-29.

<sup>505</sup> CWA Comments at 19-20; CWA Reply App. 1.1 at 10; Free Press Comments at 13-14.

<sup>506</sup> CWA Comments at 21; CWA Reply App. 1.1 at 6.

<sup>507</sup> CWA Reply App. 1.1 at 6; Free Press Comments at 10.

<sup>508</sup> CWA Comments at 20-21 (citing BOB PAPPER, RADIO TELEVISION DIGITAL NEWS ASS'N, TV AND RADIO STAFFING AND NEWS PROFITABILITY SURVEY 2009 (2009) ("RTNDA Survey"), available at <http://www.rtdna.org/media/pdfs/research/TV%20and%20Radio%20Staffing%20and%20Profitability.pdf>); CWA Reply App. 1.1 at 7 (citing RTNDA Survey). CWA states that the RTNDA Survey found that the amount of local news programming across all markets averaged 26.4 hours per week (approximately 15.7 percent of total airtime). CWA Comments at 20-21; CWA Reply App. 1.1 at 7. Stations in DMAs 101-150 were found to average 22.9 hours per week (approximately 13.6 percent of total airtime). CWA Comments at 20-21; CWA Reply App. 1.1 at 7. Ultimately, many stations could completely outsource their news operation without exceeding the 15 percent attribution threshold. CWA Comments at 20-21; CWA Reply App. 1.1 at 7; see also 47 C.F.R. § 73.3555, Note 2(j).

<sup>509</sup> CWA Comments at 20-21; CWA Reply App. 1.1 at 7.

<sup>510</sup> ACA Comments at 2,

<sup>511</sup> *Id.* at 11, 21.

<sup>512</sup> Local TV Coalition Reply at 7; Gray Comments at 14; NAB Comments at 84; Nexstar Comments at 19.

<sup>513</sup> Gray Comments at 14-15.

The Local TV Coalition and Nexstar note that the Commission has long held that sharing agreements (e.g., JSAs) generate efficiencies and serve the public interest.<sup>514</sup>

202. According to the Local TV Coalition and TTBG, sharing agreements can be particularly important in small and mid-sized markets.<sup>515</sup> The Coalition asserts that the advertising revenue available in most small and mid-sized markets is insufficient to support four stand-alone broadcast television news operations.<sup>516</sup> In such markets, the Coalition states, broadcasters budget an average of approximately \$1.8 million per year for the capital and operating expenses associated with local news production.<sup>517</sup> The Local TV Coalition notes that unprofitable news operations, like any unprofitable business venture, likely will be eliminated over time.<sup>518</sup> The Local TV Coalition submits an analysis of 20 small and mid-sized markets, which it asserts shows that one or more news operations would have been lost without the existence of shared services agreements or common ownership of local stations.<sup>519</sup>

203. In addition, the Local TV Coalition provides numerous examples of claimed public interest benefits from sharing agreements. For example, in the Burlington, Vermont–Plattsburgh, New York market, the local Fox affiliate and the local ABC affiliate entered into a JSA and a SSA in 2005.<sup>520</sup> Prior to entering into these agreements, the Fox station had never aired a local newscast and the ABC station had discontinued its news operation and fired 25 staffers.<sup>521</sup> Since concluding the sharing agreements, the Fox station now produces newscasts for both stations, resulting in 28 new jobs.<sup>522</sup> NAB also submits examples of broadcast television stations that increased local news programming as a result of sharing agreements.<sup>523</sup> Nexstar states that sharing agreements have enabled it to increase news coverage in the Lubbock, Texas and the Peoria-Bloomington, Illinois markets, and as a result it has launched a nightly newscast in various markets across five states that previously had no local news coverage.<sup>524</sup> Nexstar asserts that any layoffs associated with these agreements typically involve back-office staff and not news personnel.<sup>525</sup> It also asserts that any layoffs of redundant news personnel permit local broadcasters to

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<sup>514</sup> Local TV Coalition Reply at 21-22; Nexstar Reply at 14.

<sup>515</sup> Local TV Coalition Reply at 7; TTBG Reply at 4.

<sup>516</sup> Local TV Coalition Reply at 7.

<sup>517</sup> *Id.* at 8.

<sup>518</sup> *Id.* at 7.

<sup>519</sup> Local TV Coalition Reply App. A; *see also* Local TV Coalition Reply at 9-11. For example, in the Springfield, Missouri market, the Local TV Coalition states that without the existing SSA, two of the top-four stations would have experienced significant losses in 2010 from news operations. Local TV Coalition Reply at 10; Local TV Coalition Reply App. A at 1. In order to keep the news operations profitable, the stations entered into an SSA with a “stronger” affiliate. Local TV Coalition Reply at 10; *see also* Local TV Coalition Reply App. A at 1.

<sup>520</sup> Local TV Coalition Reply at 12.

<sup>521</sup> *Id.*

<sup>522</sup> *Id.* The Coalition asserts that this news operation, and the resulting jobs, would not be possible without the JSA and SSA. *Id.* For additional examples of markets where the Coalition asserts that sharing agreements have produced public interest benefits, *see id.* at 12-20.

<sup>523</sup> NAB Comments Att. B at 26. For example, NAB states that pursuant to a JSA, a station in DMA 101-150 produces 19.5 hours per week of local news for another in-market station and a station in DMA 50-100 produces a daily newscast for another local station. *Id.*

<sup>524</sup> Nexstar Reply at 6, 11-12.

<sup>525</sup> *Id.* at 12.



invest more money in news production and other local programming.<sup>526</sup> Broadcasters state that issues concerning the joint negotiation of retransmission consent fees should be addressed in the Commission's retransmission consent proceeding, and not in the media ownership proceeding.<sup>527</sup> Ultimately, broadcasters oppose any additional regulation of sharing agreements.<sup>528</sup>

204. *Request for Comment.* Are LNS agreements and SSAs substantively equivalent to agreements that are already subject to our attribution rules, and are they therefore attributable today or should they be attributable?<sup>529</sup> What characteristics make them different from already attributable agreements? How, if at all, do LNS agreements and SSAs create interests in licensees that confer a degree of "influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions"?<sup>530</sup> What is the impact of agreements such as LNS agreements and SSAs on our competition, localism, and diversity goals? Does either of these types of agreements have a greater impact on our policy goals than the other? If so, what characteristics account for the disparity in impact? Should we, and if so how, consider the impact of these agreements on our policy goals when formulating our ownership rules?

205. If we determine that LNS agreements and/or SSAs should be attributable, how should we define LNS agreements and SSAs and what attribution standard should we adopt? If we adopt new attribution rules, should existing agreements be grandfathered? If so, how should the grandfathering be structured? If not, how long should broadcasters have to comply with the new attribution rules? If we determine that these arrangements should not be attributable, should we adopt disclosure requirements? If so, what disclosure should be required?<sup>531</sup> Such disclosures could help viewers determine the origin of news content and help the Commission monitor the proliferation of such agreements and determine whether to revisit the issue of attribution.

206. What benefits accrue from stations entering into LNS agreements or SSAs? What would be the impact of a rule that would lead to the attribution of LNS agreements or SSAs? If these agreements result in attribution, what would be the effect, if any, on the cost to produce local news, the ability to employ journalists, and the overall quality of news programming? Is it possible that, without such agreements, local news coverage could be reduced or that some stations will cease news production?

207. Instead of focusing on attributing certain named agreements (*e.g.*, JSAs, LMAs, SSAs, LNS agreements) as we have in the past, should we adopt a broader regulatory scheme that encompasses

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<sup>526</sup> *Id.* at 12. Nexstar also states that the airing of commonly produced newscasts does not result in running the same news on multiple broadcast stations. *Id.*

<sup>527</sup> Coalition Reply at 2-3; Fox Reply at 2; Gray Reply at 1-2; NAB Reply at 28, 31; Nexstar Reply at 14. *See also Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, Public Notice, 25 FCC Rcd 2731 (MB, 2010) ("Retransmission Consent Proceeding").

<sup>528</sup> Local TV Coalition Reply at 21; Gray Comments at 15; NAB Comments at 84; Nexstar Reply at 10; TTBG Reply at 4. The Local TV Coalition also argues that the media ownership proceeding is not the appropriate venue to consider attribution issues. Local TV Coalition Reply at 23 (noting that attribution of JSAs to broadcast television stations is currently under consideration by the Commission in MB Docket No. 04-256).

<sup>529</sup> *See Shareholders of the Ackerley Group, Inc. (Transferor) and Clear Channel Communications, Inc. (Transferee) For Transfer of Control of the Ackerley Group, Inc. and Certain Subsidiaries*, Memorandum Opinion and Order, 17 FCC Rcd 10828, 10841, ¶ 33 (2002) (finding that the combination of a non-attributable radio TBA and a radio JSA, not subject to any attribution rules at the time, were "substantively equivalent" to an LMA for more than 15 percent of the station's weekly broadcast time and were therefore attributable).

<sup>530</sup> *1999 Attribution Order*, 14 FCC Rcd at 12560, ¶ 1.

<sup>531</sup> *See, e.g.*, CWA Comments at 33-35; CWA Reply App. 1.1 at 24-26.

all agreements, however styled, that relate to the programming and/or operation of broadcast stations?<sup>532</sup> If so, how should we define the covered agreements and structure this regulatory scheme? What characteristics of such agreements are most likely to confer a degree of “influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions?”<sup>533</sup> Should we consider the impact of these agreements on other matters of Commission interest, such as retransmission consent negotiations? Or are these issues more appropriately considered in another context, such as the retransmission proceeding?<sup>534</sup>

208. We strongly encourage parties to existing agreements of all of these types to respond to this request for comment and to provide any other information they think is relevant. It is critical that the Commission obtain accurate information on how these agreements operate in order to make a reasoned decision on what, if any, changes should be made to the Commission’s attribution rules.

## VII. PROCEDURAL MATTERS

### A. Regulatory Flexibility Act

209. As required by the Regulatory Flexibility Act,<sup>535</sup> the Commission has prepared an Initial Regulatory Flexibility Analysis (“IRFA”) of the possible significant economic impact on small entities of the policies and rules addressed in this NPRM. The IRFA is set forth in Appendix C. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the NPRM, and should have a separate and distinct heading designating them as responses to the IRFA.

### B. Paperwork Reduction Act Analysis

210. *Initial Paperwork Reduction Act Analysis.* This NPRM may result in a new or revised information collection requirement. If the Commission adopts any new or revised information collection requirement, the Commission will publish a notice in the Federal Register inviting the public to comment on the requirement, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3501-3520). In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

### C. Ex Parte Rules

211. *Permit-But-Disclose.* The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>536</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made

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<sup>532</sup> For instance, the Commission previously sought comment on whether to attribute television JSAs. *Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, MB Docket No. 04-265, Order, 19 FCC Rcd 18166 (Med. Bur. 2004).

<sup>533</sup> *1999 Attribution Order*, 14 FCC Rcd at 12560, ¶ 1.

<sup>534</sup> *See Retransmission Consent Proceeding*.

<sup>535</sup> *See* 5 U.S.C. § 603.

<sup>536</sup> 47 C.F.R. §§ 1.1200 *et seq.*

during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

#### D. Comment Filing Procedures

212. *Comments and Replies.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12<sup>th</sup> St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington DC 20554.

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

214. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., CY-A257, Washington, D.C., 20554. These

documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

215. *Availability of Additional Information Regarding Media Ownership Studies.* The Commission has made available additional information pertaining to the media ownership studies, which are listed in Appendix A. A number of the authors of the media ownership studies created data sets using proprietary information licensed to the author or the Commission. The data sets, as well as related materials necessary to replicate the studies' analyses, including market data provided to the authors of the studies as "Government Furnished Information," are available for review and inspection by interested parties in the public reference room at the FCC's headquarters (Room CY-A251, 445 12<sup>th</sup> Street, SW, Washington, D.C.) consistent with procedures contained in the Protective Order.<sup>537</sup> Prior to reviewing the proprietary data sets, parties are required to sign and submit the Declaration, which was released as part of the Protective Order. Parties also may be able to obtain licenses from licensors of the underlying proprietary data to evaluate the results of the studies and/or to develop other studies that will contribute to the record in this proceeding.

216. *Information.* For additional information on this proceeding, contact Hillary DeNigro or Benjamin Arden of the Industry Analysis Division, Media Bureau, at (202) 418-2330.

### VIII. ORDERING CLAUSE

217. 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.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>537</sup> 2010 Quadrennial Review Protective Order, 26 FCC Rcd at 8474.

**APPENDIX A****Media Ownership Studies**

Media Ownership Study 1, Local Media Ownership and Media Quality, by Adam D. Rennhoff and Kenneth C. Wilbur

Media Ownership Study 2, Consumer Valuation of Media as a Function of Local Market Structure, by Scott J. Savage and Donald M. Waldman

Media Ownership Study 3, How the Ownership Structure of Media Markets affects Civic Engagement and Political Knowledge, 2006-2008, by Lynn Vavreck, Simon Jackman, and Jeffrey B. Lewis

Media Ownership Study 4, Local Information Programming and the Structure of Television Markets, by Jack Erb

Media Ownership Study 5, Station Ownership and the Provision and Consumption of Radio News, by Joel Waldfogel

Media Ownership Study 6, Less of the Same: The Lack of Local News on the Internet, by Matthew Hindman

Media Ownership Study 7, Radio Station Ownership Structure and the Provision of Programming to Minority Audiences: Evidence from 2005- 2009, by Joel Waldfogel

Media Ownership Study 8A, Local Media Ownership and Viewpoint Diversity in Local Television News, by Adam D. Rennhoff and Kenneth C. Wilbur

Media Ownership Study 8B, Diversity in Local Television News, by Lisa M. George and Felix Oberholzer-Gee

Media Ownership Study 9, A Theoretical Analysis of the Impact of Local Market Structure on the Range of Viewpoints Supplied, by Isabelle Brocas, Juan D. Carrillo, and Simon Wilkie

Media Ownership Study 10, Broadcast Ownership Rules and Innovation, by Andrew S. Wise

**APPENDIX B****Proposed Rules**

The Federal Communications Commission proposes to amend Part 73 of Title 47 of the Code of Federal Regulations (CFR) as set forth below:

**PART 73—Radio Broadcast Services**

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

AUTHORITY: 47 U.S.C. 154, 303, 334 and 336

2. Amend § 73.3555 by removing and reserving paragraph (c) and revising paragraphs (b) and (d) to read as follows:

**§ 73.3555 Multiple ownership.**

\* \* \* \* \*

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

(1) At the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day (9:00 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(2) At least 8 independently owned and operating, full-power commercial and noncommercial TV stations would remain post-merger in the DMA in which the communities of license of the TV stations in question are located. Count only those TV stations with a community of license in the same DMA as the stations in the proposed combination. In areas where there is no Nielsen DMA, count the TV stations present in an area that would be the functional equivalent of a TV market. Count only those TV stations with a community of license in the same area that would be the functional equivalent of a TV market as the stations in the proposed combination.

(c) [Reserved]

(d) Daily newspaper-broadcast cross-ownership rule. (1) No license for a full power AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in: (i) the TV station's community of license and the entire community in which the newspaper is published being located within the same Nielsen DMA; (ii) the predicted or measured 2 mV/m contour of an AM station, computed in accordance with Sec. 73.183 or Sec. 73.186, encompassing the entire community in which such newspaper is published; or (iii) the predicted 1 mV/m contour for an FM station, computed in accordance with Sec. 73.313, encompassing the entire community in which such newspaper is published.

(2) There is a presumption that it is consistent with the public interest, convenience, and necessity for an entity to own, operate or control in a top 20 Nielsen DMA a daily newspaper and (1) a full power radio

station, or (2) a full-power TV broadcast station provided that, (i) the TV station is not ranked among the top four TV stations in the DMA, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and (ii) at least 8 independently owned and operating major media voices would remain in the DMA in which the community of license of the TV station in question is located (for purposes of this provision major media voices include full-power TV broadcast stations and major newspapers).

(4) There is a presumption that it is inconsistent with the public interest, convenience, and necessity for an entity to own, operate or control in a DMA other than the top 20 Nielsen DMAs a daily newspaper and a full-power TV broadcast station in the same DMA as the newspaper's community of publication, or a commercial AM or FM broadcast station as defined in paragraph (d)(1) of this section.

\* \* \* \* \*

## APPENDIX C

## Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act (RFA),<sup>1</sup> the Commission has prepared this 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 (NPRM). 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 provided on the first page of this NPRM. The Commission will send a copy of this NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

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

2. Pursuant to our statutory mandate under the Telecommunications Act of 1996,<sup>4</sup> the NPRM seeks comment on the Commission's media ownership rules and proposed changes thereto. As discussed in the NPRM, we are required by statute to review our media ownership rules every four years to determine whether they "are necessary in the public interest as the result of competition."<sup>5</sup> The NPRM discusses the local television ownership rule, the local radio ownership rule, the newspaper/broadcast cross-ownership rule, the radio/television cross-ownership rule, and the dual network rule. Our challenge in this proceeding is to take account of new technologies and changing marketplace conditions while ensuring that our media ownership rules continue to serve our public interest goals of competition, localism, and diversity. The NPRM also seeks comment on economic studies analyzing the relationship between local media market structure and the policy goals that underlie the Commission's media ownership rules. In addition, the NPRM seeks comment in this proceeding on the aspects of the Commission's 2008 *Diversity Order*<sup>6</sup> that the Third Circuit remanded in *Prometheus II*.<sup>7</sup>

3. We find that the public interest is best served by modest, incremental changes to our rules.

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<sup>1</sup> 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).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

<sup>4</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996) ("1996 Act"); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) ("Appropriations Act") (amending Sections 202(c) and 202(h) of the 1996 Act). The media ownership rules subject to this quadrennial review are the local television ownership rule, the local radio ownership rule, the newspaper/broadcast cross-ownership rule, the radio/television cross-ownership rule, and the dual network rule.

<sup>5</sup> Section 202(h) of the 1996 Act, 47 U.S.C. § 303 note. Section 202(h) of the 1996 Act further requires the Commission to "repeal or modify any regulation it determines to be no longer in the public interest." *Id.* In *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) ("*Prometheus I*"), the Third Circuit concluded that "necessary in the public interest" is a "plain public interest" standard under which "necessary" means "convenient," "useful," or "helpful," not "essential" or "indispensable." *Id.* at 394. The court stated that "the first instruction [of § 202(h)] requires the Commission to take a fresh look at its regulations periodically in order to ensure that they remain 'necessary in the public interest.'" *Id.* at 391. In 2004, Congress revised the then-biennial review requirement to require such reviews quadrennially. See Appropriations Act § 629, 118 Stat. at 100.

<sup>6</sup> *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008) ("*Diversity Order*" and "*Diversity Third FNPRM*").

<sup>7</sup> *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) ("*Prometheus II*").



Recognizing current market realities, the NPRM seeks comment on the following proposals:

- *Local Television Ownership Rule.* In the NPRM, we tentatively conclude that we should retain the current local television ownership rule with minor modifications. Specifically, the NPRM proposes to eliminate the Grade B contour overlap provision of the current rule. We tentatively conclude that we should retain the prohibition against mergers among the top-four-rated stations, the eight-voices test, and the existing numerical limits. In addition, the NPRM seeks comment on whether to adopt a waiver standard applicable to small markets, as well as appropriate criteria for any such standard. Also, the NPRM seeks comment on whether multicasting should be a factor in determining the television ownership limits.
- *Local Radio Ownership Rule.* The NPRM proposes to retain the current local radio ownership rule. The NPRM also seeks comment on alternative modifications to the rule and whether and how the rule should account for other audio platforms. The NPRM also proposes to retain the AM/FM subcaps, and seeks comment on the impact of digital radio. The NPRM seeks comment on whether to adopt a waiver standard and on specific criteria to adopt.
- *Newspaper/Broadcast Cross-Ownership Rule.* In the NPRM, we tentatively conclude that some newspaper/broadcast cross-ownership restrictions continue to be necessary to protect and promote viewpoint diversity. The NPRM proposes to use Nielsen DMA definitions to determine the relevant market area for television stations, given the lack of a digital equivalent to the analog Grade A service contour. The NPRM proposes to adopt a rule that includes elements of the 2006 rule, including the top 20 DMA demarcation point, the top-four television station restriction, and the eight remaining voices test.
- *Radio/Television Cross-Ownership Rule.* The NPRM proposes to eliminate the radio/television cross-ownership rule in favor of reliance on the local radio rule and local television rule. We believe that the local radio and television ownership rules adequately protect our localism and diversity goals and tentatively conclude that eliminating this rule is not likely to lead to significant additional consolidation of broadcast facilities. The NPRM seeks comment on this.
- *Dual Network Rule.* In the NPRM, we tentatively conclude that the dual network rule remains necessary in the public interest to promote competition and localism and should be retained without modification.
- *Diversity Order Remand/Eligible Entity Definition.* We seek comment in this NPRM on issues that previously were being addressed in a separate rulemaking proceeding focused on enhancing the diversity of ownership in the broadcast industry, including by increasing ownership opportunities for minorities and women. As explained in the NPRM, the Third Circuit in *Prometheus II* remanded the measures adopted in the Commission's 2008 *Diversity Order* that relied on a revenue-based "eligible entity" standard<sup>8</sup> and emphasized that the actions required on remand from the *Diversity Order* should be completed "within the course of the Commission's 2010 Quadrennial Review of its media ownership rules."<sup>9</sup> Accordingly, we seek comment in this proceeding on how the Commission should respond to the court's remand and on other actions we should consider to increase the level of broadcast station ownership by minorities and women.

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<sup>8</sup> These measures include: (1) Revisions of Rules Regarding Construction Permit Deadlines; (2) Modification of Attribution Rules; (3) Distress Sale Policy; (4) Duopoly Priority for Companies that Finance or Incubate and Eligible Entity; (5) Extension of Divestiture Deadline in Certain Mergers; and (6) Transfer of Grandfathered Radio Station Combinations to Non-Eligible Entities. *Diversity Order*, 23 FCC Rcd at 5931, 5936, 5939, 5943-45, ¶¶ 15.31, 39, 56-61; *see also Prometheus II*.

<sup>9</sup> *Prometheus II*, 652 F.3d at 472.

## B. Legal Basis

4. The proposed action is authorized under 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.

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

5. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>10</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>11</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>12</sup> 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.<sup>13</sup>

6. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than \$14.0 million in annual receipts.<sup>14</sup> Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”<sup>15</sup> The Commission has estimated the number of licensed commercial television stations to be 1,382.<sup>16</sup> According to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) as of October 3, 2011, 950 (or about 73 percent) of an estimated 1,301 commercial television stations<sup>17</sup> in the United States have revenues of \$14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial

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<sup>10</sup> 5 U.S.C. § 603(b)(3).

<sup>11</sup> 5 U.S.C. § 601(6).

<sup>12</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the 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.” 5 U.S.C. § 601(3).

<sup>13</sup> 15 U.S.C. § 632.

<sup>14</sup> See 13 C.F.R. § 121.201 (NAICS Code 515120).

<sup>15</sup> U.S. Census Bureau, *2002 NAICS Definitions*, <http://www.census.gov/epcd/naics02/def/NDEF515.HTM> (visited Oct. 19, 2011). This category description continues, “These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.” *Id.* Separate census categories pertain to businesses primarily engaged in producing programming (e.g., Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199). 13 C.F.R. § 121.201.

<sup>16</sup> See *Broadcast Station Totals as of March 31, 2011*, Press Release (MB, rel. May 16, 2011) (“*March 31, 2011 Broadcast Station Totals Press Release*”), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-306575A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-306575A1.pdf).

<sup>17</sup> We recognize that this total differs slightly from that contained in the *March 31, 2011 Broadcast Station Totals Press Release*; however, we are using BIA’s estimate for purposes of this revenue comparison.

educational (“NCE”) television stations to be 392.<sup>18</sup> We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations<sup>19</sup> 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. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

7. 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 television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

8. *Radio Broadcasting.* The proposed policies could apply to radio broadcast licensees, and potential licensees of radio service. The SBA defines a radio broadcast station as a small business if such station has no more than \$7 million in annual receipts.<sup>20</sup> Business concerns included in this industry are those primarily engaged in broadcasting aural programs by radio to the public.<sup>21</sup> According to Commission staff review of the BIA Publications, Inc. Master Access Radio Analyzer Database on as of October 3, 2011, about 10,783 (97 percent) of 11,125 commercial radio stations have revenues of \$7 million or less and thus qualify as small entities under the SBA definition. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations<sup>22</sup> 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.

9. 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 rules may apply does not exclude any radio station from the definition of a small business on this basis and therefore may be over-inclusive to that extent. Also, as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

10. *Daily Newspapers.* The SBA has developed a small business size standard for the census category of Newspaper Publishers; that size standard is 500 or fewer employees.<sup>23</sup> Census Bureau data

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<sup>18</sup> See March 31, 2011 Broadcast Station Totals Press Release.

<sup>19</sup> “[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 C.F.R. § 121.103(a)(1).

<sup>20</sup> See *id.* at § 121.201 (NAICS Code 515112).

<sup>21</sup> U.S. Census Bureau, 2002 NAICS Definitions, <http://www.census.gov/epcd/naics02/def/NDEF515.HTM> (visited Oct. 19, 2011).

<sup>22</sup> “[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 C.F.R. § 121.103(a)(1).

<sup>23</sup> *Id.* at § 121.201 (NAICS code 511110).

for 2007 show that there were 4,852 firms in this category that operated for the entire year.<sup>24</sup> Of this total, 4,771 firms had employment of 499 or fewer employees, and an additional 33 firms had employment of 500 to 999 employees. Therefore, we estimate that the majority of Newspaper Publishers are small entities that might be affected by our action.

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

11. The NPRM proposes a number of rule changes that will affect reporting, recordkeeping and other compliance requirements. Each of these changes is described below.

12. The NPRM proposes modifications to several of the media ownership rules as set forth in Paragraph 3 above. The proposals, if ultimately adopted, would modify several FCC forms and their instructions: (1) FCC Form 301, Application for Construction Permit For Commercial Broadcast Station; (2) FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License; and (3) FCC Form 315, Application for Consent to Transfer Control of Corporation Holding Broadcast Station Construction Permit or License. The Commission may have to modify other forms that include in their instructions the media ownership rules or citations to media ownership proceedings, including Form 303-s and Form 323. The impact of these changes will be the same on all entities, and we do not anticipate that compliance will require the expenditure of any additional resources.

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

13. 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.<sup>25</sup>

14. The specific proposals on which the NPRM seeks comment, set forth in Paragraph 3 above, are intended to achieve our public interest goals of competition, localism, and diversity. The NPRM seeks comment on a number of measures designed to minimize the economic impact of our proposed rules on firms generally, as well as those intended to promote broadcast ownership opportunities among a diverse group of owners, including small entities. For example, as part of the local radio ownership rule, the NPRM proposes to retain the AM/FM subcaps, which limit the number of radio stations in the same service that an entity can own. As noted in the NPRM, the Commission has previously concluded that AM/FM subcaps serve the public interest by promoting new entry into radio ownership, particularly by small businesses, including minority- and women-owned businesses.<sup>26</sup>

15. The NPRM also seeks comment in this proceeding on the aspects of the Commission's 2008 *Diversity Order* that the Third Circuit remanded in *Prometheus II*.<sup>27</sup> Among other measures, the NPRM seeks comment on those intended to promote broadcast ownership opportunities for small businesses. For instance, the NPRM seeks comment regarding whether to reinstate the preexisting revenue-based eligible entity definition, which the Commission has concluded would "be effective in creating new opportunities for broadcast ownership by a variety of small businesses and new entrants,

<sup>24</sup> U.S. Census Bureau, *2007 Economic Census, Sector 51: Information, Subject Series: Establishment and Firm Size, Employment Size of Firms for the US: 2007* (rel. Nov. 19, 2010), [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-ds_name=EC0751SSSZ5&-lang=en) (NAICS code 511110) (visited Oct. 19, 2011).

<sup>25</sup> See 5 U.S.C. § 603(c).

<sup>26</sup> NPRM at ¶ 75.

<sup>27</sup> See *id.* at Section IV.

including minorities and women.”<sup>28</sup> The NPRM also seeks comment on whether increasing station ownership by small businesses should be an independent policy goal in this proceeding and, if so, whether readopting the preexisting eligible entity definition would be a reasonable and effective means of promoting this objective.<sup>29</sup>

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

16. None.

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<sup>28</sup> *Diversity Order*, 23 FCC Rcd at 5927, ¶ 9. As defined in the *Diversity Order*, an “eligible entity” is any entity that qualifies as a small business under revenue-based standards that have been established by the Small Business Administration (“SBA”). *Id.* at 5925, ¶ 6.

<sup>29</sup> *NPRM* at ¶ 161.

**STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS  
APPROVING IN PART, DISSENTING IN PART**

*Re: 2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 09-182, Promoting Diversification of Ownership In the Broadcasting Services, MB Docket No. 07-294, Notice of Proposed Rulemaking*

As I cast perhaps my last major vote as a Member of the Federal Communications Commission, it will come as a surprise to very few that I cannot approve of the Quadrennial Review in all of its aspects. While I find a better level of analysis here than in previous Quadrennial Reviews, the item nevertheless provokes my dissent because it heads down a similar road that the two previous Commissions travelled regarding newspaper-broadcast cross-ownership. In the vast majority of cases, I do not believe that newspaper-broadcast cross-ownership advances the public interest. It means fewer voices in the community, less localism in the industry, and steep transactional costs that all too often lead to down-sized or shuttered newsrooms and fired journalists. Our media, and our public policy, need to head in a different direction. A media that more effectively nourishes genuine civic dialogue is necessary to successful self-government.

I only wish we were in a different position than the one we find ourselves in at this moment. In the ten-plus years that I have been at the Commission, we have witnessed dramatic media industry consolidation, to say nothing of the extensive concentration that occurred during the preceding twenty years. It is time to put an end to the years of public policy shortfall that have encouraged this trend. My ideal NPRM would flash an orange caution light that change was in the works, setting the stage for a Report and Order that would turn on a red light to many consolidation transactions, while still allowing for exceptions in the few cases that would warrant them.

The media landscape is, as we all know, changing. In the last few years we have seen incredible growth in the broadband realm, ripe with exciting options and opportunities. What we have not witnessed is the breadth and depth online to replace what has been lost in “traditional” media. This becomes critically important when you look at the hundreds of millions of dollars that no longer flow into news operations, only a fraction of which has been replaced by Web newsgathering. Simply put, what we currently have is an illusion of plenty. The barriers to self-publish have never been lower, but the majority of eyeballs and clicks are still focused on too few small players. It is irresponsible to remove all protections, both in terms of ownership and public interest obligations, in traditional media on the shaky expectation that the new media of broadband will somehow make everything right and furnish our citizens with the news and information they need to make informed decisions for the future of our country. If the past is prologue here, there is no guarantee we will achieve parity in the new media platform. Indeed, we must be extremely careful to not repeat the same mistakes in new media that we permitted in traditional media by permitting so few to control so much. Developing a truly democratized media online is vital to realizing the transformative power of the Internet.

The world of media has fundamentally changed, but America’s ongoing historical challenge to provide its citizens with information infrastructure has not changed, nor has the responsibility of the FCC to create rules to enhance the statutory mandates of localism, competition, and diversity.

This is not just my philosophy. It reflects the beliefs of millions of Americans who have contacted us over the past ten years about the shortfalls of media policy. It also reflects the views of tens of thousands of citizens I have personally met with around the nation. One of my principal activities as a Commissioner has been to encourage a national dialogue on media policy. With a number of my colleagues over the past decade, I have gone on the road to foster such discussions from Florida to Vermont, from Portland, Oregon to Portland, Maine—and dozens of points between. What I hear

everywhere I go is great frustration with the current media environment—frustration as too much glitzy infotainment replaces real local news and community information; frustration with all the canned, homogenized music that has pushed aside local and regional artists and genres; frustration with too much shouted opinion and too little factual, investigative journalism. Just a few weeks ago, Commissioner Clyburn and I were in Atlanta talking about these issues. I sensed an almost palpable feeling of anguish as we listened to plea after urgent plea for more community media, more voices, and more diversity on our airwaves.

***These rules matter.*** People know that something is not right and they are looking to the FCC to make a difference. Many in Congress have let us know their concerns about an overly consolidated media. Not to mention the fact that the Court has continued to frown upon our inaction on a host of initiatives we should have taken by now, especially when it comes to fulfilling our obligation to provide a more diverse media.

I am of the strong opinion that we should be farther along in correcting the inequities of minority and women ownership of broadcast outlets. While I am pleased to see the proposal for an incubator program teed up for comment in the NPRM before us, I would have preferred us to have already taken action on such proposals as “Overcoming Disadvantages” and any number of other proposals submitted over the past several years to the Commission by our Diversity Advisory Committee. These are the kinds of actions that I believe the Third Circuit has been expecting of us for years and it is why the Court keeps sending back FCC rules that fail to deliver. In a country now nearly one-third minority, it is shocking, and I think embarrassing, that people of color own barely more than 3% of full-power commercial television stations. We must make a prompt and major commitment to ownership diversity. This certainly includes a Commission commitment to fund the necessary studies to build a record essential to satisfying judicial scrutiny so that we can go from the kind of interim steps I have just discussed to the even more aggressive policies that will be needed to bring diversity and justice to our media.

With the perils of consolidation on clear display in market after market, it would seem to me that we should be closing loopholes instead of providing openings for them. I was deeply distressed to discover, in the item’s discussion of newspaper-broadcast cross-ownership, that Chairman Martin’s proposed rule is being considered once again, even after Congress and the Court have on numerous occasions expressed their displeasure. Worse, the conditions that the then-majority attached to the 2008 newspaper-broadcast rule were so riddled with loopholes that an 18-wheeler could be driven through them—yet here they are, teed up for our consideration yet again! I was strongly opposed to the four factors that Chairman Martin proposed in the 2007-2008 proceeding, and I am opposed to considering them again in this proceeding.

It is a very positive development that we are taking a closer look at ownership attribution, especially the Shared Services Agreements and whether or not such agreements constitute an end-run around our rules. We have seen a proliferation of these types of agreements in recent years, in many cases to the detriment of independent content. Too often we see exactly the same programming being shown on two or more channels, including the simulcast of identical newscasts. There should be exceptions for expenses such as sharing a helicopter, but all too often the deals are, in reality, a transfer of power without having to come before the Commission. Commenters have also flagged the issue of how these types of agreements encroach on competition in terms of retransmission consent agreements. It is critical that the FCC look at these arrangements from all sides and make critical decisions on how our rules should be modified to incorporate these Shared Services Agreements. I am pleased we are heading in that direction.

As my time winds down at the Commission, I am more convinced than ever that strong action is needed on these fronts. The record will now be open as the Quadrennial Review proceeding moves in the months ahead to Report and Order. I hope that all stakeholders will take part in responding to this Notice of Proposed Rulemaking. We should all remember the admonition of my mentor, Senator Fritz Hollings, that “Decisions without you are decisions against you.” This is the time for citizens far-and-wide to tell

us what they really think and to offer their comments and proposals for an enhanced media. We have seen citizen input accomplish great things before; now we need to see it again. To my mind, no issue before this Commission—*no issue*—rivals in importance the future of our media. No other great issue will be successfully resolved without its being presented in all its dimensions to the American people. Our Founding Fathers understood this and took steps to make it happen. Now it is our generation's turn.



**STATEMENT OF  
COMMISSIONER ROBERT M. McDOWELL  
APPROVING IN PART, CONCURRING IN PART**

Re: *2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 09-182, Promoting Diversification of Ownership In the Broadcasting Services, MB Docket No. 07-294, Notice of Proposed Rulemaking*

The media marketplace has experienced a dramatic transformation over the past decade. More relevant to this proceeding, however, significant market developments have taken place since the previous review of our media ownership rules commenced in 2006. American consumers no longer live in a world limited to broadcast stations and newspapers. They also receive programming via cable, satellite and the Internet, not to mention mobile platforms. Today’s notice recognizes that the current media landscape has more delivery platforms than just broadcasting and newspapers; however, this vibrant competition is not reflected in the tentative conclusions. Instead, the Commission appears to be prepared to accept a regulatory *status quo* by entrenching itself into an overly-cautious, wait-and-see approach regarding the further development of new media platforms even though they have already revolutionized the market.

Perhaps the Commission’s proposed regulatory sclerosis can be explained by the history of appellate litigation that has affected our media ownership proceedings. Even though several stakeholders recently petitioned the Supreme Court to review the 2006 rules, no legal hurdles preventing us from modernizing our rules to reflect the economic and technological realities of the current marketplace stand in our way. The Commission has been aware since at least 2002 that the Internet was having a profound effect on the media landscape. Maintaining decades-old industrial policy in this age of competition, mobility and new media is not in the public interest, and it certainly is not what Congress intended when it directed the Commission to repeal or modify unnecessary regulation.

While I applaud the proposal to eliminate the radio-television cross-ownership rule, I am disappointed that we tentatively conclude to retain most of the existing media ownership rules, including the dual network, local television and local radio ownership rules. Moreover, while the Commission does propose an anemic relaxation of the newspaper-broadcast cross-ownership rule for the largest markets and seeks comment on eliminating restrictions on newspaper/radio combinations, the proposals do not go nearly far enough. We should seek comment on a much more dramatic modernization, if not complete elimination, of the 36-year-old newspaper-broadcast cross-ownership rule. Broadcast stations and daily newspapers are grappling with falling audience and circulation numbers, diminishing advertising revenues, and staff reductions as online sources gain in popularity. The notion that broadcasters may distribute their content through radio, television, the Internet, mobile devices and other unforeseen portals, but must be prohibited by law from printing the same content on the medium of newsprint, seems anachronistic at best. Arcane and burdensome rules should not be allowed to continue impeding, or potentially impeding, the ability of broadcasters and newspapers to survive and thrive in the digital era.

In fact, contrary to eliminating outdated regulations, the Commission is suggesting rule changes that would be more burdensome than existing regulations. For instance, the proposal to apply ownership combination restrictions to daily newspapers and television stations within the same Nielsen Designated Market Area may prohibit ownership combinations that are currently permitted. Further, I am troubled by yet another round of inquiries – this time within the framework of our attribution rules – into shared service agreements and other local newsgathering cooperative efforts. These arrangements are used to reduce the costs of news production and any action taken to hinder such relationships may have unintended consequences, such as reducing the quality and quantity of local news and exacerbating the failure of more newspapers. We must be wary of taking actions in the name of promoting journalism, especially if they could have the opposite effect. As I have often said, journalism does not need the government’s “help.” That very notion raises serious constitutional concerns.

In this notice, we also seek comment on the myriad proposals to enhance media diversity that have been introduced over the past few years. Our query is not only understandable but necessary as well in light of the *Prometheus II* decision, whereby the Third Circuit struck down many of the diversity provisions adopted in the 2007 Diversity Order. While some are neutral, several of these proposals are race and/or gender based. For those proposals aimed at expanding media opportunities for minorities and women, we have to be mindful that any action the Commission would take in this area *must* also be legally sustainable and satisfy the rigorous demands of the Equal Protection Clause, as interpreted under the Supreme Court's *Adarand* line of cases. As I have said several times before, the diversity studies should be completed as soon as possible to assist us in supporting any new race- and/or gender-based regulations and determining the best approaches to increase media diversity, in accordance with the Constitution.

For these reasons, I vote in support of seeking comment on the diversity proposals and eliminating the radio-television cross-ownership rule. I must concur, however, on the rest of the notice, because I cannot agree with the tentative conclusions to retain the remainder of the media ownership rules and have serious concerns regarding the possible attribution of agreements broadly relating to the programming and/or operation of broadcast stations. I have not seen any data, nor is there any evidence cited in the notice, that would support such regulation. Nevertheless, I will keep an open mind and look forward to reviewing the submissions that are filed. I hope that stakeholders will provide comprehensive data and information regarding the competitive nature of the media sector and the effects that the proposed rules will have on industry and American consumers. I also remain hopeful that the Commission will pursue the deregulatory approach mandated by Congress. In that regard, I commend the Chairman for accepting edits to elicit information about the benefits of shared service agreements and newspaper-broadcast cross-ownership and the possible harms that could result if the proposed rules are adopted. Finally, I thank the staff of the Media Bureau for their hard work on this notice and the work that still remains before them.

**STATEMENT OF  
COMMISSIONER MIGNON L. CLYBURN**

Re: *2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 09-182, Promoting Diversification of Ownership In the Broadcasting Services, MB Docket No. 07-294, Notice of Proposed Rulemaking*

In considering this item, I experienced a myriad of emotions: Hope, fear, frustration, expectation, and exasperation.

Media ownership affects every single person in this country, whether they realize it or not. Everyone digests news, some casually others voraciously. Therefore, preserving journalistic integrity and promoting a diversity of viewpoints are paramount concerns, and should remain top priorities for this agency.

Among other things, this NPRM acknowledges that the Commission needs more data. It admits that the factual information that the Commission currently has is incomplete if developing policies to promote greater female and minority ownership is still a priority. I commend the Chairman for insisting that ours is a data-driven agency, and am encouraged by the commitment to support the research necessary to achieve, in an expeditious fashion, a comprehensive picture of the current state of female and minority ownership.

Women, minorities and those who reside in rural areas come into my office painting a bleak picture. They feel disconnected from the public airwaves, and their outlets rarely speak to the needs of their communities. They echo the argument that more relaxed media ownership rules would negatively impact diversity of ownership, but without the proper data, our agency cannot concur or refute that troubling conclusion. Does consolidation harm chances for others to fairly compete? Is female and minority ownership in the broadcast sector particularly lagging as compared to other industries? Is every segment of this country getting the information its residents need? I have been told by those wishing to serve long-neglected communities that female and minority owners have a great record when it comes to diverse hiring, promotion and community service. But stories and anecdotes, no matter how persuasive or discouraging, are not enough. This Commission has a duty to get a firm and informed handle on what is actually happening in our big cities and in our small towns. We need to know how our policies are actually affecting ALL Americans.

The FCC needs to know who owns the media. We have an obligation to more fully understand what impact that ownership has on journalism and the critical information needs of all our communities. The answers to these questions are crucial, and we owe it to the public to implement policies that are informed and forward-looking.

This Commission’s responsibility to the public interest is one I take very seriously, and this falls squarely into that mission. Our research on the media landscape cannot be done quickly enough, and with the funds approved for Fiscal Year 2012, one less barrier stands in the way of us meeting that basic mission.

I will continue to work with Chairman Genachowski, my colleagues at the Commission, and other interested parties as we collect, evaluate and incorporate timely and much sought after data, which will serve as the foundation for a sound policy framework.